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This issue's editors:
Jane Norton and Natalie Fraser

NEWSLETTER

MAY 2004

From the President . . .

This is not a great time of the year, of course. An absolute desert when it comes to public holidays, constant rain, damp leaves and snails everywhere, far too many broken resolutions to get up early and go for a run etc. This is the "grin and bear it" season folks, where the only thing to look forward to (if you are lucky) is a week in Fiji or on your backside on Coronet Peak, trying to avoid snowboarders intent on putting you in a wheelchair.

Anticipating this low point, the AWLA Executive has compiled an excellent newsletter, and scheduled some fine events. The "stand out" is, of course, our Mid Winter Dinner on 18 June 2004 at The Pavilion in the Vero Centre, Shortland Street. Mai Chen, our sister from the south, is speaking. For those of you who have not met Mai, this represents a good opportunity. For those of you who mainly look forward to having someone else cook dinner, the food at The Pavilion is excellent. Please book early because numbers are limited.

There are a couple of things in the newsletter I should mention. The first is the report of the evening with Deborah Manning regarding progress to date in the *Zaoui* case. The effort she and the other lawyers involved in the case have devoted to their client's interests is inspirational.

And they will have to continue for the foreseeable future. Cases like that are "once in a lifetime" events. Everyone who heard Deborah that night was impressed by the resolve that she and the other lawyers involved have shown.

The other is the response to the questionnaire regarding use of any funds AWLA has which may prove surplus to its requirements. Many thanks to all of you who responded. We really do appreciate the feedback. I should point out that the "surplus" is a relatively recent phenomena. It has come about largely because over recent years many of the larger law firms have been generous enough to host our functions but not charged us for their hospitality. Minter Ellison are a recent example of that with the Deborah Manning evening. At the time this practice started, we were not "flush" with funds and the firms involved, knowing this, helped us out. The situation has improved because of this generosity, although there are still times in the year where things get a bit "tight", particularly if we do not get a good turnout for something. Anyway, we are going to digest the comments and if any of you wish to let us have your views (or more of them) please do write.

Other than that, it's heads down. See you all on 18 June, if not before.

Mary Peters

From the Executive . . .

Last year during the interview process for the Margaret Wilson scholarship Anita Killeen and I decided to ask those short-listed whether they would agree to the AWLA publishing précis of their dissertations in the newsletter. This suggestion was welcomed, as those short-listed were gratified at the prospect of having their work 'published' by the AWLA. You will have seen a number published in our last newsletter of 2003 and the feedback has been good.

The AWLA wants to expand on this initial idea by providing the newsletter as forum for the publication of excellent legal writing by women lawyers or law students on topics that are of interest. This month an article written by Natalie Fraser is included in the newsletter on the introduction of private prosecutions under s 54A of the Health and Safety Employment Act 2002 (see page 14).

Natalie Fraser is a current AWLA executive member. Her article was first published in *Safeguard Magazine* in July

2003. This article is a précis of her dissertation that was published in the *Auckland University Law Review* in 2003, which contributed to her gaining her honours degree.

Since September 2003 Natalie has worked as a junior barrister with me at Crescent Chambers. Since joining us she has worked on a range of cases including criminal, family, civil and commercial matters; and ranging from District Court to Court of Appeal actions. So far she has not had the opportunity to conduct a case in her specialist dissertation field. I hope she doesn't mind! For those who are interested in this specialised topic I am sure you will find it informative and useful.

Also in this edition is an article from Marie Callendar entitled *When is Pure Economic Loss Recoverable for the Tort of Negligent Misstatement Under the Common Law in New Zealand*. Marie is currently completing her Masters Degree at the University of Auckland in Commercial Law.

Suzie Abdale

REGULATING THE SEX INDUSTRY

Jennifer Caldwell, Buddle Findlay¹

“Since the Act came into force, the debate has shifted to the local arena as councils have started to become the most visible new players in regulating the sex industry.”

Much of the media coverage and public debate that accompanied the passage of the Prostitution Reform Act 2003 (PRA) focussed on the moral rights and wrongs of decriminalising prostitution, or more correctly, prostitution-related offences such as soliciting and living off the earnings of prostitution. Since the Act came into force, the debate has shifted to the local arena as councils have started to become the most visible new players in regulating the sex industry.

The main action has been the development of bylaws to control location and signage of brothels. For many councils, prostitution bylaws have represented one of the first occasions on which the bylaw provisions in the Local Government Act 2002 (LGA) have been used, and the first time that consideration has had to be given to matters such as public consultation, appropriateness and Bill of Rights issues. Even at this early stage, and before the new bylaws start to get tested in the courts, there is evidence of a wide range of different regulatory responses to regulating brothels – and by implication, prostitution – at a local level. In the Auckland region, responses have varied from no action (Waitakere City) to some of the strongest bylaw controls on location and signage in the country (Auckland City).

I recently conducted an informal survey of progress made to date by councils taking action under the PRA, and this article provides an overview of the scope of councils' regulatory powers in respect of the sex industry, and a case study of the approach taken by Auckland City Council – the council having perhaps the greatest concentration of brothels in its district and now with one of the most stringent brothels bylaws in New Zealand.

Scope of regulatory powers

The PRA, which among other things decriminalises prostitution in New Zealand, was passed by Parliament in June 2003. The principal nationally-applicable regulatory requirement in the PRA is that all operators of prostitution businesses must obtain a certificate of operation.

At a local level, the PRA specifically empowers territorial authorities to make two types of bylaws:

- Bylaws controlling signage that advertises commercial sexual services
- Bylaws regulating the location of brothels.

Signage bylaws may “prohibit or regulate” signage that is in or visible from a public place, and in doing so may impose restrictions on the content, form or amount of signage on display. Signage can only be controlled once the territorial authority is satisfied that a bylaw is necessary to prevent the public display of signage that is likely to cause a nuisance or serious offence to ordinary members of the public using the area or is incompatible with the existing character or use of the area.

The procedure for making brothel bylaws is as prescribed in the general bylaw making provisions of the LGA. Each council must make a determination as to the appropriateness of a bylaw to address the perceived problem, and consider whether there are any Bill of Rights implications. Full public consultation using the special consultative procedure is required before a bylaw is passed.

Under the new LGA, councils must consider whether a bylaw will have any New Zealand Bill of Rights implications, and must not make a bylaw that is inconsistent with the Bill of Rights Act. Legal challenges will be able to be made on the basis that, for example, a bylaw is discriminatory, in addition to the usual reasonableness tests for validity of bylaws. Signage bylaws, however, do not have to be consistent with the New Zealand Bill of Rights Act, effectively excluding any challenge on grounds of freedom of expression.

Even councils that do not opt for a bylaw will play a role through the Resource Management Act (RMA). When considering consent applications for a business of prostitution, two specific factors are relevant:

- Whether the business is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated
- Whether the business is incompatible with the existing character or use of the area in which the land is situated.

The inclusion of these matters gives rise to several questions – most critically whether they are strictly relevant in resource management terms under a piece of legislation that is primarily aimed at the sustainable management of natural and physical resources.

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“Other councils have considered their response and determined not to proceed with bylaws.”

Regulating the Sex Industry – Continued from page 2

Different regulatory styles: how different councils are approaching the key issues

Those councils with sex industry bylaws currently in force include:

- Auckland City: Brothels and Commercial Sex Premises
- Rotorua District: Prostitution
- Queenstown-Lakes District: Brothel and Prostitution Control.

Wellington City also has a current Commercial Sex Premises Bylaw which came into force in October 2001.

Those with draft bylaws currently progressing through the promulgation process include:

- Nelson City: Advertising Commercial Sexual Services
- Christchurch City: Brothels (Location and Signage)
- Tauranga: Prostitution
- Manukau City: Brothel Control (Location, Signage, Licensing).

Other councils have considered their response and determined not to proceed with bylaws. Whangarei District Council, for example, has within the last month resolved not to proceed with a draft brothel control bylaw that it developed for discussion soon after the PRA was passed last year. Waitakere City is continuing to rely on the provisions of its Hygienic Operation of Massage Facilities Bylaw 1999 and has no plans at this stage to promulgate a separate bylaw to regulate the commercial sex industry.

Councils have a number of choices to make when they choose to develop a brothels bylaw:

- What to regulate: location, signage, hygiene, touting or soliciting?
- Whether to impose an additional layer of regulation, ie a licensing regime
- Whether established businesses will be caught by the bylaw and, if so, will they have a grace period before compliance will be enforced?
- Whether to include a dispensation regime.

Auckland City Brothels and Commercial Sex Premises Bylaw

Auckland City Council, having perhaps the greatest concentration of brothels in its district, was one of the first councils to respond and late last year, passed a comprehensive bylaw regulating location and signage not only of brothels, but also of commercial sex premises. Uniquely in New Zealand to date, the Auckland City

Council Brothels and Commercial Sex Premises Bylaw also imposes an annual licensing requirement for all brothels, and has detailed operational, health and safety relating to the layout of the premises and health matters such as the display of information on sexually transmitted infections, the availability of condoms, and the need to launder towels and sheets after each use.

The location controls are detailed and specific by reference to zones and precincts in the district plan which, when mapped, have the effect of confining the sex industry largely to the areas in which it is already established. Separation distances are also imposed, ranging from 250m in respect of residential sites, schools, churches and community facilities to 75m in respect of other brothels. The bylaw also prohibits brothels within 250m of “a major public transport interchange”, defined to mean an airport, railway station, ferry terminal or bus interchange. Commercial sex premises are subject to similar location controls.

Auckland City is the only council to date to have chosen to apply the location controls to established brothels and commercial sex premises, with the effect that existing lawful establishments will have to relocate. The transitional arrangements exempt existing operators from compliance with the location controls until 30 June 2004 for brothels and until 1 January 2005 for commercial sex premises. While the council committee acknowledged that “a number of operators have considerable investments in their current premises, [and] may be subject to lease and other contractual obligations”, the limited exemption for brothels were considered to “provide a reasonable timeframe for compliance.” After that, brothels and commercial sex premises will have to relocate unless they can obtain a dispensation from the council.

Operators will have to apply to the council for a dispensation under the general provisions of the Auckland City Council Consolidated Bylaw. The dispensation test is whether in the Council's opinion full compliance with the bylaw would needlessly and injuriously affect any person or business, without a corresponding benefit to the public or any section of it. The test may be difficult to apply to many of the factual situations

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AN EVENING WITH DEBORAH MANNING

The Zaoui Case –

Where it has been, Where it is now, Where it might go

“Despite having other matters on her mind, once Manning arrived she was a whirlwind of activity – taking time to personally meet and welcome as many of her audience as possible.”

Guest speaker Deborah Manning was running late for the AWLA speaker’s evening held in late March – but with good reason. There had been a significant new development that day in what will surely be a defining case in her as yet brief legal career. Just 6 years in practice, Manning is a familiar face to those who follow current affairs.

Together with Richard McLeod and Dr Rodney Harrison QC, Manning is representing Algerian refugee Ahmed Zaoui in judicial review proceedings of the first National Security Risk Certificate issued in New Zealand. The proceedings have given rise to an intriguing mix of law and politics; perhaps a classic example for Politics 101 students of the need for checks on executive power.

The announcement that had waylaid Manning was of considerable importance to the Zaoui case. Mr Zaoui’s legal team had succeeded in an application to the High Court to have the Inspector General (retired Judge Laurie Greig) removed from the case on the grounds of apparent bias due to comments he made in the Listener magazine last year.

Despite having other matters on her mind, once Manning arrived she was a whirlwind of activity – taking time to personally meet and welcome as many of her audience as possible. She is frank about her objective – to gain the support of the legal profession, if not for Mr Zaoui’s cause, then at least for the right of lawyers, as professional advocates, to actively demonstrate their commitment to their client’s case.

At present (and likely to continue for some time to come) the case is a 7 days a week responsibility for the Zaoui team, who have observed their client’s psychological state deteriorating. The criticism (including from Government) directed at the team’s apparent personal attachment to their client (and consequent lack of objectivity) would appear to discount the fact that Mr Zaoui is detained in prison with no family members or close friends to monitor his psychological health and boost morale.

His lawyers have been responsible for procuring such basic items as a toothbrush holder and exercise books for Mr Zaoui to write in, described by Manning as a

bureaucratic nightmare and the product of obstructive prison staff. She provided anecdotes of the appalling treatment received by Mr Zaoui in prison; yet another aspect of this multifaceted case.

The attention of the international community, particularly advocates of human rights, has no doubt been captured by the events in New Zealand. Aware of the Tampa incident and the liberal leanings of our Prime Minister, Manning explains how her client felt assured that his basic human rights would be respected in New Zealand. Perhaps the most telling account was of a prison officer’s refusal to allow Mr Zaoui fresh air during his many months of confinement. When pressed for a reason, Manning was told an earnest tale of Zaoui being whisked away out from the exercise yard by a low flying chopper, James Bond style.

What about women’s issues? There were a few to captivate the already attentive crowd of 70 strong female practitioners. In fact, it was one of the few men in the audience who tactfully asked Manning how Mr Zaoui felt about having a female counsel in light of his upbringing in a country where attitudes to women are perhaps not as egalitarian as they are in New Zealand.

Manning did not perceive this to be an issue, noting ironically the lack of respect she received from the male prison officers. Astutely, “Debbie” (as they called her) and her male colleagues observed that the fastest way to progress matters with the officers was through good old fashioned rapport building, taking the form of a man to man ciggie and a yarn.

The most interesting feature of this case is the unknown. To a large degree, Zaoui’s lawyers are in the same boat as the rest of us. They do not yet know precisely why their client is being detained in spite of his legitimate refugee status. In light of this feature, Manning understands that she may not be preaching to the converted. It was evident during question time that there were some sceptics in the audience. However, by the end of the evening, most if not all cynics were reformed – if not entirely convinced about Zaoui, then at least by Manning’s sincerity, passion and commitment.

“The most interesting feature of this case is the unknown. To a large degree, Zaoui’s lawyers are in the same boat as the rest of us.”

“Unusually for many career minded young women at the time, Kate had a husband in tow and embarked on having children early by today’s standards.”

“... Kate has really stretched herself. Her services to the profession and the Mother-Care venture are examples of how she will push herself for betterment not just for herself but for others too.”

Spotlight on Kate Davenport: ADLS Vice-President



In this week’s Law News you will have read of the election of Kate Davenport as Vice President of the ADLS. Kate is a past President of the AWLA (94/95); member of the AWLA executive for the 3 preceding years; ADLS council member for 6 years; council member of the NZLS; and this year elected Board member of the NZLS. In addition, in 1998 Kate was temporary Director of Proceedings for the Health & Disability Commissioner while a permanent appointment was being sought. Kate has practiced as a barrister since her return to New Zealand in 1989. Three quarters of her practice is general civil litigation, and about a quarter is medical prosecution work for the Medical Council (which she began doing in the mid-1990’s). She doesn’t agree, but I suspect that a significant amount of her time is spent on services to the profession.

I knew Kate from Law School. She was completing her degree (1983) as I was beginning mine. She was one of those young women who you just knew were going to have a bright future ahead of them. Unusually for many career minded young women at the time, Kate had a husband in tow and embarked on having children early by today’s standards.

My main connection began with Kate soon after she returned to New Zealand from the UK with the new addition to the

family of baby Giles. I can’t remember how it happened but in 1989 Kate and I were part of a ‘coffee group’ of professional women who had just had babies (all of them boys). I remember Kate being the only one who was working full time with full time nanny on board. It seems to me, looking back, that Kate put in enormous effort to be everything to everyone and continue with a full time career. Two other children followed, beautiful little girls (I have 4 boys).

It seems bizarre now, but at the time (15 years ago) one of our group’s gripes was the inability to get quality children’s clothes in New Zealand. We would lend each other precious Mother-Care and Osh Kosh catalogues, and make overseas orders. Typical of Kate that she later tried to do something about it by bringing the Mother-Care franchise to New Zealand in 1998. Kate recalls that the venture was exciting and challenging, but that she has also learned that it is not that easy to translate legal skills to running a national business and being part of an international organisation.

In many ways Kate has really stretched herself. Her services to the profession and the Mother-Care venture are examples of how she will push herself for betterment not just for herself but for others too.

It is customary for one of the Vice-Presidents of the ADLS to be voted as President the next year. This year Gary Gotlieb is also Vice-President. I asked Kate if she intends to push for being President next year. She has said that she is content with the Vice-President role for the present, but I for one will be voting for her for President.

Suzie Abdale

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Government extends paid parental leave

On 8 March 2004, Prime Minister Helen Clark and Women's Affairs Minister Ruth Dyson announced that the eligibility and duration of paid parental leave is to be extended.

The leave period will be extended from 12 to 14 weeks, phased in over two years. Parents will also be able to take paid parental leave if they have been in the same job for at least six months, rather than a year as at present.

Helen Clark and Ruth Dyson said a Department of Labour evaluation of the paid parental leave scheme shows it has been a resounding success: both employees and employers have adjusted well to the entitlement, with few administrative or employment issues arising.

According to Dyson, "the ability to take 12 weeks paid leave, and return to the workplace has increased employees' well-being and feeling of being appreciated, while retaining competent staff has been a benefit to employers.

Two-thirds of all recipient parents who participated in the evaluation stated that there were no drawbacks of the scheme for them. Of the third that did cite drawbacks, the most frequently mentioned was that the length of paid leave was not enough.

Although business groups had voiced some concerns prior to the scheme's introduction, a third of employers surveyed last year cited a positive or very positive impact on their businesses, half said it had no real impact, and only nine per cent believed the overall impact of paid parental leave had been less favourable.

From the employers' perspective, the most frequently cited benefits of the scheme were: that staff were happier and more satisfied, that they were more likely to retain experienced staff, and that the scheme stopped mothers returning to work too early or before they were ready.

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Helen Clark and Ruth Dyson said that New Zealand has long been at the forefront of many initiatives to improve family and women's rights:

"It is satisfying that in the area of paid parental leave, where New Zealand has lagged behind the rest of the world, we have not only made progress, but also that progress has been largely accepted by New Zealand employers and employees.

They also went on to say that "New Zealand businesses have to compete internationally for skilled employees, so it is important that New Zealand employees' quality of life matches that of other developed countries. Extending the paid parental leave scheme will be positive for families, for businesses, and for the country."

Eligible parents will get 13 weeks of paid parental leave from 1 December 2004, and 14 weeks from 1 December 2005. The two-phase introduction will bring New Zealand into line with International Labour Organisation standards.

Parents who have been in a job for at least six months will now also qualify for paid parental leave. Their job must be held open for the 13 weeks (increasing to 14 in 2005) while they take their paid parental leave.

Further work will be carried out this year on the feasibility of extending paid parental leave to self-employed.

It is estimated that around 26,000 employed women have babies each year. Latest figures now confirm that 19,000 parents accessed paid parental leave in its first year. A further 3,400 women are expected to benefit from the extensions to the scheme.

The combined cost of the new proposals for a full year is \$17.3 million. This adds to the current annual expenditure for the scheme of \$51 million.

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UPDATE: Law Commission Preliminary Paper 54 “New Issues in Legal Parenthood”

The Law Commission released its preliminary paper “New Issues in Legal Parenthood” on 31 March 2004.

The paper reviews the rules relating to parenthood in New Zealand law focusing on:

- when a genetic/non genetic parent combination raises a child from birth following donor conception;
- matters relating to paternity including the presumption that a husband is the father of his wife’s child;
- matters relating to maternity such as whether a genetic mother could claim legal maternity where she is not the gestational mother;
- situations where there is no named father on the birth certificate and where the father dies before the child is conceived or born;
- what information is recorded on birth certificates and children’s needs and rights to know who is their genetic father and genetic and gestational mother;
- the place of agreement among adults about parental status and parenting responsibilities; and
- rules for proving and disproving parenthood.

Set against the overarching principle of the needs and interests of children, the paper raises options for reform of the rules of parenthood where children have been:

- conceived by donated sperm or a donated egg or embryo;
- born into lesbian and gay families and to single women;
- born into surrogacy arrangements;
- registered with no named father on their birth certificate.

The Law Commission is seeking feedback on the options for change raised in the paper. Submissions close on 24 May 2004.

For a copy, call Colleen Gurney, Assistant Publications Officer (04) 473 3453, com@lawcom.govt.nz Level 10, 89 The Terrace, PO Box 2590, Wellington.

A media release and copy of the publication is available from the Law Commission’s website at <http://www.lawcom.govt.nz>

For any queries or discussion on the paper contact Susan Hall or Claire Phillips on (04) 473 3453. Commission personnel will meet with interested groups, as resources permit.

CALENDAR OF EVENTS – 2004 –

19 May – Careers Evening

18 June – Mid-Winter Dinner
(Guest speaker *Mai Chen*)

3 August – Quiz Night

29 September – Drinks in Auckland CBD

26 November – Christmas Dinner

Hosking v Runtig: A tort of privacy



Mike Hosking

In a judgment handed down in March (*Hosking v Runtig*, CA101/03, 25 March 2004), the New Zealand Court of Appeal rejected an attempt by Mike Hosking, a former TV presenter, to prevent

the magazine *New Idea* from publishing photos of his twin daughters. Hosking and his estranged wife, Marie, had appealed against a High Court decision allowing *New Idea* to publish photographs taken by Simon Runtig in Newmarket. The Hoskings said they feared the twins might be kidnapped if photos were published. The decision of the Court of Appeal reversed the decision of Randerson J in the High Court which, following developments in the United Kingdom, held that there was no general law of invasion of privacy and where the law does protect against the publication of private information it is done within the scope of breach of confidence.

The Court of Appeal, agreeing with Randerson J, ruled against Hosking on the facts: the photographs would not publicise any fact in respect of which there could be a reasonable expectation of privacy; a person of ordinary sensibilities would not find the publication of these photographs highly offensive or objectionable even bearing in mind that young children were involved; and if even finding the first two elements existed there was no evidence to suggest a serious risk to the children if publication occurred. Despite agreeing with Randerson J on these points, the majority of the Court of Appeal (Gault P, Blanchard and Tipping JJ) nevertheless went beyond the requirements of the case and ruled in favour of a separate tort of privacy.

After a thorough discussion of the British, Australian and North American case law, Gault P and Blanchard J said [at para. 148] that they thought the case for a right of action for breach of privacy by giving publicity to private and personal information was made out. They took that view, in summary, because:

- it is essentially the position reached in the United Kingdom under the breach of confidence cause of action;
- it is consistent with New Zealand's obligations under the International Covenant and the UNCROC;

- it is a development recognised as open by the Law Commission;
- it is workable as demonstrated by the Broadcasting Standards Authority and similar British tribunals;
- it enables competing values to be reconciled;
- it can accommodate interests at different levels so as to take account of the position of children;
- it avoids distortion of the elements for breach of confidence;
- it enables New Zealand to draw upon extensive United States experience; and
- it will allow the law to develop with a direct focus on the legitimate protection of privacy, without the need to be related to issues of trust and confidence.

Justice Tipping elaborated on the first point by explaining [at para 257] that the result in substantive terms of recognising a separate tort is not significantly different from the extended form of the breach of confidence cause of action as it is being developed in the United Kingdom. What was at stake was really a matter of legal method rather than substantive outcome. He thought that it could not logically be held that one method is an unjustified limit on freedom of expression whereas another is not. In his view, New Zealand courts have, to a greater or lesser extent, already espoused a separate tort to protect privacy interests and he was not persuaded there was any good reason to put the clock back and confine the law to a method of analysis which does not fit the true nature or the realities of the cause of action.

The formulation of the tort of privacy proposed by the Court was heavily influenced by Dean Prosser's article entitled, quite simply, "Privacy" (1960) 48 Cal L Rev 383. In it Prosser considered the developments in the law since Warren and Brandeis' highly influential article "The Right to Privacy" (1890) 4 Harv L Rev 193 and concluded that the existence of a right of privacy (in fact four separate torts) was recognised by the great majority of American jurisdictions that had considered the question. For the purposes of the case before them, the Court of Appeal concerned itself with, and effectively adopted, the third of the torts identified by Prosser and named *Publicity Given to*

"New Zealand Courts have ... already espoused a separate tort to protect privacy interests and [Tipping J] was not persuaded there was any good reason to put the clock back."

Continued on page 9 ➤

“Once again the [Court of Appeal] demonstrate[s] the judicial habit of paying lip-service to the New Zealand Bill of Rights Act.”

“Having failed on the facts, Hosking v Runtig was not the best case with which to develop a tort of privacy.”

Hosking v Runtig – Continued from page 8

Private Life. In relation to how the tort should be formulated in New Zealand law, the Court used Nicholson J’s judgment in *P v D* [2000] 2 NZLR591 as the starting point and went on to state that the two fundamental requirements for a successful claim for interference with privacy are:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The Court agreed with the statements of Prosser that public figures may have lower or diminished expectations of privacy in relation to their private lives for three reasons: (1) by seeking publicity they have consented to it; (2) their personalities and affairs are already public facts not private ones; and (3) there is a legitimate interest in the publication of details about public figures. This lower expectation of privacy may extend to the families of public figures. While there may be special circumstances pointing away from that conclusion, such as where there is evidence of risk to the plaintiff, this was not made out in the present case. The Court did conclude, however, that the criteria for the protection of privacy provide adequate flexibility to accommodate the special vulnerability of children.

However, despite the majority’s clear stance in favour of the tort, Anderson J, in dissent, said [at para. 271] that he thought the court should not lose sight of the fact that this litigation came into being to prevent the publication of photographs of people in a public street. There was nothing in the least personally embarrassing or distressing about the material which might be published. Anderson J thought the declaration, by the majority, that there is a new civil liability for publishing facts about a person was created in a

sidewind, was amorphous, unnecessary, a disproportionate response to rare, almost hypothetical circumstances and fell manifestly short of justifying its limitation on the right to freedom of expression affirmed by the New Zealand Bill of Rights Act 1990.

This final point identified by Anderson and Keith JJ is one of the concerning aspects of the majority judgment. Despite mentioning the “fundamental importance of the [sic] freedom of expression” [para.113] the President and Blanchard J once again demonstrate the judicial habit paying lip-service to the New Zealand Bill of Rights Act. They provide only a cursory examination as to whether a tort of privacy would be a reasonable limit on the right that can be demonstrably justified in a free and democratic society. With sparse analysis, the Justices simply conclude that “it could not be contended that limits imposed . . . cannot be justified” [para 114]. Thankfully Keith J, in his dissenting judgment, provides a more thorough discussion of the relationship between a tort of privacy and freedom of expression concluding that a general tort of unreasonable publicising of private information should not be recognised in law because the proposed limitation is not demonstrably justified as required by s 5 of the Bill of Rights. He also concluded that the tort would depart, without good reason, from long established and well-considered approaches to the protection of personal information.

Having failed on the facts, *Hosking v Runtig* was not the best case with which to develop a tort of privacy. There is little evidence as to where this judgment will lead and with what effect it will have in New Zealand law particularly on the right to freedom of expression. Further case law and academic commentary are eagerly awaited.

Jane Norton



Television presenter Mike Hosking and his estranged wife, Marie, leave the Court of Appeal in Wellington.

“Women are concentrated in low-paid jobs, and earn less than men even when they work in the same professions. They are more likely to have a post-school qualification, but take much longer to pay back student debt (and incur more interest) because of their lower earnings and childcare responsibilities. They still occupy fewer than one-third of all senior management positions in New Zealand companies.”

Action plan a ‘first’ for New Zealand women

A new action plan addressing women’s issues across the whole of government for the first time was launched by the Minister of Women’s Affairs, Ruth Dyson, on 8 March 2004. It is a whole-of-government programme to improve women’s lives in the workplace, home, community and as members of society.

The Action Plan is an inclusive programme developed after consultation with New Zealand women on the discussion document prepared by the Ministry of Women’s Affairs, *Towards an Action Plan for New Zealand Women: A discussion document* (2002). A national consultation process was held between December 2002 and March 2003 by the Ministry in partnership with the National Council of Women of New Zealand, the Maori Women’s Welfare League and PACIFICA. Close to 300 submissions were received

Work has been prioritised in three areas:

- economic sustainability
- work-life balance
- well-being

The Ministry of Women’s Affairs will co-ordinate implementation of the Plan over the next five years.

Ruth Dyson said, although a lot of progress had been made on women’s issues, many barriers still prevented women from participating fully and equally in society.

“Women are concentrated in low-paid jobs, and earn less than men even when they work in the same professions. They are more likely to have a post-school qualification, but take much longer to pay back student debt (and incur more interest) because of their lower earnings and childcare responsibilities. They still occupy fewer than one-third of all senior

management positions in New Zealand companies. . . . For Maori, Pacific, rural, ethnic, low-income, rural, older and disabled women, the barriers are frequently greater.”

Ms Dyson has outlined a number of initiatives contained in the plan, including:

- promoting women’s success in enterprise;
- helping Maori women gain governance, management and business skills;
- improving women’s participation in modern apprenticeships;
- increasing women’s access to financial planning advice and uptake of retirement savings schemes;
- reducing the impact of student loans on women;
- improving the level of family income assistance, which will benefit many women in lower-income groups;
- new policies to encourage work/life balance and address pay and employment equity;
- greater support for early childhood education and out of school care and recreation, to improve quality, access and affordability;
- a social statistics package, including plans for a second Time Use Survey and the development of satellite accounts to help understand the contribution of household and non-profit activity to the economy; and
- new policies to enhance opportunities for women with disabilities, particularly in employment.

Copies of the ‘Action Plan for New Zealand Women’ is available from the Ministry of Women’s Affairs website www.mwa.govt.nz, or by emailing mwa@mwa.govt.nz

MARK YOUR DIARIES

Please note the following key dates now for forthcoming AWLA functions

19 May 2004
Careers Evening

“New Zealand women have a vision for women in Aotearoa New Zealand. This includes access to affordable quality housing, education, and health and the ability to exercise their civil, social, economic, cultural and political rights.”

Barriers to the Advancement of Women

The following is the Oral Presentation to the CEDAW Monitoring Committee given in July last year to accompany the NGO Non-Maori Shadow Report. It identifies 8 Key Barriers that the Non-Maori NGO Community considered were impacting on the advancement of New Zealand women, particularly economically. Each of the barriers is, in itself, arguably a reason to retain the Ministry of Women's Affairs. AWLA invites comment on these issues, in particular whether the Ministry should be retained.

New Zealand women have a vision for women in Aotearoa New Zealand. This includes access to affordable quality housing, education, and health and the ability to exercise their civil, social, economic, cultural and political rights.

The gender pay gap in both the public and private sectors continues to be a major cause of economic discrimination and the economic reforms of the 1990s have resulted in a significant group of women and children living in poverty, with Maori and Pasifika women particularly over-represented in this group. New Zealand women find it unacceptable that this situation exists at the same time as the New Zealand Government has reported a strong financial position in 2003, with a substantial Budget surplus.

You are therefore urged to study the substance and range of issues in the full Report, which collates the opinions expressed by one in five New Zealand

women – either individually or through an organisation of which they are a member.

Eight key barriers to the well-being and advancement of women in Aotearoa New Zealand have been identified.

Gender Inequities of the Student Loan Scheme (Article 10)

There have been no policy initiatives to relieve women of the unequal debt burden created by the Student Loan Scheme. This emerged as a major issue during Government consultation on the Action Plan for NZ Women. Due to the gender pay gap, women take twice as long as men to repay their student loans, and therefore pay thousands of dollars more through interest payments. The long-term impact on the lives of New Zealand women is yet to be seen.

**Page 25 NGO
Non Maori Report**

Continued on page 12 ➤

Regulating the Sex Industry – Continued from page 3

that will arise for determination under the Auckland City Brothels Bylaw, involving an assessment of the economic impact on the operator's business, balanced against an assessment of the public benefit of that brothel relocating (or closing down).

The bylaw also covers small owner-operated brothels, even though the PRA deems such small owner-operated brothels not to be operators for purposes of the PRA and they are not required to obtain operator certificates. In Auckland City these operators, such as a self employed prostitute working from home, will nevertheless be subject to the location controls, which exclude brothels from residential zoned areas, and the annual licensing requirement.

Conclusion

Decriminalisation at a national level has already produced some apparent contradictions as regulation of the newly legalised sex industry has been devolved to the local level. Regulation by councils is in its early stages, but the range of regulatory responses reflect the wide range of community views on prostitution

itself and create some tension with the purpose of the PRA, which includes to safeguard the human rights of sex workers and protect them from exploitation.

The key issues for councils that pass brothels bylaws will be enforcement and defending the bylaws against inevitable legal challenge, which will ensure that the inevitable moral debate about prostitution will continue. What should not be underestimated is the determination of the sex industry itself to protect its position, particularly in those districts whose bylaws do not provide exemptions in respect of established premises. These businesses have much at stake in financial terms, and are likely to mount well-resourced challenges to the PRA-related bylaws when they are enforced. The oversight of the courts in determining the reasonableness of bylaws made under the PRA will be an important mediator in the new debate.

Jennifer Caldwell

¹ This article is based on a paper "Bylaws – Regulating the Sex Industry" presented to the LexisNexis Local Government Legal Forum on 23 April 2004. For a copy of the full paper, please contact the writer.

Barriers to the Advancement of Women – Continued from page 11

“... there are serious deficiencies in the Child Support Act which mean that the majority of non-custodial fathers pay only the minimum contribution of \$13 per week.”

“Increasing financial pressures on women over time have resulted in gender-based discrimination for our increasingly ageing population.”

Gender, Ethnicity and Disability Pay Gaps (Article 11)

The Government's recent announcement of a Pay and Employment Equity Taskforce covering the public service, public health and education sectors is welcomed. All proposals will be subject to a cost benefit assessment, raising concerns that pay equity initiatives required to meet NZ's international obligations may be ruled out for financial reasons. There also remains a glaring policy gap in addressing pay equity in the private sector.

**Page 29 and 30
Non Maori Report**

Casualisation of the Workforce (Article 11)

The government has indicated that an inquiry into work-life balance and casualisation be held during 2003, however details are yet to be announced. There are pressing problems around precarious work that need to be addressed, including:

- Uncertain hours or conditions of work
- Low wages
- Ineffective protection against discrimination
- Job insecurity, often meaning no accrued entitlement to 'standard' employment benefits such as sick, domestic, bereavement and parental leave
- Limited opportunity to gain and retain skills through access to education and training
- Dangerous or unhealthy work.

The Holidays Bill introduced into Parliament on 18 February does not address the exclusion of short-term, casual or weekend workers from basic leave entitlements.

**Pages 28 and 29 NGO
Non Maori Report**

Cost of Transition between Paid and Unpaid Work (Articles 11 and 13)

Income support payments have not been adjusted for cost-of-living in real terms since payment levels were slashed in 1988. Women who would like to move off the government-funded benefit are faced with some of the highest marginal tax rates in New Zealand, because any paid work is taxed at a secondary rate and their benefit is still sharply abated. Combined with this is the high cost of childcare, for which government provides only a partial subsidy and minuscule tax relief.

In addition there are serious deficiencies

in the Child Support Act which mean that the majority of non-custodial fathers pay only the minimum contribution of \$13 per week. This is a farcical amount and does little to help support his children and nothing to assist a female sole parent struggling to return to the workforce.

**Pages 32, 41 and 42 NGO
Non Maori Report**

Undervaluing of Caring Work done by Women (Articles 5 and 13)

There is insufficient recognition of women's work as mothers and as carers of other dependents.

Whilst work tests have been abolished for sole parents in receipt of a benefit, these parents are immediately required to plan their return and/or entry to paid work. If they do not comply, they can lose up to 50% of their benefit

The introduction and review of paid parental leave is welcomed. However 36% of women employees and all those who are self-employed are not eligible for this payment. Currently 61% of fulltime women workers receive less than two thirds of their previous income, which is below the minimum requirement under ILO Convention 183.

**Pages 17, 18, 31 and 32 NGO
Non Maori Report**

Financial Insecurity and Health of Older Women (Articles 11 and 13)

Increasing financial pressures on women over time have resulted in gender-based discrimination for our increasingly ageing population. Older women are more likely to live alone, be socially isolated, have lower incomes and fewer assets, and care for frail dependents. More than 25% of New Zealand women over 45 have disabilities which further compounds this disadvantage. Government policy falls short of addressing this imbalance.

**Pages 32, 37, 38 and 41 NGO
Non Maori Report**

Under-resourcing of women's health initiatives (Article 12)

Despite a considerable number of government health strategies, there are inadequate resources devoted to improving women's health status. Systemic issues of deprivation and disadvantage, educational failure, abuse and violence must be addressed together with equitable

Continued on page 19 ➤

Crimes Amendment Bill (No.2)

The Law and Order Committee has called for submissions on the Crimes Amendment Bill (No 2) and these closed on 14 April. This Bill will be an important piece of legislation.

The Bill is the first review of sexual crimes contained in the Crimes Act 1961 and aims to update the law to reflect more recent changes in criminal behaviour and social attitudes towards sexual matters.

The main amendments aim to ensure:

1. All sexual offences (with the exception of rape, which is a male-against-female offence only and is retained in the new bill) are expressed and applied in a sex-neutral manner;
2. The law's coverage for vulnerable groups is strengthened, including provisions relating to sexual offences against children, which are to be

simplified into three groupings so they overlap and close a loophole that allows some offenders to escape conviction when the precise age of the child cannot be established;

3. Offences based on "sexual intercourse" are extended to cover "sexual connection" as currently defined for the crime of "sexual violation";
4. It will not be a defence to argue that the young person consented;
5. The penalties for sexual offending are set at an appropriate level;
6. The provision of a statutory basis for drug rape prosecutions; and
7. The bill facilitates New Zealand's compliance with the Optional Protocol to the United Nations Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography.

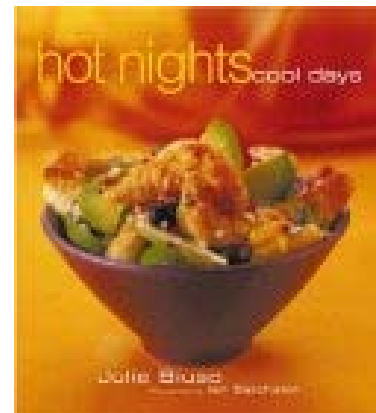
BOOK REVIEW

Hot Days, Cool Nights by Julie Biuso

Julie Biuso has long been one of my favourite food writers. As well as numerous books, Julie has been the food editor of both *Cuisine* and the *Viva* section of the *Herald*. More recently she has taken on the role of food editor for *Women's Day*, *Home & Entertaining* and *Your House and Garden*. Julie's recipes tend to be accessible and her writing reflects her effervescent nature.

Her latest book, *Hot Nights, Cool Days*, does not disappoint. In fact, this is perhaps her most practical book to date. Julie's writing is fresh, fun and inspiring. She encourages cooks to take the best and freshest ingredients to create stunning results with simplicity.

Not only does this book have the wonderful, Mediterranean inspired food that Julie is famous for, but it also contains useful tips and information on the ingredients used, wine to serve, and nutritional advice. For example, the delicious recipe for panfried fish fillets with tomatoes and lime (and yes, I have tried it!) comes with the nutritional advice "with fish, onions, tomatoes, extra virgin olive oil, herbs and limes this is good for the brain and heart, lowers cholesterol, fights cancer and keeps away colds". Julie also recommends that the recipe be served with a glass or two of sauvignon blanc!



Some of the delicious meals that I have made from this book include the fish mentioned above, Hawke's bay salad (a fantastically simple roast pumpkin, feta and cherry tomato salad that got rave reviews), barbecued pork fillets stuffed with apricots and lemon thyme and rice and apricot puddings with brulee topping, just to name a few. And there are so many more that I want to try. Ian Batchelor's superb photographs which accompany the recipes, leap off the page and I am sure make even the most reluctant cook eager to try some new things.

As the obsessed owner of a large number of cookbooks, *Hot Nights, Cool Days* is certainly one I use with regularity. I would recommend it both to experienced and novice cooks alike.

You can also check out Julie's style on the web – a great way to "try before you buy" – www.juliebiuso.com

Tammy McLeod

The Introduction of Private Prosecutions under the section 54A of the Health and Safety in Employment Act 2002

As the curtain closed on the 2002 Parliamentary year the controversial Health and Safety in Employment Amendment Bill was passed. Although the changes were to be accompanied by an extensive advertising campaign as a means of educating the public, the Bill came into force with limited fanfare on the 5th of May 2003.

Included in the new amendments was section 54A, which removed OSH's monopoly on prosecutions under the Health and Safety in Employment Act 1992. The crux of this amendment was that it allowed for private prosecutions to be brought where OSH decided not to take enforcement action. The original S54 expressly prohibited the bringing of prosecutions by anyone other than an Inspector. Meaning that if OSH did not bring a prosecution, criminal redress could not be sought by any other means. This left a bitter taste in the mouths of many.

The Department of Labour stated that the removal of the monopoly would provide another avenue of redress for victims; act as a safeguard against official inertia or incompetence; provide an alternative course of action in those cases where the case is not of sufficient public interest for OSH to pursue a prosecution but it is important to the private individual who has been harmed.

Employer interest groups felt the removal of the monopoly would add to an already employee focused system. Business New Zealand stated in their submissions to the Transport and Industrial Relations Select Committee "Employers will be forgiven for believing that the size of the stick has much increased but any carrot is entirely missing." Rather than using the power in a legitimate fashion it was believed that "unions will do it [bring a prosecution] for the social gain of making the employer pay and to prove that OSH didn't do their job." (Paul Jarvie, EMA Northern).

Criticism has been directed at the poor quality of investigations carried out by OSH, which have led to questionable conclusions and the decision not to lay charges (EMPU submissions to Transport and Industrial Relations Committee on s54A). Supporters of the amendments believed that the removal of the monopoly would impact positively on the decision-making processes of OSH, most fundamentally in OSH's decision of whether or not to lay an information.

Backdoor Compensation?

The amendments increase the level of fine able to be imposed under the Act, (ss23 and 24) and employers viewed this as a means of providing employees with backdoor compensation. Concern was expressed that prosecutions would be motivated by the chance of a monetary penalty. However, suspicions of large awards were calmed by the fact that prior to an award being made a private prosecutor would have first have to secure a conviction; money would not be paid where it was not deserved. On conviction the court would have to consider the appropriate level of fine according to the criteria detailed in De Spa (which looks at factors such as culpability, the financial position of the defendant, the degree of harm, and the defendant's attitude), including it was said, whether under the section 28A of the Criminal Justice Act any part of the fine should be awarded to the victim of the crime.

On their face these concerns appeared to be valid. However, the repealing of the *Criminal Justice Act by the Sentencing Act 2002* makes them academic. The judicial discretion that existed under the *Criminal Justice Act* to award a percentage of the fine to the victim or the victim's family has been repealed. The court can no longer order part of a fine to the victim, removing the danger that the Act may be used to inflate fines in order to increase compensation for the victim (Mouton A, [A right to Justice: Removing the OSH Monopoly on Prosecutions of Breaches of the Health and Safety in Employment Act 1992](#) (2000), Research Opinion prepared for the OSH Policy Unit). In its place the *Sentencing Act* provides for a reparation assessment that is severely limited by ACC.

Reparation "may be awarded on the basis of loss or damage consequential on any emotional or physical harm to the victim" (Geoff Hall *The Sentencing Act – New Bottle, Same Wine?* <http://www.nz-lawsoc.org.nz/lawtalk/583hall.htm>). Proof of purely physical harm is not enough. A worker who has lost a limb because of a workplace accident does not automatically receive reparation on the conviction of the defendant. The victim must be able to show emotional loss or damage that is consequential on the physical harm.

Continued on page 15 ➤

*The Introduction of Private Prosecutions – Continued from page 14***Failings of the new s54A**

In order for the *HASE Act* to work OSH inspectors have “relatively extensive powers allowing entry to premises, access to witnesses and information, and power to stop dangerous work practices immediately, or to seal a scene in order to collect evidence”. Where the Department decides not to prosecute, evidence collected by the inspectors is subject to the provisions of the *Official Information Act 1982* and the *Privacy Act 1993* (Review of the *HASE Act 1992*, Proposal to remove the prosecution monopoly).

Under the new system a private individual will be able to lay an information and bring a private prosecution, but they will not be provided with investigative powers or the right of entry that are available to an OSH Inspector. The ability of a private prosecutor to gather evidence will be severely limited. OSH has six months from being made aware of a workplace accident, or when they reasonably should have been aware of an accident to decide not to bring a prosecution action (Prosecution action means, the laying of an information, the issuing of an infringement Notice (IN), or the making of an application for a compliance order). Only after that time has lapsed can a private prosecutor lay an information. (*Health and Safety in Employment Amendment Act 2002* section 54B). However, due to the inherent nature of worksites it is unlikely that they will remain in the same state as when the accident happened (Mouton, A). Any potentially probative evidence would have already been collected by OSH or would have disappeared forever.

The system cannot work unless a median is found and clear guidelines and powers are put in place. Provision needs to be made so that the right to bring a private prosecution is an effective right. Although it is undeniable that the

defendant has the right to fair process, what use is a power to bring a private prosecution if you lack the power to gather the evidence necessary to prepare your case?

It is not only the lack of investigative machinery that cripples an individual's ability to bring a successful, or even meaningful private prosecution. Under the amendments there is no duty imposed on OSH to share information that they have obtained during their investigation. The converse is in fact true. There is no specific duty to disclose. It is the private prosecutor's “responsibility to seek their own information . . . the Act contains nothing special to say that OSH has to disclose” (DOL, Legal Services). It would seem obvious that if information obtained in the course of an investigation plays a role in OSH's decision not to take enforcement action, then the same information is more likely than not to be important in any subsequent decision as to whether to bring a private prosecution. There is an assumption that if OSH is not bringing a prosecution then there is good reason for it not being brought. Without access to the evidence obtained by the inspector during an investigation a case will be difficult to prove, without access to OSH's records, a case would arguably be pointless.

If the aim of the amendments is to reduce workplace injury it does not seem that allowing private prosecutions will have the desired effect. Although it is a ‘wait and see’ game as to the actual impact the amendments will have, strong feelings are evident as to the perceived effect that private prosecutions will have on workplace safety. Across the board the overwhelming impression is that the impact of the new section 54A will be negligible.

Natalie Fraser



Auckland Women
Lawyers' Association Inc.

'Careers Evening 2004'

Wednesday, 19 May 2004

The Law Faculty, University of Auckland
Wine and nibbles @ **5:30pm** in the Staff Common Room
Speakers will begin @ **6:00pm** in the Algie Lecture Theatre

This year we are pleased to invite:

Sarah Katz, Litigation Partner at Russell McVeagh
Marie Dyhrberg, Criminal Defence Barrister
Laila Harre, Politician
Lianne Meyer, Partner at Rick Williams Associates

To speak about their different career paths and experiences based on the common phenomena of having a law degree.

STUDENTS:
join AWLA on the night for the discounted price of \$10.00

-
- Please Pre-Register for Catering Purposes

FREE for Students

\$5 charge for members, **\$10** charge for non-members

Please RSVP with your payment to: Sharyn Larkin, AWLA, PO Box 6568, Wellesley Street, Auckland by **12 May 2004** (awla@xtra.co.nz) or post this flyer to the above address.

Thank you.

Name(s): _____

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I enclose \$ _____ for _____ tickets

“The extent of liability is still a matter of argument with the fear of indeterminate liability being a strong constraining factor in any action.”

“... issues have been discussed in a wide variety of contexts including claims involving professional advice from auditors, accountants, surveyors, bank managers and valuers.”

When is pure economic loss recoverable for the tort of negligent misstatement under the common law of New Zealand?

By Marie Callander – postgraduate student (Masters in Commercial Law)
– University of Auckland.

Prior to 1963 it was possible to recover damages for negligent actions but not for negligent words. Within the boundaries of contract law actions could succeed on the basis of fraudulent misrepresentation and it was not uncommon for some nominal consideration to be construed so that the defendant could be sued in contract rather than tort. In 1951, in the English Court of Appeal, Lord Denning's dissenting judgment provided an obiter dictum statement of reasoning to support the right to sue in negligent misstatement for purely financial loss. But the *ratio* in that case had come down firmly opposing such a right. For any change in the law to take place it required a decision in the House of Lords. Such a decision came in 1963 in the case of *Hedley Byrne v Heller and Partners Ltd* [1964] A.C. 465, H.L. Lord Denning was vindicated and although the plaintiff lost the case due to a disclaimer of liability the obiter statements of Lords Reid, Morris of Borth-Y-Gest, Hodson, Devlin and Pearce were so strong that the right to bring an action for negligent misstatement for purely financial loss was established. They made it very clear that they regarded *Candler* to have been wrongly decided.

Since that time the boundaries of liability for such torts have been tested, expanded and contracted in the New Zealand and English courts along with those of other common law jurisdictions. The extent of liability is still a matter of argument with the fear of indeterminate liability being a strong constraining factor in any action. Other key issues that have arisen since *Hedley Bryne* relate to such matters as the significance of the distinction between physical and economic loss, concurrent liability in both contract and tort, discretionary powers of statutory bodies, the concept of assumption of responsibility. These issues have been discussed in a wide variety of contexts including claims involving professional advice from auditors, accountants, surveyors, bank managers and valuers. Statutory bodies such as city councils and the Ministry of Transport have defended claims in relation to building approvals and ship surveys certificates, and lawyers have frequently faced actions in relation to various certificates issued by them.

My research essay is intended to explore and trace the development of this area of New Zealand law, highlighting some of the key cases from *Hedley Byrne* to *Carter & Wright* [2003] 2 NZLR 160.

The paper begins by looking at the English background with discussion of the key facts and principles found in *Hedley Byrne v Heller and Partners Ltd, Dorset Yacht Co. Ltd. v Home Office* [1970] A.C. 1004, and *Anns v Merton London Borough Council* [1978] AC 728. From these three cases comes, firstly, what has become known as the '*Hedley Bryne* criteria' of special skill, assumption of responsibility by the defendant making the statement and reasonable detrimental reliance by the plaintiff. Secondly, where statutory provisions do not specifically say, a statutory body or its agents is not exempt from liability at common law in the performance of their statutory duties where reasonably foreseeable damage resulted from their negligence. Thirdly, what has become a vital part of New Zealand's approach to the law of negligent misstatement, the two-stage test of proximity and policy for establishing a duty of care on the part of the maker of a negligent misstatement or other negligent act or omission.

Significant New Zealand cases following *Anns* are described and discussed from throughout the last quarter of the twentieth century. These cover potential liability for company auditors, solicitors' certificates, local bodies, insurance investigators, engineers and government agencies. Other significant cases from outside New Zealand such as *Caparo Industries Plc v Dickman* [1990] 2 A.C. are also discussed and their impact on the development of New Zealand's 'unique approach' is briefly analysed.

By the early 1990s, when *South Pacific Manufacturing Co Ltd & Anor v New Zealand Security Consultants & Investigations Ltd & Ors* [1992] 2 NZLR 282 (CA) came before the Court of Appeal, Cooke P. was ready to give a detailed list of fifteen points to be considered when establishing whether a duty of care existed and stated that the two stage approach was firmly established in New Zealand. In *Invercargill City Council v Hamlin* [1996] 1 NZLR 513

Continued on page 19 ➤

Executive Member Off on New York Internship



The Executive would like to extend their congratulations to **Anita Killeen**, a Prosecutor with the Serious Fraud Office, who has been a member of the Executive for the past two years.

Anita has been accepted into the United States Attorney's Office training and development scholarship programme. It is considered that she is the first New Zealand lawyer to be accepted into this programme.

The purpose of the scholarship is to observe the different procedures undertaken in the United States Attorney's Office (in Manhattan) in conjunction with the FBI to see how their procedures for the preparation and presentation of cases in Court differ to New Zealand. Ms Killeen will be hosted in July by the federal prosecutor's office in Manhattan: the United States Attorney for the Southern District of New York. The Deputy Chief of the Criminal Division will co-ordinate with the Securities Fraud and Major Crimes Unit (which both handle white-collar crime) to meet with Ms Killeen to discuss cases, arrange court visits/attendance at seminars, and the like.

Ms Killeen is a former Auckland High Court Judges' Clerk and is currently employed as a Prosecutor at the Serious Fraud Office.

Barriers to the Advancement of Women – Continued from page 12

access to health services and information. Otherwise it is likely New Zealand women will continue to have high rates of breast and cervical cancer, sexually transmitted infections, and the third highest rate of teenage pregnancy in the OECD.

Pages 33 to 39 NGO
Non Maori Report

Under-representation of Women in Decision Making (Articles 7 and 8)

We in New Zealand are proud of the high profile women in our country – the Governor General, the Chief Justice, the Prime Minister. This level of decision-making does not reflect the reality for the vast majority of women in New Zealand. The last local and national elections both saw a decrease in the number and proportion of women as civic leaders and parliamentarians. The vast majority of

government and quasi government boards are overwhelmingly male and draft legislation is considering downgrading EEO reporting requirements for some government entities. Women must be a part of all decision making processes.

Pages 19 and 20 NGO
Non Maori Report

Conclusion

The critical issue for New Zealand women is financial discrimination. This is evidenced in lower remuneration, inability to repay student loans quickly, and a disproportionate responsibility for all facets of childcare. Financial discrimination impacts on broader areas of wellbeing.

In New Zealand many women do not have economic independence because of the policy issues identified.

When is pure economic loss recoverable – Continued from page 18

the independence of our Court of Appeal from England was recognised by the Law Lords in their affirmation of the of the court's decision in this case which went against their own recent decision of *Murphy v Brentwood DC*, [1991] 1 A.C. 398; (HL). The House held that New Zealanders expected local councils to accept liability for negligent approvals of house foundations and that this expectation was valid reason to take a different approach in New Zealand than in England.

Some of the decisions in the late 1990's and into 2000 seemed to be moving away from the two-stage approach and returning to the narrower *Hedley Byrne* criteria. Cases such as *Price Waterhouse v Kwan* [2000] 3 NZLR 39, *R M Turton & Co Ltd (In Liquidation) v Kerslake and Partners* [2000] 3 NZLR 406 and *Boyd Knight v Purdue* [1999] 2 NZLR 278 are explored in the paper and the criticisms that have been

levelled against the Court of Appeal are considered. The answer from the Court of appeal in *Attorney General v Carter & Wright* is the final case analysed and it provides an articulate description of the approach to be taken by New Zealand courts.

The conclusions drawn from the cases analysis for novel situations involving negligent misstatements look at concurrent liability in contract and tort, the influence of a contractual matrix on the likely imposition of a duty of care, the impact of the statutory environment, the significance of the *Hedley Byrne* criteria, and the impact of insolvency amongst the parties on the imposition of a duty of care.

The paper closes with a brief look at the possible future development of this area of law. In particular the leaky building issue in light of the willingness of our courts in the past to impose a duty of care on local councils.



Postgraduate Study in Law

More graduates than ever are turning to The University of Auckland Law School to undertake a first class postgraduate qualification that will broaden their careers.

The intensive and single-semester courses contribute to a programme that accommodates both practitioners and full-time students. An extensive range of courses leading to the Master of Laws Degree (LLM) and Master of Environmental Legal Studies is offered. Specialisations are possible in the LLM in Commercial Law, Environmental Law or Public Law.

The seminar-style classes are limited to 25 students to ensure maximum participation. The courses listed below are offered for Semester Two 2004. Those marked with an asterisk (*) are offered on an intensive basis by scholars of international renown. (*Course dates are available on application*).

Semester Two (July - October) *Applications recommended prior to 19 June 2004.*

Comparative Bill of Rights Law: Civil and Political Rights*		Professor Dave Douglas & Associate Professor Paul Rishworth
Comparative Environmental Law*		Professor Oliver Houck
Conflict of Laws*		Dr Pippa Rogerson
International Sales & Finance*		Professor Michael Bridge
Restitution in Commercial Contexts*		Associate Professor Rob Chambers
Communications & Information Technology	Thurs 5-8pm	Louise Longdin & Alex Sims
Copyright Law	Wed 5-8pm	Professor Ian Eagles
Employment Law	Tues & Thur 5-7pm	Associate Professor Bill Hodge & John Timmins
Public International Law	Tues 1-4pm	Dr Caroline Foster
Resource Management Law	Thurs 5-8pm	Associate Professor Kenneth Palmer
The Regulation of International Trade	Tues 5-8pm	Chris Noonan

These courses may also be taken towards a Postgraduate Diploma in Legal Studies (PGDipLS) or, subject to availability, a Certificate of Proficiency. Postgraduate study may be completed full or part-time.



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Postgraduate Study in Law at The University of Auckland

More graduates than ever are turning to The University of Auckland Faculty of Law for a first class postgraduate qualification that will broaden their careers.

The partnership with the University of Melbourne, the mix of visiting lecturers and leading University of Auckland staff together with a range of students from diverse backgrounds creates a dynamic and international learning experience.

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The following distinguished visitors will teach intensive Masters courses that contribute to either the Master of Laws or Master of Environmental Legal Studies in Semester Two 2004.

Professor Michael Bridge (University College London)
 Associate Professor Robert Chambers (University of Alberta)
 Professor Davis Douglas (William and Mary School of Law)
 Professor Oliver Houck (Tulane University)
 Dr Pippa Rogerson (University of Cambridge)

Courses Offered in Semester Two 2004 (19 July – 22 October)

The courses marked with an asterisk are offered on an intensive basis, with approximately 30 hours of class time over a five-day period (weekends are not included). To enhance the learning experience, all courses are taught in small classes with a maximum of 25 students.

Specialisation in the LLM degree allows students the option of completing a LLM "in" Commercial Law, Environmental Law or Public Law.

Comparative Bill of Rights Law: Civil and Political Rights*		<i>Professor Davis Douglas & Associate Professor Paul Rishworth</i>
Comparative Environmental Law*		<i>Professor Oliver Houck</i>
Conflict of Laws*		<i>Dr Pippa Rogerson</i>
International Sales & Finance*		<i>Professor Michael Bridge</i>
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The Regulation of International Trade	<i>Tues 5–8pm</i>	<i>Chris Noonan</i>

Applications recommended prior to 1 June 2004. Current postgraduate law students may enrol directly in these courses at <https://ndeva.auckland.ac.nz/ndeva/> Please telephone 0800 61 62 63 if you have any difficulties with your enrolment.

Contact:

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REPORT ON THE RESULTS OF THE SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS

Thank you to those busy practitioners who took the time to answer the survey questions. In all 50 responded. This may not seem much out of a membership of about 400, but as far as other responses to questions put directly to members go, this was quite a good response.

What do the results mean?

80% agreed that as an organisation the AWLA should provide financial assistance from any surplus.

62% considered that 50% or more of our surplus should be directed to a donation.

56% considered that our existing objectives contained in our constitution enable us to provide financial assistance to organisations that provide services to women and children.

56% agreed that the AWLA executive or an AWLA sub-committee should be solely responsible for deciding to whom and how much any surplus is donated to in any given financial year. 10% gave qualified consent for the executive or a sub-committee having these powers. The qualifications largely related to the executive or sub-committee having the wider membership approval to make specific donations in any given year.

50% believed that any donation should be directed to organisations benefiting women and children. Women's Refuge and Auckland Sexual Abuse HELP featured most predominantly. 10% believed that donations should only be made to women within the profession. 6% believed that the donations should have an educational benefit.

26% favoured another scholarship fund, many supporting this in addition to a donation to a charitable organisation. 18% also favoured another scholarship fund if sufficient funds were available. In all 44% supported another scholarship fund in some form or another.

54% favoured a hardship grant or scholarship being made available. An additional 8% favoured such a grant or scholarship only if funds allowed. Another 2% favoured increasing the existing scholarship to include hardship. In all 64% favoured a scholarship that assisted those within the profession in need.

The request for any other suggestions was passed up by most who responded, but there were some who made very interesting suggestions, and one response, I am still trying to work out whether it was a serious answer or not.

What these responses have shown is that the debate is not over on this issue, but thanks to those who responded we have been given some clear guidelines that will help us action this issue.

8% were opposed at having any surplus at all. In considering this point, I have thought about the power that being in the position to dispense money can put one in. Would we as an organisation be more visible, more appreciated in the community by being able to dispense donations? Is this what we are about anyway? Would we be more credible as an organisation at the Law School if we were offering more financial assistance?

As is often the case questions raise more questions, and this is a good thing, right? Already we have received a note with a returned questionnaire thanking the AWLA for preparing the questionnaire and 'tackling this issue head on'.

At this stage of the process the executive will further evaluate the responses and before the AGM present a proposal to the membership. Until then those who wish to be counted on this issue, I suggest you get your responses to the questionnaire in.

Suzie Abdale

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS

Questions

1	2	3	4	5	6	7	8
Y	50-75%	Y	Y	As required	N	As required	N
-	-	-	-	-	-	Hardship matters should be referred to the ADLS	-
Y	50%	Y	Y	As required	N	N	<ul style="list-style-type: none"> •Accumulate •Amend constitution to enable executive to deal with surplus
Y. So long as AWLA has made the most of surplus first eg: for educational advancement	50%	Y	Y. If the exec is able to commit time to this	Preference for funds to be used in the profession	Y	Perhaps scholarship that is open to those with financial hardship	N
Y	75%	Y	Y	Charities that promote the interests of women & children ie: YWCA Future Leaders	Depends on amount of surplus. Yes if enough for both scholarship & charity	Good idea, but funds should not be limited law profession	
Y	25%	Y	Y	-	Part charity part scholarship	Y	<ul style="list-style-type: none"> •Increased visibility at Law School •Establish AWLA prizes for Part IV elective "Women & the Law" •Prize for Honours papers/dissertations on a topic within AWLA aims
N. Not main purpose of AWLA	15% subject to change in constitution	N	The larger the amount donated would need greater consultation with membership	Need suggestions for law related charity	Y	Y or for mature student with dependant children	-
Y	50%	Y	Y	Women's shelters etc	Possibly	Y	-
Y	75%	Y	Y	Not sure	AWLA should invite applications for scholarship for study/objective in keeping with its objectives	Maybe. Perhaps beef up amount given in existing scholarships and prizes	-
Y	10%	N		N	N	N	<ul style="list-style-type: none"> •Reduce subs •Subsidise functions •Fund women litigants in suitable cases •Fund amicus curie in suitable cases
Y	75%	-	Y	HELP foundation	N	N	N

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS *CONTINUED*

Questions

1	2	3	4	5	6	7	8
N	-	-	-	-	Y	Y	Any surplus should be used to assist women lawyers or law students in need, in any practical way
Y	50%	Y	Y	Legal women's charity	-	Y	Funding women lawyers to conferences
Y	50%	Y	Y	-	No preference either way	Y	-
N	N/A	N	Y. If it is decided that AWLA is permitted to	AWLA funds should be used to benefit members. I do not agree to AWLA donating to charity	N	N	There should not be a regular annual surplus. If there is, subscriptions are too high. If there is a surplus every now & then it should be used for funding a loss-making function or dinner
Y	50%	Y	Y. Members have input via the exec	-	Y	N	Aim to increase the Margaret Wilson Scholarship where it covers 1 years fees and texts
Y	2 X 25% ie: to 2 charities of 25% each	Y	N	Charities to support women, children, educational, making submissions on Government proposals	Y 25%	N	Reduce cost of our dinners with rest of surplus: subsidise our own celebrations
N	N/A	N	N/A	N/A	N	N	More should be done to provide a network for women in law and to work for the advancement of those women before any funds should be considered as 'surplus'. A number of memberships are paid for by employers. Employers would not be so willing to fund memberships if some of the funds are being donated to charities

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS *CONTINUED*

Questions

1	2	3	4	5	6	7	8
Y	50%	Y	Y	YWCA Future Leaders Programme	N	N	A charitable cause in the community is best because it is good for AWLA to be seen to help those outside its own interest group
Y	75%	Y	Y	Women's Refuge (involves legal issues for beneficiaries)			The other 25% should go to enhance the Margaret Wilson Scholarship
Y	50%	N	Y	Not to existing charities	-	Y	Donations should target women in law ie: assistance with studies or career development
Y	75%	Y	Y. After input from members	<ul style="list-style-type: none"> •Auckland Sexual Abuse HELP •AUT Refugee Home Tutor Scheme 	N	Y	-
N	N/A	N	N	N. I do this on personally & don't want the AWLA doing it for me	N	N	Reduce the subscription so that there is little surplus – in fact run for a year or 2 at a loss – I object strongly to organisations that charge more than required for the purpose
Y	25%	Y	Y	<ul style="list-style-type: none"> •Auckland Sexual Abuse HELP •Women's Refuge •Maybe AWLA could alternate between the 2 from year to year 	Part could be used for this	Y	-
Y	50%	Y	Y	Women's Refuge	Balance to Margaret Wilson Scholarship fund	Y	N
Y	75%	-	Y	Y	Y	Y	-
Y	25%	Y	Y	To organisations that provide services to women & children	Y. That is another good option	Y	N

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS *CONTINUED*

Questions

1	2	3	4	5	6	7	8
-	-	-	-	-	-	-	<ul style="list-style-type: none"> •I do not agree to spending any surplus on any racial group, specifically Maori or Polynesian, as I feel I give enough in my taxes to these groups who receive massive funding from the state. •I also do not agree to spend any excess monies on any projects that are child focused, parents who choose to have children should make the necessary contributions •Donations to the SPCA, well yes I totally endorse these contributions
Y	50%	Y	N	<ul style="list-style-type: none"> •NCWNZ •ACYA •EEO Trust •Auckland YWCA Mentoring fund 	Y. Some of it	Y	Grants for overseas post-graduate study. I imagine it is harder for women to fund international study than men given pay & seniority gaps long identified by the profession
Y	25%	-	Y	-	-	Y. If funds allow	-
Y	-	-	-	The funds should be used for something closely linked to Women and the law			<ul style="list-style-type: none"> •support for women law students •finance research on a legal topic of interest to women •finance someone to monitor law reform issues of interest to women & prepare comprehensive submissions on behalf of AWLA

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS CONTINUED

Questions

1	2	3	4	5	6	7	8
							<ul style="list-style-type: none"> •Pay for women lawyers or law students to upskill particularly for leadership positions & company directorships •Hire speakers or trainers on topics of interest for AWLA functions
Y	50%	N	Y	-	Y	Y. For women law students in difficult financial circumstances	-
Y	75%	Y	Y	Organisations that provide services to women & children	Y 25%	Y	N
Y	25%	Y	Y	Any proven women's groups in Auckland area	-	Y	-
Y	75%	Y	Y	Financial need	Y	Y	Perhaps a scholarship for disabled/deaf/blind students
Y	50%	N	N	-	Y	Y	The surplus should be directly targeted to the Associations aims. People can donate to individual charities on their own account
Y	50%	-	Y	<ul style="list-style-type: none"> •Women's Refuge •HELP 	-	Does the Student's Association have one?	-
Y	75%	Y	Y	Auckland Sexual Abuse HELP, but I'm happy for it to be circulated to other charities as the exec sees fit	N	N	-
N	-	-	N	Child Cancer Foundation	N	N	AWLA is for all women members, it is not to take on a decidedly political stance (toward the left)

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS CONTINUED

Questions

1	2	3	4	5	6	7	8
Y	50%	N	•The money should be used as a lobbying fund. This could be used for members travel costs to Wellington to make submissions to select committees and government departments on appropriate subjects			I'd prefer that AWLA provided a hardship grant than a scholarship	As an example of the changes we could lobby for: Women's Refuge. The bulk of their resources are spent on accommodating women and their children in refuges. WINZ and ACC should be required to fund this accommodation and pay directly to the refuges. This is not happening at this time. AWLA could investigate how this initiative could come about and lobby to make it happen.
Y	50%	Y	N	Women's Refuge, Camelia House	N	Y	Disabled students
Y	75%	-	N	•Domestic Violence Centre •HELP	N	N	N
Y	75%	Y	Y	Women's Refuge	Some money could go to hardship grant after donation to Women's Refuge	Y	-
Y	50%	Y	Y	Y. Any of those referred to	N	Y	Honorarium for President with an increase in President's role to be more proactive about women's issues - I would like us to be more political
Y	15%	-	Y	-	Y	N	Increase level of writing prize
Y	25%	Y	Y	Leave to sub-committee to decide on annual basis	N	N	-
Y	75%	Y	¥	•Women's Refuge •CanTEEN, *Auckland Sexual Abuse HELP •Rape Crisis	N	N	Lisa Tremewan's excellent work with World Vision

RESULTS OF THE AWLA SURVEY ON WHAT TO DO WITH THE ANNUAL SURPLUS *CONTINUED*

Questions

1	2	3	4	5	6	7	8
N	None	-	N	N	N	N	Return the surplus to members, and cut the membership levy. There should be no surplus
Y	75-100%	Y	Y	<ul style="list-style-type: none"> •Women's Refuge •Scholarship to students •Study grants •*research grant (to solo mums, women etc) 	Either or is fine	Y	Any other scholarship relating to contribution to the community; to women; to law
Y	Depends on what it would otherwise be spent on. It would perhaps be better spent (in terms of our constitution) organising events, speaker evenings, educating, promoting women's & community interests, scholarships	N	N. Ultimately the exec should be accountable to AWLA members and what they believe should be done with surplus money.	A small % to a relevant charity ie: Women's Refuge, and also to another scholarship more aimed at financial need and potential for promoting women's rights as opposed to academic merit	Both	Y. Bbut other factors should be included such as leadership potential and ability to promote women's interests and community involvement etc.	Our objectives are facilitative ie: provide scholarships, educate people, provide information in order to work for the advancement of women. Rather than passing on money as a donation it perhaps should be utilised such as providing a research scholarship regarding how to reform the law...