UNREPORTED JUDGMENTS AND PRINCIPLES OF PRECEDENT IN NEW ZEALAND

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I INTRODUCTION

Litigation in New Zealand has increased dramatically. Between 1981 and 1986, the number of High Court civil actions instituted annually rose from 2,902 to 4,213.[1] In addition to and contributing to the steep rise in litigation, there has been a growth in administrative tribunals, their decisions, and judicial review of those decisions.[2] The result — a phenomenal increase in judicial decisions — should be no surprise.[3] However, no marked increase has occurred in the number of official reports of New Zealand court decisions.[4] Consequently, there appears to be an explosion in the number of unreported decisions of courts circulating within the legal community and being relied upon in argument before the courts.[5]

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1 1981 figure from Department of Statistics, *Justice Statistics* (1985) 39 table 2; 1986 figure from Law Commission, *Preliminary Paper No 4, The Structure of the Courts, A discussion paper,* App C 73 (hereafter *The Structure of the Courts*). This continues a trend in the 1970s in which Supreme Court litigation increased notwithstanding the removal of accident cases from the courts by virtue of the Accident Compensation Act 1972. See Palmer, "The Growing Irrelevance of the Civil Courts" (1985) 5 Windsor YAJ 327, 335-37.

2 However, one commentator has indicated that judicial review of administrative decisions accounts for only a small number of High Court actions. Taylor, "May Judicial Review Become a Backwater" in Taggart (ed) *Judicial Review of Administrative Action: Problems and Prospects* (1986) (suggesting there were about 84 such actions in 1984).

3 See n 64 infra.

4 As noted recently by the President of the Court of Appeal: "The basic problem is that the output of judgments from all Courts has increased enormously, far out of proportion to the limited increased space allowed by the division of the New Zealand Law Reports into two annual volumes [in 1973]". Rt Hon Sir Robin Cooke, "The New Zealand National Legal Identity" (speech delivered at the 1987 New Zealand Law Conference) 2.

5 The President of the Court of Appeal has noted in an interview that "counsel . . . [p]articularly in the bigger cases . . . tend to spend too much time . . . go[ing] through a plethora of authorities, including a range of unreported cases at all levels . . .". "Court of Appeal President: An Interview with Rt Hon Sir Robin Cooke" [1986] NZLJ 170 at 173.

This article considers current principles of precedent, the increase in the number of unreported judgments,[6] the patchwork quilt of reporting which has evolved in part in response to this increase, and the implications of and relationships among these developments.[7] The purpose of this article is to highlight recent developments in New Zealand concerning precedent and reporting of judicial decisions and to stimulate debate on the adequacy of the reporting network. It is not intended to provide conclusive quantitative data about such developments but rather an overview and outsider's perspective.

Part II outlines current principles of precedent in New Zealand with comparisons to English doctrine.[8] Part III discusses the growth in judicial decisions and changes in the reporting system, including publication of "quasi-reports" and specialised unofficial reports to publicise the ever increasing number of unreported decisions and decisions for which a time lag in official reporting exists. Part IV considers the judicial response to and the implications of these developments.

II Current Principles Of Precedent

1 General principles

Precedent is defined as reference to a prior decision as a basis for deciding a case today.[9] It also requires consideration of future implications of decisions.[10] Practically, case law as precedent serves courts, counsel, and the community by indicating what the law is or may be.

Precedent operates either as a mandate or as a guide to prior judicial practice for a court making a current decision.[11] The former approach, known as the doctrine of stare decisis ("standing by" a prior decision), has been traditionally considered a fundamental Anglo-Saxon principle of law. The latter approach characterises continental judicial systems[12] and also

6 Throughout this article the terms judgment and decision are used synonymously as defined in Rule 539 of the High Court Rules. Rule 539 defines judgment to include any decree or order of the court. This definition is much more inclusive than the traditional definition of judgment as ". . . obtained in an action by which a previously existing liability of the defendant that the plaintiff is ascertained or established . . .". *Ex p Chinery* (1884) 12 QBD 342, 345 (CA) per Cotton LJ. Thus, judgment as used in this article includes both final determinations of rights and liabilities and any interlocutory determinations in a proceeding.

7 Discussion on this topic has occurred in other jurisdictions. See eg Cumbrae, "The Aim and Form of Law Reports" (1985) 59 ALJ 616; Von Nessen, "Law Reporting: Another Case for Deregulation" (1985) 48 MLR 412 (Australia); Andrews, "Reporting case law: unreported cases, the definition of a *ratio* and the criteria for reporting decisions" (1985) 5 Legal Studies 205; Munday, "The Limits of Citation Determined" (1983) 80 L Soc Gazette 1337; and Goodhart, "Law Reporting and the Computer Revolution" (1982) 132 NLJ 643 (England); see also n 102 infra.

8 English principles of precedent are noted in Part II although it will be shown that New Zealand courts are developing their own distinctive approaches, as is occurring in other areas of the law. See speech of Sir Robin Cooke, supra n 2.

9 *Black's Law Dictionary* (5th ed 1979).

10 See Shauer, "Precedent" (1987) 39 Stan LR 571 at 572-75.

11 Goodhart, *Precedent in English and Continental Law* (1934) 9.

12 Idem. See also n 28 infra.

operates where stare decisis is not required. Apart from the extremely limited instances involving stare decisis, most cases require a court to make a decision by reference to the particular facts and, where available, to relevant prior cases to which the court must accord some weight.[13]

However, whether as mandate or guide, judicial decisions can operate as precedent only to the extent that courts, counsel, and society have both notice of and access to decisions.[14]

2 *Current developments in principles of precedent*

A dramatic shift in judicial perspectives on principles of precedent has occurred during the past twenty years. Prior to 1966, the accepted English doctrine of stare decisis was that the House of Lords and the English Court of Appeal were bound by their respective prior decisions.[15] However, in 1966 the House of Lords issued a practice statement which "modif[ied] their present practice and, while treating former decisions of th[e] House as normally binding, [proposed] to depart from a previous decision when it appear[ed] right to do so".[16] Since 1966, the House of Lords has overruled both civil[17] and criminal[18] decisions.

13 In such instances, various factors affect the weight to be accorded any decision. These include the position in the judicial hierarchy of the court which issued the prior decision and its relationship to the court now considering the issue, the stature of the particular judge, the position in the judicial hierarchy of the courts that have relied upon the decision, the age of the decision, and the scope of deliberation involved in making the decision. See generally Perry, "Judicial Obligation, Precedent and the Common Law" (1987) 70 Oxford JLS 215, 241-43. The scope of deliberation has both temporal and depth dimensions. For example, ex parte interim decisions reflect limited deliberation in both time and scope of information available to the decision maker. The nature of the decision (interim or final) and form of delivery (oral, written, reserved) indicate the time available for decision.

14 One commentator has aptly noted: "Accurate, accessible records of judicial pronouncements have always been important to the proper functioning of the common law system, valuing as it does adherence to precedent." Von Nessen, supra n 7 at 412.

15 Goodhart, supra n 11 at 10 (stating in 1934 that the House of Lords was "absolutely bound by its own decisions" and that the "Court of Appeal is probably bound by its own decisions"). *Young* v *Bristol Aeroplane Co Ltd* [1944] 2 All ER 293, [1944] KB 718 (CA); affd [1946] 1 All ER 98, [1946] AC 163 (HL), removed any doubt whether the English Court of Appeal was bound by its decisions. The English Court of Appeal continues to be bound by its own decisions as well as those of the House of Lords. *Davis* v *Johnson* [1978] 1 All ER 1132 (HL). However, Lord Denning noted quite forcefully, though ultimately unsuccessfully, in the Court of Appeal in *Davis* that *Young* was a departure from pre-1944 practice whereby the Court of Appeal did depart from a decision "if it thought it right to do so". *Davis* [1978] 1 All ER 841, 853-55. Lord Denning has also noted that prior to 1861 (when lay peers voted in cases) the House of Lords did not consider itself bound by its decisions. Lord Denning, *From Precedent to Precedent* (1959) 22-28. See also Evans, "The Status of Rules of Precedent" [1982] CLJ 162, 167-72.

16 Practice Statement of House of Lords [1966] 1 WLR 1234, [1966] 3 All ER 77.

17 See eg *Oldendorff (E L) & Co GmbH* v *Tradax Export S A* [1973] 3 All ER 148, [1974] AC 479 (HL), discussed by Cantan in "The House of Lords and Precedent: A New Departure" [1987] NLJ 491.

18 *R* v *Howe* [1987] 1 All ER 771. In *R* v *Shivpuri* [1986] 2 All ER 334, the House of Lords overruled its decision in *Anderton* v *Ryan* [1985] 2 All ER 355, which was reached only twelve months earlier. See generally Cantan supra n 17.

Although expressly limited to the House of Lords, the practice statement reflects a change in perspective[19] on the balance to be struck among following prior decisions in the interests of certainty and predictability, obtaining justice in particular cases, and allowing for development of the law.[20] A similar development is apparent in current New Zealand judicial views on precedent.

As applied to the New Zealand judicial hierarchy, three issues are of primary concern:

(a) The discretion of the District and High Courts to depart from their respective prior decisions;
(b) The duty of the District and High Courts to follow higher courts in the judicial hierarchy; and
(c) The ability of the Court of Appeal to depart from its prior decisions and from opinions of the Judicial Committee of the Privy Council and decisions of the House of Lords.

(a) The discretion of the District and High Courts to depart from their respective prior decisions

In England, courts of first instance of co-ordinate jurisdiction are not bound by, but should give great deference to, prior decisions of that court.[21] Thus it has been stated:[22]

> I think the modern practice is that a judge of first instance, although, as a matter of judicial comity, he will usually follow the decision of another judge of first instance unless he was convinced that that judgment was wrong, certainly is not bound to follow the decision of the judge of equal jurisdiction. The judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, he may be also, of the division of the Court.

In New Zealand the High Court has, without express discussion of this principle, disagreed with prior decisions of the High Court,[23] and in several

19 The change, viewed in terms of recognition of judicial law-making, is discussed by McHugh in "The Law-making Function of the Judicial Process" (1988) 62 ALJ 15 (Part I), 18-24, 116 (Part II).

20 Among the functions which courts and commentators claim precedent serves are certainty, predictability, decision making efficiency, treating like cases alike, and avoiding opening the "floodgates" to repeated litigation of the same legal issues. See *Davis* v *Johnson* [1978] 1 All ER 1132, 1137 (Lord Diplock); Schauer supra n 10; Rickett, "Precedent in the Court of Appeal" (1980) 43 MLR 136 and criticism of Rickett by Aldridge, "Precedent in the Court of Appeal – Another View" (1984) 47 MLR 187.

21 *Huddersfield Police Authority* v *Watson* [1947] 2 All ER 193, 196. See also Cross, *Precedent in English Law* (3rd ed 1977) 122. See generally 26 Halsbury's Laws of England (4th ed 1979) para 580.

22 *Huddersfield Police Authority* v *Watson* supra n 21 at 196.

23 See eg *Armourguard Security Ltd* v *Geraghty* unreported, High Court, Auckland, 13 September 1987, CP1032/87 Wylie J (where Wylie J, after noting a divergence of opinion between two prior High Court decisions on the test for grant of an interim injunction in restraint of trade cases, adopted a third test); and the subsequent decision of *Lep International Ltd* v *Hass* unreported, High Court, Auckland, 2 December 1987, CP1987/87, Jeffries J (involving the same issue).

cases the Court of Appeal has resolved divergent High Court views of the law without casting doubt on the propriety of such disagreement.[24]

The trend in New Zealand is that High Court judges increasingly have "no qualms" about disagreeing with one another.[25] This approach, more flexible than that in England, makes sense due to the absence of an intermediate appellate court in New Zealand and the fact that the Court of Appeal is, in practice, the court of last resort.[26] In particular, reasoned disagreement in the High Court may foster articulation of various positions for consideration by the Court of Appeal when an issue ultimately comes before that Court.[27]

(b) The duty of the District and High Courts to follow decisions of higher courts in the judicial hierarchy

One fundamental principle of judicial hierarchy is that courts must follow decisions of higher courts in the judicial hierarchy.[28] This concept is so entrenched that it received only passing references by four members of the Court of Appeal in *Collector of Customs* v *Lawrence Publishing Co Ltd.*[29]

In *Lawrence,* the Court of Appeal, sitting en banco, heard an appeal by the Collector of Customs from a District Court decision that twenty illustrated calendars with pictures of nude males were not indecent pursuant to section 2 of the Indecent Publications Act 1963. In reaching its decision, the District Court followed the 1980 full court decision of *Waverly*

24 See eg *McBreen* v *Ministry of Transport* [1985]2 NZLR 495 (Court of Appeal resolved differences of opinion in several High Court cases concerning the definition of "road" under the Transport Act); *Donselaar* v *Donselaar* [1982] 1 NZLR 97, 101 (where Cooke J noted: "opinion among High Court Judges has varied [as to whether an action for exemplary damages for personal injury is barred by the Accident Compensation Act 1972])." *Andrewes and Crampsie* v *Browne* 4 NZAR 104 (Court of Appeal resolved a question of law which had given rise to a difference of opinion in the High Court).

25 Interview with the Hon Mr Justice Jeffries on 18 February 1988. The Rt Hon Sir Robin Cooke has also noted a recent trend toward more robust disagreement among High Court judges (interview with the Rt Hon Sir Robin Cooke, President of the Court of Appeal, on 19 February 1988).

26 See the comments of Richardson J in *Collector of Customs* v *Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 at 414, discussed infra at text to nn 51-54: ". . . less than one percent of those unsuccessful in this Court feel able to [seek review by the Privy Council]" and of Somers J in the same case at 422: ". . . this Court is in almost all cases the Court of last resort for litigants."

27 The President of the Court of Appeal, Sir Robin Cooke, noted in an interview on 19 February 1988 that the increased disagreement could be healthy for the judicial process in the long run. This development may be viewed as an institutional response "to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined" (*Report of the Royal Commission on the Courts* (1978) para 267) horizontally rather than vertically in the judicial hierarchy. Even if an intermediate appellate court is established (see generally *The Structure of the Courts* paras 92-101 and Cato, "Privy Council: The Takaro Properties case" [1988] NZLJ 110, 114-16), it is valuable to permit such disagreement among judges of courts of first instance.

28 Cross, *Precedent in English Law* (3rd ed 1977) 6. Although undisputed in New Zealand, this proposition is not a prerequisite of a judicial system. For example, in France a judge is not bound by the decision of any prior French judge regardless of the position of the court in the French judicial hierarchy (Cross at 12-14).

29 [1986] 1 NZLR 404.

Publishing Ltd v *Comptroller of Customs*[30] and applied the test of "some discernible injury to the public good" for indecency, notwithstanding the arguably inconsistent and more inclusive indecency test stated by the Court of Appeal in 1975 in *Police* v *News Media Ownership Ltd.*[31]

Thus, *Lawrence* raised two important precedential concerns: whether the District and High Courts are bound to follow the decisions of the Court of Appeal; and whether the Court of Appeal is bound by its prior decisions. With regard to the former issue, Woodhouse P noted:[32]

> [S]omething should be said about the view expressed by [the District Court Judge] that it was open to him to choose between the authorities . . . . There can be no doubt that a decision of the Court of Appeal is binding upon a Full Court of the High Court and of course the District Court.

McMullin J stated:[33]

> Although at the level that this matter has now reached, it is unnecessary to decide whether the District Court Judge was entitled to choose [between the decisions] . . . there can be no doubt that in the hierarchy of the Courts the District Court was clearly bound to follow the majority decision of this Court in the *News Media* case and not the decision of the Full Court.

Somers J also reflected this position in commenting:[34]

> In this state of the authorities it cannot be doubted . . . that the decision of the Court of Appeal . . . is binding on all Courts in New Zealand unless and until it is reversed by the Privy Council or by the Court of Appeal itself.

Cooke J noted, "I understand that all members of this Court are agreed that the District Court Judge was bound by the majority decision in the *News Media* case."[35]

Thus, the District Court must follow a decision of the Court of Appeal over a decision of the High Court, even where the High Court sits as a full court. Further, as both Woodhouse P and Somers J noted in *Lawrence,* the High Court is bound by decisions of the Court of Appeal.

(c) The ability of the Court of Appeal to depart from its prior decisions and from opinions of the Judicial Committee of the Privy Council and decisions of the House of Lords

Young v *Bristol Aeroplane Co Ltd*[36] provides that the English Court of Appeal must follow its prior decisions except in very limited circumstances. In New Zealand, however, the opinions of all five permanent members of the Court of Appeal in *Collector of Customs* v *Lawrence Publishing Co*

30 [1980] 1 NZLR 631.
31 [1975] NZLR 610.
32 [1986] 1 NZLR at 406-07.
33 At 416.
34 At 421.
35 At 413.
36 Supra n 15.

Ltd[37] strongly suggest that the New Zealand Court of Appeal will depart from the English principle stated in *Young.* In *Lawrence,* all five members stated (although the issue was not argued[38] and arguably only two Judges found it necessary to decide the issue[39]) that the Court of Appeal (at least when sitting en banco[40]) is not bound to follow its prior decisions. However, the circumstances in which the Court of Appeal is free to depart from a prior decision are, as stated by Somers J, "far from clear".[41]

The views of the members of the Court of Appeal expressed in *Lawrence* are divergent on this point. Because the issue was not argued, both Cooke and Somers JJ refrained from stating definitive opinions on the issue. Cooke J suggested a broad, albeit imprecise, view:[42]

> I think that, at least in developing fields of common law, departure from stare decisis may be warranted by new thinking in this country or abroad, or changing social conditions. This must naturally depend on the nature of the changes.

Somers J was extremely hesitant to give more than "tentative views on a few of the more obvious aspects of stare decisis".[43] Nonetheless he noted:[44]

> It may be expected that the Court would be willing to review an earlier decision in the exceptional cases instanced in *Young* v *British Aeroplane Co Ltd* [1944] KB 718. I think it likely to be the case too, and as Cooke J suggests, that there are other and wider circumstances in which in New Zealand such a review may be undertaken. *North Island Wholesale Groceries Ltd* v *Hewin* [1982] 2 NZLR 176 . . . may be such a case. Another, from Australia, is *Todorovic* v *Waller* (1981) 150 CLR 402, in which the pragmatic demand for a settled practice in the assessment of damages required a re-consideration of some previous decisions.

Woodhouse P agreed with the views of McMullin and Richardson JJ concerning precedent.[45] McMullin J found that "in practice the Court has been reviewing earlier decisions on a case to case basis".[46] He cited the

37 [1986] 1 NZLR 404.

38 Cooke P recently noted this fact in *Shing* v *Ashcroft* [1987] 2 NZLR 154, 157: "The question whether or in what circumstances this Court should hold itself free to overrule one of its own decisions has not been argued in this Court in recent years."

39 A majority of the Court (Cooke, Somers and Richardson JJ) did not consider it necessary to decide the issue whereas McMullin J did. Since Woodhouse P concurred with the views of both Richardson and McMullin JJ on precedent, it is unclear whether he viewed the issue as necessarily decided. He did, however, state at 410: "[I]f . . . Richmond J [writing for the majority in the prior Court of Appeal case] intended . . . to lay down some lesser test [for indecency], then, with respect, I am unable to agree with him" which suggests he did necessarily decide the issue. One commentator has noted that the case is "somewhat unsatisfactory [because] [t]he issue [of state decisis] was not argued and the judgments while expressing views on *stare decisis* did so without them being necessary to determine the issue". Downey, "Certainty and Stare Decisis" [1987] NZLJ 137, 139. Compare Williams, "Towards Being the Court of Last Resort" (1986) 12 NZULR 206, 207 ("in *[Lawrence]* . . . a majority of the full bench of the Court of Appeal unequivocally rejected the restrictions imposed by the rule in the *Young* case").

40 See discussion infra at n 56.

41 *Lawrence* [1986] 1 NZLR at 421.

42 At 411.

43 At 422.

44 At 421-22.

45 At 410.

46 At 417.

Court's decisions in *R* v *Buckton*[47] and *Civil Aviation* v *MacKenzie*[48] as recent illustrations of his conclusion that the "Court has on a number of occasions reviewed its earlier decisions and either reversed or substantially modified an earlier approach".[49] Thus he found that the court "should be free to [depart from its prior decision] in this case, *Young* . . . notwithstanding".[50] However, he gave no indication of the circumstances in which departure from an earlier decision would be appropriate.

Richardson J provided the most elaborate discussion on precedent. After a review of the English rule expressed in *Young* and decisions in Australia he moved on to the situation in New Zealand:[51]

> While this Court has not had occasion since its reconstitution in 1957 to pronounce in any definite way on the circumstances in which it will reconsider an earlier decision the practice of the Court indicates a cautious willingness to review earlier decisions in what are perceived to be appropriate cases and a reluctance to be completely fettered by past decisions of its own . . . . In none of these cases was there any discussion about stare decisis. The Court simply proceeded on the basis that it was entitled to review its earlier decision. Then in *McCormack* v *Foley* [1983] NZLR 57 two members of the Court expressly left open the precedent considerations affecting Privy Council judgments ruled on in *Brewer* v *Wright* [1982] 2 NZLR 77. And in *L D Nathan & Co Limited* v *Hotel Association of New Zealand* [1986] 1 NZLR 385 where we were asked to overrule *Attorney-General* v *Daemar* [1960] 2 NZLR 89 but dealt with the statutory construction issues on another basis, McMullin J simply observed that a judgment of a division of this Court, particularly one so recent, should be reviewed and overruled, if that is to be its fate, only by a Full Court of 5 Judges.
>
> Clearly the court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that The Court lists are jammed by litigants seeking to find a chance majority for change, but also the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case. This Court has the final responsibility within New Zealand for the administration of the laws of New Zealand and while its decisions are subject to review by the Privy Council few litigants, less than one percent of those unsuccessful in this Court, feel able to follow that path. It is I think unwise to try to formulate any absolute rule. *I tend to the view that we should go no further than to indicate that this Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it should do so, but without attempting to categorise in advance the classes of cases in which it will intervene. In the end and after weighing the considerations favouring and negating review in this particular case, the members of the Court must make their own value judgments as to whether it is appropriate in the interest of justice to review and perhaps overrule an earlier decision.* (emphasis supplied.)

Ultimately, Richardson J found the "ratio decidendi of the *News Media Ownership* case . . . obscure". Thus review of the decision was justifiable in view of the House of Lord's decision in *Midland Silicones Ltd* v *Scruttons*

47 [1985] 2 NZLR 257.
48 [1983] NZLR 78.
49 *Lawrence* at 417.
50 Idem.
51 At 414-15.

Ltd[52] and did not entail "departing from a settled interpretation of the statute . . .".[53] He found: "[F]or reasons particular to this case . . . I do not consider it necessary to reach any final view as to stare decisis today."[54]

Taken as a whole, the opinions in *Lawrence* suggest that the Court of Appeal, although wary of adopting a definitive rule as to when departure from precedent is appropriate, does not view its prior decisions as necessarily binding.[55] It appears that departure from a decision will only be considered and, if appropriate, taken by a Court of five members after notice by the party inviting the court to take such action.[56]

Further, in light of the liberal view of precedent of the Court of Appeal in *Lawrence,* it is possible that the Court of Appeal will consider itself less compelled than before to follow House of Lords decisions and opinions of the Privy Council, except in instances of appeal from the New Zealand

52 [1962] AC 446, 476.

53 At 415-16.

54 At 415.

55 The position is not very different from that espoused by Lord Denning in *Davis* v *Johnson,* supra n 15. However, the reluctance of the *Lawrence* Court to articulate the circumstances in which departure from a prior decision is appropriate suggests that the court may adopt an approach along the lines described by Perry, supra n 13 at 240, as the "strong Burkean conception of precedent" (ie that a decision will not be overruled merely if the court now thinks it incorrect, but rather only where the "collective weight [of the reasoning in the current case] appears . . . to be . . . above a threshold of strength which is higher than what would be required on the ordinary balance of reasons"). Obviously, the difficult problem is articulating what that threshold should be. Interestingly, a deconstructionist approach to the law suggests the same question should be asked: how persuasive are the arguments for overruling the decision? See Katz, "After the Deconstruction: Law in the Age of Post-Structuralism" (1986) 24 U Western Ontario LR 51. For a more general discussion, with emphasis on recognition of policy considerations in adjudication and reconciliation of judicial and legislative roles, see McHugh, supra n 19.

56 See *Shing* v *Ashcroft* [1987] 2 NZLR 154, 157 where Cooke P stated: "Counsel was informed that in the absence of notice of the foregoing invitation [to the Court to reconsider a prior decision], the submission of *Meates* should be overruled would not be entertained at this hearing. Obviously the issue of precedent and, if appropriate, the question whether this particular prior decision should be overruled ought not to be dealt with except by a Court of five." See also *L D Nathan & Co Ltd* Hotel *Association of New Zealand* [1986] 1 NZLR 385, 391 where McMullin J noted that a view of a decision should be by a full court of five judges. Although a full court has traditionally been viewed as constituting five members both in the House of Lords and the Privy Council, nothing would prevent the New Zealand Court of Appeal from developing a practice of having more than five judges sit when prior decisions are being reviewed. See *Criminal Appeal* CA 87/88, unreported, where for the first time the court sat as a bench of seven in a case where a prior practice was reviewed. The Judicature Act 1908 as amended by section 2 of the Judicature Amendment Act 1987 provides for six permanent members of the Court of Appeal, in addition to the President and the Chief Justice. Other High Court judges may also sit on the Court of Appeal for limited periods (see, eg, *Criminal Appeal* CA 87/88, where Hardie-Boys J sat by invitation). Now that the court can sit in divisions and that the number of members has increased (see infra n 63) it may be appropriate to reconsider how many members should sit on the court in cases involving review of a prior decision.

judicial system.[57] This position should be strengthened if appeal to the Privy Council is eliminated,[58] as recommended in 1987 by both the Attorney-General and the President of the Court of Appeal.[59]

The New Zealand trends toward more disagreement among judges in the High Court and a more flexible view of stare decisis in the Court of Appeal may be particularly appropriate given the increasing number of decisions by the courts and the consequent chance that incorrect positions will be adopted.[60] However, as discussed in Part IV, these approaches also may contribute to an increase in litigation, which in turn will increase the universe of decisions facing both courts and counsel. With this in mind, the proliferation of judicial decisions and the patchwork quilt of reporting which has evolved in New Zealand are considered.

III Increase In Adjudication And Development Of Specialised And "Quasi" Unofficial Reports

1 Increase in judgments

New Zealand society is becoming more litigious.[61] Since 1981 the number of civil actions instituted annually in the High Court has risen by more than 45 percent.[62] In response to increasing demands on the judiciary, the number of High Court judges has jumped from 23 to 32 between 1978 and 1988.[63] One effect has been a dramatic rise in the number of judgments

57 Compare *Breuer* v *Wright* [1982] 2 NZLR 77, discussed by Taggart in "The Binding Effect of Decisions of the Privy Council" (1984) 11 NZULR 66, with *McCormack* v *Foley* [1983] NZLR 57, noted by Richardson J in *Lawrence* [1986] 1 NZLR at 414.

58 Compare *Cook* v *Cook* (1986-87) 162 CLR 376 in which the High Court of Australia stated: "[S]ubject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning" (joint judgment of Mason, Wilson, Deane and Dawson JJ; concurred in by Brennan J). See discussion of *Cook* in "Statement by High Court on respect to be paid to precedents of other legal systems" (1987) 61 ALJ 263.

59 The Capital Letter (1987) Vol 10 No 38, 1.

60 In a similar vein, Lord Bridge recognised that: "The 1966 Practice Statement is an effective abandonment of our pretension to infallibility." *R* v *Shivpuri* [1986] 2 All ER 334, 345.

61 See Cato, supra n 27, 115.

62 Supra n 1.

63 Judicature Amendment Act 1978 s 2 and Judicature Amendment Act 1986 s 3(1). In 1980 the Supreme Court was reconstituted as the High Court and the number of High Court judges was increased from 26 to 27. Judicature Amendment Act 1979 ss 2 and 3(1). These numbers include members of the Court of Appeal because all judges of that court are High Court judges. In addition, the Judicature Act 1908 was amended in 1977 to permit the Court of Appeal to sit in divisions and between 1978 and 1988 to increase the number of permanent members of the Court of Appeal from four to seven, excluding the Chief Justice. (Judicature Amendment Act 1977 ss 5 and 7 and Judicature Amendment Act 1987 s 2.)

issued by the courts.[64]

This increase in adjudication may be attributed in part to review of tribunal decisions, increase in criminal proceedings, and an increase in interim decisions by courts.[65] With regard to interim decisions, many disputes in the employment, intellectual property, and company law fields entail urgency which leads litigants to seek immediate relief.[66] Although interim, these decisions are significant in their respective areas because the problems will continue to require immediate adjudication, necessitating interlocutory relief, and will be final in effect if not form.[67] As such, they constitute valuable precedent and merit reporting.

2 *The patchwork quilt of reporting*

Essentially, three forms of reporting exist in New Zealand: the official reports, "quasi-reports" which note recent decisions before they are reported, if ever, and specialist series of reports.

64 No precise record of judgments issued exists. The office of the New Zealand Law Reports (hereafter NZLR) received the following number of judgments delivered for each of the following years:

	1984	1985	1986	1987
Court of Appeal	199	174	261	267
High Court	1482	1295	1777	1967
Total	1681	1469	2038	2234

(Interview with Frances Wilson, editor-in-chief of NZLR, on 19 February 1988, supplemented by letters dated 13 and 14 April 1988.) The question which remains is whether the courts are forwarding all decisions to NZLR. The divergence between the figures of NZLR and of the Court of Appeal (listed below) for 1985-87 suggests that some decisions are not being forwarded to NZLR.

The Court of Appeal records reflect issuance of the following numbers of reasoned judgments:

1985	1986	1987
267	272	289

(Data supplied by the President of the Court of Appeal in a letter dated 26 April 1988.)

Justice statistics are not consistent with these figures. The number of High Court "judgements entered" as reported in *Justice Statistics* has decreased from 351 in 1981 to 282 in 1985. (Department of Statistics, *Justice Statistics,* 1985, part A, 39, table 2.) The reason for this ostensible disparity between these records and those of NZLR is the exclusion from the Justice Statistics of interlocutory decisions and, in some registries, of final decisions which have not been sealed by the High Court Registrar. (Telephone conversation with Mrs Pat Kershaw, Justice Statistics Department, on 8 October 1987 and correspondence with High Court Registrars.) Although the number of appeals lodged has increased from 177 in 1981 to 224 in 1986, the number of decisions of the Court of Appeal reported by the Department of Statistics has remained virtually the same since 1981 – 110 decisions in 1981 and 112 in 1986. (Department of Statistics, *Justice Statistics,* 1985, 39, table 2, supplemented for 1986 by Mrs Pat Kershaw, Justice Statistics Department.)

65 This is merely suggestive of possible reasons for the increase; it is beyond the scope of this article to provide more than conjecture. See Cato, supra n 27, suggesting reasons.

66 In passing off and restrictive post-employment covenant cases, this is particularly true. In the criminal area, decisions are "frequently of a preliminary character". *The Structure of the Courts,* para 30.

67 This is particularly true in matters where interlocutory decisions inevitably require changes in conduct (eg passing off and post-employment activity disputes). See eg *Klissers Farmhouse Bakeries Ltd* v *Harvest Bakeries Ltd* [1985] 2 NZLR 129, 138-39, appeal dismissed, [1985] 2 NZLR 140, 142.

(a) Official reporting

The official reports, *The New Zealand Law Reports,* are published under the auspices of the New Zealand Council of Law Reporting[68] pursuant to the New Zealand Council of Law Reporting Act 1938 (the Act). The Act was passed "to provide for the incorporation and reconstitution of the New Zealand Council of Law Reporting, and to define its powers and functions".[69] The Council, as an unincorporated association, was "formed primarily for the purpose of publishing or arranging for the publication of the series of reports of legal decisions known as *The New Zealand Law Reports*".[70]

The Act provides for an official system of reporting decisions which are necessary or of value to practitioners or persons administering the law of New Zealand.[71] Section 12(3) of the Act effectively grants the Council a monopoly on publishing.[72] Ironically, since section 12(3) merely prohibits anyone other than the Council from publishing series of reports of decisions of the superior courts, the Act only agitates the otherwise muddy waters of copyright in judicial decisions,[73] a live issue because copies of unreported decisions necessarily must be made if the public is to be informed about decisions.[74]

68 Butterworths of New Zealand Ltd publishes the New Zealand Law Reports. See also infra n 77.

69 Long title to the Act.

70 Preamble to the Act.

71 Section 12(1) of the Act.

72 Section 12(3) provides:

> It shall not be lawful after the passing of this Act for any person, firm, or company other than the Council to commence the publication or to publish a new series of reports of decisions of the Supreme Court or Court of Appeal [or of the Land Valuation Court] (either separately or in conjunction with reports of any other judicial decisions) except with the consent of the Council of the New Zealand Law Society, which may be given on the ground that the New Zealand Council of Law Reporting has failed to publish or to arrange for the publication within a reasonable time and at a reasonable cost to purchasers of adequate reports of the decisions of the Supreme Court or Court of Appeal [or of the Land Valuation Court], but shall not be given on any other ground.

However, see discussion of specialist reports, infra at Part III 2(c).

73 Arguments exist that judges or the Crown own such copyright or that no copyright subsists in judgments because they are in the public domain. See Department of Justice, Law Reform Division, *Reform of the Copyright Act 1962: A discussion paper* (April 1985) para 9.3-9.7, 24-25, which notes: "There is some uncertainty about the ownership of copyright in reasons for judgment." Taggart forcefully argues that judgments should be in the public domain in "Copyright in Written Reasons for Judgment" [1984] Sydney LR 319 in response to Bannon's view in "Copyright in Reasons for Judgment and Law Reporting" (1982) 56 ALJ 59 that the Crown owns such copyright in Australia. See also Von Nessen, supra n 7 at 417-18.

74 Theoretically, copies can be obtained from the respective court registries. See discussion infra at Part IV 2(e). Several publishers have stepped in to make copies of decisions available because of difficulties in getting copies from court registries. Both New Zealand Recent Law and The Capital Letter advertise the service of providing copies of unreported decisions noted in their respective publications. Other publishers provide copies on an "as requested" basis. (Interview with Peter Smailes, managing editor of Brooker & Friend Ltd, on 19 February 1988.)

The practice of the Council for the past fifteen years has been to publish two volumes of reports annually.[75] In light of the recent proliferation in decisions, a dramatic increase in the number of decisions which are not officially reported has occurred.[76] In addition, the deluge of decisions has helped to overburden the understaffed editor of the official reports.[77] Not surprisingly, three large cracks have arisen in the official reporting scheme. First, many decisions, some of which are "necessary or of value" to practitioners or persons administering the law in New Zealand,[78] are lost forever because they are not reported.[79] Second, an increasing time lag exists

75 Between 1954 and 1972 the single annual volume contained over 1100 pages, as compared with approximately 1500 pages of reports combined in the two annual volumes since 1973. The Council has no definite plans for any increase in reporting although such action may be considered once NZLR overcomes its current backlog of decisions for review and publication. (Interview with Solicitor General, Paul Neazor QC, member of the Council of Law Reporting, on 19 February 1988.)

76 For example, in 1985 only 6.4 percent of the decisions of the High Court and Court of Appeal considered by the editor of the official reports were officially reported. Calculation made from data provided by NZLR.

77 In July 1987 the Council contracted with Butterworths of New Zealand Ltd to provide support to overcome this problem. (Interviews with Frances Wilson, editor-in-chief of NZLR, and with Solicitor General Paul Neazor QC, member of the Council of Law Reporting, on 19 February 1988.)

78 Section 12(1) of the Act.

79 The editor-in-chief of NZLR has noted that the s 12(1) "necessary or of value" standard is too general to be useful in deciding what to report. Prior to 1987, the editor of NZLR used the following criteria for reporting:

> *"Reportability."* In the most general terms judgments are reported which are considered "interesting and useful". Priority is given – both in numbers and speed of reporting – to judgments of the Court of Appeal and Privy Council over those of the High Court. More specifically, a judgment is reported if:
>
> (1) it lays down a new principle of law, applies a principle to a new field, deals with a novel situation, or extends the application of an existing principle;
>
> (2) it deals with the construction of a statute or subordinate legislation; or construes other documents (contracts, wills, etc) if the word or phrase is in common use in documents of that type;
>
> (3) the Judge restates in modern terms an old principle, restates a principle of law in terms of particular applicability to New Zealand, or applies a principle which although well established has not been applied for many years;
>
> (4) a Court states its view on a point of practice or procedure;
>
> (5) a Court, usually an appellate Court, sets out deliberately to clarify the law;
>
> (6) appeals from decisions which have already been reported;
>
> (7) decisions which highlight a conflict in judicial approach.
>
> In general a judgment is not reported if it merely depends on the proper inference to be drawn from facts, or depends on the construction of very particular words, or which applies a settled principle of law to particular facts.

(Interview with Frances Wilson, editor-in-chief of NZLR, on 19 February 1988.) Due to the space limitations on NZLR it seems extremely doubtful whether all judgments meeting these criteria were reported.

Since 1987 priority has not been given to Court of Appeal or Privy Council decisions and the Council has instructed the editors of NZLR to report all decisions of the Court of Appeal and High Court designated by the individual judges as "High Priority". See discussion infra text at n 111. NZLR editors also report other decisions which they deem merit reporting, given the limited space for reporting in NZLR. (Telephone conversation with Frances Wilson, editor-in-chief of NZLR, on 25 May 1988.)

Interestingly, current judicial and legislative activism in New Zealand increases the pressure to report more decisions for two reasons. First, more cases involve evolving common

between time of judgment and reporting.[80] Third, where persons become aware of an unreported decision, it is becoming more costly – both in time and money – to obtain a copy.[81] These faults in official reporting leave practitioners and courts[82] in a quandary: they increasingly know less decisional law or, at best, are apprised of it well after issuance or only because they hear of it through the legal grapevine. The curtains thus open on two phenomena: the creation of "quasi-reports" to apprise practitioners (and courts) more timeously of recent decisions;[83] and the multiplication of specialist reporter series to publish cases which might otherwise remain lost as unreported judgments.

(b) "Quasi-reports"

Two "quasi-reports" exist: Butterworths Current Law and The Capital Letter.[84] The prefix "quasi" is adopted because these publications are not full text reports but rather brief notes of cases.[85] "Quasi-reports" do serve an extremely useful role in apprising practitioners and courts of recent decisions.[86] However, counsel still need access to the full text of decisions

law principles or interpretation of recent legislation. Second, decisions which might otherwise be cases on the facts take on new meaning as reaffirmation of potentially endangered principles.

80 See Speech of Sir Robin Cooke, supra n 4 at 2. The Court of Appeal has itself responded to this problem by supplying more of its decisions to Law Society libraries. (Interview with the Rt Hon Sir Robin Cooke, President of the Court of Appeal, on 19 February 1988.) Even in the best of times, a delay of up to six months in official reporting is likely. (Interview with Solicitor General Paul Neazor QC, member of the Council of Law Reporting, on 19 February 1988.)

81 See infra at Part IV 2(e).

82 Interview with the Hon Mr Justice Jeffries on 18 February 1988.

83 This problem first surfaced in 1974 when judges' clerks in the Supreme Court began to "catchline" decisions of the Supreme Court and Court of Appeal for the judges due to delays in official reporting. Butterworths Current Law then commenced publication of these catchlines to inform the profession of recent decisions. (Interview with Frances Wilson, editor-in-chief of NZLR, on 19 February 1988.)

84 Arguably two additional quasi-reports are New Zealand Recent Law and Brooker & Friend's Consolidated Case Annotations but these are excluded because there is a sizeable timelag between date of decision and publication. Most recently, publishers have begun issuing specialist "quasi-reports". See eg Butterworths Conveyancing Bulletin.

85 It is for this same reason that these publications avoid any problems concerning s 12(3) of the Act and copyright in judgments.

86 Interviews with the Hon Mr Justice Jeffries and the Rt Hon Sir Robin Cooke, the President of the Court of Appeal, on 18 and 19 February 1988 respectively.

of interest.[87] At the extreme, unreported decisions are not precedent because they cannot be accessed. Specialist reports have been published in part to meet this concern.

(c) Specialist reports

The trend toward publication of specialist reports is substantial. There are currently being published at least fourteen series which include decisions of the High Court or Court of Appeal, more than half of which have been started in the last eight years.[88] At least two reasons exist for the proliferation of these series. First, publishers have stepped in to publish decisions which the official reports have failed to report timeously or at all.[89] In one of the few instances where the publisher of a specialist report obtained the consent of the Council of the New Zealand Law Society as prescribed by section 12(3) of the Act, that Council[90]

> found that the NZ Council of Law Reporting has failed to publish or to arrange for the publication within a reasonable time and at a reasonable cost to purchasers of adequate reports of the High Court, the Court of Appeal and the Land Valuation Tribunal . . ..

Second, publishers have found a market within the profession for reports limited to special practice areas.

Specialist reports present several problems. First, where they contain otherwise unreported decisions, counsel (and consequently clients) without access to such series may be disadvantaged. This problem is compounded because the inclusion of a decision in a specialist report may weigh against its inclusion in the official reports.[91] Thus, practitioners are likely to find

87 A copy is needed both to determine if, in fact, the case is relevant and to supply a copy to the court as required by a recent practice note: see infra at n 109. The recent case of *Turnwald* v *Ministry of Agriculture and Fisheries,* infra at n 131, highlights the fact that quasi-reports are no substitute for adequate reporting of decisions. *Fowler Roderigue Ltd* v *Attorney-General,* infra n 133, relied upon in part by Cooke P in *Turnwald,* was noted in TCL Vol 10 No 37, 6 October 1987, 5, and in BCL, 27 October 1987, Nos 1423 and 1466. A review of these notes would not indicate the principle for which Cooke P cited it in *Turnwald.* In fact, the language in BCL might be interpreted to suggest that *Fowler* stood for the contrary principle (". . . [R]elevant enactments had been repealed by the Fisheries Act 1983"). This is not a criticism of the quasi-reports themselves, but rather of any suggestion that they are sufficient in themselves.

88 See Australian and New Zealand Insurance Cases (CCH Australia); Australian Tax Reports (Butterworths Australia); Butterworths Company Reports (Butterworths NZ); Criminal Reports of New Zealand (Brooker & Friend); Family Reports of New Zealand (Brooker & Friend); Intellectual Property Reports (Butterworths Australia); NZ Administrative Reports (Butterworths NZ); NZ Business Law Cases (CCH NZ); NZ Company Law Cases (CCH NZ); NZ Conveyancing and Property Reports (Butterworths NZ) (only one volume in 1983); NZ Employment Law Cases (CCH NZ); NZ Town Planning Appeals (Butterworths NZ); and Tax Reports (New Zealand) (Butterworths NZ). Brooker & Friend also intends to publish two new series: Procedure Reports and Trade and Competition Law Reports.

89 The lack of inclusion of many judgments in the Weekly Law Reports was given by Karlen as "probably why specialised reports . . . flourish in England". Karlen, *Appellate Courts in the United States and England* (1963) 88.

90 1 October 1987, Resolution of the Council of the New Zealand Law Society.

91 Interview with Frances Wilson, editor-in-chief of NZLR, on 19 February 1988.

that more and more decisions are only included in unofficial specialist reports. Second, where decisions do appear in both the official and one or more specialist reports, duplication and waste occurs. Third, specialist reports, as commercial ventures, may cease publication. As a result, areas of jurisprudence may "go down the drain".[92] Fourth, categorisation of decisions into specialist reports may diminish other significant aspects of a decision. For example, a decision which includes both procedural and company law principles may appear in a company law series and its procedural precedential value may possibly be lost.[93]

There are, however, some advantages to specialist series. Most importantly, they are convenient for practitioners who specialise. In addition, they can provide both courts and counsel with an appreciation of how principles are evolving in a particular area of law.[94] They also provide a more complete picture of certain major litigation sagas[95] because many of these series include tribunal and inferior court decisions along with High Court and Court of Appeal judgments.[96]

The current fabric of reporting in New Zealand is a patchwork quilt comprised of the official reports, "quasi-reports," specialist reports, and gap filler articles and books.[97] The judicial response to and implications of these developments will now be considered.

IV Judicial Response And Implications

1 Judicial response

Theoretically, the fact that a judicial decision is unreported should not affect its value as precedent:[98] "The authority of a case depends not upon whether it is to be found in a series of reports but upon the fact that it is a judicial decision."[99]

92 Interview with the Hon Mr Justice Jeffries on 18 February 1988.

93 This problem exists to a lesser degree with a general series of reports depending upon the skill of the reporter headnoting decisions and the specificity of any accompanying index. Therefore, the preferred remedy is to create a full text computer database. This would provide a means by which any aspect of a case could be targeted provided proper search terms were identified.

94 Interview with the Rt Hon Sir Robin Cooke, President of the Court of Appeal, on 19 February 1988.

95 See eg the Clutha River water rights cases, *McGregor* v *Attorney-General* (1979) 7 NZTPA 355; *Environmental Defence Society* v *National Water and Soil Conservation Authority* (1979) 7 NZTPA 385; *Annan* v *National Water and Soil Conservation Authority* (1980) 7 NZTPA 417; *Gilmore* v *National Water and Soil Conservation Authority* (1982) 8 NZTPA 298; and *Annan* v *National Water and Soil Conservation Authority (No 2)* (1982) 8 NZTPA 369.

96 Telephone conversation with Peter Haig, an editor for Butterworths, on 14 April 1988.

97 See eg Burrows, "The Contractual Remedies Act 1969 Six Years On" (1986) 6 OLR 220 and Hall, *Sentencing in New Zealand* (1987) which both contain reference to many unreported decisions.

98 This view is shared by the Rt Hon Sir Robin Cooke and the Hon Mr Justice Jeffries. (Interviews with the Hon Mr Justice Jeffries and Sir Robin Cooke, President of the Court of Appeal, on 18 and 19 February 1988 respectively.)

99 *Leighton* v *Harland & Wolff Ltd* 1953 SLT (Notes) 34, 36, per Lord Guthrie (Scottish Outer House).

However, an unreported decision has no practical value as precedent if courts, counsel, and the community are neither aware of nor can readily access it. Judicial response to increases in decisions in various jurisdictions has been diverse and has affected the precedential value of such decisions.[100] In England, the House of Lords has adopted a strict rule generally prohibiting citation of unreported decisions.[101] In the United States, federal courts of appeal have issued no-citation and no-publication rules.[102]

All of these approaches have been the subject of much discussion and criticism.[103] Essentially, the question is whether the benefits from limits on reporting and citation outweigh the costs.[104] These benefits include cost savings to practitioners, clients, and the judiciary as a result of reducing the universe of decisions which must be considered in any case. Cost savings also flow from the reduction in reported material which practitioners must purchase and which consumes shelf space. However, one dilemma is articulating and applying with consistency criteria for deciding which cases are worthy of reporting.[105] In addition, any such limits may diminish judicial responsibility to precedent and accountability to other judges and to the community.[106] One commentator has noted:[107]

100 See generally Von Nessen, supra n 7 at 427-31.

101 *Roberts Petroleum Ltd* v *Bernard Kenny Ltd* [1983] 1 All ER 567.

102 Reynolds and Richman, "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform" (1981) 48 U Chi LR 573 (hereafter "An Evaluation"); Reynolds and Richman, "The Non-Precedential Precedent-Limited Publications and No-Critation Rules in the United States Courts of Appeals" (1978) 78 Colum LR 1169 (hereafter "Non-Precedential Precedent"); Note, "Unreported Decisions in the United States Courts of Appeals" (1977) 63 Cornell LQ 128.

103 For criticisms of Lord Diplock's approach in *Roberts* see Tunkel, "Available at Last: The Court of Appeal Transcripts" [1986] NLJ 1045 at 1047; Andrews, supra n 7; Harrison, "Unreported Cases: Myth and Reality" [1984] NZLJ 165; Munday, supra n 7; and Bennion letter in Postbox (1983) 80 L Soc Gazette 1635. For discussion and criticism of the American approaches see n 102.

104 For a detailed discussion of costs and benefits in the United States context, see Reynolds and Richman, "Non-Precedential Precedent", supra n 102 at 1181-1204, and "An Evaluation", supra n 102.

105 For example, the editors of both NZLR and The Capital Letter noted that judges apply the designations discussed infra at text to notes 111-21 quite differently. (Interviews with Frances Wilson, editor-in-chief of NZLR, and with Jack Hodder and Graham Taylor, editors of The Capital Letter, on 19 February 1988.) See also comments of Haig infra n 119. Arguably some of these problems can be overcome with more specific criteria for determining reportability. Reynolds and Richman, supra n 102, "Non-Precedential Precedent", at 1177, and "An Evaluation", at 627-28, also noted this concern in the United States and thus argued for specific criteria.

106 See Reynolds and Richman, "An Evaluation", supra n 102 at 598-606 (noting inferior quality of United States circuit court unpublished decisions).

107 Von Nessen, supra n 7 at 429. Although if taken literally, Von Nessen's approach might cripple the judiciary, the point remains that judicially imposed limits on reporting and citation could impair the institutional check imposed by the general principle. As Reynolds and Richman, "Non-Precedential Precedent", supra n 102 at 1205, note: "Judges are likely to feel more pressure to avoid inconsistent decisions and suppressed precedent since their unpublished opinions are available for use and subject to scrutiny."

> A by-product of the doctrine of stare decisis is the necessity of the judiciary to reconcile each judgment with prior decisions [and judicial control in reporting may] . . . undermin[e] . . . proper review of the judicial function.

In New Zealand, the practice of the courts is to cite and rely upon unreported judgments with regularity.[108] Although a recent practice note of the High Court requires counsel to provide the court with a full copy of any unreported judgment to which counsel refers,[109] no practice statement or rule bars citation of and reliance on unreported decisions before the courts.[110]

Although New Zealand courts have demonstrated a willingness to rely upon unreported decisions, a classification system was devised by the Council of Law Reporting to assist NZLR in selecting decisions for inclusion in the official reports.[111] Judges are supposed to affix a pre-printed label to the first page of every decision to indicate whether it is to be given

108 See eg *Taylor Bros Ltd,* infra n 129; see also *Sheldon* v *Whitcoulls Group Ltd,* unreported, High Court, Christchurch, 9 December 1986, M510/86, Holland J (where Holland J in citing to a case reported in NZCLC noted at 2 that the case: ". . . is the only known case of an application to the New Zealand Courts. There may well have been other unreported cases but they are not known to counsel or to the Court.") However, Cooke P has stated extra-judicially that "something will have to be done to restrain . . . [reference to unreported cases] unless addicts at the Bar reform voluntarily". (Speech of the Rt Hon Sir Robin Cooke, supra n 4.) One commentator has noted a reluctance to refer to unreported decisions. Burrows, "The Contractual Remedies Act 1969 Six Years On" (1986) 6 OLR 220 (noting "while one is normally reluctant to place weight on unreported judgments, especially if they are oral . . . an exception can legitimately be made . . . given the importance of the new legislation and the desirability of developing patterns of decision being made known with reasonable promptitude").

109 Practice note dated 30 November 1987, para 7, reported in [1987] 1 NZLR 483. This requirement may preclude counsel from using unreported decisions as precedent because of the increasing problems in procuring copies of such judgments. See discussion infra at Part IV 2(e).

110 A copy of a signed unreported judgment may be cited in court. This is because New Zealand judges, as barristers, have the same powers as English barristers, Law Practitioners Act 1982 s 61, including authentication of a report which they author: 3 Halsbury's Laws of England (4th ed 1973) para 1117.

111 The current sticker system was initiated as of 1 February 1986. (Memorandum to All Court of Appeal and High Court Associates from the Hon Mr Justice Jeffries dated 27 November 1985.) The prior two-tier system (special consideration or no special consideration) was in operation since at least the mid-1970s. One of its drawbacks was that in practice it resulted in three classes – the two express classes and all the other decisions which were not brought to the attention of NZLR. (Interview with Frances Wilson, editor-in-chief, on 19 February 1988.) The Council of Law Reporting sought to remedy this deficiency by requesting that the Court of Appeal and High Court registrars send the editor of NZLR a ". . . copy of every judgment of which a transcript is made . . . irrespective of whether or not the Judge has affixed [a sticker]". (Council letter to Court Registrars dated 16 December 1983.) It is unknown how many High Court decisions the registrars do not forward to NZLR. An estimate can be made for Court of Appeal decisions. See supra n 64 and infra n 116.

"High"[112] "Medium"[113] or "Low Priority"[114] or is "Not Recommended".[115] This approach raises several concerns. First, judges may not assess accurately what cases merit publication.[116] For example, valuable decisions may be given a "Not Recommended" label. This raises the same concerns of judicial responsibility to precedent and accountability noted above.[117] Second, although the classifications may lead to more efficient case reporting, their effect may be detrimental because the practical precedential value of a decision may be diminished by a "Not Recommended" or "Low Priority" status.[118] In addition, although such designations are intended to assist publishers in deciding whether to note or report a particular decision,[119] erroneous or inaccurate classifications may result in exclusion of decisions from such publications, with the result that no practical way will exist to become aware of them.

Notwithstanding these concerns, the sticker system may be worthwhile, given that only limited resources are available for law reporting.[120] However,

112 Category 1 – High Priority – Red sticker: "Judgments which warrant definite consideration for inclusion in the New Zealand Law Reports."

113 Category 2 – Medium Priority – Blue sticker: "Judgments which would warrant definite consideration for inclusion in one of the available specialised series of law reports, but not excluding the New Zealand Law Reports". See eg *Lake Tekapo Motor Inn Ltd* v *White,* unreported, High Court, Christchurch, 21 May 1987, CP 171/86, Tipping J.

114 Category 3 – Low Priority – Green sticker: "Judgments which might hold some interest for brief, or catchline type, reporting but probably do not warrant reporting in a series of law reports." See eg *Domtrac Equipment Ltd* v *Lambert,* unreported, High Court, Rotorua, 26 September 1986, CP 73/86, Barker J.

115 Category 4 – Not Recommended – Yellow sticker: "Judgments which decide nothing of interest other than to the parties themselves." See eg *Spivey* v *The University of Canterbury,* unreported, High Court, Christchurch, 5 November 1987, CP 448/86, Holland J.

116 See discussion supra n 105. One significant issue is how many decisions are not forwarded by the registrars to the reporters for possible publication. For example, statistics noted supra n 64 indicate that in 1987 22 Court of Appeal judgments were not received – and thus not considered for reporting – by NZLR. How many High Court decisions fall in this category is unknown.

117 See discussion supra text at nn 104-05. However, Von Nessen, supra text at n 105, was discussing United States no-citation and no-publication rules as contrasted with the indirect influential role played by judges in New Zealand.

118 The intended practice is that only copies given to law reporting agencies have stickers affixed to them. (Memorandum to All Court of Appeal and High Court Associates from the Hon Mr Justice Jeffries dated 27 November 1985.) However, the sticker designation is legible on some copies received by the University of Otago Law Library and, presumably, by others. Provided that the system continues, any such designations should appear on all copies of decisions.

119. One editor indicated that such designations did not affect his decision other than to err on the side of notation of cases designated "High" or "Medium" priority. (Interview with Graham Taylor, editor of The Capital Letter, on 19 February 1988.) Another suggested that the designations were a useful guide notwithstanding that a sticker "represents no more than the inevitably subjective (and often hasty) view of a judge about his own product, and that some judges are notoriously prone to mis-assessing the importance of their own judgments". (Letter dated 12 April 1988 from Peter Haig, an editor for Butterworths.) However, one editor disregarded the classifications. (Interview with Jack Hodder, editor of The Capital Letter, on 19 February 1988.)

120 The Hon Mr Justice Jeffries, a member of the Council of Law Reporting, has noted: "The basic premise of a judge judging his own work for the purposes of law reports is, in my view, far from ideal, but with the resources available for law reporting in New Zealand, I think unavoidable." (Letter dated 12 April 1988 from the Hon Mr Justice Jeffries.)

consideration should be given to promulgation of rules expressly identifying criteria for classification of decisions for reporting.[121] In addition, such designations should continue to serve merely as a guide, rather than as a mandate, to reporters.

2 *Implications*

(a) Fairness

As more decisions go unreported, courts, counsel and clients will have greater difficulty ascertaining what the law is since there is no general subject index of unreported decisions.[122]

This problem, although present in both civil and criminal contexts, is particularly troubling in criminal proceedings. The Crown Law Office in Wellington possesses copies of all unreported Court of Appeal criminal decisions (which are bound and indexed each year) and circulates copies of some decisions of interest to Crown Solicitor offices nationwide.[123] However, criminal defendants and their counsel do not have access to the Crown's records of unreported decisions.[124] Consequently, the Crown may have an unfair advantage in prosecution and sentencing proceedings.

The problem of lack of access to prior case law also affects civil clients. Most of the larger New Zealand law firms are compiling their own indices of unreported decisions.[125] Obviously, larger firms can afford such expenditure but many practitioners cannot. Such indices may result in unequal access to the law. Arguably clients can retain counsel who possess access to all pertinent decisions; but taken to the extreme, independent barristers would face significant barriers to practising effectively because they do not have all the relevant law at their disposal.

To suggest that any person can obtain a copy of a decision by requesting it from a particular registry sidesteps the real problem – the lack of an adequate system to search for relevant unreported decisions. In addition, the requirement that counsel must now provide the court with a copy of an unreported decision which they intend to cite[126] does not remedy the problem because there may be other decisions arguably favourable to opposing party which may not be cited.[127] The practice note is also deficient

121 For discussion of possible criteria, see supra n 79; Reynolds and Richman, supra n 102, "An Evaluation" at 627-28 and "Non-Precedential Precedent" at 1176-77; Cumbrae, supra n 7; and Andrews, supra n 7 at 225-31.

122 This problem is ameliorated to an extent by virtue of the "quasi-reports". However, none of these is all inclusive. Thus some cases may fall through the cracks. This also may occur where decisions are not forwarded by court registrars to the reporters. See supra n 116. In fact, no general index to judgments reported solely in specialist series exists. The only index for specialist reports, published as a segment of the supplement to the Index to New Zealand Legal Writing, covers the period 1982-85.

123 Interview with Solicitor General, Paul Neazor QC, on 19 February 1988.

124 Access may exist by virtue of the Official Information Act 1982 which provides that the Crown Law Office is subject to the Act.

125 Interview with Mary Kelly, Wellington District Law Society librarian, and Hazel Dobbie, librarian with Buddle Findlay, on 19 February 1988.

126 Practice Note, supra n 109.

127 See also Reynolds and Richman, "Non-Precedential Precedent", supra n 102 at 1187.

because it does not require counsel to provide a copy of an unreported decision to opposing counsel.

(b) Increase in adjudication due to lack of clarity

Among the functions served by judicial decisions are clarification and statement of the law:[128]

> Along with the resolution of the dispute (or indeed even without it) and with the application of the law, the court might also have the task of reaffirming, clarifying or developing the law in issue. That is seen as another principal judicial function, at least for the more senior courts in the hierarchy. That clarification — stressed in a general way in the Law Commission Act — is a public function of the courts. It should of course reduce the need for potential litigants to go to court and make it easier for their lawyers to advise them. It also helps with the important principle of the equal application of the law to all subject to it.

To the extent that decisions which serve to clarify or develop the law remain unreported, this public function is unfulfilled.[129] Potential litigants will not be dissuaded from proceeding by existing, but unavailable, decisions because such decisions will not exist from their perspective. Also, lawyers may be unable to advise clients of new developments which would affect client behaviour.[130]

The recent case of *Turnwald* v *Ministry of Agriculture*[131] highlights this problem. In *Turnwald* the defendant appealed from a High Court reversal of a dismissal by the District Court of a charge for the alleged offence of fishing for controlled fish in the Hauraki Gulf without a licence. Cooke P noted that:[132]

> The whole argument for the defendant at all stages has been that at that date [of the alleged offence] there was no controlled fishery, because the Notice declaring it . . . had been revoked as from 1 January 1984 by the Fisheries Act 1983 . . ..

On 25 September 1987, subsequent to the High Court decision in *Turnwald,* the Court of Appeal issued its decision in *Fowler & Roderique Ltd* v *Attorney-General*[133] in which Somers J stated:[134]

> The effect of the unusual draftsmanship of the 1983 Act is I think to continue the existence of the controlled fishery despite the revocation of the Notice which gave it birth.

128 *The Structure of the Courts,* para 33.

129 See eg *Taylor Bros Ltd* v *Taylors Textile Services Auckland Ltd,* unreported, High Court, Wellington, 1 October 1987, CP 95/87, where McGechan J at 38 "regret[ted]" the failure to report *New Zealand Farmers Co-operative Association of Canterbury Ltd* v *Farmers Trading Company Ltd,* unreported, Supreme Court, Christchurch, 16 October 1979, A496/78, Somers J.

130 Obviously the criminal is not very likely to adjust behaviour based on case law developments; but civil clients might be so inclined.

131 Unreported, Court of Appeal, 20 April 1988, Cooke P, Somers and Bisson JJ (delivered by Cooke P).

132 At 1-2.

133 Unreported, Court of Appeal, 25 September 1987, CA 61/85, Cooke P, Somers and Casey JJ.

134 *Turnwald,* supra n 131 at 6 quoting Somers J in *Fowler & Roderique Ltd.*

However neither party in argument before the Court of Appeal in *Turnwald* was aware of the as yet unreported decision in *Fowler & Roderique.* Cooke P, in a clear pronouncement reflecting frustration with the current reporting system stated:[135]

> On both sides counsel in the present case were unaware of that case, which is still unreported, at the commencement of the argument in this Court today. We draw attention to this as an instance of how the present law reporting system results in unsatisfactory delays and can result in an unawareness, for which counsel cannot be criticised, of relevant judgments of this Court.

(c) Increase in adjudication due to relaxed principles of precedent

Interestingly, the cumulative effect of the more liberal views on precedent and the growth in the number of unreported judgments may be to increase further the amount of civil litigation. As noted by Richardson J, "a Court which freely reviews its earlier decisions is likely to find . . . that the Court lists are jammed by litigants seeking to find a chance majority for change . . .".[136]

Counsel may advise clients that there is a possibility to have a prior Court of Appeal decision overruled or, more likely, for a High Court judge to disagree with an earlier High Court case. In addition, the failure to report decisions may lead litigants to pursue claims because they believe the law to be undecided, whereas it is merely unreported and practically unavailable.[137]

(d) Unenviable obligations of counsel

Counsel have an ethical obligation to advise the court and their clients of the law. Given that unreported decisions constitute precedent and that reporting of decisions is such a patchwork quilt, counsel are placed in the unenviable position of trying to fulfil that obligation. It remains to be seen whether courts or the New Zealand Law Society will view this obligation to include research of specialist reports, the most recent editions of The Capital Letter or Butterworths Current Law, and any other specialist "quasi-reports".[138] Ultimately, clients will pay if counsel are compelled to undertake

135 At 6.

136 *Lawrence* [1986] 1 NZLR at 414.

137 Eg, would the defendant have appealed the High Court decision in *Turnwald,* discussed supra text at nn 131-35, had the opinion of Somers J in *Fowler* been known to the parties?

138 The recent decision in *Turnwald* suggests that the Court of Appeal recognises it may be unfair to presume that the *private* parties and their counsel are aware of recent decisions. This was not the case for the Crown. In refusing to award costs to the Minister of Fisheries Cooke P stated at 6-7: "Bearing in mind that the *Fowler and Roderique* judgments should have been known to the Ministry of Agriculture and Fisheries at least and drawn to counsel's attention, we are not prepared to make any order for costs." It could be argued that such presumed knowledge of recent decisions will be limited to cases in which a particular Ministry was a party. Compare the view of Lord Guthrie in *Leighton* v *Harland & Wolff Ltd,* supra n 99: ". . . [N]ot only is reference to unreported cases unobjectionable, but it is the duty of counsel to refer the Court to all cases which bear upon the point at issues whether such cases are reported or not." Taken literally, Lord Guthrie's approach would impose on counsel the unrealistic requirement to search all court registries on any issue.

time consuming research to meet their ethical obligations. Consideration must therefore be given to reconciling rules of precedent, the reporting system, and realistic standards for counsel.

(e) Escalating costs of the law[139]

More flexible rules of precedent coupled with an expanding universe of decisions will lead courts to expend greater judicial resources both in review of the law and in reconsidering issues other courts have addressed.[140]

In addition, costs to practitioners and clients are increasing for several reasons. First, there are more publications, such as "quasi-reports" and specialist series, which practitioners may feel compelled to buy. Second, more time may be consumed in sifting through the burgeoning universe of decisions.[141] Third, there are increasing costs in procuring copies of unreported decisions. In theory, persons can write to court registries to obtain copies of decisions for a fee. In 1987 the Justice Department raised this fee from $10 to $15 for High Court judgments of more than five pages.[142] However, delays of several weeks when ordering judgments from registries can and do occur.[143] As a result, practitioners, typically those in large firms with in-house librarians who have time to pursue unreported decisions, are turning to legal publishers for copies of judgments.[144] It is not unusual for law firms to pay as much as $40 to procure a copy of an unreported decision.[145] However neither $15 and 2 week delays nor $40 and prompt delivery is a satisfactory answer to the problem.

(f) Need for restraint by Bar and Bench

Effective advocacy necessarily requires research of the facts and law at issue in any case and then distillation of both facts and law to their essence for presentation to the Court. As the universe of arguably relevant decisions expands, some counsel tend to sidestep the second step of distillation of authorities. Sir Robin Cooke has noted this on several occasions.[146] In a recent interview he provided the following analogy:[147]

139 Some of these costs are the same as those in the United States noted by Karlen in his study comparing United States and English appellate courts in the 1960s. Karlen, *Appellate Courts in the United States and England* (1963) at 154-56.

140 In extreme situations, reporting delays may lead a court to expend time hearing argument on issues the court itself has recently considered. See eg *Turnwald,* discussed supra, text at nn 131-35.

141 In England this problem was aptly noted by Goodhart: "The more cases reported, the more expensive the reports will be and the harder it will be to find gold among the rubbish." ("Law Reporting and the Computer Revolution" [1982] 131 NLJ 643.)

142 SR 1987/37 and SR 1987/68. The fee is $5 for High Court judgments up to five pages. The previous increase, in 1984, was from $3 to $10 (SR 1984/295). The fee for a Court of Appeal decision of any length is $15 (SR 1987/36 and SR 1987/68).

143 Interview with Mary Kelly, Wellington District Law Society librarian, and Hazel Dobbie, librarian with Buddle Findlay, on 19 February 1988.

144 See discussion, supra n 74.

145 Telephone conversation with Pat Northey, research co-ordinator for Russell McVeagh, on 24 May 1988.

146 See supra n 4. See also supra n 108.

147 Interview with the Rt Hon Sir Robin Cooke, President of the Court of Appeal, on 19 February 1988.

> An argument is like putting up a building, you need scaffolding, but in the end product you have the structure, and demolish the scaffolding . . . we [the Court] don't want to see the scaffolding.

Thus counsel should distill their argument and simply refer the Court to those leading cases which state the principles upon which they rely. The failure of counsel to do so wastes judicial resources both in court time and in time expended by judges in considering such authority in cases where they reserve judgment.

What is good for the goose is also good for the gander. To the extent that judges fail to distill their decisions to refer to only leading cases to support each principle which forms a part of the reasoning, costly space in judicial reports is wasted. In addition, valuable judicial time may be consumed in reviewing such decisions. In extreme cases, the length of a judgment may make it unreportable.[148] However the other extreme — failure to cite any prior authority for the principle(s) upon which a decision rests — leads to the dilemma of inability to determine whether a case decides anything new or is merely application of an established principle to particular facts.

Appellate judges should also exercise restraint in cases where several judges issue reasons for their decisions. Obviously, judges should indicate differing reasons for which they come to the same or different conclusions as other members of the Court. However, this may not require restatement of the facts or certain principles on which there is agreement.

Finally an additional consideration for High Court judges is the structure of their decisions. In cases where it is the court of first instance, the High Court has the critical fact finding responsibility in addition to application of law, and where necessary, statement of developing principles. However, because High Court judgments also serve as precedent, it might assist editors of law reports if High Court judges considered structuring decisions with distinct sections covering review of facts, factual findings, and statement and application of legal principles. This would facilitate editing decisions to exclude a review of facts from reported decisions where appropriate.

V CONCLUSION

The proliferation of unreported decisions coupled with more flexible principles of precedent requires either the promulgation of no-citation or no-publication rules or review of the entire reporting system if the system

148 See eg *Superintendent of Mount Eden Prison* v *Benipal,* unreported, Court of Appeal, 3 December 1987, CA 29/86, Cooke P, Richardson, Somers, Casey, and Bisson JJ, where Cooke P noted at 10: "Unfortunately, as together they [the two High Court judgments in the case] extend to the unprecedented length of 459 pages, they are presumably for practical purposes not reportable. It is impossible to read them fully without being struck by [the] single-minded concern to do justice that has led to these remarkable judgments. We pay that tribute while recognising that, as the Judge himself would be the first to recognise, a disadvantage of judgments of this length is that in various ways they tend to appropriate valuable time. Moreover, it is difficult to give an adequate summary of them for the purposes of a judgment on appeal."

is to be both fair and to operate more effectively. In view of criticisms of and reluctance within the New Zealand judiciary to adopt the former,[149] improvements to reporting are essential. The mere existence of so many specialist series, only a small number of which are published in conformity with section 12(3) of the New Zealand Council of Law Reporting Act 1938, highlights the failure of the Act to facilitate making court decisions which are "necessary or of value" available to the public. Although some may view deregulation as the answer, such an approach could be contrary to the long-term interests of New Zealand practitioners, courts, and society because it is doubtful that a comprehensive reporter series would be published; rather specialist series would continue to multiply.

Reform of the New Zealand Council of Law Reporting Act 1938 is essential and overdue. The touchstones of reform should be recognition of Crown responsibility:[150] (1) to continue publication of NZLR as a series of general official reports; (2) to publish a general index to decisions, including those not officially reported; (3) to institute an effective clearing house to provide the public with copies of decisions in contrast to the current costly, time-consuming, and ad hoc system of obtaining decisions; and (4) to establish, subject to cost feasibility, a computerised database of the full text of decisions, which perhaps could be implemented through district law society offices.[151] Reform should also expressly establish or confirm that copyright does not subsist in judgments. This would require repeal of section 12(3) of the Act. Although this repeal may lead to more specialist series, such series are preferable to ensure that decisions are available to the public.

If expansion in output and speed of reporting occurs, the official reports can best serve New Zealand. As suggested by the President of the Court of Appeal, consideration should be given to creation of a separate series for decisions of the High Court and the Court of Appeal; this could expedite publication of both and afford readers a clearer picture of patterns

149 Interviews with the Hon Mr Justice Jeffries and the Rt Hon Sir Robin Cooke, President of the Court of Appeal, on 18 and 19 February 1988 respectively.

150 The means by which the Crown fulfils its responsibilities and whether a body such as the Council of Law Reporting should be retained are different issues. For example, contracting with private publishers, as is now the case between the Council and Butterworths, see supra n 77, may be appropriate.

151 This may be feasible because both High Court and Court of Appeal decisions are now generated on computer and possibly could be transferred to a general database. (Interview with Frances Wilson, editor-in-chief of NZLR, on 19 February 1988.) Currently two computer database projects for unreported decisions are underway. The Auckland District Law Society Library is compiling a database of catchlines of decisions of the Auckland High Court and John Miller at Victoria University is piloting a full text database of all Court of Appeal decisions for use on Kiwinet, a database of the National Library of New Zealand. Because the former project is not a full text database, it serves as no more than a quasi-report and is subject to the same criticisms. See discussion, supra Part III 2(c). A database along the lines of Lexis is needed.

of appellate developments of the law.[152] Consideration should also be given to promulgation of rules with express criteria upon which the courts should make designations for publication purposes.

Finally, the community must recognise that as it becomes more litigious and as social change occurs more rapidly, real costs – whether in the form of unequal access to law or of expenditure of judicial, client, practitioner or publishing resources – necessarily will be incurred.

152 Supra n 4 at 2.