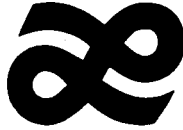


WAIKATO LAW REVIEW

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EDITOR'S INTRODUCTION

I am pleased to present the fifth edition of the *Waikato Law Review*. I thank the referees to whom articles were sent and the members of the editorial committee for their assistance.

The *Review* is proud to publish the Harkness Henry Lecture of the Governor-General, the Rt Hon Sir Michael Hardie Boys. His lecture, and the article by Professor Margaret Wilson, provide insights into the changing constitutional structure of New Zealand in the wake of the change to the Mixed Member Proportional Representation system.

The *Review* is also pleased to publish the presentation by Nicola Baker, the winner of the annual student advocacy contest kindly sponsored by another Hamilton firm, McCaw Lewis Chapman. Her argument, and the article by me, highlight the growing importance of dispute resolution systems other than the traditional, adversarial court process.

The other publications in the *Review* present new developments in the areas of sport law, copyright and tort. A new feature of the *Review* is the list of theses and dissertations which have been completed by staff and students of the Waikato Law School over the past four years. This research, and the articles in this *Review*, indicate the wide range of innovative research that is being conducted within the Waikato Law School.

Professor Peter Spiller,
Editor, *Waikato Law Review*.

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CONTINUITY AND CHANGE: THE 1996 GENERAL ELECTION AND THE ROLE OF THE GOVERNOR-GENERAL

BY THE RIGHT HONOURABLE SIR MICHAEL HARDIE BOYS*

In late 1994, the High Court of Malaysia was asked to rule on a weighty matter of constitutional law.¹ Following a general election in one of the states of Malaysia in February that year, the head of state in that jurisdiction had appointed a new Chief Minister and, on his advice, other Ministers to form the new government. There was no question about the correctness of those actions - the Chief Minister had been the leader of what was clearly the majority party in the newly elected Parliament at the time. But politics can be volatile. By March there had been defections from the governing party to the opposition. The Chief Minister lost his majority. He duly tendered his resignation. On the same day the head of state appointed a new Chief Minister - one assumes from the facts that the person appointed was the leader of the opposition. A week later, on the advice of the new Chief Minister, the head of state also appointed a number of other Ministers to form the new Cabinet.

So far, so good. For those who keep questions of constitutional law fresh in their minds, this would seem to be a straightforward change of government without a general election, following a change in the levels of support in the elected Parliament. But one of the outgoing Ministers was unhappy. He sought to challenge the actions of the head of state in appointing the new government, on the basis that *he* personally had never resigned from office. (You will recall that the Chief Minister had resigned - the question was whether it was necessary for all members of the Cabinet formally to tender their resignations in this situation). On that basis, this lone Minister sought a range of declarations from the Court, essentially with the aim of securing a declaration that - despite the change of government that appeared to have transpired - he was still a Minister, was still entitled to exercise the powers, privileges and responsibilities of office, and was still entitled to attend Cabinet meetings. The arguments were based on detailed interpretations of the written constitution of the state.

* GNZM, GCMG, Governor-General of New Zealand.

¹ *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah and Others* [1994] 3 Law Reports of the Commonwealth 1.

An initial motion to strike out the claim failed. On the papers, there was a case to be answered. But at the full hearing the Court dismissed the application. It held that, where a Chief Minister who has lost the confidence of the House resigns, the written constitution, convention and usage all resulted in the other members of Cabinet being deemed to have vacated office, even if no formal resignations are submitted. The aggrieved "Minister" had indeed lost office in March and must become reconciled to the opposition benches.

I. THE LAW IN CONTEXT

The main point I take from this case is a general one, about the importance of context. It is always useful to consider areas of law in their social and economic context. But constitutional law in particular is inextricably intertwined with politics, and must always be considered in its context if one is to be confident of reaching sensible conclusions. It may seem an arcane and dry subject, but the application of constitutional law in fact requires an intensely practical approach. A constitution like ours is not just law, but comprises a complex mix of law (both statutory and common law), convention, principle, politics and administrative practice. In this address I aim to illustrate that general point by reference to the events surrounding the 1996 general election. The political events of last year are well known, and the legal principles are also relatively clear. But tonight I will also set out the practical and administrative steps which were taken to give life to those principles and to mesh them with the political events.

This general point about the importance of context can be made over and over in relation to any number of constitutional and administrative law issues. Looking only at the tangle of written provisions of the constitution in that Malaysian state, our aggrieved Minister may have been able to mount an arguable legal case. But if one paused only briefly, and looked at the practical and political context, the answer was of course obvious. Support in the Parliament had shifted. The government had changed, in accordance with the representative democratic will. It was in practical terms unthinkable that any court would find that a lone Minister was entitled to continue in office and to continue to serve as a member of a Cabinet which was in all other respects made up of that Minister's parliamentary opponents.

The relevant background to an issue may be the political, historical, social or economic context. For example, you need context to understand fully what was going on in *Fitzgerald v Muldoon*, how the case arose and why

the court acted in the way it did in relation to a remedy.² In that case the Prime Minister had issued a press statement which the court found purported to suspend the law without the consent of Parliament. In effect, the Prime Minister was attempting to end the then-operating superannuation scheme, without waiting for legislation to repeal and replace the scheme. His action followed a large election victory in which superannuation policies had been a key issue. He clearly had a democratic mandate to end the scheme, but the court held that he had no legal power to do this in advance of the appropriate legislation. In a pragmatic move, which recognised the political and administrative context of the issue,³ the court did not initially rule on a remedy, but adjourned the hearing on remedy for six months. In this period the government was able to steer the necessary legislation through Parliament. The court was then able to decide that no further action was necessary.

A further example of the importance of context, which attracted attention both in the Muldoon era and in the transition to MMP, is the convention on the conduct of caretaker governments. The convention cannot be sensibly considered without some recognition of the political environment in which it will inevitably be operating. This background also provides the answer to those who might wish the convention to be a stronger beast, perhaps with some legal teeth.⁴ The context is that the government in office retains the legal power to govern, and to take all the actions that a government is generally entitled to take. But, in recognition that the

² *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

³ The political context was the fact that the executive was assured of obtaining the support in Parliament to make the necessary law changes promptly. The administrative context was the extreme cost and disruption that would be caused by attempting to restart the superannuation scheme for a few months, until it was properly abolished.

⁴ Constitutional conventions are not of course "law" in the strict sense, but supplement the strict letter of the law with politically accepted and enforced rules. See the description of a convention in *Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 125 DLR (3d) 1, 84-87. One country that does put this restriction into law is Denmark, where the constitution states that "Ministers may perform only what may be necessary to ensure the uninterrupted conduct of official business" during periods of caretaker government. In most other countries the situation appears similar to that in New Zealand, with the restriction operating at a political or conventional level, rather than the legal. See State Services Commission (SSC), *Working Under Proportional Representation: A Reference for the Public Service* (1995) para 7.17 and Appendix 1.

government no longer has the support of the House, the convention constrains the actions of the government in decisions of significance.⁵

The application of the convention in New Zealand has generally been straightforward, in the situation where the next government has been clearly identified and there is just a brief transition period until it takes office. During this period it has long been accepted that the outgoing administration acts on the advice of the incoming administration. The one notable exception to this practice followed the general election in 1984, when the Prime Minister and Finance Minister initially refused to accept the decision of the incoming Labour government to devalue the dollar immediately. This incident resulted in the convention being articulated with greater clarity and also provided the catalyst for other more general clarification of New Zealand's core constitutional law.⁶

The convention has attracted more attention and controversy following the last two general elections, neither of which on election night gave a single party an immediate and clear majority of seats in the House. In 1993, the final election results did produce a clear majority and so the convention operated for only a short time. But in 1996, the political situation in the House could only be resolved by the political parties in Parliament negotiating with one another over the formation of a coalition as the next government.

The topics of coalition negotiations may well coincide with actions the incumbent government may be having to consider in the context of the caretaker convention. That is one powerful reason why the convention operates in the political realm only, and recognises that the decision on appropriate government action, finally, is for the government to take. That decision will balance a raft of differing factors, including the perceived significance of the issue, the effect of delay, the attitude of other political parties to the question and public sentiment on the issue. As the New Zealand courts have already recognised, that is not the type of decision which legal institutions can or should attempt to second guess, simply because it is a decision during a caretaker period.⁷

⁵ For a full description of the convention as currently understood in New Zealand, see the *Cabinet Office Manual* (1996) paras 2.35-2.51. For discussion of the background to the convention and overseas equivalents, see SSC, *supra* note 4.

⁶ See Department of Justice, *Report of an Officials Committee on Constitutional Reform* (1986).

⁷ *Te Waka Hi Ika o te Arawa v Hon D Graham*, unreported, CA 277/96, 27 November 1996.

II. APPOINTING GOVERNMENTS UNDER MMP

The example of constitutional law in practice on which I wish to concentrate tonight is the events surrounding the 1996 general election and, in particular, the translation of the core constitutional powers of my office into practical administrative steps.

You will not be surprised, given the timing, that when I was preparing to take up office as Governor-General in early 1996, I felt it necessary to give close attention to some of the core powers of the office. Often loosely called the reserve powers, the key powers are the powers to summon and dissolve Parliament and to appoint and dismiss the Prime Minister. They are set out in deceptive simplicity in the Constitution Act and the Letters Patent.⁸

It also seemed prudent to adopt a comparative approach, and obtain a practical understanding of how governments are formed in other countries, particularly those with similar constitutional arrangements which routinely experience hung Parliaments. Therefore, immediately before I took up office, I travelled to Ireland and Denmark to examine the operation of relevant powers in those countries. Others had also been looking to overseas examples to gather information on how these and other matters were handled in countries with proportional representation systems, and the results of those efforts were starting to become available.⁹

In Denmark, governments are formed within a few weeks of a general election. The tradition seems to be of minority governments, which are often coalitions as well. Apparently the polls close at 8.00 pm, and the results are known by about 11.00 pm. The process of government formation begins that night, as party leaders debate on television. The next morning, the Prime Minister sees the Queen. If the election outcome is unclear, the Prime Minister will advise the Queen to meet with the leaders of all of the parties represented in the new Parliament, in a process known as "the Queen's round". The Queen meets each of the leaders for about 10 minutes, in order of the size of the party in the House. The party

⁸ See Article X, Letters Patent Constituting the Office of Governor-General of New Zealand 1983, reproduced in Appendix 1 of the Cabinet Office Manual; and Constitution Act 1986, s 18.

⁹ See eg *Report of the Standing Orders Committee on the Review of Standing Orders* (1995) AJHR I.18A; Shroff, "The Operation of Central Government under Proportional Representation Electoral Systems" (unpublished paper, 1994); SSC, supra note 4; Boston, J et al, *New Zealand Under MMP: A New Politics?* (1996).

leaders bring written advice to the Queen on their view of what should now happen. The advice is simple, even direct. The typical example, I was told, was along the lines of “We advise the Queen to choose X to form a government”. The advice is also made public immediately after the meeting.

Drawing on the advice, the Queen will then appoint a Royal Investigator to lead political discussions on the formation of the next government. This person is usually a leading politician who could well become the next Prime Minister. The Investigator reports back on the results of the negotiations and provides advice on the next step. If all is going smoothly, that advice is likely to be to appoint a particular person as Prime Minister. If not, the advice may be to begin “the Queen’s round” again, so that further discussions can be held.

There are several consequences of this approach. The Queen is seen to be separated from active participation in the political discussions which must take place to form a new government. And the Queen is seen to be receiving information directly from all of the parties in the House. The Queen is therefore publicly distanced from the political process, but also publicly informed about the outcomes of that process.

In Ireland the situation is different again. The Constitution gives the President the power to appoint the Prime Minister, “on the nomination of the Dail” (Parliament). The House meets within a month of the election: once a Speaker is elected, its first task is to vote on whom to nominate to the President as Prime Minister. Thus the formal power of appointment still rests with the head of state. But again the head of state is explicitly distanced from the political negotiation and receives very public and unequivocal advice on its conclusion. In Ireland, however, the advice on whom to appoint is channelled through the Parliament, rather than received directly from the political parties, the Prime Minister, or some appointed intermediary.

There are many other examples.¹⁰ The Netherlands and Norway both use intermediaries appointed by the sovereign, in processes similar to that in Denmark. In the Netherlands, however, the time-scale is usually considerably longer, and it can take eight months rather than eight days for a new government to be formed. Germany and Sweden are both closer

¹⁰ See White, “Report to the Standing Orders Committee on Constitutional Aspects of its Subcommittee’s Study Tour of European Parliaments” in *Report of the Standing Orders Committee*, 1995. See also SSC, *supra* note 4, Appendix 1 for descriptions of overseas systems.

to the Irish model and use a formal vote in the Parliament to determine who should be appointed as Prime Minister. In Germany, the appointment itself is still made by the head of state after that vote, but in Sweden even the formal power of appointment no longer resides with the head of state, but has been shifted to the Parliament. Some of the Pacific constitutions also use the device of a formal vote in the House as the basis on which the government is appointed. In countries with relatively loose or changing political parties, this process provides unequivocal information on which the head of state or other relevant officer may act, in what may otherwise be volatile and confusing political circumstances.¹¹

You can see, therefore, that clear principles or themes emerge quite quickly. Indeed I have commented that the similarity across countries, in even this most basic of national processes, is quite striking. In all of the countries examined, it is very clear that the real responsibility for forming a government rests with the political parties. That political parties provide this vital link between the democratic election process and the formation of a government has long been the case in New Zealand. MMP has made their importance more apparent.¹² It is political parties which, through negotiation, must find a viable government in the Parliament. No-one else can arrive at the solution for them, or impose an outcome on them.¹³

Once negotiations between the parties have resulted in a clear view on who will be able to form the next government, the question is how that information is presented to the head of state (or whoever holds the relevant formal power of appointment) in an authoritative form. A range of processes is used in different jurisdictions to ensure that the holder of those powers does not need to begin to make subjective judgments on the merits of competing claims, but can exercise the relevant powers on the basis of unambiguous information.

III. THE PROCESS OF PUBLIC EDUCATION

At the same time as I and others were researching these matters, the level of public and media interest in them was growing as the election loomed. There was much speculation, both informed and uninformed, about the

¹¹ See, for example, the Constitution of Niue, Article 4.

¹² See Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (1986-87) IX AJHR H3, chapter 8, for a discussion of the role of political parties in New Zealand.

¹³ In other addresses I have mentioned the catchphrase Brazier refers to as a "constitutional guiding light" - "political decisions, politically arrived at". See Brazier, *Constitutional Practice* (2 ed, 1994) 28.

role of the Governor-General in the process, and indeed about what process there might be after the election.

Governors-General do not usually give advance notice of their actions. But we were in an extraordinary period of change. As the attention given to the educational role of the Electoral Commission showed, public education was vital if confidence in the electoral and political system was to be maintained. The participants in the political process would also be assisted if there was at least some common understanding of the basis on which I intended to act. And of course, there was the perennial refrain of the need for the money markets to be informed and reassured about how this leap into the new era would be resolved.

Therefore, in April last year I gave a speech which was widely reported, in which I outlined in general terms how I saw my role.¹⁴ I also gave a series of interviews over the following months repeating and clarifying these key points, culminating in my participation in a television documentary which screened very shortly before the date of the election. The aim was to ensure, as far as possible, that the principles and processes for moving from the election to the formation and appointment of a new government were clear and understood by a sufficient number, so that the focus of public attention could be where it belonged - on the political actors who would be required to negotiate and work together to reach a political resolution.

The work of the Electoral Commission in its public education campaign was also relevant. Its public education material contained brief explanations of the role of the Governor-General, the reserve powers and the concept of caretaker government.¹⁵

Overall, my personal assessment is that this aspect of the process went well. In the period following the election, all the participants demonstrated a clear understanding of their respective roles and the relevant processes. The media in particular were very clear on election

¹⁴ See "The Role of the Governor-General under MMP", address to the Institute of International Affairs, 24 May 1996. See also Shroff, "Supporting Central Government through Change", address to the conference on *The Constitutional Implications of MMP* (1996), which outlines the detailed procedures undertaken by the Clerk of the Executive Council in the process of a government being appointed and gives practical reality to the larger constitutional principles. (See also *Cabinet Office Manual* (1996) paras 1.21-1.24, 2.4).

¹⁵ See eg Electoral Commission, *Everything You Need to Know about Voting Under MMP: New Zealand's Electoral System* (1996) 2-4, 41.

night and over the following weeks on what needed to happen. There was no media entourage camped outside Government House, waiting for me to emerge and proclaim some magic resolution. Rather the country witnessed the media day after day camped in the corridors of Parliament, swarming around the politicians when they periodically emerged from their coalition talks.

IV. THE CORE PRINCIPLES

Through this public speaking and writing I tried, in essence, to make clear a few simple points:

1. The formation of a government is a political decision and must be arrived at by politicians.
2. My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation, that might require me to communicate with the leaders of all of the parties represented in Parliament.
3. Once political parties have reached an adequate accommodation, and a government is able to be formed or confirmed, the parties could be expected to make that clear by appropriate public announcements of their intentions. At that point it might be necessary for me to talk with some party leaders. I would then expect to have sufficient information to be able to appoint a new Prime Minister, if that were required.
4. Throughout this period of negotiation, the incumbent Prime Minister remains in office, governing in accordance with the caretaker convention.

The second of these points is the nub of the matter. In a parliamentary democracy, the exercise of my powers must always be governed by the question of where the support of the House lies. It is this simple principle which provides the answer to those who sometimes suggest that in situations like that encountered by New Zealand after the last election, the head of state should simply call on the leader of the largest party to form a government. Size alone provides no reason to prefer a party if its leader does not appear to have the support of a majority of the House. It is better to wait for negotiation among the parties to produce a majority.¹⁶ This

¹⁶ See eg Quentin-Baxter, "The Governor-General's Constitutional Discretions: An Essay Towards a Redefinition" (1980) 10 VUWLR 289; see also Quentin-Baxter, "Implications for the Governor-General" and Joseph, "Implications for the Governor-General", both addresses to the conference on *The Constitutional Implications of MMP* (1996).

principle is also the answer to those who regularly write to Government House suggesting that the Governor-General dismiss the government and call another election, based on perceived public sentiment, dissatisfaction with particular actions, or opinion polls. To repeat: in a parliamentary democracy such as ours, the exercise of the powers of my office must always be governed by the question of where the support of the House lies. If that is unclear, I am dependent on the political parties represented in the House to clarify that support, through political discussion and accommodation.

V. THE 1996 ELECTION: SOME CONSTITUTIONAL MARKERS

What took place after the election in October last year, in political terms, is still relatively fresh in the minds of most of us.¹⁷ And as I have just set out, the general constitutional principles are also relatively clear. But it may be useful if I take this opportunity to outline what took place in terms of constitutional markers, in order to give some insight into the approach taken to dealing with the constitutional niceties at the practical administrative level.

1. Election Day

As the votes were counted on 12 October, it was clear by late that night that, as predicted, no single political party would be able to command a majority in the House. In media interviews all the party leaders confirmed that they would now begin a process of discussions amongst themselves over the possible formation of a coalition or minority government.

The media statement by the Prime Minister also made clear that the government now viewed itself as bound by the caretaker convention until resolution of the political situation was achieved.

2. The Beginning of Negotiations

The next day I issued a press statement reiterating the key points as I saw them, about the process for moving to the formation of a new government. The aim was to provide the media and others with confirmation that my position on these matters had not changed in the light of the election results.

¹⁷ For a detailed description of the political developments, see Boston, "Coalition Formation" in Miller, R (ed) *New Zealand Politics in Transition* (1997); Boston and McLeay, "Forming the First MMP Government: Theory, Practice and Prospects", in Boston, J et al *From Campaign to Coalition* (1997, forthcoming).

I also determined that when a political leader thought that he or she was in a position to form a government, he or she should in the first instance contact the Clerk of the Executive Council, who could clarify with the political leader what information I would require before acting. In that capacity, the Clerk also offered assistance to all party leaders with any issue relating to the actual formation of a government. This contact was to take place only with my authority and in the strictest confidence. The aim of making clear the Clerk's role as my agent or intermediary at this early stage, was to facilitate the smooth operation of the relevant constitutional processes.¹⁸

3. The Conclusion of Negotiations

On 10 December 1996, after some eight weeks of parallel negotiations between New Zealand First and the Labour and National parties, the New Zealand First party reached a decision and publicly announced that it would be joining the National party in a coalition government. The Prime Minister publicly confirmed that agreement had been reached between the two parties and the leader of the Labour party conceded that the party could not form a government. The Clerk, on my authority, began liaising immediately with the Prime Minister over the arrangements for the change to the new coalition administration. With his agreement, she also worked with the leader of the New Zealand First party on the administration of the transition.

The next day I spoke with the Prime Minister and received his direct confirmation that the agreement reached meant that he was able to lead a government which would have the confidence of the House. For the sake of clarity, I issued a brief press statement confirming my acceptance that this was the case.

The basis on which the two political parties were agreeing to form a government together was set out in a detailed written coalition agreement. The two parties publicly signed and released the agreement in a brief ceremony on 11 December 1996, involving the presidents and leaders of both political parties.

4. The Change to the New Administration

The leaders of the two parties then proceeded to take decisions on the individuals to be appointed as Ministers in the new government. The new Ministry was announced by the Prime Minister on 15 December.

¹⁸ See *Cabinet Office Manual* (1996) paras 1.21-1.24, 2.4 and Shroff, *supra* note 14.

Given the significance of the change to the new coalition government, the Prime Minister chose to give effect to the change of administration with a full resignation of the incumbent Ministry and a full swearing in of the new government. All Ministers, including the Prime Minister, resigned from office both as Ministers and Executive Councillors. Those who were to hold office in the new administration were then sworn in, in a full ceremony at Government House on Monday 16 December.

VI. THE TIMING AND LENGTH OF THE TRANSITION PERIOD

There are a couple of points about the transition process which may be worth comment. They concern the length of time taken by the negotiation and transition process.

The passage of eight to nine weeks between the election and the conclusion of coalition talks surprised many. I do not wish to be seen to be offering comment on whether that was necessary or unnecessary. I had certainly made the point in my public statements that we should not be afraid of some time passing before a new government was formed, and that it was better to take the time to hold considered discussions. I had also noted that there is an established convention on caretaker government which would enable the business of government to continue during an interregnum. It may be that the novelty of the process for all concerned meant that the process took longer than, or was approached differently from, what might happen in the future. One should not assume that a New Zealand standard has now been set. Only time and greater experience will tell us what an “average” period of and process for negotiations in New Zealand will be.¹⁹

I had also commented on the fact that the requirement for Parliament to meet within approximately eight weeks of the election could act as some sort of incentive for the politicians to reach a resolution. In the end, it was clear that the meeting of Parliament did operate as an informal deadline for the process. The Constitution Act 1986 required Parliament to meet no later than Friday 13 December. As already mentioned, coalition talks concluded on 10 December, and an agreement was signed on 11 December. The formal Commission opening of Parliament took place on Thursday 12 December, with the State Opening and the Speech from the Throne the following day.

¹⁹ For an indication of some average lengths of negotiating periods, see SSC, *supra* note 4, chapters 7, 8, and Appendix 1. This research suggests a rough average of 1-2 weeks in Denmark, 6 weeks in Germany and Ireland, and several months in the Netherlands.

The timing at the end of the year was unquestionably tight. This created some practical difficulties. From my position, the obvious illustration of the awkwardness was the Speech from the Throne, which I am required to deliver on the day of the State Opening. At a general level, its historical purpose has been to explain the reasons for the calling of Parliament. But it has traditionally been seen as a vehicle for the government to outline its legislative programme to the Parliament.²⁰ The ceremonies which surround the Speech make it clear that it is a government statement, delivered by the Governor-General on the advice of the Prime Minister.

In 1996, it was clear who the new government would be - the coalition agreement had been signed and released on the Wednesday - but it had not assumed office by the time of the State Opening on the Friday. The content of the Speech was therefore slightly awkward. But again a practical approach provided the answer. The incumbent Prime Minister, who was after all to continue in that office, provided the necessary advice to me. Hansard records that the speech was brief, and described the current political situation and the transition process. The speech briefly reflected the principles for the incoming government which had been outlined in the coalition agreement.²¹

I make no comment as to whether our recent experiences on these and other points were good or bad. I merely note that the change to the electoral system has raised and will continue to raise further questions such as these for examination. These consequential issues are both large and small, practical and symbolic, ranging from the reserve powers, the procedures for opening Parliament, to the minutiae of parliamentary procedures and the budget cycle. Attention has now been drawn to these various points. There is also greater awareness of the fact that others organise the same matters quite differently. Information on overseas systems has become easily accessible. Debate does not suddenly end, once it has been awoken. We can expect the process of constitutional debate and change, of which the move to MMP has been a part, to continue for some time yet.

VII. THE INTERNATIONAL CONTEXT

It may be timely to note another point about context. Particularly in this area of law, New Zealand is not an island. The links between the Commonwealth countries on the way the law and practices develop, have been extremely strong. The very evolution of an Empire to a

²⁰ See McGee, *D Parliamentary Practice in New Zealand* (2 ed, 1994) 98.

²¹ (1996) 10 NZPD, 13 December 1996.

Commonwealth of Nations means that our constitutional development inevitably has been tied up with the constitutional development of all other former British colonies. The Imperial Conferences following World War I, which resulted in the Balfour Declaration and ultimately the Statute of Westminster, are a clear illustration of the fact that New Zealand is, constitutionally, one member of a family. The family tree may often contain clues as to why particular steps were taken at particular times.²²

Pick up any essay on the reserve powers and you are immediately directed to, for example, Canada in the 1920s, Australia in 1975, and Great Britain between 1910 and 1915.²³ The precedents are few and far between and analogous systems will always look to each other for guidance. In my current position that academic comparative approach becomes more personal. One finds that the fate of Lord Byng in Canada, or Sir John Kerr in Australia, resonates in the background, providing some markers of dangerous territory.

Clearly we can benefit from awareness of the past and continuing experiences of other democratic countries. But we should also bear in mind that there is no body of constitutional precedent in the sense that the common law forms a body of legal precedent. The international experience is no more than a series of events of constitutional history in the countries concerned, which offer lessons for the future. Events in New Zealand are now contributing to that body of constitutional experience, and providing lessons for us and others for the future.

VIII. CONCLUSION: A CLIMATE OF CHANGE AND DEMYSTIFICATION

As James Belich notes in the conclusion to his new work on our early history, New Zealand history is not very long, but it is very fast. The picture he paints is of a precocious nation, where international forces for change are concentrated into a cauldron of progress. At the outset he notes that:

²² See Beaglehole "The Old Empire and the New" in Beaglehole, *J C New Zealand and the Statute of Westminster: Five Lectures* (1944), for a good discussion of our constitutional heritage from this perspective, at the time that New Zealand was considering adopting the Statute of Westminster.

²³ See eg Quentin-Baxter, "The Governor-General's Constitutional Discretions", *supra* note 16; Republic Advisory Committee, *An Australian Republic: The Options* (1993), Appendix 6; *Evatt and Forsey on the Reserve Powers* (1990 reprint).

[The] characteristics of small population size, great isolation, and short history, combined with various cultural cringes, have sometimes given New Zealand history a mundane reputation - educative to the dutiful, exemplary to the patriotic, but a good place for those in search of inspiration or insight to slit their wrists. This work sets out to show that, on the contrary, New Zealand is an historian's paradise: a laboratory whose isolation, size and recency is an advantage, in which grand themes of world history are often played out more rapidly, more separately, and therefore more discernibly, than elsewhere.²⁴

I suggest that New Zealand's constitutional history illustrates this point well. Over the last decade or more, constitutional debate in this country has reflected pressures that are felt internationally, but has often resulted in more immediate and perhaps more dramatic change. In a climate of reform, and with the growing culture of open government, reform and its consequences have also been studied and discussed quite freely. Aspects of the constitution which elsewhere remain in the shadows have in New Zealand, particularly with the move to MMP, become quite regularly discussed by academics and other commentators. As tonight illustrates, the participants also show a greater willingness than in the past to speak out about their roles.

For my part, I see the role of the office of Governor-General in New Zealand in the area I have been discussing tonight as allowing the holder to act innovatively when that is necessary, while always adhering to democratic principle. Our own Professor Quentin-Baxter has said of the role in relation to the appointment of a Prime Minister:

Even in a situation of doubt, it is not the function of the Governor-General to form a view about the relative merit of possible contenders. His task is the more humble one of finding the true successor, by ascertaining the will of Parliament. Where no party has a majority, it will be the normal course for party leaders to conduct their own discussions until a coalition [or I would add, a minority government with support] identifies itself and its leader. In such circumstances, the Governor-General will no doubt wish to satisfy himself by consultation that he understands correctly the alignment of parliamentary forces. Only in limiting situations the responsibility for which would rest with the political leaders, should the Governor-General commission a Prime Minister whose immediate support in Parliament is not assured.²⁵

²⁴ Belich, J *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (1996) 7.

²⁵ Quentin-Baxter, "The Governor-General's Constitutional Discretions", supra note 16, at 307.

These simple propositions, written long before a change to our electoral system seemed a serious prospect, are in my opinion sound in principle. They express the essence of the procedure that is most likely to lead to the exercise of reserve powers in a manner that fits New Zealand's needs while adhering to principle. They should result, as expeditiously as appropriate, or at least as practicable, in the appointment or confirmation in office as Prime Minister of the person whose administration will be supported by a working majority in the House. The Governor-General has the responsibility of ascertaining the will of Parliament and of acting on it. While different means may be followed in different political situations to achieve this end, it should always be the touchstone for exercise of the powers. The experience of 1996 shows this philosophy in practice and, I cautiously suggest, shows it to be effective.

To recall the words of J C Beaglehole, writing more than fifty years ago, the constitution should not be "some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the sleepless priests of the Crown Law Office tread with superstitious awe".²⁶ The advent of MMP has dusted off and unwrapped for public inspection some central aspects of our constitution, which in times past have tended to be the preserve of an honoured few. I hope that, with tonight's talk, I have been able to shed some light on the approach taken to the practical operation of these issues in last year's election, and so remove some of the superstition and awe.

²⁶ Beaglehole, *supra* note 22, at 50.

THE RECONFIGURATION OF NEW ZEALAND'S CONSTITUTIONAL INSTITUTIONS: THE TRANSFORMATION OF TINO RANGATIRATANGA INTO POLITICAL REALITY?

BY MARGARET WILSON*

1. Introduction

In this article I discuss Māori political representation, under the New Zealand mixed member proportional representation system (MMP), as an expression of tino rangatiratanga. Tino rangatiratanga in the context of the Treaty of Waitangi guaranteed the right of Māori to self-determination, that is, the right to make decisions over their land, their communities (villages) and those matters that related to the preservation and advancement of their culture (treasures).

The subject matter of this article arose from a specific experience. I was instructed by the lawyer for the National Māori Congress to appear as counsel in a claim before the Waitangi Tribunal.¹ I begin this article by narrating the details relating to the claim. I do so to illustrate that Māori felt strongly that their constitutional rights were being interfered with, without their participation or consent, and to emphasise that their capacity to challenge legally the Crown's action was limited. I then discuss the various meanings attributed to the term tino rangatiratanga; the nature of sovereignty, in particular, parliamentary sovereignty in the New Zealand context; and finally the possibilities and limitations of MMP as a site for struggle for the recognition of tino rangatiratanga.

2. Māori Electoral Option Claim

The claim arose out of the 1993 referendum that resulted in a majority vote to introduce MMP. In the transformation of the referendum outcome into legislation, provision was made, but only after last minute intervention from the pan-tribal groups, to retain separate Māori representation in Parliament. However, instead of retaining the existing four Māori seats, the Electoral Act 1993 provided for the number of seats to be determined by the number of Māori registered on the Māori electoral roll. The more Māori on that roll, the greater the number of seats. Māori were to be given an opportunity to exercise their choice of

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¹ *Report of the Waitangi Tribunal on the Māori Electoral Option Claim* Wai 413, 10 February, 1994.

electoral roll after each census. Because the next census was not until after the first MMP election in 1996, it was decided to provide Māori with an opportunity to exercise their option before that election.

The subject of the claim was the way in which the Crown provided that opportunity. On 22 December 1993, the Māori Option Notice issued by the Minister of Justice was published in the Gazette, just three days before the Christmas holiday break. It provided a two month period, from 15 February to 14 April 1994, during which Māori were to exercise their option. The concern of Māori at the shortness of the notice was expressed at a hui held at Turangawaewae on 14 January 1994. Although the hui was held in the holiday period, up to 300 people attended, including the Presidents of the key Māori organisations - the National Māori Congress, the New Zealand Māori Council, and the Māori Women's Welfare League. The claim before the Tribunal was a direct result of that hui. Urgency was sought and granted by the Waitangi Tribunal and we commenced the claim on the 27 January 1994.

On the surface the issue in the case was simple. The Māori applicants² were contesting the adequacy of the funding to Māori to assist them to promote enrolment of their people and to gain an understanding of the nature and implications of the choice they were required to make when registering on the Māori or General Electoral Roll. The applicants were not contesting the legitimacy of the Crown to enact this form of political representation for Māori. That argument had been won or lost, depending on one's perspective, during the political process that had produced the inclusion of the Māori seats within the new electoral system. I shall refer to this process later in the article.

In this claim those Māori who supported separate representation were endeavouring to position themselves to take full advantage of the new system and gain the maximum number of seats Māori were capable of achieving under MMP. We estimated that twelve seats may have been possible. This estimate was based on a very optimistic assessment of all eligible Māori voters being registered to vote and a large majority of them being on the Māori electoral roll. Just how optimistic that assessment was can be seen from the fact that, in the 1991 census, 126,723 Māori were registered on the General Roll, while 87,562 were on the Māori roll. It was also estimated that 50,000-60,000 Māori were not registered at all and therefore did not participate in the political system. Although twelve Māori seats was unlikely, the Māori leadership wanted the best possible

² They included the 3 pan-tribal national organisations, the National Māori Congress, the New Zealand Māori Council, and the Māori Women's Welfare League.

position with which to enter the new system, because for the first time it offered a real opportunity to exercise political influence, and maybe even power. It was essential not to miss this opportunity, but money was needed if all Māori were to be made aware of the possibility of obtaining more effective political representation.

To acquire the financial resources necessary, the applicants needed to establish that the Crown was under an obligation to provide Māori with the resources they needed. Since the Crown's legal obligations to Māori derived from the Treaty of Waitangi, I argued that the Crown was in breach of its statutory duty to guarantee Māori under Article 3 of the Treaty the same rights and privileges of British subjects. Although in 1840 citizenship rights were somewhat limited for both Māori and European/Pakeha, it is now accepted as a matter of policy and law that, when interpreting the text of the Treaty, reliance may be had on the principles or intent underlying the Treaty. The Treaty is recognised as a living document and not a legal fossil. The Court of Appeal in *New Zealand Māori Council v A-G*³ described the Treaty as:

a document relating to fundamental rights; ... it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms.⁴

The current relevance of the Treaty was also recognised in 1989 when the Labour Government published a policy document that attempted to translate the language of 1840 into statements of policy relevant to the 1990s.⁵ The principles outlined were not an attempt to rewrite the Treaty, but "to help Government make decisions about matters related to the Treaty".⁶ Under these principles, Article 3 of the Treaty was translated as follows:

The third Article of the Treaty constitutes a guarantee of legal equality between Māori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.

³ [1987] NZLR 641.

⁴ At 655-656.

⁵ Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (1989).

⁶ *Ibid.*, 1.

The third Article also has an important social significance in the implicit assurance that social rights would be enjoyed equally by Māori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.⁷

In policy terms, then, the common law is the law of the Treaty, and the common law is the only law to which reference can be made when determining the rights and obligations that flow from the Treaty. The authority for this interpretation flows from a reading of Article 1 of the Treaty as giving the Crown kawanatanga or government of the land, and from the settlers and the Crown interpreting government as being carried out in accordance with the common law. However, the right to government was subject to the previously mentioned Article 3 guaranteeing the right to equal citizenship, and also to Article 2 under which the Crown agreed “to protect the Chiefs, the Subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures”.⁸ Māori argue that this Article 2 right to tino rangatiratanga includes the right to exercise their customary law in accordance with the terms of the Article. There was statutory recognition of this right in section 71 of the 1852 New Zealand Constitution Act, which provided for the setting apart by Letters Patent of certain districts within New Zealand in which Māori laws, customs, and usages, not repugnant to general principles of humanity, were maintained “for the Government of themselves, in all their Relations to and Dealings with each other”. However, this provision was never implemented and was not included in the current New Zealand Constitution Act 1986.

When arguing the Māori Electoral Option Claim, I relied on the principles of the Treaty of Waitangi, in particular those contained in Article 3, as those principles have been interpreted by the Courts. In particular, I relied on the *Broadcasting Assets Case*⁹ to establish the nature of the Crown’s obligation in the claim. The judgment in this case sets out the current legal understanding of the legal status of the Treaty. The Privy Council followed the “principles” approach, and described those principles thus:

Foremost among those “principles” are the obligations which the Crown undertook of protecting and preserving Māori property, including the Māori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Māori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the

⁷ Ibid, 12.

⁸ Translation of Professor Hugh Kawharu.

⁹ *New Zealand Māori Council v Attorney-General* [1994] NZLR 513.

Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances.¹⁰

I argued that, on the basis of this decision that the Crown was under an obligation to protect the citizenship rights of Māori, and that although the obligation was not absolute and unqualified, in the circumstances of this case the Crown had not acted reasonably.

Although the *Broadcasting Assets Case* dealt with an Article 2 obligation, the Waitangi Tribunal held that the same reasoning applied to Article 3 obligations, and that the Crown was in breach of its obligation in this case. The Tribunal stated:

There can be no doubt that the obligation on the Crown actively to protect Māori Treaty rights extends to the rights protected under article 3 and in particular to the right of Māori political representation, which is one of the most important rights, if not the most important, included in this article.¹¹

Although the applicants won the claim before the Tribunal, it was lost on appeal, where the argument centred on the reasonableness of the Minister of Justice's decision.¹² It was clear from the decisions that neither the New Zealand Court of Appeal or the Privy Council were prepared to address the constitutional implications of the case. By treating the issue as one of administrative law, the Courts avoided any possibility of challenge to the authority of the Crown to govern in accordance with the common law. The case highlighted the real limits on the legal force of the Treaty, and emphasised that, if the Treaty is genuinely to be considered a constitutional document, it requires specific legal recognition of this status.¹³

¹⁰ At 517.

¹¹ *Supra* note 1, at 14.

¹² *Taiaroa v Minister of Justice* [1995] 1 NZLR 411, and *Taiaroa v Minister of Justice* [1995] 2 NZLR 1.

¹³ "Constitutional Recognition of the Treaty of Waitangi: Myth or Reality?" in Wilson, M and Yeatman, A (eds) *Justice Biculturalism and Difference* (1995) 1-17.

It is interesting to note that some of the arguments presented have been incorporated in the administrative arrangements for the current Māori Electoral Option. The time for the Option has been extended from two to four months; the amount of money allocated by the Crown has been increased from \$220,663 to \$2 million; and an information campaign has followed the traditional Māori method of face-to-face contact. The fact that Dr Ngatata Love, the former chair of the pan-tribal group that led the campaign in 1993, is now the Chief Executive of the Ministry of Māori Policy/Te Puni Kokiri, had undoubtedly also assisted a change of government policy. The recent Electoral Option has resulted in sufficient number of Māori shifting to the Māori Electoral Roll to create six Māori seats at the next election. The significance of this gradual shift of Māori to the Māori Electoral Roll has yet to be analysed. For the purposes of this article, however, it supports the argument that I make later, namely, that the Māori seats under MMP have the potential to effect a more fundamental change in Māori citizenship.

Before I develop this argument, however, I want to complete the narrative of the case and the comment of the Tribunal that set me thinking about the thesis of this article. The Tribunal noted in its report that I had relied on Article 3 in support of my argument, but that I had raised the possibility, in my closing submission, that Article 2, the guarantee of tino rangatiratanga, may also be relied on in this case. I argued that rangatiratanga embraces the right of self-determination which, in the context of this claim, means the form and nature of political representation which gives Māori the maximum control over their political representation that is consistent with the provisions of the Electoral Act 1993. The Māori seats, I submitted, represented the closest form of political self-determination currently available to Māori, therefore the Crown was under an obligation to ensure that everything was done to enable Māori to achieve the maximum number of Māori seats through the exercise of the Māori electoral option. Because adequate opportunity had not been given to the Crown to respond to this argument, the Tribunal expressed no opinion on it. The Tribunal did observe however that

the provisions in the Electoral Act 1993 greatly enhancing the extent of political representation of Māori in Parliament and, hence, the rangatiratanga of Māori, constitute a taonga in terms of article 2 of the Treaty and are entitled to Crown protection on that account also.¹⁴

¹⁴ *Supra* note 1, at 15.

In effect the Tribunal was suggesting that political representation in Parliament was an essential element of Māori rangatiratanga/sovereignty, and not only an expression of the right to citizenship rights on the same basis as British/New Zealand citizens.

3. *Tino Rangatiratanga*

While the source of Māori citizenship rights as individuals is Article 3 of the Treaty, the right to full citizenship as tangata whenua is derived from the right to rangatiratanga under Article 2. Attempting to give meaning to tino rangatiratanga is fraught with difficulty. This is not only because of the dangers inherent in any translation of a concept from one language to another, but also because it is a concept that is subject to change within both Māori and European/Pakeha contexts. It is a living notion that takes form according to its context. However it undoubtedly contains an essentialism that is associated in European constitutional terminology with sovereignty, and self-government. Roger Maaka and Augie Fleras describe Māori perception of tino rangatiratanga as follows:

The principles and practice of tino rangatiratanga conjure up a host of reassuring images for restoring "independent Māori/iwi authority" to its rightful place in a post-colonizing society (Mead 1997). The essence of rangatiratanga is sovereignty driven: For some, this sovereignty prevails over the entirety of Aotearoa, for others, it entails some degree of autonomy from the state, for still others, it consists of shared jurisdictions within a single framework. To one side are claims for control over culture under tino rangatiratanga (Smith and Smith 1996); to the other are arrangements for economic development as a spearhead for cultural growth and political autonomy (Mahuta 1996). To be sure, the relationship between rangatiratanga and sovereignty is complex and poly-textured: That is, tino rangatiratanga serves as a precursor of Māori assertions for sovereignty; it also provides the basis *for*, derives *from*, and is strengthened *by* claims to self-determination. In all cases, however, tino rangatiratanga is inseparable from Māori challenges to the once undisputed sovereignty of the Crown as sole source of authority.¹⁵

I support the Maaka and Fleras assessment that rangatiratanga is the source of Māori challenge to the Crown's notion of a sovereignty that is the sole source of authority over all peoples, in all circumstances. While the specific content and institutional forms of rangatiratanga are being developed and tested in a variety of contexts on a daily basis in New

¹⁵ "Politicizing Customary Rights: Tino Rangatiratanga and the Re-Contouring of Aotearoa New Zealand", paper delivered at the Conference on Indigenous Rights, Political Theory and Reshaping Australian Institutions (1997) ANU.

Zealand Aotearoa, it is the constitutional recognition of rangatiratanga, as a source of authority, independent of the Crown, that is the subject of this article. While the Treaty of Waitangi recognises tino rangatiratanga under Article 2, the interpretation of Article 1 that gives the Crown the right to determine the constitutional arrangements for governance has meant that rangatiratanga must be exercised within the limits as defined by the dominant culture. This subordinate status of rangatiratanga makes it impossible in the New Zealand Aotearoa context to achieve, under its current form of constitutionalism, what James Tully has described as the “philosophy and practice of constitutionalism informed by the spirit of mutual recognition and accommodation of cultural diversity”.¹⁶ In other words, the interpretative gloss that has been placed on the Treaty of Waitangi Articles has constructed a monocultural constitutionalism, that affords limited recognition to the “other” culture of Māori. Such recognition is always confined within the boundaries of the principles and practices of European modern constitutionalism, which are expressed in New Zealand Aotearoa through the institution of the sovereign Parliament.

4. *Parliamentary Sovereignty*

The importance of parliamentary sovereignty in the New Zealand context can best be understood through a brief description of the principles and institutions of constitutionalism as developed by the white settler society over the past 150 years. As the Royal Commission on Electoral Reform stated:

Democracy is the fundamental principle of our constitution. It associates the people of the country with their Governments, treating each member of the people equally.¹⁷

The early struggles of the white settlers to free themselves from the governance of the English bureaucrats and politicians revolved around the formation of representative institutions. The importance of the right of all people to participate in the political decisions that affected their lives is seen in the fact that, by 1893, all people, men and women, Māori and European, had the right to vote.

The settlers experimented with various institutional forms of representation, including an upper house. However, since 1950, New

¹⁶ Tully, J *Strange Multiplicity: Constitutionalism in an age of diversity* (1995) 209.

¹⁷ *Report of the Royal Commission on the Electoral System Towards A Better Democracy* (1986) 7.

Zealand Aotearoa has settled on a simple unicameral constitutional framework, consisting of the sovereign, who is the head of state; the executive, which comprises members of the House of Representatives and the bureaucracy; the House of Representatives, consisting of members elected in accordance with the Electoral Act 1993; and the judiciary, who are appointed by the executive, but removed only by the House of Representatives. The power to make laws and appropriate public monies resides in the Parliament which consists of the sovereign and the House of Representatives. These constitutional institutions are enacted in the New Zealand Constitution Act 1986, which can be amended by a simple majority of Parliament. Representation in Parliament is organised according to membership of political parties, that are private organisations, most of which are unincorporated. It is possible to sit as an independent member of Parliament, but it is extremely difficult to be elected as an Independent.

The purpose of this brief description is to illustrate that the reality behind the concept of sovereignty is that it resides in the individuals who comprise the members of the majority party elected to the House of Representatives. These individuals, normally working in unison, exercise considerable power, limited only by the need to act within the law, which they themselves make, and their perception of public support. Under the first past the post electoral system, this power was exercised, in practical terms, by the members of the governing party who were members of Cabinet. This constitutional arrangement has been described as follows:

New Zealand's constitution under FPP offered the most streamlined executive decision-making machine in the democratic world - once elected to government a political party could do what it liked for the next three years.¹⁸

It was this concentration of power in the executive that enabled the restructuring of New Zealand Aotearoa during the 1984 - 1996 period to be effected so rapidly and without effective opposition. Those changes included legislation enabling the backdating of claims under the Treaty of Waitangi until 1840, and a policy to devolve to iwi resources to provide them with an economic base.

The deconstruction of this centralisation of power in government, or more accurately the Cabinet, has been undertaken in two ways, economically and politically. First, the policies of economic rationalism required the state to devolve or divest from itself the power to make decisions over the

¹⁸ Palmer, G and Palmer M *Bridled Power: New Zealand Government under MMP* (1997) 3.

allocation of resources. The market was deemed to be the best mechanism for this task. For those tasks left to the decision of state institutions, the market principles of managerialism were introduced to ensure that the cost of the remaining services were minimised. New Zealand Aotearoa followed the familiar path of privatisation of state assets and public sector management based on private sector models. It is important to note, however, that while the number and variety of tasks performed by the state institutions decreased, the central authority of Parliament was not diminished. These policies affected Māori, as individuals and as a community, as they affected everyone. It is beyond the scope of this article to discuss the implications of economic rationalism for Māori. I shall now concentrate on the political reaction to this radical restructuring of New Zealand Aotearoa society.

The political reaction of the people to economic restructuring was to reconstruct the membership of the House of Representatives to try to redress the adverse effects of the centralisation of power in the executive. MMP was the mechanism chosen by the people through referendum to enhance the authority of the House of Representatives through making it more representative. The need to include within the political decision-making institutions the community's diversity was recognised as essential if the democratic principles on which the government was founded were to be preserved. Although diversity can lead to conflict and less certainty of outcome, the need to negotiate and mediate political outcomes was seen as a primary benefit of the new electoral system. Consensus decision-making was deemed preferable to the authoritarianism experienced under the previous electoral system. Palmer and Palmer concluded a consideration of the effects of MMP on government with the observation that:

MMP adds new, and more complicated dynamics to government structures and processes, but because these allow more points of view to be heard, developed, and considered in the process of governing, our democracy will be enhanced.¹⁹

If the principles on which the new MMP system was founded are the incorporation of diversity within the formal institutions of political decision-making, and if the expectation of the need to negotiate and mediate political decision-making through forming a consensus is fulfilled, it may be possible to construct a site that is willing to look at *tino rangatiratanga* on its own terms, that is, as a source of authority separate and distinct from the authority of Parliament. I am aware that there are a lot of "ifs" in this argument. As a political realist, however, I

¹⁹ Ibid, 20.

argue that the conditions are more favourable to such a process under MMP than they have been in the past. Whether the potential of MMP for Māori is fulfilled will depend on how those conditions are used by the various parties, both Māori and European/Pakeha.

5. *MMP and Māori Political Representation*

It is important to consider how Māori fit into MMP, a more diverse, more democratic electoral system. The first point to note is that since 1867 Māori have had separate political representation in the form of four separate Māori constituency seats. The establishment of these seats was not in recognition of the Treaty obligations to guarantee equal citizenship to Māori. Alan Ward observed that the seats “stumbled into being” for pragmatic political reasons of the colonial government of the time,²⁰ and Sorrenson described them as “a useful way of rewarding Māori loyalists, and placating Māori rebels, while also reassuring critics in Britain that the colonists would look after Māori interests”.²¹ Whatever the intention of the colonial politicians, the Māori seats became an established part of the House of Representatives, afforded Māori limited political representation, and serve as a constant reminder of the larger claim of tino rangatiratanga.

While there were various attempts from time to time to reopen the question of the need for separate Māori political representation, it was not until the Royal Commission on Electoral Reform in 1986 that a formal recommendation was made to abolish the Māori seats. This recommendation, which was against the submission of Māori who wanted to retain the seats, was made in the context of the Commission’s recommendation to replace the first past the post electoral system with a mixed member proportional representation electoral system.

It is important to try to understand the rationale behind the recommendation of the Royal Commission to abolish the Māori seats when faced with the overwhelming support of Māori for their retention. At the beginning of its Report, the Commission stressed that it was through Parliament that the people became sovereign and that Parliament “is the essential source of law”.²² The review of the electoral system was therefore consistent with the traditional concept of the supremacy of Parliament as sovereign. The methodology of the Commission in its assessment of the electoral options was to identify 10 criteria against

²⁰ Ward, *A A Show of Justice* (1974) 209.

²¹ Sorrenson, “A History of Māori Representation in Parliament” Appendix B in *supra* note 17, at 20.

²² *Supra* note 17, at 6.

which to test the existing and alternative electoral systems. The criteria chosen were fairness between political parties, effective representation of minority and special groups, effective Māori representation, political integration, effective representation of constituents, effective voter participation, effective government, effective Parliament, effective parties, and legitimacy.²³

In terms of effective representation for Māori under the existing plurality system, the Commission concluded that it was “seriously deficient in providing for effective representation for Māori people”.²⁴ It also found that separate Māori political representation “works against the mutual understanding between the races, a factor which is also relevant to the next criterion [political integration]”.²⁵ When testing the alternative electoral systems against the criterion of effective Māori representation, the Commission concluded that MMP provided the best opportunity for representation, but did not support a separate electoral roll or separate representation for Māori.

Although the Commission recognised the special representation needs of Māori, it considered that those needs were best addressed through integration. The Commission argued that it would be in the interests of the political parties to appoint Māori to their lists, and that if Māori felt that such representation was not adequate they could form their own political party. This conclusion was reached through the construction of Māori political representation in terms of minority representation. As the Commission correctly observed:

Having Māori MPs, however, is necessary but not sufficient for the effective representation of Māori interests. In a democratic system, the protection of minority interests ought to be the responsibility of Parliament as a whole and not just of the MPs who happen to belong to the minority group. All MPs ought to be accountable in some degree to Māori electors. Support of the majority for Māori interests is more likely to be forthcoming if all Māori electors have an effective vote - one which carries some weight in the election of political parties to Government, and

²³ Ibid, at 13-14.

²⁴ Ibid, at 19. One of the main deficiencies was the fact that Māori had entered a formal alliance with the Labour Party in the 1940s and thereafter the Māori seats had always been Labour seats. The Commission argued that this provided a disincentive for Māori to contest the seats. The fact that Labour had only been in government in six years between 1949 and 1984 also gave Māori a limited opportunity to influence government policy. It must be noted in this context that the National Party never seriously sought to enter into a political alliance with Māori.

²⁵ Ibid, at 19.

hence one for which parties will need to compete. An effective Māori vote would have an important bearing upon the ways in which Māori concerns are regarded both by the individual representatives and by the political parties.²⁶

Thus, Māori interests were to be best protected through the exercise of their vote to effect the success or failure of one of the larger political parties, which represented the interests of a segment of European/Pakeha community.

There is political logic in this argument that appeals to European/Pakeha political self-interest. It does not however address the issue of what happens once the vote has been cast, the advantage gained, and the government does not address the needs of Māori electors. Under the FPP system, Māori, like other groups, had no real way in which to compel the government to implement its election manifesto. Although MMP presents the voter with a similar problem, it does provide the potential of a minority group to act as broker and enable one of the two major political parties to become government. MMP then provides Māori with an opportunity to attain real political power that could effect a positive policy outcome for Māori interests.

The Commission's approach avoided the issue of tino rangatiratanga in terms of a competing sovereignty, because it affirmed that there was only one sovereign, Parliament. The Commission therefore concentrated its endeavours on giving greater effect to the Article 3 rights. The problem with this approach is that full effect of Article 3 rights can only be achieved through a recognition of tino rangatiratanga. Māori political representation was therefore constructed in terms of the European/Pakeha political experience. Although the Commission correctly analysed the weaknesses of the existing system for Māori political representation, it provided a European/Pakeha solution.

To be fair to the Commission, it recognised that Māori had not achieved full citizenship under the current constitutional arrangements, and that this was unlikely to occur unless the status of, and the rights and obligations under the Treaty of Waitangi were clarified. The limitations of reform of the electoral system to produce the constitutional reform required by Māori were acknowledged by the Commission in its recommendation to government that:

7. Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Māori people about the definition and

²⁶ Ibid, at 88.

protection of the rights of the Māori people and the recognition of their constitutional position under the Treaty of Waitangi.²⁷

This recommendation was never implemented though reference has been made to it by Māori in their negotiations with the government over the details of the Electoral Act 1993.

The story of how the recommendations of the Royal Commission became law is beyond the scope of this article. I concentrate on how the recommendation of the Royal Commission relating to the abolition of the Māori seats was not incorporated into the new Electoral Act 1993. The initial draft of the legislation did not include provision for separate Māori representation. The pan-tribal Māori organisations had to fight a rearguard battle to amend the Bill to reinstate the policy of separate Māori representation. The National Māori Congress argued for retention on the following grounds:

Constitutions do not need to be written to exist and some rules simply grow out of time. The status of the Treaty within our constitutional law has been left open for the courts today to declare that the Treaty is part of our Constitution.

What flows from this in terms of the Electoral Reform Bill as it exists at the moment is probably assimilistic. The Bill currently does not recognise the constitutional status of Māori.

We are *not* a mere minority but rather to be seen as a *Constitutional Entity* and the four Māori seats acknowledge that status. While that acknowledgment is probably more accidental than by intent, the result is that the constitutional status of Māori is at least acknowledged.

There is a clear need to have an electoral system which gives better power to Māori to participate in the political process but this must be done in a manner that is consistent with the Treaty of Waitangi and in a way which acknowledges our unique constitutional status.²⁸

This article emphasises the basis on which Māori sought recognition of their constitutional status. The preservation of the Māori seats was part of the claim under the Treaty of Waitangi to a unique constitutional status. However the submissions by Māori sought not only the preservation of the Māori seats but also the establishment of a Māori Electoral

²⁷ Ibid, at 112.

²⁸ National Māori Congress Justice Committee, *The Treaty of Waitangi and Constitutional Implications of the Electoral Reform Bill Discussion Paper* (1993).

Commission to “promote Māori participation in a parliamentary democracy; to facilitate the provision of fair and just representation of Māori in parliament; to educate Māori to exercise their political franchise”.²⁹ The functions of this Commission included determining the size of the Māori roll, maintaining the Māori roll, enrolling Māori on the Māori roll, determining the ratio of constituency MPs to list MPs, and determining the Māori electoral boundaries.

The scheme proposed in this submission was a practical example of an attempt to construct the right to rangatiratanga *within* the context of a parliamentary democracy. It was an attempt by Māori to assert self-determination over their political representation. The notion of a separate Māori Electoral Commission was rejected by the Committee. However, the Electoral Act eventually provided for the provision of a separate Māori electoral roll; for the inclusion on the Representation Commission, when it determined the boundaries of the Māori seats, of the Chief Executive of Te Puni Kokiri and a Māori nominee of the government and the opposition; and for the number of Māori seats to be in proportion to the number of Māori on that roll. There was no longer a fixed number of Māori seats, but there was the potential for a greater number of seats in the House of Representatives. This is in fact what happened.

After the controversy surrounding the Claim with which I began this article, the Māori Electoral Option produced five Māori seats. The second Option has resulted in six Māori seats. The prediction of the Royal Commission that the political parties would need to incorporate more Māori members within the Party lists also proved correct and the end result after the 1996 election was 15 Māori Members of Parliament out of a total of 120. The Māori members are distributed amongst all the political parties and more importantly, the party with the most Māori members, New Zealand First, holds the balance of power. After a period of courtship, which was probably not a good example of the type of political negotiations hoped for by the advocates of MMP, New Zealand First entered a political marriage with the National Party. The bride price paid by the National Party was high in terms of sharing the trappings of political power - the leader of New Zealand First was made Deputy Prime Minister and Treasurer, and the Party was given two other full Cabinet positions with a promise of two more in 1998, as well as four positions outside Cabinet. The National Party however paid very little in terms of policy, so that the policy of economic rationalism continued unabated, but now directed by a Māori Treasurer. The Coalition Agreement's section on

²⁹ *Implications for Māori of the Electoral Reform Bill: Addendum* (1993) 3.

Māori is a mixture of specific and generalised commitments. The statement of general direction states that:

The Treaty of Waitangi is fundamental to the relationship between the Crown and Māori. Within that broad framework, Government is committed to working with Māori to achieve full and active participation in New Zealand society. Māori have the dynamism and vitality to determine their own social and economic development. Justice and equity are overriding principles in improving education, health, housing and economic outcomes, and in settling Treaty claims.³⁰

This statement affirms Māori as an essential part of the political system and their right to participate fully within New Zealand society. The statement hints at increased autonomy but does not state a commitment to rangatiratanga in the sense of sovereignty. It is essentially a statement of a policy of continued integration, but with some limited areas of greater autonomy - an autonomy consistent with devolution of previous state responsibilities to the private sector. Whether this statement reflects the insistence of the National Party, which supports integration, or the confusion of the NZ First politicians, who fought an election campaign with a policy that has been described as a "notional construct", is not known. Previous statements of Winston Peters, the New Zealand First leader would indicate that he supported a policy in which Māori have the right to participate as full citizens, but that there is a national interest to which both Māori and non-Māori are subservient.³¹ This is consistent with preservation of Parliament as the sole source of sovereignty, with limited recognition of Māori autonomy consistent with that sovereignty.

Thus the first MMP election produced the best case scenario for Māori political representation. Māori members hold the balance of power. The question now arises whether the exercise of that power has advanced both the citizenship rights for Māori under Article 3, and the right to rangatiratanga under Article 2. While it is too early to make that assessment, it is possible to make some observations on what has been a turbulent nine months in politics in New Zealand Aotearoa.

On a superficial level, the first nine months of MMP government has been a political disaster for both the New Zealand First and National Parties. Political opinion polls have been consistently tracking the decline in popular support for both parties. New Zealand First now rates around 1.7 per cent, a drop from 13 per cent at the time of the election, and the Labour Party has overtaken the National Party as the preferred major

³⁰ *The Coalition Agreement* (1996) 47.

³¹ Peters, "A Time for Leadership" (1995) 25 VUWLR 118-128.

party and Helen Clark leads the preferred Prime Minister stakes. The reasons for decline may be summed up as a criticism of the style of government as well as the policies. Some of the Māori members of the government have displayed a disregard for constitutional conventions and provoked criticism from all sections of the community.

The “warrior” behaviour exhibited by certain Māori members is inconsistent with the kinder, gentler, consensus politics envisaged by the supporters of MMP. There is insufficient time to analyse the causes and implications of this political style. I concentrate on a more disturbing outcome of this period, and that is the renewed call for the abolition of separate Māori representation. It is disturbing because I have argued that, without separate representation, it will be difficult not only to achieve equality of citizenship in New Zealand Aotearoa, but also to achieve the recognition of tino rangatiratanga by the current institution of sovereignty, the Parliament.

The argument for abolition of the Māori seats has arisen from community organisations that espouse a “one New Zealand” policy and are gathering signatures for a petition to have a referendum on the issue, and from the opposition ACT party. An ACT MP Derek Quigley is reported as stating that

Māori were no more indigenous to New Zealand than other people. All New Zealanders had arrived at some time or another. It was better to talk about different groups than to talk about people who are either indigenous or not. This acknowledges that there are many groups in New Zealand society. Māori had suffered injustices and they needed to be remedied as quickly as possible so a situation could be reached “where all New Zealanders are treated the same”.³²

The argument was supported by his leader Richard Prebble, who stated that he was “reaching the conclusion that having Māori representation is not assisting Māori, it is not promoting good race relations, but in fact, the opposite. It is indeed dangerous”.³³ One may well ask, dangerous for whom? The reason for this criticism of the Māori seats is found in the same statement of Mr Prebble who said:

I have been as shocked as the electorate by the strident militancy of the five Māori MPs. Even MPs like the Honourable John Tuariki Delamere - as he now insists on being called - have given militant speeches on race which in no way reach out over the racial divide and acknowledge that for any sort of future, all races in New

³² *Sunday Star-Times*, March 9, 1997.

³³ *Sunday Star-Times*, March 16, 1997.

Zealand must pay respect to one another if we are going to have any sort of reasonable future.³⁴

The only Māori member of ACT, Donna Awatere, former activist and author of the seminal work *Māori Sovereignty*,³⁵ criticised her leader's call for a referendum on abolition of the Māori seats as it would show up a "fatal flaw in democracy". If there was to be a referendum, however, she is reported as stating it should be amongst Māori voters only.³⁶

This attack on separate Māori political representation is not merely a reaction to the political style of some Māori MPs. The attack on the seats masks a deeper underlying concern which can best be described as a fear that acknowledgment of difference will seriously endanger the notion that the peoples of New Zealand Aotearoa have sufficient commonality of values and interests to sustain a stable community founded on democratic principles of individual freedom and equality. Any assertion by Māori of rangatiratanga that challenges the notion of parliamentary sovereignty is construed by many European/Pakeha, and in particular by those who exercise the authority of Parliament, as being an attack on the fundamental unity and stability of the state.

6. Conclusion

The developments under MMP have highlighted the fragility of the recognition of the claim of Māori under the Treaty of Waitangi to rangatiratanga. However difficult the current political conditions for advancing the claim, I argue that it is a claim which is on the political agenda, and it is one that will eventually have to be dealt with. If Māori separate political representation can survive the current coalition government, Parliament can provide the site for the development of a process through which the Māori concept of sovereignty, rangatiratanga, can be given practical expression. I am aware of the real difficulties that lie before those who undertake that process. Both Māori and European/Pakeha will have to work on their understandings of the concept of sovereignty, and the nature of the citizenship that flows from a mutual recognition of two people's right to sovereignty within one country occupied by them both. There is the added challenge that this process of negotiation must be conducted in the context of a form of globalisation that is determined to make the whole concept of sovereignty, however defined, irrelevant.

³⁴ Ibid.

³⁵ Awatere, D *Māori Sovereignty* (1984).

³⁶ *New Zealand Herald*, 18 March 97.

**THE SMALL CLAIMS SYSTEM:
A COMPARISON OF THE SOUTH AFRICAN SMALL CLAIMS
COURT AND THE NEW ZEALAND DISPUTES TRIBUNAL**

BY PETER SPILLER*

I. INTRODUCTION

During the 1970s the rise of the consumer justice movement and the accompanying demand for more accessible institutions of justice prompted the emergence of small claims forums in Australasia and other parts of the Commonwealth. In the case of New Zealand, the Small Claims Tribunals Act was passed in 1976, and Small Claims Tribunals were introduced on pilot basis the following year. These Tribunals were in time established throughout New Zealand and were upgraded and renamed Disputes Tribunals in terms of the Disputes Tribunals Act 1988.¹

In South Africa, the Small Claims Courts Act 1984 was passed as a result of the findings of the Hoexter Commission of Inquiry into the structure and functioning of the courts in South Africa. This Commission reported in 1982 that South Africa was in desperate need of a court designed to settle small civil claims in an informal and inexpensive manner.² In South Africa, as had occurred in New Zealand, the Small Claims Courts were introduced in selected centres on a pilot basis but soon proved their success and were extended throughout the country.³

This article will analyse and compare key aspects of the South African Small Claims Court and the New Zealand Disputes Tribunal. The article

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¹ Spiller, P *The Disputes Tribunals of New Zealand* (1997) 3-5.

² Bredenkamp, I M *The Small Claims Court* (1986) Introduction.

³ The pilot projects began on 1 October 1985 in Durban and six other centres, and by late 1990 84 Small Claims Courts had been established (Gough, I "The Small Claims Court: A Court with a Human Face?" (unpublished LLM thesis, University of Natal, Durban, 1992) 14). The power of the Minister of Justice to establish Small Claims Courts is provided in s 2 of the Small Claims Courts Act 1984.

is based on my research in South Africa (including observation of the Small Claims Court in Durban) and in New Zealand, and on my experiences as a Referee of the Disputes Tribunal. The purpose of the article is to reflect upon the strengths and weaknesses of each system and to assess what possible improvements may be made.

II. PRESIDING OFFICER

The presiding officer in the South African Small Claims Court is called a Commissioner, and as such is equivalent to the Referee of the New Zealand Disputes Tribunal.⁴ As in New Zealand, the qualities and expertise of the presiding officer are central to the operation of the small claims system. This is because the presiding officer performs his or her duties without the assistance of legal counsel, with a considerable amount of discretion and flexibility of procedure, and with limited subjection to review. The presiding officer's standards and approach substantially affect the quality of justice afforded to small claims litigants and the overall tenor and credibility of the small claims system.⁵

1. Criteria for Appointment

A Commissioner is required to be qualified to be admitted to practise as an advocate or as an attorney or to be appointed as a magistrate. Furthermore, a Commissioner must, for an uninterrupted period of at least five years, have practised as an advocate or attorney or occupied the post of magistrate; alternatively, he or she must for five years have been involved in the tuition of law and also practised as an advocate or attorney for such period as, in the opinion of the Minister of Justice, makes him or her suitable for appointment, or possess such other experience suitable for appointment.⁶ In appointing Commissioners, the Minister of Justice may act on the advice of the Advisory Board established for each Court area.⁷ In the Durban area, the roster comprises some 60 Commissioners, who are mainly White and Indian attorneys.⁸

The decision of the South African legislature to restrict Commissioners to those with legal qualifications and experience follows the approach of

⁴ Small Claims Courts Act 1984, s 8.

⁵ See Spiller, *supra* note 1, at 11.

⁶ Small Claims Courts Act 1984, s 9(2).

⁷ Section 25(1)(d) and Rule 2(3)(a).

⁸ There has recently been a concerted attempt to persuade Black lawyers to become Commissioners: interview, Mr Cyril Mncwabe, 15 July 1997.

most small claims systems.⁹ The South African restriction is in line with the requirement of Commissioners to administer justice “in accordance with the laws and customs” of South Africa.¹⁰ My observation of Small Claims Court hearings in Durban revealed the advantages of the Commissioners’ knowledge of relevant law, familiarity with court procedures, experience of a range of human affairs and disputes, investigative techniques and the balancing of conflicting evidence, and ability to provide quick and authoritative decisions. The reservation sometimes expressed that lawyers presiding in small claims forums might compromise the “user-friendly” image of the forum was not borne out by my observations, and the Commissioners observed generally conducted the proceedings in a down-to-earth, common sense fashion.

The requirement of the South African Small Claims Courts Act that Commissioners have legal qualifications and experience contrasts with the New Zealand Disputes Tribunals Act which simply requires a person to be “capable, by reason of that person’s personal attributes, knowledge, and experience, of performing the functions of a Referee”.¹¹ The broad wording of this section was consciously adopted to dispel any indication of a presumption in favour of the appointment of lawyers as Referees. While lawyers are not prevented from becoming Referees, in fact only one quarter have formal legal qualifications.¹²

There are particular reasons in New Zealand (unrelated to the South African small claims system) which support the retention of broad criteria for the appointment of New Zealand Referees, notably, their need to assess whether it is appropriate to assist the parties to negotiate an agreed settlement, and to give decisions according to substantial merits and justice notwithstanding the strict letter of the law.¹³ Nevertheless, New Zealand Referees are required to have regard to the law and statutes presented to them in deciding disputes.¹⁴ As New Zealand prepares to increase the jurisdiction of the Disputes Tribunal to levels considerably beyond those of the South African Small Claims Court, the legislature would do well to reflect upon the advantages which can flow from legal

⁹ See eg the Queensland Small Claims Tribunals Act 1973, the Victorian Small Claims Tribunals Act 1973, the Western Australian Small Claims Tribunals Act 1974, and Spiller, *supra* note 1, at 12.

¹⁰ Small Claims Courts Act 1984, s 9(6).

¹¹ Disputes Tribunals Act 1988, s 7(2)(a).

¹² CRESA, *Disputes Tribunal Research Project* (1997) 15.

¹³ Disputes Tribunals Act 1988, s 18(1) & (6).

¹⁴ Sections 18(6) and 51(1). 93% of Referees believe that legal knowledge is essential for them to carry out their role (CRESA, *supra* note 12, 34).

qualifications and experience particularly in hearing and deciding upon claims at the higher level of jurisdiction.¹⁵

2. *Nature of Appointment*

The office of the South African Commissioner is a voluntary, unpaid position. Commissioners are normally appointed by the Minister of Justice, and there are no statutory requirements for advertisement or an appointment process.¹⁶ The Commissioner, once appointed, holds office during the pleasure of the Minister of Justice, who may at any time withdraw the appointment if “in his opinion there is sufficient reason for doing so”.¹⁷ Little or no training is provided for new Commissioners, who are presumably required to draw on their legal training and expertise in conducting Small Claims Court work. Commissioners respond to the call for appointment for a variety of reasons. Some declare their commitment to serving the community, some see their work as Commissioner as a way of developing their skills and gaining valuable experience, and some hope that the experience may assist their aspirations to be appointed to higher judicial office.

In New Zealand, the office of Referee is a paid position. Referees are appointed following advertisement and an appointments process defined by the Disputes Tribunals Act, and they hold a judicial warrant from the Governor-General for a period of three years.¹⁸ Like District Court Judges, Referees may “at any time be removed from office by the Governor-General for disability, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Governor-General”.¹⁹ On appointment, Referees are expected to observe Tribunal hearings and work with an experienced Referee as supervisor. Thereafter training sessions are periodically provided for all Referees, and for all of their training time Referees are paid. It must however be pointed out that the level of remuneration set for Referees has been unchanged since 1989 and has become a source of dissatisfaction amongst Referees; and the level of Referee support and training in law and other areas has not matched the

¹⁵ The current proposal favoured by the Minister of Justice is to increase the Tribunal’s jurisdiction to \$7500 and \$12000 by consent. Note, increasingly Referees are acquiring legal qualifications: 26% have law degrees and 16% of Referees have partially completed law degrees (CRESA, *supra* note 12, 15).

¹⁶ Small Claims Courts Act 1984, s 9(1)(a): there is special provision for the appointment of Commissioners by Magistrates, to hear particular claims (s 9(1A)).

¹⁷ Small Claims Courts Act 1984, s 9(3) & (5).

¹⁸ Disputes Tribunals Act 1988, ss 7(1) and 8. See also Spiller, *supra* note 1, at 17.

¹⁹ Disputes Tribunals Act 1988, s 7(4).

promises which were made at the time of the passing of the Disputes Tribunals Act.²⁰

While the unpaid nature of the South African system provides a considerable financial saving for the South African Department of Justice, there are significant disadvantages of this system. The South African Small Claims system is dependent on the goodwill and altruism of a dedicated group of Commissioners, some of whom have considerable experience while others have less. Sitting times have to be scheduled after hours so that the Commissioners can fulfil their Small Claims Court duties without interference with their legal practice. There are circumscribed limits to what can be expected of unpaid Commissioners, in terms of extra time for training, out of court preparatory work, and the number of sittings per evening. Even without these extras, Small Claims hearings late in the evening after a busy day's practice can be a heavy burden: it is well known that the size of a person's claim may bear little relation to the complexity of the issues and the emotional energy vested in them.²¹ My observation of the Small Claims Court revealed a high overall level of expertise, but clearly training in the Small Claims Courts Act and its practices would be beneficial in producing more streamlined and consistent procedures.²²

It is submitted that the New Zealand system, which views the position of Referee as a paid (albeit part-time) occupation, better reflects the importance of the small claims part of the justice system. The incentive of payment draws a wider pool of appointees, more can be expected of Referees by way of training and availability, and there can be greater accountability for performance. At the same time, the level of remuneration, support and training of Referees needs to be reassessed and improved. It is important that the small claims systems in South Africa and New Zealand not fall into the trap of economising on the time of

²⁰ Spiller, *supra* note 1, at 19-21 and 102-103; and CRESA, *supra* note 12, 30.

²¹ Spiller, *supra* note 1, at 11. In one case observed in Durban, the seemingly straightforward claim for return of a tenancy bond and refund of rental masked a highly emotional interaction in which the landlord was accused of abuse by his daughter, who had in turn elicited the aid of the tenant.

²² Gough, *supra* note 3, at 374, argues that there needs to be greater financial involvement on the part of the State in the running of the Courts. He also argues that Commissioners require training, courses and lectures, particularly as the Small Claims procedure is different from that in which the Commissioners have been trained, and because the Act vests much discretion in the hands of the Commissioner but with few guidelines (at 295).

professional judges by exploiting the goodwill of those willing to serve in this area.²³

III. JURISDICTION

Jurisdictional limits are an important feature of small claims institutions. They signal the judgment call made by legislatures as to the point where the accessible, informal and inexpensive small claims system must give way to the more formal court system. At this point it is deemed that the size and/or complexity of the claim requires the protections devised by the traditional court process. The jurisdictional limits of the small claims system are to be respected by both the litigants and the presiding officers. This is underlined by the South African Act which states that the consent of the parties does not give the Small Claims Court the power to hear any action which exceeds its jurisdiction.²⁴ Failure of the presiding officer to respect the system's jurisdictional limits may have highly unfortunate consequences: in the South African and New Zealand systems excess of jurisdiction can be remedied only by the cumbersome and expensive process of review to the Supreme Court or High Court (respectively).²⁵

1. Financial Limits and Causes of Action

South Africa follows the pattern of some small claims systems in allowing a fairly wide-ranging jurisdiction subject to a low monetary limit.²⁶ The upper financial limit has recently been increased to only R3000, which (taking into account the comparatively high inflation and low exchange rates in South Africa) is one of the lowest limits placed in Commonwealth countries.²⁷ This limit is not specified by the Act, and is left to the Minister of Justice to determine from time to time by notice in the Government Gazette.²⁸ The Small Claims Court has jurisdiction over causes of action within this limit, in claim or counterclaim, including a

²³ Dawson, J P A *History of Lay Judges* (1960) 293.

²⁴ Small Claims Courts Act 1984, s 22. Except for the express provision as to consent to a higher financial limit, the position is the same in New Zealand (Spiller, *supra* note 1, at 28).

²⁵ Small Claims Courts Act 1984, s 46(a), and Spiller, *supra* note 1, at 132.

²⁶ Cf the Fijian Small Claims Tribunals Decree 1991.

²⁷ The current exchange rate of the South African Rand would translate R3000 into approximately £400, A\$860 and C\$890. In England the jurisdictional limit is £3000, in Queensland, Victoria and ACT it is A\$5000, and in Ontario it is C\$6000 (Spiller, *supra* note 1, at 36).

²⁸ Small Claims Courts Act 1984, s 15.

number specifically mentioned in the Act. Those specifically noted are actions for the delivery or transfer of movable or immovable property, for ejectment of occupiers of premises or land, and based on or arising out of liquid documents, mortgage bonds and credit agreements.²⁹ Certain matters are specifically excluded from the jurisdiction of the Court: these include the dissolution of marriage, the validity or interpretation of wills, the mental capacity of persons, defamation, malicious prosecution, wrongful imprisonment or arrest, seduction, and breach of promise to marry.³⁰ The Small Claims Courts Act is subject to other legislation, which means for example that employment matters are required to be determined by the Labour Court.³¹

My observation of the Durban Small Claims Court indicated that a high proportion of the claims heard relate to contractual issues, including claims for refunds for allegedly inadequate services rendered or goods bought, for loans, and for tenancy bonds and rental. Tort claims also featured, including those relating to damage to motor vehicles and personal injury.³²

The New Zealand approach to jurisdiction has been to impose a modest upper financial limit and to confine the allowable causes of action to clearly-defined areas. This approach is entirely appropriate in the light of the provisions that Referees are not required to be legally trained, that in principle lawyers are not allowed to represent parties, and that there is only limited right of appeal. The Tribunal is allowed to hear claims up to \$3000 and by consent of all parties \$5000: these levels are significantly beyond the South African limit but still at the lower level of Commonwealth limits.³³ The financial limits are specified in the Disputes Tribunals Act, which means that any change requires legislative amendment approved by Parliament. The Act stipulates the classes of action that can be heard (contract, quasi-contract, tort relating to damage to property, and statutory causes of action), and specifically excludes a range of actions including claims for the recovery of land or interest in land.³⁴ The Disputes Tribunals Act is subject to an array of other statutes which restrict the jurisdiction of the Tribunal.

²⁹ Ibid.

³⁰ Small Claims Courts Act 1984, s 16.

³¹ Interview, Mr Manikam, Commissioner Small Claims Court, 15 July 1997.

³² Interviews with Small Claims Courts Commissioners, Durban. In the Durban Small Claims Court, which is one of the oldest and busiest in South Africa, an average of over 1600 claims have been lodged each year over the past five years.

³³ These levels would translate approximately to R9000 and R15000.

³⁴ Disputes Tribunals Act 1988, s 11.

As in South Africa, most claims in New Zealand in fact relate to contractual issues such as services rendered and goods bought, and tort matters arising out of damage to motor vehicles.³⁵ However, the range of issues routinely dealt with in the Disputes Tribunal is much narrower than that dealt with in the Small Claims Court. A significant proportion of matters which are heard in the South African Small Claims Court are dealt with by New Zealand courts or by other specialist bodies in New Zealand (such as the Tenancy Tribunal and the Accident Compensation Corporation).

Comparison of the small claims jurisdiction in South Africa and New Zealand reveals the tension between providing an accessible system of justice for lower-level claims while not exposing the system to overload or undue strain. The common theme of both systems is that the small claims system is geared towards claims of a small amount, based on causes of action which involve essentially factual disputes that are not legally complex.³⁶ The South African Act underlines this point by providing that where the Court “is of the opinion that a case contains difficult or complex questions of law or of fact which cannot adequately or fairly or should not be decided by it, it shall stop proceedings and the plaintiff may institute a fresh action in another court”.³⁷ To like effect is the provision in the New Zealand Act which allows a Tribunal to transfer a matter to the District Court where it considers that the matter may more properly be determined there.³⁸

It is submitted that the South African system, which is in the hands of legally-qualified Commissioners, could well handle a much higher financial level of claims, subject to extended hearing times. The caution

³⁵ Spiller, *supra* note 1, at 29 and 32; and CRESA, *supra* note 12, 50.

³⁶ *Ibid*, 25. Note, both systems allow for abandonment of part of a claim to bring it within jurisdiction. The South African Act helpfully makes clear that if a claim which has been partly abandoned “is granted in part only, the abandonment shall be deemed first to apply to that part of the claim ... which was not granted” (ie the claimant is not to be penalised by the artificial jurisdictional limit).

³⁷ Small Claims Courts Act 1984, s 23.

³⁸ Disputes Tribunals Act 1988, s 36(2). South African legal authority provides helpful guidance on the situation where a claim is within jurisdiction but a counterclaim exceeds jurisdiction. The South African approach is that where the counterclaim is interconnected with the claim and depends upon a determination of the same issues, the matter should not be pursued in the Small Claims Court (Strauss, *SAS You in the Small Claims Court* (2 ed, 1990) 39, and *Swart v Sher* 1987 (2) SA 454). It is submitted that the same approach should be adopted in New Zealand.

of the South African authorities in setting upper financial limits provides a salutary lesson for the New Zealand authorities, as the New Zealand Tribunal is largely in the hands of Referees without legal qualifications or experience. At most, New Zealand might adopt the provision in the South African Small Claims legislation which allows for the Minister of Justice to adjust the upper financial limit from time to time to allow for inflation. Beyond this, the New Zealand authorities should not increase the Tribunal's jurisdiction without a careful review of the Disputes Tribunals Act as a whole.

2. The Debt-collecting Issue

Both South Africa and New Zealand addressed the issue of making the small claims system as accessible as possible while at the same time not exposing the system to domination by debt-collectors. South Africa's response was to open the system to all claims in contract, whether disputed or not, subject to the restriction that a claimant who carries on a business or profession is allowed to institute only one action at a time, and may commence a second action only when the first action has been completed.³⁹ New Zealand's response was to require that claims in contract or quasi-contract for debts or liquidated sums normally be in dispute.⁴⁰

Enquiries revealed that the South African system is not overloaded with debt-collecting claims. The South African system has the advantage that one-off debts owed to small businesses can be claimed without imposing the (at times artificial) requirement that they be disputed. There is evidence that the New Zealand system is open to the vagaries of local practice. Some Registrars and Referees effectively waive the requirement for a dispute in apparently deserving cases, while others impose the letter of the law with the result that in some cases debts are not pursued because of the prohibitive costs of the District Court.⁴¹ In the light of these considerations it is submitted that the South African response to this difficult issue is to be preferred.

³⁹ Small Claims Courts Act 1984, s 29(1)(b). There is also the restriction, discussed below, that juristic persons (corporate bodies) may not institute claims in the Small Claims Court.

⁴⁰ Disputes Tribunals Act 1988, s 11(1)(a).

⁴¹ Spiller, *supra* note 1, at 31. A slight majority of Referees believe that the Tribunals' jurisdiction should be extended to include matters of debt (CRESA, *supra* note 12, 34).

IV. PERSONS APPEARING

Tensions similar to those affecting jurisdiction are apparent in the law governing those who may appear in the small claims forum. On the one hand there is the view that the small claims system should provide a private forum, reserved for the lay parties who, unlike corporate bodies, lack the resources to pursue claims in the higher courts. On the other hand there is the view that the small claims forum should be a public body, open to all without restriction or distinction of status.

1. Parties

The South African Small Claims Courts Act provides that only a natural person may institute an action in the Court.⁴² A natural person is an individual human being (including an individual who constitutes a partnership), and is distinct from a juristic person who is a legal entity such as a company, a corporation or statutory body.⁴³ However, a juristic person may become a party to an action in the Court as a defendant, except that no action may be instituted against the State.⁴⁴

My observation of the Durban Small Claims Court bears out the statements made by the Court Clerk and Commissioners interviewed that the Court is now being used by a wide cross-section of the community, with a mix of gender and races. Most of the plaintiffs and certain of the respondents were Blacks, necessitating the services at times of a Zulu interpreter. Whites and Indians also featured as plaintiffs and defendants. The mode of speech and dress of the parties indicated that they came from a variety of educational and income groups. Most disputes were between individuals, but there were defendants representing corporate groups such as a furniture store and the local city council.

The New Zealand Act allows access by parties irrespective of whether they are private persons or corporations,⁴⁵ and proceedings may be brought by or against the Crown in the same manner as other proceedings.⁴⁶ Access by corporate bodies is subject to the elaborate

⁴² Small Claims Courts Act 1984, s 7(1). Similarly, the Queensland Small Claims Tribunal limits claims that arise out of a contract between a consumer and a trader to a consumer that is not a corporation.

⁴³ Strauss, *supra* note 37, at 9-10.

⁴⁴ Small Claims Courts Act 1984, ss 7(1) and 14(1).

⁴⁵ This is also the approach of the ACT Small Claims Act 1974 and the Tasmanian Magistrates Court (Small Claims Division) Act 1989.

⁴⁶ Disputes Tribunals Act 1988, s 3, and Crown Proceedings Act 1950, s 12.

provisions governing insurance companies, which are designed to ensure that both insured and insurer are entitled to attend and be heard subject to provisions that their respective interests be respected.⁴⁷

Like the South African Small Claims Court, the Disputes Tribunal draws people from a variety of quarters, and the proceedings are not dominated by big business or Crown agencies.⁴⁸ However, there is evidence that the Tribunal (like other small claims systems) attracts a disproportionate share of males, Europeans and those of the better-educated, middle-income bracket.⁴⁹ The findings of a 1986 Review of the Tribunals found that “women, the young and the elderly, those in low socio-economic groups, and Māori and Pacific Islanders are under-represented amongst those who are aware of small claims tribunals”.⁵⁰ This is of particular concern because such groups include those most vulnerable in terms of consumer issues, and those least likely to be able to afford legal services or have the skill to negotiate on their own behalf. There is also evidence that in disputes involving the supply of goods or services by a trader to a consumer, commonly the trader appears as the applicant and the consumer as the respondent.⁵¹

It is submitted that the New Zealand approach which allows access to applicants that are corporations better reflects the underlying philosophy of the small claims system as the provider of access to justice for all. However, there is an ongoing challenge in both South Africa and New Zealand to attract those most in need of the inexpensive justice that the system offers, through advertising and making the system as accessible as possible. Particularly in New Zealand, groups under-represented in the small claims system need to be targeted with educational programmes which increase awareness of the system.

⁴⁷ Spiller, *supra* note 1, at 31.

⁴⁸ CRESA, *supra* note 12, 49.

⁴⁹ Spiller, *supra* note 1, at 44-45, and CRESA, *supra* note 12, 77-78. See also Ramsay, “The NSW Consumer Claims Tribunals” (1987) 12(4) *Legal Service Bulletin* 145, 146, and Yin and Cranston, “Small Claims Tribunals in Australia” in Whelan, C J *Small Claims Courts* (1990) 66.

⁵⁰ Oxley, P *Small Claims Tribunal Evaluation. Volume 1: Discussion Paper* (Wellington, Policy and Research Division, Department of Justice, 1986) 11.

⁵¹ *Ibid.*, 27. See Moulton, “The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California” (1969) 21 *Stanford Law Review* 1657, 1660; Weller, Ruhnka and Martin, “American Small Claims Courts” in Whelan, *supra* note 49, at 22; and Ramsay, “Small Claims Courts in Canada” in Whelan, *ibid.*, 37.

2. *Representatives and Supporters*

In South Africa, each party to a Small Claims Court action must appear in person before the Court, and may not be represented by any person during the proceedings. The exception is juristic defendants who may be represented by a director or other officer.⁵² There is no statutory provision for supporters to be present to assist the parties.

In New Zealand, no person is entitled to be represented at a hearing unless it appears to the Referee to be proper in all the circumstances to allow this and the Referee approves the representative.⁵³ Express provision is made for representation of minors, corporate bodies and persons under disability.⁵⁴ The Referee may not appoint or approve as a representative any person who is or has been enrolled as a barrister and solicitor, or who, in the opinion of the Tribunal, is or has been regularly engaged in advocacy work before other tribunals.⁵⁵ The Disputes Tribunals Act also allows any person nominated by a party to the proceedings to be present at the hearing and to assist the party in the presentation of the case if it appears to the Referee to be proper in all the circumstances to permit this. Such a support person is not entitled to be heard.⁵⁶

It is submitted that both the South African and New Zealand legislatures have made a correct assessment that personal appearance by the parties is the preferred option in the small claims system. Representation, particularly legal representation, increases costs and can import formality, technicality and delay into the proceedings. However, should there be a significant extension of jurisdiction (as is proposed for the New Zealand system), provision might be made (as in Australia) to allow legal representatives where all parties agree and/or the presiding officer is satisfied that the unrepresented party will not be unfairly disadvantaged by the opposing lawyer's presence.⁵⁷

⁵² Section 14(2) & (4).

⁵³ Disputes Tribunals Act 1988, s 38(2).

⁵⁴ Sections 27 and 38.

⁵⁵ Section 38(7). However the presence of lawyers is allowed where the lawyer in question is a party to the dispute or is the majority shareholder of a company involved in the dispute.

⁵⁶ Section 38(5)-(6).

⁵⁷ See the Queensland Small Claims Tribunals Act 1973, the Victorian Small Claims Tribunals Act 1973, the New South Wales Consumer Claims Tribunals Act 1987, the Western Australian Small Claims Tribunals Act 1974, the South Australian Local and District Criminal Courts Act 1926, Part VIIA, and the Tasmanian

It is also submitted that the New Zealand provision for supporters is a valuable aspect of the New Zealand system, and one which could play a useful role in South Africa. Supporters, be they family members or friends, can be of assistance in situations of power imbalance, where a party lacks skills or confidence and requires assistance with presenting evidence and emotional support. Furthermore, certain cultural groups traditionally emphasise interdependence and link identity with the wider family and tribal unit, and the provision for supporters may help to make the small claims forum a less individualistic and more accommodating one.⁵⁸

3. *The Public*

In South Africa, the proceedings of the Small Claims Court must, in principle, take place in open court.⁵⁹ The documents of the Court are available for inspection by the public under the supervision of the Clerk of the Court upon payment of the prescribed fees.⁶⁰ These provisions are in line with the notion that the administration of justice should be open to public scrutiny.⁶¹ In line with this principle, the practice that I observed was that all the parties, due to appear in cases set down before a particular Commissioner on a particular evening, sit in the Court and observe proceedings until their case is called. The South African rule is subject to the right of the Court, in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the Court, to order that the proceedings be held behind closed doors or that specified persons not be present at the proceedings.⁶²

In New Zealand the principle is that "all proceedings before a Tribunal shall be held in private".⁶³ Privacy is seen to make for a more accessible Tribunal, encourages free, open and frank exchange, allows the parties to take part in negotiation more readily, and gives the parties a safe

Magistrates Court (Small Claims Division) Act 1989. In Canada, all jurisdictions except Quebec permit lawyers to represent clients before the Small Claims Courts.

58 Spiller, *supra* note 1, at 59-60, and National Working Party on Mediation, *Guidelines for Family Mediation* (1996) 24.

59 Small Claims Courts Act 1984, s 4(1).

60 Section 6(2).

61 To similar effect is the Fijian Small Claims Tribunal Decree 1991, s 25, and the ACT Small Claims Act 1974, s 18(1).

62 Small Claims Courts Act 1984, s 4(2). See also s 4(3).

63 Disputes Tribunals Act 1988, s 39(1).

environment in which to sort the matter out without loss of face.⁶⁴ It is also pointed out that the Tribunal does not set precedents.⁶⁵ In line with this principle, the practice observed in the Tribunal is to have each dispute assigned a separate time (usually at one hour intervals), and only parties and relevant people attend each hearing. However, a Referee may allow the presence of persons who have a “genuine and proper interest either in those proceedings or in the proceedings of Tribunals generally”.⁶⁶ This provision was inserted because of the belief that the Tribunals would elicit some interest in a general way from interested persons and organisations, and to allow parties to have a relative or friend present.⁶⁷ The provision also allows for the presence of trainee Referees who wish to observe and learn from experienced Referees, and those who are doing research on the Tribunals.⁶⁸ Such persons are not allowed to participate in the proceedings in any way, and their continued presence is in the discretion of the presiding Referee.⁶⁹

It is submitted that the New Zealand approach, with its built-in safeguards, is to be preferred. The reality is that small claims hearings, being concerned with private disputes usually without public relevance, are almost invariably of interest only to the presiding officer, the parties and those directly involved in the particular dispute, and it is not common for members of the public to wish to attend. The attendance of parties at hearings unconnected with their own can be a waste of time, can provide distractions, and detracts from the informal, safe and open forum conducive to discussion and resolution of disputed matters.

V. PROCEEDINGS

The central objective of the small claims system is to allow access to speedy and low-cost justice. This requires observance of the principles of natural justice, so that justice may be done and seen to be done. At the same time, because the system directly involves lay people unskilled in legal procedures, it is essential that the proceedings of the small claims system be as flexible and accommodating as possible.

⁶⁴ Spiller, *supra* note 1, at 13.

⁶⁵ *Ibid*, and Secretary for Justice to Minister of Justice, 11 May 1979.

⁶⁶ Disputes Tribunals Act 1988, s 39(3). Cf the Western Australian Small Claims Tribunals Act 1974, s 33(1)(a), and the New South Wales Consumer Claims Tribunals Act 1987, s 22(2).

⁶⁷ R Montagu, for Secretary for Justice, to Minister of Justice, 6 May 1976.

⁶⁸ Spiller, *supra* note 1, at 11.

⁶⁹ Disputes Tribunals Act 1988, s 39(3).

1. Commencement of Proceedings

In South Africa, proceedings are usually instituted in the Court of the area where the defendant resides, carries on business or is employed, or where the cause of action arose.⁷⁰ On hand to assist the parties is a clerk of the Small Claims Court, who in many cases compiles or prepares the necessary documentation under instruction from the parties. The clerk may, when faced with issues of legal complexity, call upon the services of a legal assistant assigned to the local Court.⁷¹ The plaintiff is required to have written a letter of demand to the defendant allowing the latter at least 14 days from the date of receipt to satisfy the plaintiff's claim, and to have delivered this to the defendant by hand or by registered post. On failure by the defendant to satisfy the claim, the plaintiff must lodge the letter of demand and complete a standard summons prescribed by the Court.⁷² If the clerk is satisfied that the summons complies with the requirements, a date and time is set for the hearing. This is set for 5.00 pm on Mondays to Thursdays, at Department of Justice premises designated for the Small Claims Court.⁷³ The summons is then handed to the plaintiff who must personally serve it on the defendant or deliver it to the sheriff of the court for service subject to the payment of the required fee.⁷⁴ The defendant may at any time before the hearing lodge with the clerk of the Court a written statement setting out the nature of the defence and particulars of the grounds on which it is based.⁷⁵

In New Zealand, proceedings are commenced by lodging a claim in the prescribed form with the appropriate Tribunal. This is normally the Tribunal nearest to the place where the applicant resides, although the Referee may transfer the claim to another Tribunal if satisfied that the claim can more conveniently or fairly be heard there.⁷⁶ The Registrar of the local Tribunal has the duty to ensure that assistance is reasonably

⁷⁰ See the Small Claims Courts Act 1984, s 14, for further details of this provision. Jurisdiction of a particular Court may be obtained where a defendant takes no objection to the jurisdiction.

⁷¹ Section 11(1) & (3).

⁷² Section 29(1).

⁷³ The Durban Small Claims Court commenced sittings at the University of Natal, Durban, but was later moved to premises in the city centre to make it easier for Commissioners to attend.

⁷⁴ Small Claims Courts Act 1984, s 29(2). This is currently in the R40-R50 range, depending on the distance to be travelled (as indicated below, costs may be recovered by the successful plaintiff).

⁷⁵ Section 29(3).

⁷⁶ Disputes Tribunals Act 1988, s 24.

available from the court staff to any person who seeks it in completing the forms required by the Act. This assistance applies, not only to the lodging of claims, but also to applications for rehearings, appeals and enforcement of Tribunal orders.⁷⁷ The applicant is required to lodge, with the claim, the prescribed fee.⁷⁸ Since 1989, the fee has been \$10 for claims below \$1000 and \$20 for claims above this amount.⁷⁹ Once a claim is received in the Tribunal, the Registrar (through the court staff) fixes a time and place of hearing and gives notice of these details to the parties to the proceedings.⁸⁰ Tribunal hearings are conducted in Department for Courts premises, usually at the local District Court in specially designated hearing rooms or in Judges' retiring rooms. Hearings are normally held during standard office hours in the week, although night sittings have been held on a pilot basis in certain centres. Notice of hearing (as with any notice or order relating to the Tribunal) may be given either by personal delivery or by postal delivery, subject to the right of the Referee or the Registrar to direct that notice be served by other means.⁸¹ Service is effected by a bailiff, who is a District Court official responsible for serving all summonses and orders and for executing all warrants issued out of the Court.⁸²

Comparison of the two systems reveals attractive features of both. The South African requirement for a written demand or reminder provides a last opportunity for an out of court settlement (with the added incentive of being under the shadow of the small claims system) and may prevent certain claims reaching the Court. The New Zealand preference for the applicant's forum is a departure from the procedure in the District Court, but it reflects the philosophy of the Tribunal as being to enhance access to justice for those with modest claims.⁸³ Both systems provide state assistance to the lay litigants, but South Africa takes this a step further by providing access to a legal adviser. The cost of commencing proceedings in both systems is low: it is potentially free for South African plaintiffs who serve the summons themselves, but the New Zealand system offers a more uniform and streamlined service with a low filing fee. Both systems attach the small claims system to the formal justice process, which adds credibility to the system and emphasises that the small claims system is

77 Section 55.

78 Section 24(1).

79 Rule 5(1).

80 Disputes Tribunals Act 1988, s 25(1).

81 Rules 10 and 12.

82 District Courts Act 1947, s 17(1)(c).

83 Secretary for Justice to Chairman, Justice and Law Reform Select Committee, 12 April 1988. See District Courts Rules 1992, r 113(1)(a).

meant to provide an impartial forum beyond the influence of either consumer bodies or seller associations.⁸⁴ The South African hearings in the evenings and the New Zealand hearings in the day obviously benefit different needs of the public. Finally, the South African provision for defendants to provide an outline of their defence can be of great help to the presiding officer in discovering the issues in dispute and so enhancing the dispatch of claims.

2. Conduct of Proceedings

In South Africa, control of the proceedings lies in the hands of the Commissioner, who has a large measure of discretion in the conduct of the hearing. The Commissioner may at any time before judgment amend any summons or other document unless any other party may be prejudiced thereby.⁸⁵ The Commissioner may ascertain any relevant fact in such manner as he or she thinks fit, the rules of the law of evidence do not govern the Court's proceedings, and evidence may be given orally or in writing. The Commissioner proceeds inquisitorially to ascertain the relevant facts, and parties are not allowed to question or cross-examine any other party or witness unless the Commissioner so permits.⁸⁶ The Commissioner has the power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.⁸⁷ Formality is given to the proceedings by the requirement that all evidence has to be given under oath.⁸⁸ Any one of the twelve official languages may be used in the proceedings, and where necessary a competent interpreter may be called in by the Court.⁸⁹ Where a person wilfully insults, interrupts or otherwise misbehaves at a hearing, that person may be sentenced summarily by the Commissioner or upon summons to a fine or imprisonment.⁹⁰

⁸⁴ By contrast, the New Zealand private member's Small Claims Tribunals Bill of 1975, which was largely a replica of the New South Wales Consumer Claims Tribunals Act 1974, proposed an administrative tribunal independent of the judicial system.

⁸⁵ Small Claims Courts Act 1984, s 33(1).

⁸⁶ Section 26(1)-(3).

⁸⁷ Section 27(2).

⁸⁸ Section 28.

⁸⁹ Constitution of South Africa Act 1996, s 6; and Small Claims Courts Act 1984, s 5(2).

⁹⁰ Small Claims Courts Act 1984, s 48: the Commissioner's sentence must be reviewed by a Supreme Court Judge.

My overriding impression of the Small Claims Court in Durban was that of a common sense Court in which the Commissioner was the dominant figure.⁹¹ The plaintiffs, defendants and their witnesses were seated on the Court benches at 5.00 pm, and rose on the entry of the Commissioner who was announced by an usher and then took his seat at a raised dais. The most experienced of the Commissioners commenced proceedings by reading through the names of the parties to each of the seven cases set down before him. Those cases where neither party appeared were struck off the roll, then the Commissioner dealt with the cases where the defendant did not appear, and finally the Commissioner proceeded to the cases where both the plaintiff and defendant appeared.⁹² All the Commissioners observed were active in summarising the evidence of the parties, crystallising the essence of the disputes, interrogating parties and their witnesses, explaining procedures, and occasionally warning parties about inappropriate behaviour.⁹³ Most cases ended with the oral decision of the Commissioner, but some adjournments were allowed for further evidence, and in one case the Commissioner reserved his decision for a week to address the evidence and the law.

In New Zealand, subject to the Disputes Tribunals Act and to the Rules made under the Act, a Referee may adopt such procedure as he or she “thinks best suited to the ends of justice”, and “no proceedings of a Tribunal, or order or other document of a Tribunal shall be set aside or quashed for want of form”.⁹⁴ The Referee may “receive and take into account any relevant evidence or information, whether or not that evidence or information would normally be admissible in a Court of law”.⁹⁵ The Referee may, on his or her own initiative, seek and receive such other evidence and make such other investigations as he or she

91 There was some confusion amongst parties as to how to address the Commissioner, with epithets such as “sir”, “your worship” and “your honour” being used.

92 The Small Claims Courts Act 1984, s 35, contains helpful provisions regarding judgment by default. Where the defendant fails to appear, the Court “may, upon application by the plaintiff, grant judgment for the plaintiff in so far as he has proved the defendant’s liability, and the amount of the claim to the satisfaction of the Court”; and where the plaintiff fails to appear, “the Court may, on application by the defendant, dismiss the plaintiff’s claim, provided that the plaintiff may again institute an action for that claim with the consent of the Court”. For similar but less explicit provisions in the Disputes Tribunals Act, see s 42(1).

93 In one case the Commissioner adjourned for an inspection in loco, as the motor vehicle accident had taken place in the street below.

94 Sections 44 and 54.

95 Section 40(4).

thinks fit.⁹⁶ Thus, unlike traditional courts of law, the Tribunal has an investigatory or inquisitorial role.⁹⁷ The Act requires that all evidence and information received or ascertained on the Referee's initiative must be disclosed to every party, and every party must be given an opportunity to comment on it.⁹⁸ Evidence given does not have to be (and is not normally) on oath, although the Referee may at any stage of the proceedings require that evidence or any part of it be given on oath.⁹⁹ As Māori is an official language,¹⁰⁰ the right to an interpreter of Māori is automatic; and in the case of other languages the discretion rests with the Referee, who should appoint an interpreter whenever this is conducive to the achieving of natural justice. Where persons act in contempt of the Tribunal, the Referee may order the exclusion of such a party and may as a last resort report to the local Registrar with a view to contempt proceedings being instituted.¹⁰¹

The actual operation of the Tribunals in New Zealand depends very much on the attitudes and aptitudes of the Referee, who actively works with the parties to resolve the dispute in question without the aid of lawyers. Because Referees in New Zealand come from a wide variety of backgrounds, there is a range of styles ranging from the mediatory to the judicial. Generally, however, by comparison with the Small Claims Court, the Disputes Tribunal operates in a less formal or legal manner. The Referee usually sits at the same level as the parties (who are called applicant and respondent), parties are usually not sworn, and almost invariably court officials are not present. Because each hearing is reserved only for the particular parties, there is (in comparison with the South African system) a more intimate atmosphere, conducive to a more relaxed and frank interchange.

The balance between formality and informality in a small claims justice system is a delicate one. The traditional justice system offers protections that need to be balanced along with the need for accessibility to lay participants. The decision of the South African system, in line with certain jurisdictions overseas, is essentially for an extension downwards

⁹⁶ Section 40(2).

⁹⁷ R Montagu, for Secretary for Justice, to the Statutes Revision Committee, 29 March 1976, and *Jamieson Castles Gould v Lacey* (1986) 3 DCR 353, 355.

⁹⁸ Section 40(3).

⁹⁹ Section 40(1).

¹⁰⁰ Māori Language Act 1987, s 3: this Act lists the Disputes Tribunal as one of the Tribunals before which Māori may be spoken.

¹⁰¹ Disputes Tribunals Act 1988, s 56.

of the court system, subject to modifications.¹⁰² The option chosen by the New Zealand legislature is to create a body different from the traditional court, although the New Zealand option is not as radical as that chosen by some jurisdictions.¹⁰³ Subject to the quality and training of the Referees, it is submitted that the New Zealand system offers the potential to marry the competing demands of the small claims system in the most effective way.

VI. FUNCTIONS AND ORDERS

The broad objective of small claims systems is to settle small civil claims in an effective manner. Within this objective, legislatures in various jurisdictions have seen the potential for a range of dispute techniques and outcomes. The functions and orders of the presiding officer in a particular small claims system provide key indicators of the overall philosophy of the system in question.

1. Functions

The function of the Commissioner, as the presiding officer of a Court, is essentially an adjudicative or judicial one. The Commissioner is required to “administer justice ..., as the circumstances of a particular case may require, in accordance with the law and customs of the Republic of South Africa”.¹⁰⁴ After the hearing, he or she is empowered to grant judgment for the plaintiff or for the defendant, in respect of the claim or of the defence or counterclaim (respectively), “in so far as [that party] has proved it”.¹⁰⁵ If the Commissioner is of the opinion that the evidence does not enable him or her to give judgment for either party, he or she may grant “absolution from the instance”.¹⁰⁶ The Commissioner may also grant such judgment as to costs “as may be just”.¹⁰⁷

¹⁰² See Ramsay, “Small Claims Courts in Canada” in Whelan, *supra* note 49, at 26-27; Whelan, “Small Claims in England and Wales”, in Whelan, *ibid*, 100, 104; Greer, “Small Claims in Northern Ireland”, in Whelan, *ibid*, 138; Ervine, “Designing a New Scheme for Scotland” (1986) *New Law Journal* 615; and the ACT Small Claims Act 1974, the Northern Territory Small Claims Act 1974, the South Australian Local and District Criminal Courts Act 1926, Part VIIA, and the Tasmanian Magistrates Court (Small Claims Division) Act 1989.

¹⁰³ *Supra* note 83.

¹⁰⁴ Small Claims Courts Act 1984, s 9(6).

¹⁰⁵ Section 34(a)-(b).

¹⁰⁶ Section 34(c).

¹⁰⁷ Section 34(d).

My observation of the Small Claims Court clearly indicated that the hearings were conducted with a view to the matter being concluded by a decision of the Commissioner. The Commissioners gathered the evidence, and, where the evidence was not available, afforded the parties reasonable opportunity to obtain this. Certain Commissioners admirably foreshadowed the factors which weighed with them and gave the parties opportunity to comment on these factors prior to the final decision. At the same time, the Commissioners worked with the parties to achieve a fully-informed and shared understanding of the dispute and its outcome. The Commissioners were heard to summarise the stories and capture the feelings of the parties, clarify the issues, and reality test the claims made and positions adopted by the parties.¹⁰⁸

The New Zealand Referee has, in comparison with the South African Commissioner, a more complex set of functions to fulfil. The Referee is required to assess "whether, in all the circumstances, it is appropriate to assist the parties to negotiate an agreed settlement".¹⁰⁹ However, where it appears to the Referee that it is not appropriate to assist the parties to negotiate an agreed settlement, or the parties are unable to reach an agreed settlement approved by the Referee, or the Referee does not approve an agreed settlement reached by the parties, the Referee makes a decision. The Referee determines the dispute according to the substantial merits and justice of the case, and in doing so must have regard to the law but is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.¹¹⁰

The precise extent to which the mediatory and adjudicative functions of the Referee are called into play in any dispute depends on the training and background of the Referee, the attitude of the parties to reaching an agreement, and the nature and merits of the dispute.¹¹¹ Generally, Referees give the parties time to tell their stories in their own way, summarise the parties' presentations, draw out the issues, and where appropriate explore options for settlement. A minority of disputes end with an agreed settlement, and the remainder are decided in accordance

¹⁰⁸ In one dispute, where each side gave a different version of a conversation which was witnessed by a third party who was not at the hearing, the Commissioner, before adjourning the hearing for the third party to be summonsed, asked the parties to think about the fact that at the adjourned hearing one of them would lose face.

¹⁰⁹ Disputes Tribunals Act 1988, s 18(1)-(2).

¹¹⁰ Section 18(5)-(6).

¹¹¹ See Spiller, *supra* note 1, at 92-93, 98-99. Most Tribunal users "expected, and wanted, their disputes to be resolved through adjudication" (CRESA, *supra* note 12, 75).

with the evidence presented, the merits and justice as they emerge, and (to a greater or lesser degree) the relevant law.¹¹²

It has been observed that “in practice, the line blurs between adjudication and mediation”.¹¹³ This is particularly so where the person charged with assisting the parties to negotiate has the power to decide the matter. Nevertheless, it is submitted that it is useful for the New Zealand Act to signal that negotiation of agreed settlements is a desirable option in the small claims system. Should a similar provision be inserted in the South African Act, it would support and extend the kind of productive work that is already being done in the Small Claims Court.¹¹⁴ The success of the mediation process lies not simply in the number of agreements produced, but in levels of understanding reached, greater acceptance of the outcomes, and the empowering and educative effect on the parties. The hope is that the lessons gained by the lay litigants from their experiences in the small claims system will be of benefit to them and society as a whole.

2. *Types of Orders and Costs*

The usual order made by a Commissioner is the payment of money, and this is paid by the judgment debtor direct to the judgment creditor.¹¹⁵ The Commissioner may also order the rendering of an account or the delivery or transfer of any movable or immovable property, but apart from these two cases has no jurisdiction over claims for specific performance without an alternative claim for payment of damages.¹¹⁶ The Commissioner may not issue a decree of perpetual silence or issue an interdict (that is, require or restrain the doing of an act or course of conduct).¹¹⁷ It is usual for the Commissioner to award costs in favour of the successful party, but these

¹¹² Research in New Zealand and overseas has indicated that between one-third and one-quarter of disputes end with an agreed settlement (ibid, 98). A recent analysis of Tribunal outcomes revealed that “the vast majority of disputes that get to hearing resulted in referees making decisions” (less than a fifth of disputes concluded with an agreement) (CRESA, supra note 12, 60 and 75).

¹¹³ Folger and Baruch Bush, “Ideology, Orientations to Conflict, and Mediation Discourse” in Folger, J P and Jones, T S (eds) *New Directions in Mediation* (1994) 4.

¹¹⁴ Gough, supra note 3, at 374, argued that alternative methods of dispute resolution especially mediation need to be encouraged in the Small Claims Court.

¹¹⁵ Small Claims Courts Act 1984, s 38.

¹¹⁶ Section 16(d).

¹¹⁷ Section 16(e) & (g).

may only include court fees, fees for the issue of the summons, and fees and travelling expenses of the sheriff of the Court.¹¹⁸

In the New Zealand Tribunal, the most common order is for the payment of money by one party to another.¹¹⁹ The Referee may order one party to deliver specific property to another; order that a party is not liable for a claim founded on contract or quasi-contract; order that an agreement between the parties be varied or set aside where it is found to be harsh, unconscionable, or induced by fraud, misrepresentation or mistake; and/or vary or set aside any writing purporting to express the agreement between the parties which does not accord with their true agreement.¹²⁰ The Referee may also direct the performance of a work order, which is an order to make good a defect in any property, or a deficiency in the performance of services, by doing such work or attending to such matters as may be specified in the order.¹²¹ The reality that such work might not be performed prompts the provision in the Act that work orders must always be coupled with an alternative order to pay a sum of money.¹²² Outside of the work order, the Act does not empower the Referee to issue an injunction (the equivalent of an interdict). However, the Act's provisions as to the types of orders made by the Tribunal do not restrict the making by the Tribunal of any order that it is authorised to make by any other enactment.¹²³ As in many overseas jurisdictions, the general principle is that costs are not awarded against parties to proceedings before a Tribunal, and indeed costs are usually not a feature of Tribunal orders.¹²⁴

The limitations on the types of orders in the small claims systems of both jurisdictions indicate that the system is essentially designed for one-off factual situations, and that disputes of a more legally complex or ongoing nature (such as status or family matters) better belong in the court system. In the normal course of events, both systems appear to work well, although the slightly greater flexibility of the New Zealand system,

¹¹⁸ Section 37.

¹¹⁹ Disputes Tribunals Act 1988, s 19(1)(a).

¹²⁰ Section 19(1)(b)-(f).

¹²¹ Sections 2 and 19(1)(d).

¹²² Section 19(1) and (3).

¹²³ Section 19(8).

¹²⁴ Section 43(1). See Clark, "Small Claims Courts and Tribunals in Australia: Development and Emerging Issues" (1991) 10 *University of Tasmania Law Review* 201, 210, the South Australian Local and District Criminal Courts Act, 1926-75, s 152d, the Western Australian Small Claims Tribunals Act 1974, s 35, and Ramsay, "Small Claims Courts in Canada" in Whelan, *supra* note 49, at 27.

including orders for non-liability, is an advantage. The restriction on costs in the New Zealand system is in line with the view that the Tribunal is meant to be as accessible as possible to lay people, to the extent that they should be able to approach the Tribunal without incurring major legal and other expenses.¹²⁵ However it is difficult to see the flaw in the South African approach, that costs directly related to the proceedings are normally awarded to a party in whose favour the merits of the case are proved to lie.

3. Conditional Orders and Enforcement

In South Africa, where the Commissioner grants judgment for the payment of a sum of money, he or she must enquire from the judgment debtor whether the judgment can be complied with without delay. If the judgment debtor indicates that this cannot be done, the Commissioner may in chambers conduct an inquiry into the financial position of that person and the ability to pay the judgment debt and costs. After such an inquiry the Commissioner may order the judgment debtor to pay the judgment debt and costs in specified instalments, or suspend the order either wholly or in part on such conditions as to security or otherwise.¹²⁶ Orders for payment of money must be paid within 10 days, unless otherwise ordered.¹²⁷ Such orders must be paid by the judgment debtor direct to the judgment creditor.¹²⁸ Failing payment the judgment creditor may proceed as if the judgment was granted in the Magistrate's Court.¹²⁹

In New Zealand, any order made by the Referee may be unconditional, or may be subject to such conditions (for example, as to the time for or mode of compliance) as the Referee thinks fit to impose.¹³⁰ The general practice is that orders should be complied with within 28 days of the order, as this is the period within which parties may apply for a rehearing or may appeal.¹³¹ However, where, as commonly happens, parties who are liable are unable to satisfy an order within 28 days, and the successful party is prepared to agree to a longer period or to instalment payments, the

¹²⁵ Costs are also seen to add to formality and technicality, and encourage the participation of lawyers. For the exceptions to this principle, see the Disputes Tribunals Act 1988, s 43(2)-(4).

¹²⁶ Small Claims Courts Act 1984, s 39.

¹²⁷ Section 41(1).

¹²⁸ Section 38.

¹²⁹ Section 41(1).

¹³⁰ Disputes Tribunals Act 1988, s 19(2).

¹³¹ Spiller, *supra* note 1, at 33.

Referee may incorporate such conditions in the order.¹³² There is no provision regarding where payment of orders is to be made, with the result that some Referees always require payment to be made into court whereas others normally expect that payments be made direct from one party to another.¹³³ Orders or approved settlements requiring a person to pay money or deliver specific property to another are deemed to be orders of the District Court of which the Tribunal is a division, and are enforced accordingly.¹³⁴

The South African provision requiring Commissioners to enquire as to the means of judgment debtors to pay money orders is a helpful and realistic one. This is in view of the vagaries of the enforcement process and the greater likelihood that, if there is an agreement as to a realistic time-frame, payment will actually be made without the parties having to take enforcement measures.¹³⁵ The South African provision requiring direct payment to the judgment creditor produces a quicker, easier and simpler method of payment, which saves court staff time, and which gives the parties more control of the process. However, this provision could be subject to the overriding discretion of the judicial officer, particularly in cases where the creditor requests payment into Court so as to avoid any further disputes about whether or not the money has been paid and to minimise further contact between hostile parties. The automatic final sanction of the Court process which buttresses both the South African and New Zealand systems is important for the effectiveness and credibility of the small claims process in both countries.

VII. FURTHER PROCEEDINGS

One of the objectives of the small claims system is to provide swift and effective justice. Thus, both the South African and the New Zealand systems provide that orders of the presiding officer are final.¹³⁶ However, both systems recognise that there may be situations in which the proceedings of the system need to be reviewed either by the presiding

¹³² Department of Justice, Minute Sheet, 5 November 1993.

¹³³ A survey of Tribunal outcomes for a selected period in 1997 revealed that nearly two-thirds of orders were paid directly to the parties (CRESA, *supra* note 12, 60).

¹³⁴ Disputes Tribunals Act 1988, s 45(1) and 47(1).

¹³⁵ The 1994 New Zealand Ministry of Consumer Affairs Review strongly recommended that Referees ask parties about their means at the end of the hearing and order instalment payments where appropriate (*Review of the Operation of Disputes Tribunals from a Consumer Perspective* (Wellington, Ministry of Consumer Affairs, 1994) 111).

¹³⁶ Small Claims Courts Act 1984, s 45, and Disputes Tribunals Act 1988, s 23.

officer or by a higher Court, with a view to preventing miscarriages of justice.

1. Rehearings

The South African Commissioner may, upon application by any person affected thereby, rescind or vary any judgment granted in the Court. First, this may occur where judgment was granted in the absence of the person against whom that judgment was granted, provided the application is made within six weeks after the applicant first had knowledge of the judgment. Secondly, this may occur where the judgment was void, obtained by fraud, or as a result of a mistake common to the parties, provided the application is made not later than one year after the applicant first had knowledge of any errors.¹³⁷

The New Zealand Referee may, upon application within 28 days of an order or settlement, order the rehearing of a claim, to be had upon such terms as he or she thinks fit.¹³⁸ In the case of a party who was absent at the hearing, he or she may apply on the ground that there was sufficient cause for the failure to present his or her case.¹³⁹ In the case of an approved settlement, a rehearing may be ordered only where after the hearing a party to the settlement discovers facts directly relevant to the dispute that could not, with reasonable diligence, have been obtained before the hearing and that, if known at the time, would have had a bearing on whether that party agreed to the settlement.¹⁴⁰

Both systems rightly vest a considerable measure of discretion in the hands of the presiding officer as to whether the original outcome should be set aside and a rehearing granted. Although rehearings can be used as a stalling tactic by those disgruntled with the outcome of a hearing, they are an important safeguard against potentially unfair results, particularly where parties have through no fault of their own been unable to attend the initial hearing.

¹³⁷ Small Claims Courts Act 1984, s 36(a)-(b). The Commissioner may also correct patent errors in any judgment (s 36(c)).

¹³⁸ Disputes Tribunals Act 1988, s'49(1).

¹³⁹ Section 42(2).

¹⁴⁰ Section 49(2)(c).

2. Appeal and Review

In South Africa, no appeal lies from a judgment or order of the Small Claims Court.¹⁴¹ However, proceedings may be taken on review to the Supreme Court on the grounds of absence of jurisdiction, interest in the cause, bias, malice or corruption on the part of the Commissioner, and gross irregularity with regard to the proceedings.¹⁴²

In New Zealand, a party to the Tribunal proceedings may without expense appeal on the grounds that the proceedings were conducted by the Referee in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.¹⁴³ The right of appeal was provided to allay suspicions of the informality of the Tribunal's procedures and "any fears that the summary trial of disputes could lead to the arbitrary and capricious exercise of the wide discretionary powers that must necessarily be imposed on a Referee".¹⁴⁴ A supplementary procedure for disputants dissatisfied with proceedings in the Tribunal is to apply to the High Court for review of the proceedings under the Judicature Amendment Act 1972. Like appeal under the Disputes Tribunals Act, judicial review is concerned not with the merits of the dispute but with the process by which the decision was reached.¹⁴⁵ The right to apply for judicial review exists in addition to the right of appeal, unless the exercise of the appeal has removed the breach of natural justice.¹⁴⁶ Judicial review also lies where the Tribunal has acted outside its jurisdiction.¹⁴⁷

The number of reviews and (in the case of New Zealand) appeals, in proportion to the number of claims heard, is small, and the great majority are unsuccessful.¹⁴⁸ However, like the rare appeals from the New Zealand Court of Appeal to the Privy Council, the right of appeal or review has a significance beyond the cases in which it is exercised. This right

¹⁴¹ Small Claims Courts Act 1984, s 45.

¹⁴² Section 46.

¹⁴³ Disputes Tribunals Act 1988, s 50(1) (this also applies to an inquiry conducted by an Investigator appointed by the Referee).

¹⁴⁴ R Montagu to Chief Parliamentary Counsel, "Small Claims Tribunals Bill: Commentary", 8 May 1975, and (1975) 401 New Zealand Parliamentary Debates 4828.

¹⁴⁵ *Bradley v Taylor*, unreported, High Court Christchurch, CP 240/93, 18 April 1994.

¹⁴⁶ *Bellis v Green* (1991) 5 PRNZ 21, 26.

¹⁴⁷ *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453.

¹⁴⁸ Interview, I Gough, 15 July 1997 and Spiller, *supra* note 1, at 137. Similarly, in Australia, appellate courts have seldom allowed appeals (Clark, *supra* note 124, at 208).

encourages a sense of accountability, particularly about procedures and the reasons for decisions. The New Zealand system offers the advantage of an inexpensive right of appeal for litigants who allege procedural unfairness. It is especially appropriate that the New Zealand system should provide this accessible and inexpensive appeal procedure to supplement the right of review to the High Court. This is in view of the fact that the New Zealand Referees are not normally legally trained, and exercise a higher level of jurisdiction than that exercised by the South African Commissioners.

VIII. CONCLUSION

Comparison of the South African Small Claims Court and the New Zealand Disputes Tribunal has revealed a number of common characteristics. At the same time, each system has highlighted strengths and weaknesses not shared by the other.

Improvements that could be made to the South African system in the light of the New Zealand experience are:

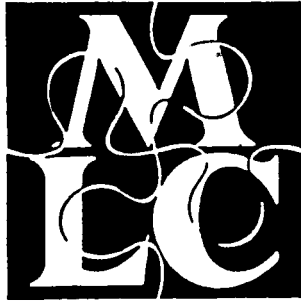
- * payment and training of presiding officers;
- * openness of the forum to all parties including corporate plaintiffs;
- * provision for supporters;
- * private hearings;
- * hearings normally heard in the applicant's forum;
- * provision for day hearings;
- * provision for the presiding officer to assist the parties to negotiate agreed settlements;
- * provision for orders which declare non-liability to pay;
- * provision for appeals to the next level in the court hierarchy on the ground of procedural unfairness.

Improvements that could be made to the New Zealand system in the light of the South African experience are:

- * legal qualifications and legal experience to have greater weight in the appointment of the presiding officer;
- * a cautious approach to the financial limits of jurisdiction, which takes into account the system as a whole, yet which allows for incremental change without the need for legislative amendment;
- * provision for recovery of debts subject to controls on the number of actions brought at any one time;

- * the statutory requirement of a preceding letter of demand from the plaintiff and provision for the defendant's response to be lodged prior to the hearing;
- * access to a legal assistant assigned to the local Court;
- * provision for evening sittings;
- * provision for costs directly related to the proceedings to be recoverable by the successful party;
- * statutory provision for the presiding officer to enquire into the judgment debtor's ability to pay;
- * statutory provision for direct payment to the judgment creditor.

It is my submission that the South African and New Zealand systems stand to gain from the insights and experiences of each other. Improvement of the two systems will further enhance the valuable role which they play in providing access to justice for those with small civil claims.



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THE MCCAW LEWIS CHAPMAN ADVOCACY CONTEST

LEGISLATED COURT AUTHORITY TO REFER TO MEDIATION OR ARBITRATION?

BY NICOLA J BAKER*

1. Introduction

The High Court Review Committee recently prepared a proposal to extend the use of alternative dispute resolution (ADR) in civil cases in New Zealand.¹ The proposal was that the Court should have legislated authority to enable judges to refer cases to mediation or arbitration, probably shortly after a defence had been filed. This initiative followed similar overseas approaches to ADR in England, Australia and the United States of America.² The context of the proposal is stated as being the need to establish effective case management in all courts, and the objective is “to provide more timely, less legalistic, cost-effective dispute resolution”.³ However, the overseas experience of court referral to ADR does not clearly indicate that these objectives of cost savings, efficiency and justice are met by the implementation of the system. Accordingly, it is submitted that compulsory referral to ADR should not become part of the legal system in New Zealand, but that it should remain a voluntary option for the parties involved.

2. ADR Overseas

The United States of America has had lengthy experience of compulsory referral to ADR. In the 1980s, referral became part of the compulsory intrajudicial processes designed to improve the legal system from within. However, with that element of compulsion, the nature of ADR changed, losing some of its original advantages.⁴

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¹ Courts Consultative Committee, *Court Referral to Alternative Dispute Resolution* (1997) 6.

² *Ibid.*, 17-20.

³ *Ibid.*, 10.

⁴ Katz, “Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin” (1993) 1 JDR 1: “With the growth of ADR has come a strong element of compulsion and coercion. The voluntary nature of alternatives has been eroded, and individuals and institutions find themselves

For example, mediation is usually perceived as a faster, cheaper and more “humanistic” way of resolving disputes. The United States experience was that, when the courts and lawyers became involved, mediation could lose that humanistic face: the advancement of settlement and agreement became the overriding goal; and mediators became pressured to achieve settlements and conform to legal standards rather than being non-directive and allowing more party self-determination.⁵ It has been observed that “the higher the volume, the more routinized and de-humanized the process is likely to become”.⁶ As mediation becomes increasingly directive, it is no longer an alternative to decision-making by judges, and can be more like a cheaper substitute.

Even if ADR processes do remain relatively informal, the United Kingdom experience is that parties can be confused by the disjunction between a cosy, user-friendly, informal procedure on the one hand and the formality of the decision itself.⁷ To confuse the matter further, while the process is apparently informal, the outcomes it produces are confined to strictly legal criteria. In addition, sometimes the lack of legal representation is a serious disadvantage for weaker parties, even if the process is an attempt to move away from formality.

3. *Expense and Efficiency*

There is no evidence that mandatory ADR significantly reduces the expense and time involved in litigation. Procedures such as compulsory referral to ADR would divert large numbers of cases from the courts. However, given that 90 per cent of cases in New Zealand settle before a hearing,⁸ surely the remaining 10 per cent are those in which any kind of settlement is unlikely to be reached? Requiring additional procedures such as mediation and arbitration in large numbers of cases adds a new

mandated or pressured into participating in what were once considered purely optional activities”.

⁵ Alfani, Barkai, Bush, Hermann, Hyman, Kovach, Liebman, Press, and Riskin, “What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions” (1994) 9 (2) OSJDR 307, 309.

⁶ Ibid, 311.

⁷ Lloyd-Bostock, “Alternative Dispute Resolution and Civil Justice Reform: Is ADR being used to Paper over Cracks?” (1996) 11 (2) OSJDR 397, 402.

⁸ Courts Consultative Committee, *supra* note 1, at 31.

layer of administrative expense for courts and another layer of transaction costs for litigants.⁹

Compulsory referral to ADR may even add to the case-load of the courts.¹⁰ As more cases are settled and fewer judgments are handed down, the information available to prospective litigants about the probable resolution of their cases is reduced. Due to the resulting dearth of information, some litigants are likely to file a claim which they would not have filed if published adverse precedents existed.¹¹ Studies also show mixed results as to improved efficiency in the courts, as some cases are delayed by the ADR process.¹²

There are other ways to improve efficiency in terms of case-load and time management. Currently in the United States there is more emphasis on judicial management techniques such as discovery control and assertive use of deadlines to achieve efficiency in litigation.¹³ The use of new technologies can assist greatly. For example, the courts can look at increasing the use of computers, CD-Rom disks for discovery, and videoconferencing.

4. Achieving Justice

An important question is whether compulsory referral to ADR will achieve quality of justice. Compulsory referral undermines the principle of every individual's right to a fair trial.¹⁴ It has been observed that "speedy injustice is not an improvement over slow justice".¹⁵

ADR assumes a rough equality between the contending parties.¹⁶ However, ADR may reinforce existing power imbalances.¹⁷ For example, serious power imbalances may be created as private individuals are forced

⁹ Katz, *supra* note 4, at 46.

¹⁰ Fredlund, "Just, Speedy, and Inexpensive or Just Speedy and Inexpensive? Mandatory Alternative Dispute Resolution in the Western District of Missouri" [1992] 1 JDR 133, 146.

¹¹ *Ibid*, 146.

¹² Katz, *supra* note 4, at 47.

¹³ *Ibid*, 52.

¹⁴ *Ibid*.

¹⁵ McPheeters, "Leading Horses to Water: May courts which have the power to order attendance at mediation also require good faith negotiation" (1992) (2) JDR, 377, 392.

¹⁶ Fiss, "Against Settlement" (1984) 93 Yale LJ 1073, 1076.

¹⁷ Fredlund, *supra* note 10, at 154.

to negotiate with corporations that have well practised negotiation tactics, strategies, and access to expert negotiators. A poorer party may be less able to access and analyse information and therefore may be disadvantaged in the bargaining process.¹⁸ Poorer parties are also generally more susceptible to an early settlement which may be significantly less than that to which they are entitled.¹⁹

With compulsory referral to ADR there are fewer opportunities for judicial rule-making, “in which a public figure explicates and actualizes public values as expressed in the law subject to appellate review”.²⁰ Case law develops and evolves through judgments, and a trial is the beginning of that process. The settlement of a case deprives a court of the occasion, and perhaps even the ability, to render an interpretation.²¹ It also runs a risk of disservice to society as a whole as society has an interest in knowing the resolution of disputes.²²

Is justice being sacrificed for the sake of cost efficiencies?²³ It is important to look at the diversity of interests behind the support for ADR and whether it is driven by the legal profession’s self-interest and instinct for self-preservation, rather than simply the efficient delivery of justice.²⁴ What happens to victims’ rights in ADR?²⁵ Some parties may be harmed and receive less justice the more ADR becomes incorporated in the judicial system. Another issue is that if ADR is used to cut short discovery, it can cut short opportunities for developing evidence.²⁶

There are also constitutional issues concerning the separation of powers. When ADR procedures vest decision-making powers in non-judges, questions arise regarding the separation of powers. Judicial power usually rests with judges. However, with compulsory referral to ADR, will that

18 Fiss, *supra* note 16, at 1076.

19 Dawson, “Non-Consensual Alternative Dispute Resolution: Pros and Cons” (1993) 4(3) ADRJ 173, 176.

20 Katz, *supra* note 4, at 50.

21 Fiss, *supra* note 16, at 1084.

22 Fredlund, *supra* note 10, at 153.

23 Lloyd-Bostock, *supra* note 7, at 401: “Is it not likely that goals such as cost savings and reducing the caseload of the court will conflict with other goals, not least of which is justice?”

24 Dawson, *supra* note 19, at 174.

25 Lloyd-Bostock, *supra* note 7, at 401: “Mediation can place very strong psychological pressure on claimants to settle for less than the amount a court would award. In what sense is this a “good thing”?”

26 Katz, *supra* note 4, at 5.

power also be vested in arbitrators who may be practising lawyers or even non-lawyers such as medical experts?

5. Degree of Participation and Settlement Pressures

An old adage is: "you can lead a horse to water, but you can't make it drink". The parallel here is that one may force parties to attend mediation but they cannot be forced to settle. There are several difficulties with the compulsion aspect of referring parties to ADR. Are parties compelled actually to attend mediation and arbitration,²⁷ particularly if they object?²⁸ What level of participation is necessary?²⁹

One must also ask how much pressure a judge can put on the parties to reach a settlement:

If the decision is left to the reasoned notions of the parties, then deciding to mediate a case can overcome any number of perceived problems in the legal system. But when judges alone become such a large part of the equation that the wishes of the parties are rendered meaningless, the legal system should tremble.³⁰

If judges cannot compel participation, let alone the reaching of a settlement,³¹ then what is the purpose of allowing a judge to order attendance at mediation or negotiation? There is little gain in efficiency if lawyers and their clients do not obey the court orders in good faith. Some

²⁷ For example, a company would have to send a representative with sufficient authority to make a settlement without consulting the Chief Executive Officer, because of the need for speed underlying the system. A company may send a lawyer as a representative anyway, bringing more formality back into the process.

²⁸ In the case of *Decker v Lindsay* 824 SW 2d 247 (Tex Ct App 1992) the district judge ordered the parties to mediate. The plaintiffs objected to the order and were overruled. The plaintiffs then went to the Texas Court of Appeal, reiterating their objections to the mediation order. The Court of Appeal held (at 252) that, when a party clearly indicates its wish not to negotiate a settlement of a dispute but to proceed to trial, a referral to mediation cannot require good faith negotiation.

²⁹ In *Graham v Baker* 447 NW 2d 397 (Iowa 1989), the Iowa Supreme Court held that mere attendance equated to participation in mediation, even though the attorney's position was not negotiable and his client refused to settle.

³⁰ McPheeters, *supra* note 15, at 388: "any entry by a judge into settlement matters can appear to be coercive". See eg *G Heilman Brewing Co v Joseph Oat Corp* 871 F 2d 648.

³¹ McPheeters, *ibid*, 391: "Courts readily admit that referral to mediation carries no guarantee of settlement. All that they can require is that parties make an effort to reach agreement".

parties may just go through the motions instead of participating in a meaningful manner.³² Therefore referral simply adds one superfluous level of activity to an already overcrowded system.³³ It is inefficient to force parties to participate in a costly, time-consuming process that is futile.³⁴

Compulsory ADR can evolve rapidly into intense pressure to settle, or at least negotiate and alter settlement tactics. This is highly questionable in terms of judicial ethics and basic litigant rights.³⁵ In the United States there is inconsistency in case law over the issue of compelled negotiations. What happens if the party's position is not to settle? In some circumstances judges have penalised parties for failure to settle.³⁶ However, in another case, it was held that a mediator to whom a case is referred "may not compel the parties to mediate (negotiate) or coerce the parties to enter into a settlement agreement".³⁷ These issues can give rise to further satellite litigation on ADR procedures themselves.

6. Conclusion

Compulsory referral to ADR does not necessarily improve efficiency in terms of cost and time in the judicial system. There are serious questions about the quality of justice achieved in compulsory referral. There is overseas evidence of increased coercion and undue pressure to settle, which goes against the very philosophy of ADR itself. There are also issues concerning the level of participation and co-operation by the parties involved. ADR should be an option available to parties, but it should remain voluntary.

³² Katz, *supra* note 4, at 37-38. In one case "the defendant sent a representative to arbitration who called no witnesses and stated to the arbitrator that she did not care what he did, since the client would refuse to pay any damages awarded".

³³ McPheeters, *supra* note 15, at 390.

³⁴ Winston, "Participation Standards in Mandatory Mediation Statutes: "You can lead a horse to water..." (1996) 11(1) OSJDR 187, 196.

³⁵ Katz, *supra* note 4, at 41: "Compulsory ADR, therefore, raises important questions as to the authority of judges to pressure parties to settle and therefore their authority to compel good faith settlement negotiations".

³⁶ *Ibid*, 45: "The US Supreme Court has indicated that when a defendant offers a settlement that includes all relief a plaintiff could potentially win at trial, the court may effectively force settlement by entering an order in accordance with the defendant's offer".

³⁷ *Ibid*.

THE SPORT OF BOXING: FREEDOM VERSUS SOCIAL CONSTRAINT

BY DAVID GENDALL*

I. INTRODUCTION

One of the fundamental issues in law is the tension between freedom and social constraint. This has become prominent recently in the area of sport where the law has faced issues of whether or not to interfere with the freedoms previously enjoyed by individual sports and their participants.¹

In this context, two particular dilemmas have emerged recently in sport. The first relates to the activities loosely regarded as “sport” which are seen as so unacceptable to society as a whole that they should be labelled “illegal” and banned. In this regard, activities such as cage-fighting, fox-hunting, and competitions involving animal fighting have been under recent spotlight.² The second dilemma relates to the degree to which certain extreme actions within individual legal sports should also be proscribed.

This article will consider these issues by reflecting on the concept of sport and the growing public demands for social control and legal intervention. The article will then focus on these issues in the context of the sport of boxing, which recently has captured significant world and media attention.³ In conclusion, the article will reflect on the patterns that have emerged and the lessons for the future.

* Senior Lecturer in Law, University of Waikato.

1 As to the broader issue of the need for certain controls in a civilised society to preserve people’s general freedoms (including freedom to participate in leisure) see Clarke, J and Critcher, C *The Devil Makes Work - Leisure in Capitalist Britain* (1985).

2 *The Dominion*, Wellington, 28 August 1997 (cage fighting), *Waikato Times*, 5 August 1997 (fox-hunting), and *Sunday Star-Times*, 10 August 1997 (animal fighting competitions).

3 The June 1997 ear-biting incident in the aborted Holyfield-Tyson heavyweight title fight has again drawn world attention to the “discipline” of boxing.

II. SPORT AND THE RATIONALE FOR INTERVENTION

The activity of sport as we know it is generally regarded as a physical confrontation played out within a framework of defined rules.⁴ In the past, sport developed as a recreation or pastime, a way of either breaking free from the everyday activities of life, or training citizens in the values of that community.⁵ Historically, sports generally involved either competitions of bodily skill between human beings, or persecution and often the ultimate slaughter of animals.⁶

The growth of sport was accompanied by various sets of rules which were game-specific in nature and, in New Zealand, emphasised principles of non-intervention and the traditional British notions of fair play.⁷ Today, however, this has changed noticeably. We have witnessed a growing movement towards a much-increased intervention in the daily lives of the citizen, which has affected sport.⁸ Further, the profound transformation in the concept of sport itself, since the nineteenth century in particular, has been accompanied by steadily increasing intervention by the law and the courts into matters involving sport.⁹

⁴ See Barnes, J *Sports and the Law in Canada* (1996) 1-4. Definitions of "sport" include a wide range of games, competitions and undertakings. The sports of the ancients included chariot racing, gladiatorial contests, field sports, marathon running and wrestling. The middle ages saw jousting, hunting, fencing, archery, golf, bowls, horse-racing, animal-baiting and duelling amongst the range of pastimes featuring regularly as "sport". Subsequently, sports such as rugby, soccer, cricket, tennis, netball, cycling and motor-racing developed, and more recent additions are baseball, gridiron, snowboarding, water-skiing, triathlon, and touch rugby. Throughout, wagering (betting) on sporting contests was an integral part of many of these activities.

⁵ See Healey, D *Sport and the Law* (1996) 12-15.

⁶ For example, cock fighting, bull baiting and bear baiting, all featuring growing degrees of gambling as an incidental part of the activity and shooting, foxhunting and fishing. See Cashmore, E *Making Sense of Sport* (1990) 41-53.

⁷ See Grayston, E *Sport and the Law* (1987) 12-18.

⁸ Recently, we have witnessed too the growing movement in society generally to develop controls in areas such as domestic violence, pornography, child abuse and drug abuse. Some would say that we should, however, contrast the economic positions adopted by recent New Zealand Governments with their claimed hands-off, laissez-faire approach and privatisation policies.

⁹ The explosion in commercialisation and commodification of sport - the new entertainment spectacle - dominated by media and television interests, professionalism and employment contracts, merchandising, sponsorship, ownership

There are two fundamental bases supporting the argument that the law should not stop at the boundary of the sports court or field. The first involves the notion of universality. Just as the community and individual victims are entitled to protection from abuse which occurs outside the sporting arena, such as common assaults, road traffic infringements¹⁰ and business fraud, so too should remedies lie for breaches of the law of the land which happen within the context of individual sports.

The second foundation for this interventionist argument involves the notion of community morality and is summarised in the words of Lord Devlin:

There is only one explanation of what has hitherto been accepted as the basis of criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.¹¹

This idea of community morality does not exclude the notions of the classical liberal theorists¹² that individual freedom and non-intervention by the State are desirable.¹³ Rather, the focus for a proper justification of intervention by the law in these areas is aptly argued by J S Mill:

the only purpose for which power can be rightfully exercised over a member of a civilised community against his will is to prevent harm to others.¹⁴

of teams and sporting leagues are just a few of the many matters affecting sport and lawyers in the twentieth century.

¹⁰ This is exemplified by the change from the original road traffic rules of the 1890s requiring a person marching on foot with a red flag to precede all motorised vehicles, to current road safety rules requiring compulsory disqualification for drunk or drugged drivers. The rationale for today's drink-driving disqualification laws surely reflects an abhorrence of such universally acknowledged anti-social behaviour and a need for it to be severely penalised. Some might question whether anti-social sporting offenders should be judged by similar principles.

¹¹ Devlin, Patrick Lord *The Enforcement of Morals* (1965) 6.

¹² Such as Locke, Hobbes, Mill and Smith.

¹³ These classical ideals of non-intervention in people's lives are seen in areas as diverse as free trade, opposition to censorship and pornography laws, freedom of contract and the notion that "an Englishman's home is his castle".

¹⁴ Mill, in "Essay on Liberty" quoted in Williams, "Consent and Public Policy" [1962] Crim LR 74, 76.

Against the above background I shall now turn to the sport of boxing, and sketch the history of its interaction with the law and the modern imperatives for increased legal and social control.

III. HISTORY OF BOXING AND THE LAW

In early English law and society, boxing matches were seen to serve a useful purpose described once as:

in reality no more than a friendly exertion of strength and dexterity. They are manly diversions, they tend to give strength, skill and activity, and make fit people for defence.¹⁵

An early case involving the issue of what constituted a lawful boxing contest was *R v Young*.¹⁶ Here, one of the participants in a sparring bout with gloves conducted in a private room died from injuries sustained after falling against a post. His opponent was charged with manslaughter. Medical evidence was produced which claimed that sparring with gloves was not inherently dangerous. The judge accepted this and his further directions to the jury emphasised that the bout had occurred in private and there had been no breach of the peace. Glanville Williams has succinctly described such incidents and the rationale for the law to intervene at the time in this way:

the death of one of the combatants in the ring from exhaustion or injury was very common, and serious riots not infrequently took place when the onlookers, to save their bets, cut the ropes and forcibly put an end to the fight. These riots were of more concern to the magistrates than the injury received by the combatants, because they carried a greater threat of extensive civil disorder.¹⁷

In this case it was accepted that, in relation to the participants themselves, a display of the skill of sparring was not illegal.

However, the law came to draw a distinction between consensual bouts of fighting in private and prize-fighting. In *R v Orton*,¹⁸ the participants wore gloves but still severely punished each other. The jury found that this was a prize-fight rather than a mere exhibition of sparring and it was therefore illegal. Furthermore, knuckle fights, which often proved to be extremely brutal, became a target of the courts in the nineteenth century.

¹⁵ Foster, M *Crown Law* (1762) 260.

¹⁶ (1866) 10 Cox 371.

¹⁷ Williams, *supra* note 14, at 79.

¹⁸ (1878) 14 Cox CC 226.

This was so even though the bare knuckle protagonists consented fully to the contest.

In what has been seen as the leading case on the topic of unlawful fights, *R v Coney*,¹⁹ the court held that a knuckle fight in public before spectators who bet on the outcome was illegal as a prize-fight. Here, the consent of the protagonists was seen as no answer to a charge of assault, and spectators and others aiding and abetting the fight could also be guilty of assault.²⁰ Lord Coleridge CJ said:

I conceive it to be established, beyond the power of any argument however ingenious to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace.²¹

Stephen J said:

the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many grounds.²²

And Hawkins J said:

Nothing can be clearer in my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage.²³

One of the major implications from this decision is the notion that society has the right to intervene in dangerous contests in order to protect freely

¹⁹ (1882) 8 QBD 534.

²⁰ However, the court in this case held that clear evidence of aiding and abetting the fight was necessary to justify a charge of assault - mere presence at the contest was not enough.

²¹ At 567.

²² At 549.

²³ At 554.

consenting pugilists from the physical harm which is a natural consequence of their own actions.²⁴

In 1890, however, the supporters of boxing fought back. The Marquis of Queensbury rules were formulated with the general intention of improving safety standards in boxing so that the activity could be accepted as legal. Bare knuckle boxing was replaced but its opponents would say that nevertheless the essence and spectacle of pugilism was preserved.

The anti-boxing lobby of the day was not satisfied and, in 1901, in *R v Roberts*,²⁵ the view that boxing was now a new and safe form of contest was challenged. This challenge argued that, despite the rhetoric, little had really changed with virtually all the evils of the prize-fight still retained. The judges, however, rejected this argument. Not surprisingly, they held that boxing under the new Marquis of Queensbury rules was not prize-fighting but was merely an amicable demonstration of the skill of sparring and was accordingly legal. It was this approach which provided the somewhat unsteady foundation for the world of boxing in the twentieth century.

IV. CURRENT DEVELOPMENTS IN BOXING

1. *Nature of Modern Boxing*

Boxing as a pastime and an industry continues today. Professional boxing, particularly in North America, is big business:

Added to the fans' emotional investment is financial investment in boxing. Millions of dollars are bet on big matches. Fans pay hefty sums to watch the matches on cable television at home or on closed-circuit television in theatres. Like any other multi-million dollar product on the market, boxing is heavily hyped by promoters and by the media.²⁶

Most boxers are said to be:

²⁴ *R v Coney* was regarded as authoritative in *R v Donovan* [1934] 2 KB 498, where the appellant in a private setting beat a 17-year-old girl for purposes of sexual gratification, it was said with her consent See below p 94.

²⁵ *The Sporting Life*, 20 June 1901.

²⁶ Messner, Michael A and Sabo, Donald F *Sex, Violence and Power in Sports* (1994) 77.

from poor, working-class backgrounds. Many are members of minority groups for whom boxing may seem to be one of the few ways out of the misery they were born into ... an impoverished society (such as in many Latin American nations) or an economically depressed city (such as Detroit) is fertile ground for a flourishing boxing industry.²⁷

Current criticisms of boxing are commonly expressed by commentators in a forceful way:

However ancient, and lauded with the rhetoric of noble action, the 'manly art of self defence' regularly produces a vegetable-like state in its hero-victims. There is a dangerous dynamic at work here. Young men, usually from minority and disadvantaged backgrounds, become lured into a gradual process of physical self-sacrifice, the motive being the lure of celebrity-status, the big purse, and the adulation of a small but vocal public.²⁸

And, in a recent issue of *The Times*, London correspondent Simon Barnes, in commenting on the June 29, 1997 Holyfield - Tyson fight, said:

Only boxing makes a virtue of violence ... [and] ... there is no moral to be found here for the sport of boxing. That is because boxing does not have such things.²⁹

Modern professional boxing and its participants are a world away from what has been described in the early cases as amicable demonstrations of the skill of sparring. The pressures from promoters, spectators the media and others involved in boxing today are to see action, excitement and overwhelming knock-outs. The role of the boxing referee as a result has become increasingly difficult. Referees are officially required to ensure that a fight ends before someone is seriously injured, whilst at the same time they must meet the demands of the fans to see that the contest lasts the scheduled number of rounds.

In recent years there has been significant and growing medical and scientific opinion which has claimed to expose the dangers of boxing.³⁰

²⁷ Ibid, 77-78.

²⁸ Ritchie, Jane and James *Violence in New Zealand* (1993) 100-101.

²⁹ *The Times* (London) 2 July 1997.

³⁰ In Australia on 5 June 1986 the National Health and Medical Research Council endorsed a report that overwhelming medical evidence existed that boxing could cause brain damage, and recommended that boxing be banned in that country (Kelly, G M *Sport and the Law - An Australian Perspective* (1987) 261). See also

The sight of former world heavyweight boxing champion Muhammad Ali staggering and slurring his way through life in the 1990s presents a compelling picture of the likelihood that systematic and repeated blows to the head of any boxer will often cause brain damage.³¹

2. Recent Decisions

In spite of the above developments, boxing has survived and the law has continued to adopt a permissive approach.

In the 1976 Australian decision in *Pallante v Stadiums Pty Ltd (No 1)*,³² the issue as to whether a boxing contest conducted under official Australian rules was a prize-fight and therefore illegal had to be determined. The plaintiff here had received injuries in the contest which affected his eyesight and he brought an action for damages against the promoter, the organisers, the referee and his trainer. For the defence it was argued that the contest was a prize-fight and, since all prize-fights were illegal, the plaintiff could not sustain these proceedings as they would be based upon an unlawful action. McInerney J took the approach that the correct test as to whether a boxing contest was illegal was the need to show that the infliction of blows was intended to do grievous bodily harm. He rejected arguments of counsel that boxing did indeed involve the complete subduing of an opponent with little regard for the effects. His conclusion was that boxing as practised in the 1970s “predominantly as an exercise in boxing skill and physical condition in accordance with the rules” was not unlawful and should not be seen as criminal activity.³³

The “grievous bodily harm” test, applied by McInerney J in *Pallante* to determine the legality of professional boxing contests, may well attract questions in the future.³⁴ It is a distinctly more lenient test for this specialist sporting circle than that propounded by the English Court of Criminal Appeal in *R v Donovan*,³⁵ where the Court ruled that consent could not be a defence to a criminal charge where the injury caused was

Walsh, “Boxing: Regulating a Health Hazard” (1994) 11 *Journal of Contemp Health Law and Policy* 63.

³¹ Note the recent film “When We Were Kings” which documents the heavyweight fight between Muhammad Ali and George Foreman in 1974.

³² [1976] VR 331.

³³ At 341-343.

³⁴ See Saxon, “Whatever Happened to Pallante - the Boxer who sued for Injuries Sustained in the Ring?” (1974) 4(3) *ANZ Sports Law Association Newsletter* 1 and 10-11.

³⁵ *R v Donovan*, *supra* note 24.

“more than transient or trifling”.³⁶ It may well be that the Court in *Donovan*, in devising its test, was swayed by the comparative youth of the victim giving consent and the nature of the perversion involved in the episode to which she had consented. Suffice to say, however, the rules suggested in these two cases are inconsistent.

3. *The Consent Defence*

A central issue in the justification of boxing as a legally tolerated sport has been the notion of consent of the participants. In stepping into the ring, boxers have been regarded as expressly or impliedly consenting to the risks and hazards of the sport.

I shall adopt the analysis propounded by Smith and Hogan in relation to the consent defence to criminal charges in sporting matters.³⁷ They have suggested that the consent defence raises two distinct questions:

(a) Did the complainant consent to the act?

Issues such as the age, competence and mental capacity of the consenting participants become relevant to the question of whether consent was freely given. With boxers who suffer from diminished capacity induced by “punch-drunk” syndrome, issues of consent become problematic.

In many boxing situations the true relationship between fighter and agent and between fighter and promoter/organiser is often an exploitative one. Pressure from agents and others to accept fights is such that a boxer’s agreement is on occasions achieved through something approaching undue influence. If a relationship is not an equal one, which it rarely, if ever, is, then the real danger exists that freedom of choice and consent will be illusory.

In addition, the lure of the big purse and media hype for the professional fighter appears extremely attractive when it is reinforced by agents, promoters and their menagerie. The often surreal quality of this situation clearly influences a boxer’s choices, and, it could be argued, unduly so.

The question may be raised as to what boxers consent to. Do the participants consent to *the blows* which are struck or to the *particular injuries* they risk? If a fighter was asked the question: “Do you consent to dying in the ring?” the answer would be “no”. Yet, the reality for most

³⁶ At 509.

³⁷ Smith and Hogan *Criminal Law* (8 ed, 1996) 422.

boxers is that the blows they sustain will at least shorten their lives and, at worst, they may ultimately leave the ring in a vegetable state or dead.

Once consent is given and a fight commences, the question arises as to whether there is ever any real possibility of a participant withdrawing the agreement to fight.³⁸ Clearly a bout does not conclude until the referee stops the fight, a fighter's trainer surrenders on the fighter's behalf, the three, four or 15 rounds scheduled for the bout are over, or the boxer is knocked unconscious. Although a boxer could technically "take a dive" to end the fight, this is regarded as cowardice and is simply not an option for most fighters.

In an inherently dangerous sport like boxing, for consent to be truly free and effective, there may be a need for consent to be renewed by each participant at the end of each round, or after each major blow. The supporters of boxing would, no doubt, scoff at the impracticality of such a requirement. Also, the pressure on the participants to renew their consent from their paying audience, media, promoters and organisers would be immense. This simply points to the illusory nature of consent in the boxing context once the participants step into the ring. The health, safety and even the life of a fighter depend often on the decisions of others - the referee, trainer, promoter and even to some extent the paying public.³⁹

(b) Was the act one to which the complainant could effectively consent?

The fundamental question arises as to whether public policy should permit human beings to consent to this type of activity.

With instant and regular television and media coverage (and slow-motion replays) of what is often a brutal engagement at the professional level, is this giving the best messages and examples to our children and society generally?⁴⁰

³⁸ In the same way, in recent cases involving rape, the complainant's ability to withdraw consent at any time has been acknowledged and preserved. The acknowledgement in these cases that the word "no" means "no", so that consent must be truly free to be effective, would have equal application in the sporting context.

³⁹ Virtually none of these people would be neurosurgeons or neurologists with skills to detect the injury which is really occurring inside the damaged head and body of a battered fighter.

⁴⁰ Some would argue that televised violence in sports rarely reaches the level of brutality achieved in some popular television programmes. However, this may all

Consensual fist fights outside the boxing ring - on the street and in the car-park - are generally regarded as unlawful.⁴¹ Opponents of boxing ask why there should be any distinction when the protagonists wear shiny trunks and step into a ring?⁴²

Supporters of boxing argue that, as a sport controlled for more than a century by the Queensbury Rules where all participants wear gloves, it is rightly regarded as being different from street fighting.⁴³ The opposing view points to the extent of injuries caused by blows in the "controlled" environment of the boxing ring (a powerful blow to the head, even from a gloved fist, can be lethal) and maintains that it is right to protect pugilists from the consequences of these actions.

The protection of animals from injury or death caused in organised fights has long been accepted as a proper goal in our communities.⁴⁴ The obvious question is why similar rules should not apply when the organised fight is between human beings.⁴⁵

V. CONCLUSION

As the views of a community move over time, as the generally accepted ideas of what should be tolerated and what constrained gradually change, the community's legal principles are called upon to reflect those wider changes.

The sport of boxing highlights the tension that exists in the law between the competing demands of tolerance and individual freedom on the one hand and the need for social control and intervention on the other. There is no doubt that, in a boxing match, a fighter trying to knock out his or

be part of a major de-sensitisation to violence which is increasingly occurring on television.

41 See *R v Jobidon* (1991) 66 CCC (3d) 454 (Supreme Court of Canada) and Wadham, "Consent to Assault" [1996] *New Law Journal* 1812.

42 See Kelly, G M *Sport and the Law* (1987) 243-246.

43 See Syrota, "Consensual Fist Fights and other Brawls: Are they a crime?" (1996) 26 *Western Australian Law Review* 169.

44 For example, cock-fighting, bull-baiting and bear-baiting have long been outlawed (see eg the English Cruelty to Animals Act 1835) and organised dog-fights too are unlawful (see the New Zealand Animals Protection Act 1960, s 3(c)).

45 A possible answer is that, unlike human boxers, animals have no choice in the matter and thus cannot be seen to "consent". But, again this raises the issue of presuming what is a true consent of the participants.

her⁴⁶ opponent clearly intends to cause harm and probably serious harm, which is normally a sufficient mens rea for the crimes of murder and assault. In many cases, the fighter's action would arguably satisfy the grievous bodily harm test of *McInerney J in Pallante*.⁴⁷ We have seen that the consent defence, which has justified boxing as a lawful activity in the past, is itself subject to significant philosophical and practical difficulties.

Yet few cases have reached the courts to test the role of boxing and the continued efficacy of the defence of consent. In the few prosecutions that there have been, a generally permissive approach has been adopted. Following these lines, in the House of Lords decision in *R v Brown*,⁴⁸ all of their lordships accepted that boxing is at present lawful. Boxing was seen as an exception to the crimes of assault and murder, a special case which, in the words of Lord Mustill:

for the time being stands outside the ordinary law of violence because society chooses to tolerate it.⁴⁹

The words "for the time being" and "chooses to tolerate" may well foreshadow a time when the increasingly cogent arguments for social control and legal intervention in the sport of boxing may prevail.

⁴⁶ In New South Wales, boxing between women is illegal, whereas in Victoria and New Zealand it is currently legal.

⁴⁷ *Supra* note 32.

⁴⁸ [1993] 2 All ER 75.

⁴⁹ *R v Brown* [1993] 2 All ER 75, 109.

COPYRIGHT LAW AND MORAL RIGHTS

BY PETER JONES*

1. Introduction

New Zealand is a common law jurisdiction and a member of the British Commonwealth. Until relatively recent times, New Zealand's copyright statutes were closely modelled on the English copyright statutes of the late 19th and early 20th centuries. Some divergences from the English law have occurred in the amendments to the Copyright Act 1962.

New Zealand is a party to the Berne International Convention for the Protection of Literary and Artistic Works 1886.¹ The group of "moral rights" in international copyright law under the Berne Convention comprises, in general: the right of an author to attribution of authorship, the right to object to derogatory treatment of a work, and the right to object to false attribution of a work. The common law did not recognise these moral rights, as they were creatures of the civil law, in particular French civil law.² From that origin, they became incorporated in the Berne Convention.

In order to comply fully with treaty obligations, and following the 1988 English revision of English copyright statutes which incorporated moral rights provisions, it was inevitable that New Zealand in revision of its own copyright statute in the 1990s would introduce in express statutory form the concept of moral rights.³ The Copyright Act 1994⁴ was passed in December 1994 and came into effect from 1 January 1995. Part IV of the Act is concerned with moral rights. One of the main reasons for the particular timing of the Act was the signing by New Zealand of GATT

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1 Paris text, 1971, hereafter referred to as "the Berne Convention".

2 It is important to note that moral rights in one form or another were present in many other countries. For instance, the authors' rights for the *No* plays of Japan were protected by way of moral rights as long ago as the 16th century: Prof Teruo Doi, chairman's address, LAWASIA Biennial Conference, Manila, 30 August 1997.

3 Some indirect modes of protection were previously available, as for instance by the passing-off action in tort.

4 Hereafter styled "the Act".

TRIPs.⁵ It is important to note however that while Article 9 of TRIPs requires members to comply with Articles 1 - 21 and with the appendix to the 1971 text of the Berne Convention, it does not require compliance with Article 6bis which is the moral rights provision.

This article outlines the moral rights protected by the Copyright Act, analyses difficulties in the reception of this concept, notes the specific areas of waiver and computer software, and attempts to predict future trends in New Zealand law.

2. Moral Rights Protected

The moral rights protected under the Act are:

- the right to be identified as author or director;⁶
- the right to object to derogatory treatment of a work;⁷
- the right not to have work falsely attributed;⁸
- the right not to have a literary, dramatic, or musical work falsely represented as being an adaptation of a work of which the person is the author;⁹
- the right not to have an artistic work falsely represented as the unaltered work of the author if the work has been altered after the author parted with possession of it;¹⁰
- a right to privacy of certain photographs and films commissioned by a person for private and domestic purposes.¹¹

Under section 106, the right to be identified as the author, the right to object to derogatory treatment, and the right to privacy in photographs and films expire when the copyright in any work that is the subject of the

⁵ The Agreement on Trade-Related Aspects of Intellectual Property Rights Protection, signed at Marrakesh 16 April 1994 at the conclusion of the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade.

⁶ Section 94.

⁷ Section 98.

⁸ Section 102.

⁹ Section 103.

¹⁰ Section 104.

¹¹ Section 105.

moral right expires.¹² Also under section 106, the right to object to false attribution and to object to false representations expire at the end of 20 years from the end of the calendar year in which the person who is entitled to the right dies.

Any moral rights may be waived under section 107 but “[t]he rights conferred by Part IV of [the] Act are not assignable”.¹³ While moral rights are not assignable, under section 119 certain of them are able to be transmitted to successors of their holder on the holder’s death. The successors may not assign, but obviously if the term of the right is defined to expire at some time other than the death of the holder, someone has to be able to exercise the right pending expiry. Section 119(1) reads:

On the death of a person entitled to the right conferred by section 94 or section 98 or section 105 of [the] Act, -

- a) The right passes to such person as he or she may by testamentary disposition specifically direct; or
- b) If there is no such direction but the copyright and the work in question forms part of the estate, the right passes to the person to whom the copyright passes; or
- c) If or to the extent that the right does not pass under paragraph (a) or paragraph (b) of this subsection, the right is exercisable by the personal representatives.

12 That is, when the economic copyright expires. Economic copyright expires after the life of the author (or creator of the work) plus 50 years: s 22. See in particular s 22(1) to (3):

“(1) Subject to the following provisions of this section, copyright in a literary, dramatic, musical, or artistic work expires at the end of the period of 50 years from the end of the calendar year in which the author dies.

(2) If the work is computer-generated, copyright expires at the end of the period of 50 years from the end of the calendar year in which the work is made.

(3) If the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act.”

There are also subsequent provisions as to works of unknown authorship and joint authorship. Specific provisions in respect of films and the like in s 23 set out details of dating the commencement of the 50 year term. Some limitations in the term of protection for industrially-applied works appear in s 75, having been carried forward from the Copyright Amendment Act 1985.

13 Section 118.

There is provision that, where copyright and the moral right pass in terms of section 119(1)(b) to more than one person,¹⁴ the moral right passes in exactly the same manner as does the copyright.

Assertion and exercise of moral rights, and waiver, where exercisable by more than one person, are separately able to be dealt with so that the assertion, exercise, or waiver affect only the rights of the person who asserts, exercises, or waives, and does not affect the rights of the others.¹⁵

Rights which have passed on the death of a person are subject to consensual waivers previously given.¹⁶

Any infringement of rights under sections 102,¹⁷ 103,¹⁸ or 104¹⁹ after a person's death is actionable by the personal representatives of the deceased person.²⁰ Damages recovered by personal representatives in respect of an infringement after the death of a person entitled to any of the moral rights conferred by Part IV of the Act devolve as part of the deceased person's estate as if the right of action had existed and been vested in the person immediately before his or her death.²¹ This last provision emphasises the point that the moral right is the personal right of the author or creator of the work in question.

3. Difficulties in Reception

The core provision of the Berne Convention as to moral rights is Article 6 bis (1), which states that:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor [sic] or reputation.

¹⁴ Section 119 (2) (b): "in part to one person and in part to another". It is unclear whether this provision partitions all moral rights in shares or allows separate moral rights to devolve upon separate persons.

¹⁵ Section 119 (3).

¹⁶ Section 119 (4).

¹⁷ False attribution.

¹⁸ False representation as to literary, dramatic, or musical works.

¹⁹ False representation as to artistic works.

²⁰ Section 119(5).

²¹ Section 119(6).

So the international obligation in terms of the Berne Convention clearly separates moral rights from economic rights and links the rights to object with prejudice to the honour or reputation of an author. New Zealand, as a common law country, has difficulties with those areas because of the traditions that:

* the common law has regarded all copyrights other than Crown (or government) copyright as being only economic rights.²² While almost the entire history of private copyright in the English common law has been by virtue of statute, the original statutes were made in order to enable time-limited monopoly rights to be exercised so that authors or the assignees of authors could harvest the fruits of their labours before other people could make other use of those fruits.²³

* by and large, the common law has left the legal protection of reputation and honour to defamation law, in civil and in some limited criminal jurisdictions, rather than allowing those concepts to be protected within other defined sets of legal relationships, such as intellectual property law.²⁴

Moral rights may be broadly differentiated into two types, even though authenticity in the expression of the author's intention is central to each of the types of moral rights. The types of moral rights usually called the "paternity" rights are those requiring acknowledgment of the identity of the author or alternatively giving a right to object to false attribution. The "integrity" rights are those which prohibit the work from being published or represented in a form which is different from that in which it was expressed at the time of the author's release of the work.

People used to a system in which the only rights under copyright law have been economic rights encounter some difficulty in navigating the intersection between economic rights and moral rights. The introduction in New Zealand of moral rights legislation in recent times could therefore be expected to have a delay in utilisation due in part to misunderstanding.

22 See general discussion as to New Zealand law in Brown, B and others, *Copyright and Design* (1996).

23 See discussion in *Copinger and Skone James on Copyright* (13 ed, 1991).

24 See discussion as to defamation in *Butterworths Laws of New Zealand* Vol 10 paras 1, 4, 40, 41. Note, intellectual property law extends to the protection of reputation and honour where the author has established goodwill. See eg *Sykes and Sons v John Fairfax Ltd* (1978) FSR 312, a case involving passing-off of a pseudonym, where the goodwill attaching to the pseudonym was a critical element.

It is relatively simple to make the distinction between economic rights and moral rights, with reference to the physical treatment of an individual work of art such as a painting. The painter completes the work and sells it. At that stage, unless by agreement between the painter and the purchaser, the right of resale in the painting itself and the right to make copies of it vest in the purchaser pursuant to ordinary copyright law. These are economic rights. The purchaser also has the right to destroy the work totally, that being part of the economic rights as well as being at the centre of ordinary property law.

However, the painter has the right to object to such things as the purchaser substituting the purchaser's signature on the painting for that of the painter,²⁵ the purchaser removing the painter's signature from that work and attaching it to a work of altogether different origin,²⁶ or cutting out small scenes from the original painting and mounting and displaying them separately.²⁷

In New Zealand, both before the passing of the Act and after,²⁸ concerns were expressed that moral rights enforcement would interfere with otherwise-authorised fair use of a work such as pastiche and parody. Collage is a type of artistic work recognised in the Act as a work in which copyright may subsist.²⁹ It is to be noted that a collage may itself infringe copyright, and may also infringe moral rights, while still bearing its own copyright.

More arguable is the proposition that pastiche and parody infringe moral rights, far less copyright, to an extent that the law would recognise. Essentially both of these forms of treatment are not dealing with specific works themselves, but rather the style of work. The style of a work, compared with an actual work, is subject to the same dichotomy principle as applies in copyright law generally, wherein there is a differentiation between a basic idea, which is not copyrightable, and the expression of the idea, which may be subject to copyright. In copyright law, ideas are not the subject of copyright, but only the expression of the ideas.³⁰ The style

²⁵ Paternity - attribution.

²⁶ Paternity - false attribution.

²⁷ Integrity - false representation of an unaltered work.

²⁸ Eg van Melle, "Moral Rights; the Right of Integrity in the Copyright Act 1994" [1995] NZLJ 301.

²⁹ Section 2(1): "Artistic work - (a) Means (I) A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality..."

³⁰ In copyright law the separation of the idea and the expression of the idea are usually described as "the dichotomy principle". In patent law things have moved on from

may be part of the expression of an idea but the style in itself is also an idea. Perhaps an easier way to express it is that pastiche and parody are not defacement, nor are they outright copying: therefore in themselves they should not be breaches of copyright in the sense of either economic rights or moral rights.

Certainly, the parody of a song may involve alternative words being put to the same tune, and therefore might well amount to derogatory treatment in terms of New Zealand copyright law. The use of the musical score in this way, it might be noted, is a breach of the economic copyright in the score in any event and thus would have been actionable even under the previous New Zealand copyright legislation. In such countries as Australia and the United States of America, there are schemes whereby compulsory licensing for use of musical works is available, though in the USA compulsory licensing is subject to a fair use limitation.

4. Moral Rights and "Moral Rights"

Another point which common law lawyers have difficulties with is the expression "moral rights". The term seems to have connotations of rights which are binding only in honour rather than at law.

However section 125 of the Act clarifies the right of action:

- (i) An infringement of a right conferred by part IV of [the] Act [the part dealing with moral rights] is actionable by the person entitled to the right.
- (ii) In proceedings for infringement of a right granted by part IV of [the] Act, relief by way of damages and injunction is available to the plaintiff.
- (iii) In proceedings for infringement of the right conferred by s 98 (2) of [the] Act [the right of the author of a literary dramatic musical or artistic work and of the director of a film not to have the work subjected to a derogatory treatment], the court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made, in such terms and in such manner as may be approved by the court, disassociating the author or director from the treatment of the work.

Benjamin Franklin's conception that "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone and the receiver cannot dispossess himself of it. Inventions then cannot, in nature, be a subject of property". I submit that a closely and well-drawn patent specification will capture the idea of an invention by corraling virtually every implementation of the idea.

Injunction and damages are available by way of remedy. The measure of damages is not restricted by any of the considerations applying in economic copyright, and tends to be an accounting of profits and some small punitive element. Since the Act's provisions are predicated on Article 6bis(1) of the Berne Convention, which is aimed at the preservation of "honor and reputation", the measure of damages should be as for a successful claim in defamation.³¹

Moral rights and moral obligations are concepts which do not sit squarely with traditional New Zealand common law.³² New Zealand law is familiar with legal redress being available for failure to meet some general moral obligations, but only in fairly narrow contexts.

The best known context is that of claims under the Family Protection Act 1955, whereby a family member of a deceased person may take legal action against the deceased estate for provision out of the assets of the estate if the claimant can prove failure by the deceased person to provide by testamentary disposition for the claimant where there was a legal or moral duty so to provide. The particular circumstances are founded on a specific statutory provision.³³

There has also been discussion in some of the case law of moral obligations owed by joint venturers to one another, in circumstances where joint venture documents may have been predicated on mutual understandings, not all of which have been recorded in the joint venture documents. In that there is no fixed legal definition of a joint venture in New Zealand law, statutory or otherwise, it has been open for the courts to consider such things as moral duties as distinct from, but allied with, legal duties in that context. The discussion in the judgments, however, has largely been couched in terms of fiduciary duty and constructive trust, albeit extensions of traditional formulations of the duties of fiduciary trustees.³⁴

31 For a discussion as to damages in New Zealand defamation law, see *Butterworths Laws of New Zealand*, supra note 24, paras 14, 15, 16, and 17.

32 It may be argued that the law of fiduciary obligations, observance of good faith, and perhaps the law of equity in general depend on the courts having some general moral stance. But the courts are apparently reluctant to express it so.

33 *Re Hilton (deceased)* (1997) 15 FRNZ 340, [1997] NZFLR 438, and *Re Estate of Leach, Prestidge and another v Black* (1996) 14 FRNZ 254 are recent High Court decisions in claims where the plaintiffs were suing under the Family Protection Act based on alleged breaches of moral duty.

34 See eg the *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571 (HC), and *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA). As to so-

The difference between the copyright moral rights and the sorts of moral duty under the Family Protection Act 1955, or described in the dismissive sense noted above, is that copyright moral rights are designated now in detail in New Zealand law, pursuant to a more general requirement of international treaty. The court has a discretion as to remedies, including a particular mix of remedies for a particular case, but the particular breaches are carefully circumscribed rather than being left to the judge to find according to conscience.

The term “moral rights” is also used in contexts outside intellectual property law, for instance by philosophers to describe rights which are generally recognised but which may or may not be legally recognised. Professor Raymond Frey defined a moral right as

a right which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends.³⁵

Professor Gerald Feinberg pointed out that “the categories of moral and legal rights overlap, so that a given moral right can also be a legal right if a rule calling for its recognition and enforcement has been duly enacted into law”.³⁶ Feinberg made a distinction between those moral rights that are exercisable even prior to legal recognition and those which cannot be exercised before being enacted into law.³⁷

In the context of intellectual property law, there is a claim³⁸ being made under the Treaty of Waitangi Act 1975 before the Waitangi Tribunal for what the claimants describe among other things as “intellectual and

called “letters of comfort”, see Lennard, “Enforcing Moral Obligations in Commercial Transactions” (1991) 29(7) *Law Society Jnl* 81-83); and as to fraudulent preferences, see *Re D S Edmonds Electrical Ltd, Off Ass D S Edmonds Electrical Ltd (in Liq) v Tyree Power Construction Ltd* [1993] MCLR 237.

³⁵ Frey, *R G Interests and Rights: The Case Against Animals* (1980) 7.

³⁶ (1992) 12:2 *Oxford Journal of Legal Studies*, 149, 151.

³⁷ *Ibid*, at 152.

³⁸ Filed under number WAI 262, and referred to in this article as “the WAI 262 claim”.

property rights”³⁹ in the flora and fauna of New Zealand. What the claimants mean is that they consider that, as the descendants of the indigenous inhabitants of New Zealand, and pursuant to the Treaty of Waitangi between the Māori people and the British Crown signed in 1840, they have rights to the control, use, and derivatives of the naturally-occurring flora and fauna of the country. Their argument is essentially that, because the indigenous people were in the country first and the Treaty preserves for them the treasures as regarded in their society and the right of control over the land and forests which they retained, they have a moral right in the philosophers’ sense to control the use of, the exploitation of, and the derivatives of the naturally occurring flora and fauna of the country.

The WAI 262 claim is to establish whether that claimed moral right is actually a legally exercisable right under the terms of the Treaty of Waitangi. If the Waitangi Tribunal determines that the right is one which is legally exercisable under the Treaty, then it may make a recommendation accordingly to the New Zealand Government. The Government may then legislate to define the extent of the right and who may exercise it, in order that the right becomes a legal right.

Regardless, the claim is not of an intellectual property right as recognised either at international law or in domestic New Zealand law. Even though it is a claim of a moral right in the sense described by Frey and Feinberg, it is not in any way a moral right claim as defined under the Act.

5. Waiver

There is a specific permission in section 107 for creators of works to waive their moral rights in existing works, or those works yet to be created. Section 107(1) provides that it is not an infringement of any moral right to do an act to which the person who is entitled to the right has consented. Section 107(2) goes on to provide that:

any of the rights conferred by this part of this Act may be waived by instrument in writing signed by the person waiving the right.

A waiver must be specific as to the rights to which the waiver relates,⁴⁰ may be expressed to be subject to revocation,⁴¹ and, if made in favour of the owner or prospective owner of the copyright and the work or works to

³⁹ In paragraph 2.2 of the first amended statement of claim, August 1997.

⁴⁰ Section 107(3)(b).

⁴¹ Section 107(3)(c).

which the waiver relates, shall be presumed to extend to the licensees and successors in title of the owner or prospective owner unless a contrary intention is expressed.⁴²

There is potential therefore for publishers and others to try to create a practice or custom that authors and creators of work waive their moral rights. This potential was referred to as “the obvious blot on [the] legislative landscape” in the article by van Melle referred to above.⁴³ However, the observation and personal experience of the present writer, is that publishers are not universally requesting a waiver of moral rights. On the contrary, it seems that publishers are currently keen in New Zealand to assure writers that works will be properly attributed, and that textual alterations will be made only with consent. It may be that publishers in fields other than the law are more heavy-handed.

If extensive use is made of waivers, then the entire scheme of moral rights in the Act will be undermined, with the exception of the parts relating to the rights of privacy in section 105 which are specific and limited.

It seems pointless to have provision in the statute for rights which are stated to be inalienable but then which are subsequently stated to be subject to waiver. Waiver, if not expressed to be revocable, is equivalent to destruction of the right. It would seem logical that a right specifically preserved for the benefit of someone’s “honour and reputation”, as the Berne Convention puts it, and attaching to the personality, should not be capable of being destroyed. There is, of course, the argument that persons destroy their own honour and reputation with appalling regularity and in some cases with appalling frequency.

There are at least two reasons for the insertion in the New Zealand statute of the ability to waive moral rights. It would appear that one reason is preserving the distinction between economic rights and moral rights. Moral rights should not be sold: therefore the only way a creator of a work would allow others to deal with the work in any possible way would be to assign economic copyright and waive moral copyright. The other reason may well have come from publishers wishing to protect editorial freedom in the face of possible authors’ allegations of derogatory treatment.

42 Section 107(3)(d).

43 *Supra* note 28.

6. Computer Software

There are exceptions to the application of moral rights. One major area of exception is the application of moral rights to computer software and to computer-generated work.⁴⁴ There is no conceptual difference either in economic rights or in moral rights between computer software and computer-generated works using software written for the purpose and other works of authorship. Although computer programs have been patentable in New Zealand since the 1995 decisions on the Hughes Aircraft Corporation applications,⁴⁵ the major protection in New Zealand and for the rest of the world is still in copyright.⁴⁶

There would be some significant advantages to the protection of software in moral rights. Software piracy is a notorious problem, compounded by the fact that much if not most new software depends on re-engineering of other previously-existing software in order to operate. Legal protection of paternity and integrity rights in software, coupled with measures of damages as for defamation, could be useful but fair weapons for software creators to use in fighting the appropriation of their works by other software creators.

Software, like any other work of literature, is a manifestation of personality. Art 6bis(1) of the Berne Convention is designed to protect against the erosion of personality in the sense of reputation and honour. The defamation measures of damages are appropriate.

7. Development of New Zealand Law

There are as yet no reported cases in New Zealand as to moral rights under the current copyright legislation. The decisions of the superior courts of other common law jurisdictions, particularly the British, Australian, Canadian, and United States of America jurisdictions, are of persuasive authority for the New Zealand courts. Relevant overseas common law

⁴⁴ The right of attribution exception is in s 97(2), and the exception to the right to object to derogatory treatment is in s 100(2), in both instances as to computer programs and computer-generated works which are literary, dramatic, musical or artistic works.

⁴⁵ Decisions by the New Zealand Commissioner of Patents on 3 May 1995; see Moon, "Software Inventions Now Patentable in New Zealand" [1995] EIPR 203.

⁴⁶ Recognised in respect of databases by the World Intellectual Property Organisation (WIPO) protocol on computer databases signed on 20 December 1996 at the conclusion of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva, 2-20 December 1996.

decisions therefore might give some guide as to the likely reactions of the New Zealand courts to claims under Part IV of the Act.

The New Zealand courts are also not averse to considering court decisions in civil law jurisdictions where principles originated which have since been adopted into our local statute law. It is likely, for example, that in the area of copyright moral rights the New Zealand courts will take into account decisions which have been made by the French courts.

Such eclectic gathering of judicial authority in order to assist municipal judicial decision-making is not at all unusual in New Zealand, and has recently been plainly apparent in the area of competition law. The statutory provisions in the Commerce Act 1986⁴⁷ as to distortion of markets and abuse of dominant position were clearly inspired by the provisions of Articles 85 and 86 of the Treaty of Rome.⁴⁸ Initially the New Zealand Court of Appeal looked to European Court of Justice decisions and the decisions of national courts of European Union countries for assistance in interpretation and application of the New Zealand statute;⁴⁹ regard was also had to economic theories of the Chicago school and USA anti-trust litigation; decisions of the Australian superior courts came to be taken into account,⁵⁰ not least following legislative amendment to the Commerce Act pursuant to the Australia and New Zealand Closer Economic Relations-Trade Agreement deeming for some purposes Australia and New Zealand to be one market;⁵¹ and in more recent times the New Zealand Court of Appeal has found for itself sufficient confidence to be more forthright about applying the statute according to its view of current New Zealand conditions.⁵²

⁴⁷ This is the main competition law statute.

⁴⁸ See for instance the structural determinants of market power set out in s 3(8)(a) of the Commerce Act 1986 - the factors there set out of market share, technical knowledge, and access to materials and capital can be traced back to the European Commission definition of dominance in *Re Continental Can Co* [1972] CMLR D11, D17.

⁴⁹ A New Zealand review of European case law on market dominance appears in *Re Broadcast Communications Ltd* [1990] NZAR 433, in which decision *Hoffmann-La Roche v Commission* [1979] ECR 461 was referred to in order to formulate an approach to market dominance.

⁵⁰ See for example Richardson J in *Telecom New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429, 443-444, citing *Trade Practices Commission v Arnotts* (1990) ALR 657 and *Continental Can*, supra note 48.

⁵¹ In New Zealand legislation as s 36A, Commerce Act 1986.

⁵² See the Court of Appeal judgment in *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, (1996) 5 NZBLC 99,382.

Australia has yet to legislate for moral rights in copyright. It appears likely that it will do so. Copyright law was an area of law identified by both countries in 1988 as one where harmonisation would assist in the processes of creating a closer economic and trade relationship between them in terms of the Australia New Zealand Closer Economic Relations-Trade Agreement 1983.⁵³

8. Conclusion

Although New Zealand jurisprudence concerning moral rights will take time to emerge, in the meantime its development may safely be predicted according to understanding of the origins of copyright moral rights, the receipt and application thereof in Britain, the USA, and possibly Australia if it legislates accordingly, with perhaps a more idiosyncratic approach applying as time goes by.

Important areas of endeavour and commerce such as the computer industry would be well served by the statutory extension, and the application, of the scheme of moral rights. Important protections of the rights of indigenous peoples, as requested in the WAI 262 claim, could likewise be served by the application of the copyright moral rights, not just the philosopher's "moral rights."

The level of damages for breach, if calculated using similar criteria as for a claim in defamation for harm to honour and reputation, would be a strong disincentive to breach of moral rights.

⁵³ See the Memorandum of Understanding signed between the two countries as to business law harmonisation on 1 July 1988. Note that the report of the Steering Committee of government officials of June 1990 recorded that trade agreements between the two countries need to take into account multilateral treaties and United Nations instruments, of which the Berne Convention is one. See also *Schott Musile* 36 1 IPR 267, where the Australian Court interpreted s 55(2) of the Australian statute as having nothing to do with reputation or honour of the author, despite that statutory provision being one which relates to debasement of copyright works. It is suggested that this finding may well provoke the introduction of moral rights into Australian copyright law.

BOOK REVIEW

THE LAW OF TORTS IN NEW ZEALAND, by Stephen Todd (general editor), (2nd edition). Wellington, Brooker's, 1997, xcvi and 1316 pp, including index. Price \$144.00 including GST (softcover).

The second edition of *the Law of Torts in New Zealand* builds on the first edition, by rewriting and revising material to incorporate the changes to the law of torts in New Zealand over the last six years. The aim of the book (as expressed in the preface to the first edition, at p v) is to provide a modern New Zealand text that describes:

the distinctive approach taken by New Zealand courts towards the development of the common law of New Zealand and to evaluate the position here in the light of decisions elsewhere, notably those in England, Australia and Canada.

To be asked to review a tome of this nature comprising more than 1300 pages of detailed and complex text is somewhat overwhelming. I began the task, not only with some degree of trepidation, but also with a measure of incredulity that this second edition is 360 pages longer than the first. This is in view of the fact that in New Zealand a significant proportion of the law of negligence is removed from the common law by the Accident Rehabilitation and Compensation Insurance Act 1992, and that much of the law of nuisance is avoided by recourse to the Resource Management Act 1991.

Many of the chapters contained in the first edition have undergone substantial revision, due to the influence of key New Zealand and overseas cases which have clarified and, in some cases, restated the law. Some reordering of chapters has also occurred to provide a more logical and coherent discussion. For example, the chapter which concerns causation and remoteness of damage now follows the substantive discussion of all the tort actions, rather than remaining linked with the tort of negligence; and the chapter which considers vicarious liability follows the more general discussion of defences.

Of the five original contributors, four provide chapters in the second edition. Stephen Todd continues as the general editor and authors chapters on accident compensation, trespass to the person, aspects of negligence, abuse of legal procedure and of public office, causation and remoteness of damage, defences, parties, multiple tortfeasors, and discharge of liability. He also co-authors with John Hughes the introductory chapter, with Margaret Bedgood a chapter which considers aspects of unfair

competition, and with John Burrows a chapter concerning deceit and injurious falsehood.

Margaret Bedggood again provides the chapters which consider interference with business relations, and these have been revised to include recent case law and reference to the Employment Contracts Act 1991. John Burrows is responsible for the chapters on breach of statutory duty, defamation and privacy. Robert Chambers remains responsible for the discussion of the land torts of trespass, nuisance and the rule (or lack of it) in *Rylands v Fletcher*.

There are three new contributors to the second edition, who assume responsibility for the chapters formerly contributed by Margaret Vennell. As well as contributing to the introduction, John Hughes provides the discussion on vicarious liability, Cynthia Hawes provides a chapter which considers wrongful interference with goods, and Andrew Beck takes over the discussion of remedies.

The second edition includes two new chapters. One considers abuse of public office and includes a discussion of misfeasance in a public office and public law compensation. The latter discussion focuses on the development of a remedy in public law actions for damages, arising out of the decision in *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667. The other new chapter discusses the topic of parties, which was formerly included in the introduction to the first edition.

Of particular interest is the chapter on the rule in *Rylands v Fletcher*. This chapter has been substantially rewritten to reflect the changing approach in England following the decision of the House of Lords in *Cambridge Water v Eastern Counties Leather Plc* [1994] 2 AC 264, and the decision of the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. Robert Chambers quite understandably takes the opportunity to congratulate himself on the success of his predictions for the development of the rule in *Rylands v Fletcher* which were contained in the first edition. It was a theme of that chapter that the rule in *Rylands v Fletcher* is not a separate doctrine of legal liability but rather a subset of the law of private nuisance. Chambers rejected the view that *Rylands v Fletcher* should be considered as a separate strict liability tort, and he noted the inconsistency between requiring an element of foreseeability of harm as a prerequisite to liability in nuisance and not requiring this element in *Rylands v Fletcher*. Since the first edition, the decisions in *Cambridge Water* and *Burnie* have provided alternative paths for the determination of *Rylands v Fletcher* actions. The House of Lords, in *Cambridge Water*, effectively removed much of the difference between

nuisance and the rule in *Rylands v Fletcher* by incorporating into *Rylands v Fletcher* a requirement for foreseeability of the type of damage claimed. Describing the decision in *Burnie*, Chambers comments (at p 594) that “for the purposes of the common law of Australia, the rule in *Rylands v Fletcher* had been absorbed by the principles of negligence”. In this second edition, the author supports the approach taken in *Cambridge Water* and cogently argues for the demise of a separate action in *Rylands v Fletcher*. He concludes (at p 595) that “in every case in which a plaintiff would be entitled to succeed in *Rylands v Fletcher* the plaintiff would also be entitled to succeed in nuisance”.

While accepting the general propositions and conclusions reached on *Rylands v Fletcher*, I regret that more discussion was not provided in this edition on the reasons for the development of a difference in approach between private nuisance and *Rylands v Fletcher*. In particular, the status of the plaintiff is very briefly considered, with no discussion of the various cases which have allowed plaintiffs to recover where they had no proprietary interest in land. In order for the reader to be completely comfortable with the chapter’s conclusions it is necessary to have in this edition a complete understanding of the rule itself, including its historical development. The development of the law relating to the rule in *Rylands v Fletcher* presents a golden opportunity to illustrate the dynamic nature of tort law, using a modern twist to an unsettled area of law.

A criticism which is equally levied against both editions of *the Law of Torts in New Zealand*, is that there seems to be some ambivalence as to the target audience. The preface is silent on this point. However, the introduction to the second edition begins (at p 2): “A student new to the law may well be puzzled by what is meant by a ‘tort’”. The introduction continues with a clear discussion of the historical and theoretical framework for the development of the common law torts and other systems of compensation in New Zealand. On the face of it, therefore, this book is offered as a standard text for students of tort law in New Zealand. However, this text provides far more than any undergraduate student of torts would ever require in order to complete the requirements of the Council of Legal Education. *The Law of Torts in New Zealand* reads as an authoritative reference on all aspects of tort law relevant to New Zealand. The first edition has been used extensively as an authority in judicial decisions at all levels, including at least one decision of the Privy Council (*Invercargill City Council v Hamlin* [1994] 3 NZLR 513). The second edition, like the first, contains a wealth of commentary and authorities on every aspect of tort law, in a well written, but extremely comprehensive book. I suggest that the detailed and authoritative nature of the work is both its greatest strength and weakness. For students “new to the law” *The*

Law of Torts in New Zealand could prove to be overwhelming. Some reorganisation to clarify and state key principles and authorities at the beginning or end of each chapter would certainly enhance student access to a third edition. In many instances, a few words about the facts of cases which are cited as authorities would also do more for understanding and application of principles than a raft of obscure and ancient citations contained in the footnotes.

Another comment on organisation of the book concerns the presentation of the Table of Cases. I found the first edition to have an excellent record for accurate citations of cases and the Table of Cases is the obvious point of reference when full case citations are needed. Unfortunately, in the second edition, cases are listed in the Table of Cases without full citations and with reference only to the applicable chapter sub-headings of the text. As page references for sub-headings are not listed in the Table of Contents, it can be a laborious job to identify the correct page and thence the citation of a desired case.

Overall, however, I congratulate Stephen Todd and his co-authors on producing the second edition of a book which has become the New Zealand authority on tort law. The new edition is very readable and shows remarkable editorial consistency in combining 26 chapters written by seven different authors. The work provides a coherent framework for the law of torts, a detailed and comprehensive description and explanation of the law, and a valuable normative discussion capable of stimulating healthy academic debate.

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