At The Bar

December 2015

Chief District Court Judge on Criminal Procedure

FMCA and Company Directors' Liability

Sentience and the Animal Welfare Act 1999

www.nzbar.org.nz

New Zealand BAR ASSOCIATION

INSIDE THIS ISSUE

EDITORIAL COMMITTEE
Clive Elliott QC - Chair
Tel: +64 9 309 1769
Email: elliott@shortlandchambers.co.nz

Melissa Perkin
Tel: +64 9 303 4515
Email: melissa.perkin@nzbar.org.nz

CONTRIBUTIONS & ADVERTISING:
Jacqui Thompson
Tel: +64 9 303 4515
Email: jacqui.thompson@nzbar.org.nz

DESIGN AND LAYOUT BY
Kirsten McLeod
Tel: +64 9 834 2224

NEW ZEALAND BAR ASSOCIATION
Tel: +64 9 303 4515 Fax: +64 9 303 6516
Email: nzbar@nzbar.org.nz
Web: www.nzbar.org.nz
P O Box 631 Auckland 1140

From the President

By Paul Mabey QC

The Association's activities in recent months have been varied. Of greatest note is the formation of the Access to Justice working group as a direct result of the conference held in Napier in August. The training programme has continued with success and the Training Committee has a number of matters already in place for next year. I refer to both of these matters below.

The conference was successful and profitable. The quality of the programme and the organisation evidenced by the enthusiasm of those who attended is a tribute to the conference committee.

Next year's conference will again be a provincial affair. It will be held in Taupo on 16-17 September 2016 at the Millenium Hotel. The formal dinner will be at the Taupo Yacht Club.

A single Silks dinner was held in Wellington on 18 November to honour Mark O'Brien QC and Professor Richard Boast QC. Margaret Casey QC chose not to have a dinner in her honour.

Christmas drink functions have been organised for Auckland, Hamilton, Tauranga, Wellington, Christchurch and Dunedin; invitations have been sent.

Marsh is now offering life insurance in conjunction with the income protection package and the member benefits app, launched at the conference, has proven to be successful with many members reporting that they are taking advantage of the wide range of benefits available.

Training

We are fortunate to have Jacqui Thompson in charge of training. Her efforts in that regard are impressive. She works closely with training directors Chris Gudsell QC and Kate Davenport QC and our training committee headed by Peter Davey.

This year there has been continued expansion of our webinar programme, the goal being to run eight webinars per year in the future.

There have been four seminars on Appellate Advocacy, two being livestreamed. A Bill of Rights seminar was hosted in Wellington at Russell McVeagh and speakers included the Chief Justice, Sir Geoffrey Palmer and Dr Andrew Butler. It too was livestreamed.

A Mastering Advocacy programme is being developed by Chris Gudsell and Kate Davenport assisted by James Rapley and Peter Davey. Kate and Chris have travelled overseas to participate in training programmes and in them we have course directors of a truly international standard.

In October and November they ran a workshop entitled "Mastering Cross-Examination". This involved a one day practical workshop which was preceded by two 1½ hour webinars which dealt with the theory of cross-examination and practical tips for the participants.

The workshop was highly successful and will be run again but on a smaller scale in Wellington on 8 April 2016. Those that are interested in participating should contact Jacqui at Jacqui.Thompson@nzbar.org.nz.

Access to Justice
President Elect Clive Elliott QC is chairing and directing this initiative. As noted, a working group has been formed and the first of a number of meetings has been held.

The changing legal landscape raises a number of issues which impact on citizens' ability to access justice and partake effectively in our legal system. It is a problem that will not go away and your Association is committed to addressing it as effectively as we can. The working group membership is:

- John Billington QC
- Clive Elliott QC
- Stuart Grieve QC
- Frances Joychild QC
- Julian Miles QC
- Andrew Barker
- Felix Geiringer
- Greg Hollister-Jones
- Ron Mansfield
- Alice Osman
- Mathew Smith

As an indication of the matters under discussion at this stage I refer to the agenda for the first meeting held in November. It gives an indication of the issues under consideration and which will develop and no doubt expand as the work progresses. The November meeting discussed:

- Court procedures – simplified rules of Court
- New business models – unbundling of services/fixed fees/other creative fee arrangements/litigation funding
- Court proceedings – triaging of proceedings/on-line Courts
- Pro bono/Mentoring – mentoring and pro bono work/ pro bono clearing house/ mentoring clearing house/ junior Bar/requirement to undertake pro bono work
- Lay litigants

The business of the working group has only just begun but it will be seen that the subject matter is broad and not without difficulty.

The above matters are just some of the activities that involve the Council and our various committees. Council members, Committee members and our staff are hard-working and are a credit to your Association. I thank them for their efforts and wish you all the best for the New Year.

Paul Mabey QC

Your Membership Dollar - Is Membership of NZBA Worth It?

By David O'Neill (Treasurer, NZBA)

There are many reasons to join the NZBA, notwithstanding that there are other competing organisations around New Zealand. The NZBA represents and is the voice for barristers. We recognise the difference in approach required for those practising at the independent Bar. However, in addition to advocacy, mentoring and professional support (including by way of discounts on training attendance), we also think that members of the Association, should get something tangible in return for their investment in a membership.

Currently the standard membership for a Barrister is $320 inclusive of GST per annum. The NZBA believes that the return on the investment is many times that.

For example, the NZBA PI insurance policy with Marsh is more than competitive. While a number of factors go into determining premiums, we find that most barristers who have researched the various options soon realise that there are significant savings using the NZBA's scheme and the policy is more comprehensive.

Information resourcing is another key area of saving. The difference between the current LexisNexis package, comprising 144 on-line titles, and the cost of a small but specialised collection of 24 – 25 titles in one area of the law (this would include case law, a litigation package and one specialised collection), is approximately $1,800 in favour of the LexisNexis package for NZ Bar members.

Additionally, there is the Thomson Reuters package to NZ Bar members, which is focussed on specific practice areas but represents savings on resources within those areas.

NZBA members now have access to the recently introduced CSC member benefits app, which is downloaded to your phone and provides 45 different organisations who offer discounts. Some of these can be significant. Although this scheme was only introduced in August, we have had reports of savings such as:

- Hiring a 4WD SUV through Budget Rental Cars for travel in the South Island as a NZBA member - the saving was approximately $600;
- Bathroom supplies - $300 saving;
- A TV purchase was made with a $2000 saving.

The organisations involved in this scheme include Office Max, Barkers, fuel cards with discounts of up to 10 cents per litre depending on the service station, hotel chains, four rental car options, JB HiFi and Noel Leeming, Repco, VTNZ, Bunnings, Carters and Placemakers and many more.

These and many other offerings on the member benefits app are indicative of the savings that the members of the Bar Association can obtain. Membership of the Bar Association is a no brainer. Quite apart from the camaraderie, education, support and information for Barristers, the member benefits are extraordinary and represent a real tangible return to your pocket which you would not otherwise enjoy.

For more detail about these and other benefits, please see the member benefits section on our website at www.nzbar.org.nz.

The NZBA Insurance Plan

The NZBA Insurance Plan is one of the most significant member benefits. More than 75% of the members who require Professional Indemnity Insurance do so through our programme. Leverage is a key principle in insurance and the greater the collective, the greater benefit that can be purchased for the good of all.

The NZBA programme is more than just professional indemnity it includes all liability insurance cover that a prudent barrister should hold.

Four Key reasons for considering the NZBA Insurance Plan are;

1. Average premiums can reflect a discount up to 60% compared to premiums available on the open market.
2. The NZBA Insurance Plan offers two excess structures of $5K or $10K, which are low excess levels in the market for barristers PI. This, combined with the discounted premium levels, is another example of the programme's considerable leverage.
3. Cyber risk is one of the most significant emerging risks in NZ, especially to a professional's reputation. The NZBA Insurance Plan was one of the first facilities in NZ to offer Cyber Risk Insurance to members.
4. Marsh have been the endorsed NZBA provider for 5+ years now, and the financial support that the Association receives by way of split remuneration directly from the plan enables the NZBA to better provide services to its members.

I would urge all members to consider the Plan at renewal, as continuity of cover can easily be arranged, and this represents a significant tangible benefit to your membership.

NEVER DROP THE BALL AGAIN.

Lexis® Draft does it all for you:

- Eagle Eye for legal proofreading
- Reviews and compiles citations
- Links to deeper research
- PDF converter
- Collaboration and information-sharing tools
- Keep track of authorities with pinned items

Lexis® Draft is part of the SmartOffice® Suite,
giving you back more time to do what matters most to you.

Contact our team today on 0800 800 986.
Go to www.lexisnexis.co.nz/drafting for more information.

beEXCEPTIONAL
content | solutions | productivity

LexisNexis®

MP092015JB

Five Topics Relevant to Criminal Procedure

By Her Honour, Judge Jan-Marie Doogue

The Chief District Court Judge has kindly given the NZBA permission to reproduce a speech she gave to the Southland Otago Conference, Ascot Park Hotel Invercargill, 10 October 2015

Tena koutou katoa, good afternoon to you all

It is a pleasure to be here today. I'm delighted to have this opportunity to discuss some aspects of criminal procedure with a particular focus on the Criminal Procedure Act 2011. The Criminal Procedure Act has now been in force in full since July 2013. Over two years on, and the new procedure is still being tested, defined and settled. The Criminal Procedure Act remains a dynamic piece of legislation both in terms of compliance with its procedure and the jurisprudence surrounding that Act's provisions.

There are five topics in particular that I will touch upon. These are:

- Case Management Memoranda.
- Protocol Offences.
- Some Mechanisms for Ensuring Procedural Compliance.
- Hearing Rights in Private Prosecutions.
- Name Suppression.

Case Management

It is useful to remind ourselves what the Criminal Procedure Act 2011 was designed to achieve. The Act was the result of a simplification project, intended to modernise a process which had been in place for six decades. The primary aim of the legislators was to speed up the justice process. It was designed to reduce workload pressure on the courts in various ways, such as:

- reducing the number of court events by simplifying the process;
- placing the onus on counsel to liaise out of court;
- requiring early and upfront exchange of information, so that more cases can be disposed of during the case management phase, reducing the fallout rate at trial; and
- increasing the threshold for jury trials and making judge-alone trials the default, resulting in fewer jury trials.

In considering these aims of the legislation, it is clear why the case management procedure introduced by the Criminal Procedure Act is said to be "one of the centrepieces of the reforms under the Act".[1] It represents the main tool for reducing the workload pressures on the courts.

Under the now repealed Summary Proceedings Act, there was an amorphous void between filing an information and the day of trial. A fairly standard process of appearances had evolved over time, but there was a great degree of flexibility. That flexibility has now gone. The new Act has a rigid framework, with set timeframes, incentives for compliance, and penalties for non-compliance.

Case management memoranda, as prescribed in the Criminal Procedure Act and the Criminal Procedure Rules, are a key feature of the new case management procedure. No later than 5 working days before the date of a case review hearing,[2] a case management memorandum must be filed jointly by the prosecutor and the defendant.[3] This requirement acts as a prompt for defence counsel and prosecutors to conduct case management discussions with each other out of court. A fairly robust amount of information is required by both section 56 and rule 4.8, meaning that these discussions must be in-depth. This reduces the amount of events required in court, and provides a solid foundation for comprehensive case management discussions with a Judge at the case review hearing.

Since the introduction of these new procedural requirements, District Court Judges have found that compliance is varied.

Since the introduction of these new procedural requirements, District Court Judges have found that compliance is varied. In some instances, the case management memorandum is either not filed, or filed incomplete. Sometimes only the defence portion is filled

[1] Ian Murray *A Practical Guide to Criminal Procedure in New Zealand* (LexisNexis, Wellington, 2013) at [5].
[2] Criminal Procedure Rules 2012, r 4.6.
[3] Criminal Procedure Act 2011, s 55.

out. From a legal perspective, such memoranda are deficient for not containing all the required information. The court could refuse to accept such memoranda.

The difficulty is that without the case management discussions occurring out-of-court and the information in the case management memoranda, cases are ill-equipped to proceed to a case review hearing. Those discussions either have to take place in front of a Judge,[4] which is not the best use of judicial time, or the case review hearing has to be adjourned until a later date so the discussions can take place. Even where the memorandum is filed, but filed late, the ability of Judges to prepare and conduct meaningful case management discussions remains hindered.

Protocol Offences

One piece of information required in the case management memorandum has been the subject of recent attention by the High Court in *L v R*; it is the requirement in s 56(1)(f) that, where the offence charged is a category 2 or 3 offence, the case management memorandum must identify whether or not the offence is a protocol offence.

Section 66(1) requires "The Chief High Court Judge and the Chief District Court Judge [to] establish a protocol that identifies those category 2 and 3 offences in relation to which the level of the trial court must be determined in accordance with sections 67 and 68." The offences in this protocol are "protocol offences".

Our latest Protocol was promulgated on 1 February 2015 and details three classes of offences. Class one contains specific offences. Class two contains specific offences, but only if they have certain features, such as drug offending involving a quantity which exceeds 200 times the supply threshold. Class three generally includes any category 2 or 3 offence which exhibits certain features, including difficult issues of law, public concern about the offending or high complexity.

This procedure has replaced what was known as the 'middle-band offence category' in determining the trial court for offences which may be tried in either the High Court or the District Court. A significant change in the procedure is that the default position is now that offences are to be tried in a District Court and a positive decision is required before the offence will be transferred to the High Court.

The responsibility for identifying a protocol offence rests with the prosecutor. If the prosecutor considers the offence to be a protocol offence, they must give their view in the case management memorandum as to whether the appropriate court of trial is the High Court or District Court.

What should be happening in practice is that prosecutors assess every category 2 or 3 case to determine whether it falls within one of the three classes. Class one is straight forward: if the offence is one of the listed offences, it is a protocol offence. Class two is more difficult to determine. The presence of certain features, such as the number of defendants or age of the complainant, is simple to establish. Other features however require a more subjective assessment by the prosecutor, such as sexual violation involving "significant violence", or grievous bodily harm where the injury was "grave". Different prosecutors and indeed different judges may have divergent views of whether such features are present, and therefore whether the offence is a protocol offence. The same applies to class three, which again requires subjective assessment.

The difficulty is that where a prosecutor does not consider an offence to be a protocol offence, the matter goes no further. There is no ability under the statute for judges to formally raise the issue, though they may informally make inquiries of prosecutors. Simply put, the buck stops with the prosecutor.

Worryingly, despite the time that has lapsed since the Act's inception, we are still seeing inconsistent identification of protocol offences. This may be symptomatic of case management difficulties in general, meaning those subjective assessments are not being properly undertaken. It may also be that in borderline cases, offences are not being identified as potential protocol offences out of a desire to keep proceedings in the District Court. Such charges, which might usefully be sent to the High Court, are not being considered as a matter of course when they ought to be.

Where low numbers of protocol offences are being identified, low numbers will be sent to the High Court for trial. This skews the relative workloads of the District and High Courts, and does not make best use of judicial resources. The protocol is drafted more stringently than equivalent requirements under the old regime. The intention was to reduce the number of charges which were considered, but to maintain the number of charges which were actually heard by the High Court.

I suggest that a less conservative approach be taken when assessing whether an offence is a protocol offence. In borderline cases involving subjective features, it is preferable for the matter to go through the court of trial determination process to ensure that it ends up in the right court.

[4]As per s 57(4)(b), if a case management memorandum is not filed, the case review hearing cannot be held before a Registrar and must be held before a judicial officer.

Mechanisms for ensuring compliance

The failure to file a case management memorandum or to adequately address matters required to be attended to in the memorandum, of course, can have implications beyond reducing the efficiency of the criminal process. Failing to file a case management memorandum is a failure to comply with a procedural requirement. This failure may prompt the use of the mechanisms in the Criminal Procedure Act and related legislation for ensuring procedural compliance.

When the Law Commission reviewed pre-trial procedure in New Zealand, it recognised that "Legislative change in itself does not guarantee the buy-in of those who must implement the processes" and that:[5]

> the success of our recommendations depends on two things: the appropriate allocation of resources …; and capturing the hearts and minds of criminal justice system participants (or at least ensuring that non-compliance is no longer worth their while) …..

The result is that the Criminal Procedure Act introduced negative consequences for procedural failure, or what the Law Commission termed "sticks".

To focus on just one of these, section 364 provides for 'costs orders'. Under section 364(2):

> A court may order the defendant, the defendant's lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.

It was expected that these orders, and other 'sticks' would "be regarded as a last resort".[6] This is why section 364 requires the failure to be "significant".[7]

A costs order may be made on the court's own motion, or on application.[8] The person against whom the order is being made will be afforded reasonable opportunity to be heard before the order is made.[9]

The new costs orders in section 364 have received a lot of attention. To my knowledge these have only very sparsely used … but they have been used. In July this year (*CE of MSD v Ali* [2015] NZDC 1324), a $250 costs order was made in a case where counsel for the defendant admitted failures on her part, relevantly in relation to her failure to file a case management memorandum as directed. Overseas experience has shown that cases such as this, where a costs order is made, rarely occur and I do not foresee a dramatic increase of their use in New Zealand.

That being said, cost orders are just one of the mechanisms that are available to judges to encourage procedural compliance. I would have thought that more worryingly for counsel, another example of such a measure is found in sections 9(1)(k), 9(2)(fa) and 9(2)(fb) of the Sentencing Act 2002. Section 9(1)(k) treats as an aggravating factor on sentencing a defendant's failure to comply with any procedural obligation where that failure causes a delay in the disposition of the case or it adversely impacts on a victim or witness. Section 9(2)(fb) treats as a mitigating factor the prosecutor's failure to comply with a procedural obligation to the extent that it causes a delay that has an adverse effect on the defendant. This includes a refusal to engage in case management discussion or to prepare and file a case management memorandum.

By contrast, section 9(2)(fa) is not a 'stick' but a 'carrot', and allows sentencing credit if the defendant takes steps beyond mere compliance with procedural requirements to shorten the proceedings or reduce their cost. The participants in the Spring Hill Prison Riot of June 2013 received the "most unusual allowance"[10] of a 5% reduction in sentence in view of the exceptional circumstances of the case, guilty pleas saving the Court "the difficulty of a lengthy defended hearing with all the logistical problems that that involves".[11]

Private Prosecutions

Though the Criminal Procedure Act and Criminal Procedure Rules set the foundation for current criminal procedure, that does not mean that these instruments are absolutely prescriptive. Section 26 of the CPA, the section which introduced a new procedure relating to private prosecutions, is silent on the hearing rights of prospective defendants. This matter has become another area being addressed in the emerging jurisprudence on the Criminal Procedure Act.

Section 26 of the Criminal Procedure Act is said to have brought "a necessary degree of judicial oversight to private prosecutions".[12] It is "a sifting process designed to protect the proposed defendant from an unnecessary or wrong prosecution."[13] Now, when a private prosecutor seeks to file a charging document, the Registrar may either accept the charging document OR refer the matter to a District Court Judge for a direction requiring the proposed private prosecutor to file formal statements.

[5]Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, June 2005, Wellington) at 113.
[6]At 113.
[7]Hon Simon Power, Minister of Justice, third reading speech (4 October 2011) 676 NZPD 21637.
[8]Criminal Procedure Act 2011, s 364(4).
[9]Criminal Procedure Act 2011, s 364(5).
[10]*R v Rasmussen* [2015] NZHC 52 at [12].
[11]*R v Lakau* DC Auckland CRI-2013-004-013119, 13 March 2014 at [4].
[12]Ian Murray *A Practical Guide to Criminal Procedure in New Zealand* (LexisNexis, Wellington, 2013) at [3.18.1].
[13]*T v District Court at Auckland* [2015] NZHC 972 at [17].

Upon receiving the relevant documents, the District Court Judge must determine whether the charging document should be accepted for filing. A Judge may issue a direction that the charging document must not be accepted for filing if:

(a) the formal statements and evidence therein are insufficient to justify a trial; or
(b) the proposed private prosecution is otherwise an abuse of process.

This determination must be made only in view of the formal statements as "Section 26 is specific in its direction as to what material a Judge can take into account in deciding whether there is sufficient evidence to justify a trial."[14]

The decision made by the Judge under this section will have significant implications for proposed defendants as that person will be issued a summons.[15] Given the decision will affect the proposed defendant's interests,[16] it is then perhaps unsurprising that the hearing rights of the proposed defendant have been the focus in two recent High Court decisions and several District Courts decisions.

In the High Court decision in *Wang v District Court at North Shore*, though no ruling was made on the defendants' right to be heard, Justice Woolford suggested that, "the Court undoubtedly has a residual discretion to hear a proposed defendant if it is felt necessary for the purpose of reaching a decision."[17] He also was of the view that it is "good practice to invite a proposed defendant to provide material and make submissions prior to the Court accepting a charging document for filing", pointing to the decisions of District Court Judges in *Hard v Koncke* and *Forrest v Morris,* where such a course of action was taken.[18]

In *T v District Court at Auckland*, Justice Brewer made a determination on the issues and held that "For my part, **I would not impose on the District Court an obligation,** when considering the s 26 jurisdiction, to seek the views of the proposed defendants".[19] Instead, whether a proposed defendant is invited to make submissions:[20]

> should depend on the circumstances of the case. Parliament has not stipulated that proposed defendants have a right to be heard. Therefore, whether or not they should be given an opportunity to be heard comes down to the proper exercise of the Judge's discretion.
> …
> [In particular,] "if there is doubt, or if the circumstances of the prosecution hint at vexatiousness, then the Judge should give the proposed defendants a chance to be heard."

Justice Brewer suggested that the discretion to hear a proposed defendant would best be exercised where a private prosecutor has a personal interest in the prosecution and "the subjective nature of his approach to the case is evident on the materials … filed".[21] This would allow a judge to ensure that all material facts have been placed before the court for a proper assessment of whether the prosecution would be an abuse of process. Therefore, though the Court will not always invite submissions from a proposed defendant, it is possible that in light of the direction provided by *T v District Court at Auckland*, there will be an increasing number of cases where this is done. I myself chose not to in Mr McCready's attempts to prosecute the Prime Minister for assault on a waitress in Auckland by pulling her ponytail.

Name Suppression

One final area of development in the CPA is name suppression. The name suppression provisions of the CPA – ss 200-205 – represent a significant departure from the Criminal Justice Act 1985 ss 138-141 (repealed). Those provisions gave wide scope for the court to suppress details in "the interests of justice, or of public morality". As Duffy J noted in *Hughes v R*, the CPA instead "sets out specific factors which the Court must be satisfied of before it can make an order of name suppression. This is in stark contrast to its predecessor."[22]

The CPA provision most likely to be of interest to defence lawyers is s 200. Section 200 provides for the suppression of the identity of the defendant where publication would be likely to:

- cause extreme hardship to the defendant or a person connected with the defendant;
- cast suspicion on another person that may cause undue hardship;
- cause undue hardship to a victim of the offence;
- create a real risk of prejudice to a fair trial;
- endanger the safety of any person;
- lead to the identification of another person whose name is suppressed;
- prejudice the maintenance of the law;
- prejudice the security or defence of New Zealand.

Stage One: Is a statutory consequence likely?

The Court of Appeal has now set out a two-stage test under which s 200 applications will be considered.[23] At the first stage, the Court will consider whether any of the

[14] *T v District Court at Auckland* [2015] NZHC 972 at [25].
[15] Criminal Procedure Act 2011, s 33.
[16] *T v District Court at Auckland* [2015] NZHC 972 at [35].
[17] *Wang v District Court at North Shore* [2015] NZHC 2756 at [57].
[18] At [60]
[19] *T v District Court at Auckland* [2015] NZHC 972 at [45].
[20] At [44]
[21] *T v District Court at Auckland* [2015] NZHC 972 at [46].
[22] *Hughes v R* [2015] NZHC 150 at [15].
[23] See *Robertson v Police* [2015] NZCA 7. The Court noted that the application of the statute should be simple, stating at [38] that "the words and scheme of s 200(2) are clear beyond measure".

factors set out at s 200(2) have been engaged. For the purposes of s 200(2), "likely" means an "appreciable"[24] or "real"[25] risk of the s 200(2) consequence occurring.[26] Such an approach will mean that the consequence will be engaged where there exists "a real and appreciable possibility that cannot be ignored as being remote or fanciful".[27] The starting point for any assessment remains as before the enactment of the CPA: that the proceedings are held in open court and that news media be able to report on it.[28]

Section 200(2)(a): Extreme hardship for defendant
A number of the s 200(2) consequences have additional thresholds attached to them. Section 200(2)(a) is engaged where the defendant would be likely to suffer "extreme hardship". This threshold is higher than in the other s 200(2) consequences and will apply even if the defendant has been acquitted.[29] "Extreme hardship" has been defined as:[30]

> … something plainly out of the ordinary and must be significantly greater than undue hardship required in the other criteria of s 200(2). … the Court must conduct a comparison between the hardship the applications contend would be likely to occur and the consequences normally associated with publication of the defendant's name. The question is whether there is an appreciable or real risk of extreme hardship to the appellants if the defendant's name is published.

Financial loss[31] and stress are ordinary consequences of criminal proceedings.[32] A Court will critically examine medical reports. However, where an application is made on the basis of serious health concerns, a court should ensure that all possible evidence is brought before it.[34] Where there is a serious medical concern for the defendant, such as a "serious risk of rapid psychological decomposition", extreme hardship will be made out.[35] The same considerations will apply to a person connected to the defendant, for example a company or spouse.

Section 200(2)(c): Undue hardship to any victim of that offence
Where the identification of an offender may cause hardship to a victim, the threshold will be far lower. The test is "undue", rather than "extreme", hardship. While "normal consequences will rarely be sufficient to displace the public interest" in open justice,[36] courts will allow a suppression application where publication is not in the victim's interests. "Undue" hardship is:[37]

> … hardship that is disproportionate to the purpose which justifies publication, namely the public interest in the open reporting of proceedings and the right to freedom of expression.

In *NN*, the High Court accepted an argument of undue hardship where the victims did not wish to be identified and were closely connected to the offender.[38] In that case, the Court found that identification of the offender would have inevitably led to the identification of and undue hardship for the victim.

Section 200(2)(d): real risk of prejudice to fair trial
Since the enactment of the CPA, the grant of name suppression to avoid trial prejudice has been defined as having a "moderately high threshold".[39] Often prejudice to a trial has been considered to be better managed through the use of appropriate jury directions rather than name suppression.[40] There has been particular reluctance to grant name suppression where the alleged prejudice relates to a planned appeal against an existing conviction.[41] Though an argument for name suppression under the ground in s 200(2)(d) is more likely to succeed where the defendant is facing separate charges and a jury may have knowledge of other charges unless name suppression is granted.[42]

Section 200(2)(f): identification of suppressed person
Section 200(2)(f) will be engaged if publication of a defendant's name would lead to the identification of a person whose details are suppressed. This could include victims of certain sexual crimes, whose names are automatically suppressed.

This is not to say that where a victim's details are suppressed by s 203, s 200(2)(f) will be automatically engaged.[43] The Court retains discretion as to whether the defendant's name should be suppressed in the circumstances under stage two of the s 200 test.

Stage Two: Discretion
Once a s 200(2) consequence is engaged, the second stage of the test is that the Court *may* exercise its discretion to suppress the identity of the defendant. The s 200(2) consequence will need to be weighed against public interest factors such as open justice freedom of

[24] *JM v R* [2015] NZHC 426; *NN v Police* [2015] NZHC 589 per Asher J.
[25] *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 per Gilbert J.
[26] See *Hughes v R* [2015] NZHC 150, in which Duffy J found that "there is no material difference" between the "likely" and "real" risk approaches.
[27] *Beacon Media Group Ltd v Waititi*, above n 25, at [17], cited in *NN*, above n 24, at [21]; Hughes v R, above n 26, at [18].
[28] *Robertson v Police,* above n 23, at [38]-[44]. See also the New Zealand Bill of Rights Act 1990 s 14.
[29] *R v X* [2015] NZHC 1245 at [12].
[30] *Hughes v R*, above n 26, at [32]-[34].
[31] At [41].
[32] *ND v Police* [2015] NZHC 1916 per Davidson J.
[33] *JM v R*, above n 24.
[34] *ND v Police*, above n 32, at [96].
[35] At [52].
[36] *Beacon Media Group Ltd v Waititi,* above n 25, at [22], citing R v Liddell [1995] 1 NZLR 538.
[37] At [27].
[38] *NN v Police* [2015] NZHC 589.
[39] *ND v Police*, above n 32, at [51].
[40] At [52].
[41] *R v R* [2015] NZCA 287; upheld in Robertson v R [2015] NZSC 114. This is because information will have been released at the sentencing stage in any event.
[42] *ND v Police*, above n 32, at [52].
[43] *NN v Police*, above n 38, at [17]-[18].

expression, the presumption of innocence, whether the applicant has been convicted, the seriousness of the offending, the views of the victim and the public interest in knowing the character of the defendant.[44] Prior publicity may be relevant in exercising this discretion, but will not be determinative unless "the horse has bolted".[45]

A person who has been convicted will no longer have the benefit of the presumption of innocence weighed in their favour at this stage.[46] Furthermore, a Court may consider that the continued suppression of such a person may give rise to rumour and speculation as to the identity of a particular offender.[47] But the fact that a person has been acquitted may not outweigh the public interest. Rather, the mistaken perception of guilt (arising out of the fact of being charged) should only be considered under the s 200(2) "extreme hardship" test.[48]

As required at s 200(6), a victim's views will weigh heavily in the discretionary balancing test, including where the victim seeks ongoing suppression.[49]

Future trends: a human rights test?

Looking forward, in many overseas jurisdictions, name suppression is underpinned by a statutorily recognised right to privacy. Though New Zealand has no such right, one recent case took into account an unenumerated right to privacy when interpreting a name suppression provision.

The case was *R v McDonald*. Justice Whata reinterpreted the definition of "complainant" in s 203, such that it meant any victim of an offence other than a victim that dies as a result of that offence.[50] In doing so, Whata J carried out a New Zealand Bill of Rights Act 1990 analysis of the statute which imported principles from public law.[51] It also assumed the existence of a right to privacy arising out of a more general right to human dignity.[52] Such an approach follows the rights-balancing tests utilised in the United Kingdom.[53] Thus far Whata J's approach is unique in New Zealand name suppression law, but it will be interesting to see whether it develops traction in the coming years.

Conclusion

If nothing else, it may be concluded that despite the rigidity that was introduced by the Criminal Procedure Act, there remain areas where complete adherence to criminal procedure is yet to be established and where the true ambit of the Act's provisions are still being set. Thank you for the opportunity to speak to provide a judicial perspective on these aspects of criminal procedure.

[44] *Robertson v Police*, above n 23, at [41].
[45] *R v X*, above n 29, at [12].
[46] *R v R*, above n 41, at [32].
[47] At [35], citing *Television New Zealand v R* [1996] 2 NZLR 393 (CA).
[48] *ND v Police*, above n 32, at [104], citing JAH v Police [2012] NZHC 408.
[49] *NN v Police*, above n 38, at [42].
[50] *R v McDonald* [2015] NZHC 511.
[51] Such as the test from *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.
[52] *R v McDonald*, above n 50, at [64], citing *Brooker v Police* [2007] NZSC 30.
[53] See for example *McLaren v News Group Newspapers* [2012] EWHC 2466, [2012] All ER (D) 22; *Aaa v Associated Newspapers Ltd* [2013] EWCA Civ 554, [2013] WLR (D) 189.

Financial Markets Conduct Act 2013: Liability Implications for Company Directors

By Todd Simmonds*

Todd Simmonds specialises in criminal and regulatory litigation. In this article he considers the impact of the new Financial Markets regime on directors' liabilities.

The initial provisions of the Financial Markets Conduct Act 2013 (the FMCA) came into force on 1 April 2014, with the remaining provisions commencing as at 1 December 2014. The FMCA, and its series of regulatory regimes, has now replaced the Securities Act 1978 (the SA) and other related, financial markets conduct legislation.

The FMCA governs how financial markets are created, promoted and sold. It also governs the ongoing responsibilities of those who offer, deal and trade in financial products. The primary aims of the FMCA are to promote confident and informed participation in the financial markets and to facilitate the development of fair, efficient and transparent financial markets.[1] The FMCA provides a broader purpose than the SA which, over time, had been somewhat narrowed down to the simple notion of "investor protection".[2]

The size, scope and complexity of the new legislative regime brought about by the FMCA is significant. This article seeks to highlight how the Act's changes to the regulation of the financial markets have impacted on directors' liabilities.

The FMCA has substantially altered directors' obligations in relation to fair dealing and disclosure, and their liability if those statutory obligations are breached.

Fair dealing

Part 2 of the FMCA sets out the core standards of conduct that directors operating in the financial markets must comply with. The fair dealing rules apply to all dealings, with dealings being widely defined and including offering and promoting financial products.[3] The essence of these obligations is to impose:

- a general prohibition on misleading or deceptive conduct;
- a prohibition on making false or misleading representations; and
- a prohibition on making unsubstantiated representations.

Under the SA these obligations specifically applied to authorised advertisements that were in, or accompanied, an investment statement or prospectus.[4] By way of comparison, the FMCA provides for a more overarching and principled approach for directors to follow generally. The fair dealing concepts are based on the Fair Trading Act 1986, with some adjustment for the financial markets setting.

Disclosure

The FMCA has also replaced the SA requirements for disclosure. The disclosure regime implemented under the FMCA and FMC Regulations 2014 (the FMCR) provides directors with a more transparent legislative framework to operate under.

Under part 3 of the Act, directors are required to:

- prepare and lodge with the Registrar of Financial Service Providers a single disclosure document, namely the product disclosure statement (PDS) tailored to retail investors;[5]
- lodge any other material information or documents;
- make disclosure only to those investors not covered by the exclusions;[7]
- comply with specific rules relating to expert standards and endorsements;[8]
- provide ongoing disclosure;[9]
- provide disclosure on request;[10] and
- present the PDS in a clear, concise and effective manner.[11]

A key feature of the FMCA is the single disclosure document. The former SA required directors to prepare

[1]FMCA, ss 3 and 4.
[2]The Courts have taken this approach, as reflected *Re AIC Merchant Finances Ltd* [1990] 2 NZLR 385 (CA) which emphasised disclosure in conveying information to investors and protection of the public.
[3]Dealings is defined in s 6 of the FMCA.
[4]SA, s 33.
[5]FMCA, ss 48, 49.
[6]FMCA, ss 48, 57 and 58.
[7]FMCA, s 51 and the FMCR.
[8]FMCA, ss 57 and 60.
[9]Either by supplementary documents: FMCA, s72; replacement PDS: s73; or change to the register entry: ss 95 – 98.
[10]FMCA, s 96.
[11]FMCA, s 61.

two key disclosure documents, a prospectus and investment statement. Directors were required to disclose through these key documents a significant amount of information for investors, while also identifying all material matters relating to the offer. The result was often an excess of information, the detail of which was hard for directors to effectively monitor and comply with.

Unlike the SA, the FMCA prescribes much of the content of the PDS, thus providing directors with guidance as to the key information that should be provided to investors.[12] Under the FMCA, the single disclosure document is likely to be more succinct and focused, and helpfully, any additional relevant investment information can be notified to the Registrar in order to correct/update the information contained in the register entry.[13] In this way, directors operating under the new legislation will be able to ensure compliance with their statutory obligations by providing investors (current and/or potential) with meaningful, relevant disclosure in a timely fashion.

Schedule 1 of the FMCA outlines those persons to whom an offer can be made without a product disclosure statement.[14] This incorporates investors who are considered capable of accessing the investment information they require, small debt and equity offers and employee share purchase schemes.

If disclosure is not made in circumstances when it should have been, investors will be entitled to a refund and the offer will remain unaffected rather than being cancelled (as was the case under the SA).[15]

Enforcement and liability

The criminal and civil liability of directors has received prominence in recent years following the collapse of a number of finance companies in New Zealand. The FMCA provides for a clear statutory framework for director liability and any breach of these provisions will give rise to a potential liability for directors. Whereas the liability regime under the SA was unnecessarily complicated, the FMCA seeks to provide for a comprehensive yet straight-forward regime by way of escalating levels of liability. The liability provisions are intended to improve directors' compliance with their statutory obligations, while at the same time ensuring that any enforcement response is proportionate to the alleged breach.[16] The specific types of liability imposed under the FMCA are:

- regulatory;[17]
- infringement;[18]
- civil;[19] or
- criminal.[20]

At the lower end of the available scale, the FMA has regulatory enforcement powers to make stop and associated orders.[21] A stop order will prohibit further action in respect of offers of financial products with disclosure that is likely to deceive, mislead or confuse. A direction order can be made by the FMA to direct that specified provisions of the FMCA are complied with. Other enforcement orders available to the FMA include an order prohibiting the use of a single disclosure document, an order prohibiting a person from making an offer under a recognition regime set out in the FMCR, an unsolicited offer order, and an order that any purported exclusion for offers of products of the same class as quoted products does not apply.

The FMCA also introduces infringement offences for less serious breaches.[22] Where the FMA believes on reasonable grounds that a person has committed an infringement offence, an infringement notice can be issued. The maximum fine that can be imposed for an infringement offence is $50,000, although an infringement cannot give rise to any conviction.

Sitting above infringement offences is a new regime of civil liability[24]. This regime reflects the greater emphasis within the FMCA on civil liability upon issuers, directors and others who may be involved in contraventions. The following civil liability orders may be made:

- A declaration of contravention;
- A pecuniary penalty order;
- A compensatory order; and
- Other civil liability orders.[28]

A declaration of contravention may be sought by any person where a person has contravened, or has been involved in the contravention, of a civil liability provision[29]. The purpose of a declaration of contravention is to enable an applicant for a compensatory order or other civil liability order under section 497 to rely on the declaration of contravention in the proceedings for that order, and not be required to prove the contravention or involvement in the contravention[30].

A pecuniary penalty order may be applied for only by the FMA. There are two categories of pecuniary penalty under the FMCA. The first category, which is for the more serious contraventions, provides for a penalty not exceeding the greatest of the consideration for the transaction that

[12]Largely found in the FMCR.
[13]FMCA, s76.
[14]FMCA, Schedule 1.
[15]FMCA ss 79 and 80.
[16]Ministry of Economic Development "Initial Briefing to the Commerce Select Committee: Financial Markets Conduct Bill, 1 May 2012".
[17]FMCA, Subpart 1 of Part 8.
[18]FMCA, Subpart 5 of Part 8.
[19]FMCA, Subpart 3 of Part 8.
[20]FMCA, ss 82, 99 and 427, cl 27 Schedule 1 and Subpart 5 of Part 8.
[21]FMCA, Subpart 1 of Part 8.
[22]FMCA, Subpart 5 of Part 8.
[23]FMCR, reg 254.
[24]FMCA, Subpart 3 of Part 8
[25]FMCA, ss 486 – 488.
[26]FMCA, ss 489 – 493; the FMA must apply for such an order against the director under s 534.
[27]FMCA, ss 494 – 496.
[28]FMCA, ss 497 – 498.
[29]FMCA, s 486.
[30]FMCA, s 487.

constituted the contravention, three times the amount of the gain made or loss avoided, and $1 million in the case of a contravention by an individual or $5 million in any other case.[31] Any civil liability provision that is not specified within the first category falls within the second category.[32] Penalties are available in the second category of up to $200,000 for an individual and $600,000 in any other case.

A compensatory order can be applied for by the FMA or any other person. The Court may make a compensatory order if it is satisfied that there is a contravention of a civil liability provision, and a person has suffered or is likely to suffer loss or damage because of the contravention.[33] Where the grounds for such an order are made out, the Court may make any order it thinks just to compensate an aggrieved person in whole or in part for the loss or damage incurred.[34]

In addition to the abovementioned civil liability orders, the FMA or any other person may apply to the High Court for a variety of other civil liability orders.[35] These orders are available if the Court is satisfied that a person has contravened, intends to contravene, or was involved in a contravention of a civil liability provision.

The civil liability provisions impose strict liability (ie. they are not fault based) although there are general defences which specify the minimum standards that directors must comply with to avoid liability. The scope of the statutory defences is likely to provide a stronger basis for directors to establish defences to personal liability based on ongoing corporate governance standards and processes. The defences are available when one the following can be established on the balance of probability:

- the contravention by person A was due to reasonable reliance on information supplied by another person;[36] or
- the contravention by person A was due to the act of default of another person or to an accident or to some other cause beyond A's control, and A took reasonable precautions and exercised due diligence to avoid the contravention.[37]

Criminal liability under the FMCA is reserved for the most serious contraventions and exposure to criminal liability is significantly reduced from that under the former SA. Whereas the SA imposed strict liability across a range of criminal offences, under the FMCA intentional wrongdoing or at least recklessness is required for criminal liability. There are particular criminal offences dealing with defective disclosure and false or misleading statements,[38] and an offence for knowingly failing to comply with financial reporting standards.[39]

It is a criminal offence to knowingly or recklessly contravene the prohibition in section 82 on offers where there is defective disclosure in a PDS or registry entry.[40] Section 82 provides that an offeror must not offer, or continue to offer, financial products under a regulated offer if there is defective disclosure of a type specified at (1)(a) which is materially adverse from the point of view of an investor. The maximum penalties available to the Court on conviction for offending of this nature have been increased to 10 years imprisonment and/or a fine of up to $1 million for individuals, or a fine of up to $5 million in any other case.[41]

It is also a criminal offence to knowingly or recklessly contravene section 99 (defective ongoing disclosure), section 427 (false or misleading statements or omissions to retail investors) or Clause 27 of Schedule 1 (false or misleading statements or omissions in any disclosure document provided under Clause 26).[42] If a person is convicted for offending of this nature, a director will also have committed an offence if the "relevant act"[43] took place with the director's authority, permission or consent, and the director knew of or was reckless as to the matters giving rise to the defective disclosure. An individual offender is liable to a term of imprisonment of up to 5 years and/or a fine of up to $500,000 and in any other case, a fine of up to $2.5 million may be imposed.[44]

A person also commits a criminal offence if, with respect to a document required by or for the purposes of the FMCA, that person makes or authorises the making of a statement in it that is known to be false or misleading in a material particular.[45] On conviction an offender may be sentenced to a term of imprisonment of up to 5 years and/or a fine up to $200,000.[46]

It is also a criminal offence to knowingly fail to comply with financial reporting standards.[47] Offending of this nature gives rise to a term of imprisonment of up to 5 years and/or a fine of up to $500,000 for individuals, or a fine of up to $2.5 million in any other case.[48]

Conclusion

Although the risk of criminal liability has been significantly reduced under the FMCA, the increased ambit of the new, four-tier liability regime under the Act means that directors will need to be as vigilant as ever to avoid unwanted attention from the FMA. There remains a statutory focus on accurate and complete disclosure to enable investors to make confident and informed decisions, although equally, the Act can fairly be seen to encourage participation by businesses, investors and consumers in the financial markets. It is anticipated that the Courts will take into account the broad purposes stated in the Act, to the significant benefit of both issuers and investors, and indeed to the benefit of the New Zealand economy in general.

** For more information about Todd Simmonds, please see http://www.toddsimmonds.co.nz/*

[31]FMCA, s 490(1).
[32]FMCA, s 490(3).
[33]FMCA, s 494(1).
[34]FMCA, s 495(1).
[35]FMCA, ss 497 – 498.
[36]FMCA, s 499(1).
[37]FMCA, s 499(2).
[38]FMCA, ss 510 – 512.
[39]FMCA, s 461.
[40]FMCA, s 510.
[41]FMCA, s 510(3).
[42]FMCA, s 511.
[43]FMCA, s 511(4).
[44]FMCA, s 511(3).
[45]FMCA, s 512(1).
[46]FMCA, s 512(2).
[47]FMCA, s 461I(1).
[48]FMCA, s 461I(2).

LexisNexis®

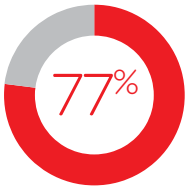
LexisNexis
SmartOffice®
RESEARCH
GIVING YOU BACK MORE TIME TO DO WHAT MATTERS MOST

Professional Responsibility In New Zealand

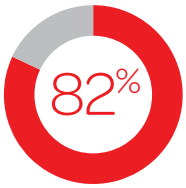
A NEW ONLINE AND DIGITAL COMMENTARY SERVICE ON ETHICS AND THE LAWYER

LexisNexis® Professional Responsibility provides expert commentary on the professional obligations of lawyers, including annotated legislation, topic-based commentary on issues outside of the relevant legislation, and updates on important case law to help practitioners stay across changes in the law.

- Manage your risk effectively by ensuring that all lawyers in the firm understand their ethical obligations
- Stay up to date with changes in the law around professional responsibility
- Find answers to your legal ethics questions quickly, 24 hours a day, 7 days a week
- Learn how to navigate difficult ethical issues, such as when the opposing party is a lay litigant



77% of survey respondents at the 2014 CLANZ conference indicated that "managing risk" was their most significant "painpoint or concern"



82% of LawPlus survey respondents rated "managing risk" as having a high impact on their role

Contact your relationship manager or call customer support on 0800 800 986
Email customer support on customersupport@lexisnexis.co.nz
Visit lexisnexis.co.nz/professionalresponsibility

Professional Responsibility in New Zealand is part of the Research Suite of LexisNexis SmartOffice®, giving you back more time to do what matters most.

beEXCEPTIONAL
content | solutions | productivity

Applying "Sentience" in the Animal Welfare Act 1999

By Dr Ian Robertson*

Dr Ian Robertson is both a qualified veterinarian, and a Barrister and Solicitor of the High Court of New Zealand. He has combined his training and experience to become an internationally recognized legal specialist on the subject of animals and the law. Excerpts from his recently published book "Animals, Welfare and the Law: Fundamental Principles for Critical Assessment" (2015, Routledge) have been incorporated into this article.

The legislative introduction of "sentience" to the Animal Welfare Act 1999 (the Act) shifts standards of acceptability away from legal minimums by obligating people to ensure that animals are not just provided with the basics, but actually experience a quality of life. If appropriately applied, the initiative has the potential to be as significant to animals, people and their shared planet, as the evolution from the Animal Protection Act 1911 to the 1999 Act.

Just over a decade ago, when animal welfare law was making its first tentative steps in to the legal arena as a distinct legal discipline, the then Head of Veterinary School in Massey University, joked "So where is animal law going? (laugh) Are we going to see class actions on behalf of sheep"? There are already legal advocates suggesting that the addition of the word "sentient" in the latest amendment[1] to the Act potentially draws New Zealand one step closer to that possibility.

In Animal Welfare Amendment Act (No 2) 2015, the New Zealand Government formally recognised animals as 'sentient' beings. The Act currently states:

> An Act—
> to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular, —
>
> to recognise that animals are sentient:

Legislative acknowledgement of the word sentient is not novel or a new initiative from a global perspective. "Animals are sentient beings" is a statement contained in the Treaty of Lisbon[2], and several countries including Germany, Austria, Switzerland and France have already incorporated the word sentient in to their legislation.

However, overseas legal definitions of sentient have largely focused on the animal's ability to experience pain and distress (with tangential reference to "respect for animals"[3] and recognition of the inherent value of animals)[4].

In maintaining its position as an animal welfare leader in order to bolster its reputation and position in the global trading market, New Zealand's Animal Welfare Act 1999 pre-amendment legislation already recognised animal's ability to feel pain and distress.

In law's house-of-words, it is a well-established principle that law will not repeat or insert a new word unless it has a separate meaning above and beyond the responsibilities already established. In a nutshell, in law, words have power. So standard legal procedure and principles of legislative interpretation mean that adding a word (i.e. "sentient") creates something "new"/"additional" with corresponding shifts in legally required changes in behaviour, responsibilities and accountabilities.

On one hand, legislative insertion of "sentient" might be nothing more than window-dressing to appease national animal welfare advocates and bolster its international trade reputation. Alternatively, the inclusion of sentience in the Act has potential impacts that go a long way beyond sentience being merely a symbolic gesture, or the same old definition which focuses on an animal's negative states/experience of pain and/or distress.
With that in mind, the question is, what is the appropriate definition of sentience to be applied in the Act?

Starting point: The one line legal definition of "animal welfare"

In order to put context to the definition of sentience in New Zealand's animal welfare law, it is helpful, in the first instance, to be clear about the legal definition of animal welfare.

Generally, there is no singular definition of animal welfare.

[1]Animal Welfare Amendment Act (No 2) 2015, 9 August 2015
[2]Treaty of Lisbon, formally, the *Treaty on European Union*, Official Journal C 115, 09/05/2008 P. 0001 - 0388, Article 13. Article 13 of Title II states that: *"In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."*
[3]https://www.animallaw.info/statute/noway-cruelty-norwegian-animal-welfare-act-2010
[4]http://lawyersforanimalprotection.eu/national-animal-welfare-legislation/

Amongst professionals and advocates, it is relatively easy to identify a plethora of advocated views and definitions, each unsurprisingly reflecting the world view and/or agenda of the deliverer. This is apparent not only in the mass of published works on the subject of "animal welfare", but also in the courtroom where experts, often scientists or veterinarians, have traditionally been at odds to provide a concise clear definition of animal welfare.

Fortunately, law has an identifiable definition of "animal welfare".

Law's one line definition of "animal welfare"

In law, animals are classified as property. More specifically they are "animate property" because, as reference to the Act demonstrates, animals are recognised as being capable of experiencing "pain" and "distress"[5].

Reference to the purposes and offences of animal welfare legislation demonstrate that there are four key words which form the legal pillars of law's definition of animal welfare: pain, distress, unnecessary and unreasonable. There is a neatly packaged one line responsibility applied to people in charge of animals which illustrates the law's definition of animal welfare. The law applies a responsibility to people to ensure that the animal does not experience what the law deems as unnecessary or unreasonable pain or distress. Animal welfare then, as defined by law, is a state where "the animal does not experience pain or distress that is unreasonable or unnecessary"[6]. This two limb test neatly sums up the standard, and thereby the legal definition, of animal welfare.

Defining sentience through the legal lens

Despite introducing the word sentient to the Act, the legislative definitions contained in s 2 do not provide a definition of sentience. It is an unfortunate oversight/omission which has already attracted criticism that the insertion of the term "sentience" might be simply "window dressing".

The inclusion of the word sentience has been viewed by many animal advocates as a significant achievement on the basis that it is expected to provide a formal point of reference for all future legislative development on issues involving animals. While its potential impact is considerable, its actual application is, as always, balanced by other interests. The duty set out in the Treaty of Lisbon on its EU members to *"pay full regard to the welfare requirements of animals"* includes responsibility to consider the animal's welfare as "a" consideration, rather than "the" central consideration that overrides competing interests. Furthermore, excitement over the inclusion of sentience in EU legislation has been tempered when the EU's legal definition of "sentience" is identified and compared to the purposes and concepts contained

[5]See the Animal Welfare Act 1999 purposes, definitions, offences and powers where "pain and distress" are referenced e.g. ss 2, 4, 9, 11, 12, 14, 15, 16, 17, 23, 28, 28A, and 29

[6]Animals, Welfare and the Law: Fundamental Principles for Critical Assessment (2015) Robertson I A, Routledge. http://www.tandf.net/books/details/9780203112311/

within contemporary animal welfare legislation. The EU interpretation primarily acknowledges that animals are distinguishable from inanimate objects and therefore have an identifiable interest in being protected from experiencing/feeling pain or distress that is unnecessary or unreasonable.[7]

So if New Zealand simply adopts the overseas definitions of sentience which set out that animals can feel pain and distress, then there would be little change needed or likely, because the acknowledgement of an animal's ability to experience pain and/or distress was already contained in New Zealand's pre-August 2015 Amendment to the Act. Essentially, the insertion of sentience would become simply a symbolic legislative appeasement to animal welfare advocates, amounting to little more than political puffery.

On the other hand, while there is the possibility that the insertion of the term sentience might indeed have been intended as just symbolic, there's also the reality that in law, words have power, and even words intended to be simply symbolic can be interpreted in the Courtroom in a manner that gives them tangible meaning and effect with a consequent shift in practical realities.

In order to identify what sentience is for legal interpretive purposes, it is helpful in the first instance to be clear about what sentience in legislation is "not". Confusion is a common outcome resulting from the misuse of terminology frequenting the language of animal law, and so it is helpful to recognise the principle of responsibility in issues attached to the definition and application of sentience, rather than confusing it with debates about animal rights or any need to change the property status of animals.[8] *"Those arguing about animal rights and legal classification miss the point that the nature of the legal obligation in the human-animal relationship is less about the property classification or questions about "rights", but more about duties associated with "responsibility" to appropriately care for those (animals) who rely on their human care-giver"*[9] In animal welfare law, the property classification is *"… more than simply a designation of ownership. It actually revolves around a concept of relationship that allows for a sense of responsibility"*.[10]

Having identified that the key word is responsibility, and avoided the pitfall discussion of rights and property, the question stands as to how the Courts and legal practitioners are to define "sentience" in the context of the Act. While being cognisant of overseas uses, established legal discipline as set out under the Interpretation Act 1999[11] and relevant case law means legislative interpretation takes account of the "text, context, purpose and values" (Glazebrook J in *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2015] 1 NZLR 1).

A review of the legal literature, dictionary definitions[12] and scientific papers yields a definition that succinctly summarises "sentience" as the ability to feel, perceive, or experience subjectively. A particularly helpful word in this definition is "experience" which infers a consciousness which, at one end of the scale, means an animal can experience suffering (i.e. the "negative" conditions namely "pain" and "distress" as set out in the Act) and, in addition, at the other end of the spectrum sentient beings experience "positive" states of "pleasure".

That spectrum including pain *and* pleasure means that "sentient" is more than simply acknowledgement that an animal can experience pain and/or distress (as already established in the Animal Welfare Act 1999). Dr Virginia Williams, Chair of New Zealand's National Animal Ethics Advisory Committee has stated "To say that animals are sentient is to state explicitly that they can experience both *positive* and negative emotions".

The legislative application of responsibilities concerning the positive/pleasure experience of animals is a credible extension of the Act. Doing so applies a definition which encompasses the new word "sentient" in a manner that

[7]Animals, Welfare and the Law: Fundamental Principles for Critical Assessment (2015) Robertson I A, Routledge. P328 http://www.tandf.net/books/details/9780203112311/

[8]http://www.cba.org/cba/PracticeLink/2015-08-bc/animal.aspx?utm_source=cba&utm_medium=email

[9]Animals, Welfare and the Law: Fundamental Principles for Critical Assessment (2015) Robertson I A, Routledge. p73 http://www.tandf.net/books/details/9780203112311/

[10]Animals, Welfare and the Law: Fundamental Principles for Critical Assessment (2015) Robertson I A, Routledge. p73 http://www.tandf.net/books/details/9780203112311/

[11]Interpretation Act 1999 (1A) s5(1) Enactments meaning "from its text"

[12]Textual references may include dictionary meanings and in this regard the Oxford dictionary states sentience is "the ability to perceive or feel things". The Collins dictionary defines it as "having the power of sense perception or sensation; conscious". Interestingly, Black's law dictionary has no definition and a search on sentient and sentience yields "no results".

is consistent not just with the Interpretation Act 1999, but also with "scientific knowledge" and current public values/expectations of "good practice" (s 10).

It follows that consideration of animal welfare has shifted from assessing the behaviour of human caregivers simply in terms of them providing basic physical, health, and behavioural needs of animals (s 4) which are based on minimum standards that focus primarily on avoiding unacceptable levels of pain or distress of an animal, toward a legislative assessment that considers whether the human caregiver has done enough according to good practice and scientific knowledge, in responsibly ensuring that the sentient animals in his/her care are provided with positive psychological experiences that are behaviourally verifiable e.g. comfort, pleasure, interest and confidence.

Test: Has the human caregiver responsibly provided positive psychological experiences for an animal in his/her care, that are behaviourally verifiable

The question is, how would the Court assess this responsibility by objective measures?

Measuring and applying "sentience" in the Courtroom

Interestingly, the obligation to consider the mental state of animals has been present in animal welfare legislation since 1999 where it was stated that persons in charge of animals had an obligation to provide animals with the "opportunity to display normal patterns of behaviour" (s 4(c)). The incorporation of the word "sentient" to the Act has heightened and highlighted the obligation to provide "positive" mental experiences for animals.

Section 4 (Definition of physical, health, and behavioural needs) might, for example, be appropriately interpreted as meaning that in the Act, unless the context otherwise requires, the term "behavioural need", in relation to a sentient animal, appropriately includes provision of behaviourally verified positive psychological experiences, being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

In practical and applied terms, legally acceptable animal welfare standards require more than just a credible assessment of the animal's physical well-being. Assessment of an animal's welfare also requires an authoritative, credible and reliable assessment of the exhibited behaviours of animals as the external observable evidence/indicator of their mental/psychological state.

The principles of the Five Freedoms which have been incorporated into s 4 of the Act are 30 years old, and being superseded by scientific concepts known as the Five Domains. The Five Domains[13] are the basis for systems already being implemented by leading animal welfare organisations within New Zealand and overseas, which provide valuable reference for the courts and lawyers in implementing credible science-based objective measures to what is already a multifactorial, potentially complicated, and subjective field. Reassuringly these measures are also consistent with the established process set out in the Interpretation Act 1999 and the wording of the existing responsibilities set out in the current Act.

Put succinctly, the Five Domains model provides a systematic method for identifying potential or actual welfare impacts associated with an event or situation in four physical or functional domains (nutrition, environment, health or functional status, behaviour) and one mental domain (overall mental or psychological state e.g. animals experience of comfort, pleasure, interest and their confidence). The model measures animal welfare from a much broader point of view than the older Five Freedoms model, and recognises the importance of not only minimising negative welfare impacts to animals, but also promoting the positive welfare outcomes that are the logical purpose that underpins the appropriate legal definition of sentience.[14]

... behavioural specialists will likely be a valuable/ additional expertise ..to assist ... [with] the mental domain [in] animal welfare cases.

Just as the Courts have relied on experts (e.g. veterinarians) to assist in interpretation and explanation of physical evidence in previous animal welfare cases, behavioural specialists will likely be a valuable/ additional expertise called on to assist the court in making determinations regarding the mental domain of post-Amendment animal welfare cases.

The impact: Evolution or rhetorical window-dressing

If applied as more than simply a continued focus on negative

[13]N Z Vet J. 2011 Nov; 59(6):263-71. doi: 10.1080/00480169.2011.610283. Extending ideas about animal welfare assessment to include 'quality of life' and related concepts. Green TC, Mellor DJ.

[14]http://www.nzva.org.nz/newsstory/massey-professor-honoured-contribution-animal-welfare-research

states (i.e. pain, distress) then incorporation of the word "sentience" in to law reduces the ability for some animal welfare interest groups to side-step heightened societal expectations regarding animal welfare in the name of other prioritised interests e.g. arguments of "standard practice" in industry, hunting, and other uses of animals. In short, defining sentience as a responsibility to provide positive experiences for animals provides a clarity demonstrating that the legal bar has been shifted.

The new legal bar logically continues the two-limb test assessing firstly if the animal has suffered pain and/or distress, and if so, was that pain "necessary" and/or "reasonable". Sentience adds a further consideration which mean that animal welfare matters must now be assessed not just in terms of what the animal did NOT experience (i.e. pain or distress) but ALSO "how could the human intervention/care/control have made/make the act/event a more positive experience for the individual animal/group of animals"?

...there are heightened responsibilities/ obligations on the animal caregiver to know more, provide more, and potentially change more.

In terms of practical reality, agricultural food producers are not likely to have to retool – not in the immediate term anyway. However, given the legislative recognition of animal's as sentient, and the consequent shifts in terms of the legal responsibilities who have animals in their care, supervision or control, then it is foreseeable that the question of change/evolution in terms of acceptable animal husbandry procedures will understandably be raised. For example, debeaking and colony cage systems in the poultry industry may be the subject of further scrutiny through the sentient-animal-lens, and practices like tail docking and castration without anaesthesia are foreseeably losing favour when considered in light of credible alternatives that enhance the animal's positive experience by way of implementation of behavioural modifiers and improved facilities.

There are further changes that are anticipatable outcomes from the inclusion of sentience in to the Act. The practice of "bullying" provides a useful example for illustrative purposes. Although something of a surprise to many people, "bullying" happens just as much in the animal kingdom as it does in the human society – and the impacts on the animals' experience can be just as significant to the bullied animals as they are to bullied people. The average observer driving past a farm sees a group of animals drinking, feeding, sleeping and moving about without realising that the behaviours of "dominant" animals commonly having negative impacts on the experience of the subservient ones.

Given the total reliance of animals on their human caregiver, and in the newly amended sentient-animal world of the Act, there are heightened responsibilities/ obligations on the animal caregiver to know more, provide more, and potentially change more. Required changes to minimise bullying and other behavioural stresses may include providing more water troughs and shelter in the cow paddocks, reconsideration of poultry colony cages according to the heightened "no-longer-just-minimum" standards, and reassessment of events in the entire "birth to slaughter/death" experience of animals destined to become food for human consumption. Despite predictable resistance from industry and collaboration from a resource-limited-government, transport requirements (e.g. carrying densities, transport times), slaughter procedures and facilities (e.g. densities and time periods holding animals in yards), and entertainment uses (e.g. racing industry standards, rodeos) are all potential areas for "re-evaluation" according to law's new "sentience" benchmark.

As such, the incorporation of sentience has as much potential impact as the shift from the old Animal Protection Act 1911 which, after nearly 100 years, shifted peoples responsibilities from simply refraining to do ("negative") acts which were deemed cruel (still retained in the Act under section the heading of "ill treatment ") to a situation where the law created criminal offences for people failing to comply with "positive duties of care" (s 4) designed with the intent of preventing animals suffering, rather than enforcement activities being triggered only after the animal had suffered.

That same principle of elevation is at work with the introduction of "sentience" to New Zealand's animal welfare law. It elevates consideration of the mental state of the animal from simply avoidance of "negative" experiences (e.g. pain/distress that is deemed unreasonable and/or unnecessary) and provision of basic minimums[15], and creates legal obligations and responsibilities on animal caregivers to ensure that the animal has a positive quality of life experience that includes demonstrable comfort, pleasure, interest and confidence.

** For more information, see http://www.guardianz.co.nz/*

[15]Five Freedoms

Advocacy Teaching – Keble College, Oxford

By Chris Gudsell QC*

Chris Gudsell QC is a Course Director for the NZBA's Mastering Advocacy Programme. This programme is a series of specialised modules that rely on a "learning by doing" approach to advocacy. As part of its commitment to quality training, the NZBA was pleased to support Chris in his attendance at one of the premier advocacy training courses. His experiences, together with those of his co-director, Kate Davenport QC, have directly influenced the philosophy and approach in our Course. The NZBA records its thanks to both Chris and Kate for their commitment to training and the NZBA's Mastering Advocacy Programme.

Earlier this year, I received an invitation to teach at an Advanced International Advocacy Course at Keble College, Oxford which was held between 31 August and 5 September 2015. The course was run by the South Eastern Circuit Bar Mess Foundation. This was the twenty-second year the Course had been run at Keble College.

I was delighted to accept the invitation and to represent the New Zealand Bar Association (NZBA) on the Faculty. Material provided by the South Eastern Circuit Bar Mess Foundation describes the course as follows:

> "The course is considered the most demanding and intensive of any advocacy course in the UK. Lord Walker said the following in the House of Lords on 10 July 2014 when talking about the Bar's work in advocacy training:
>
> "The most outstanding course, of which at least my legal colleagues will be well aware, is the week long advanced advocacy course held every year at Keble College, Oxford, which goes on to more advanced matters, including appellate advocacy, and the important topics of handling vulnerable witnesses and expert witnesses."

A little background to the invitation I received to teach at Keble College. In 2009 I represented the NZBA at an Australian Bar Association Council meeting in Canberra (the NZBA having observer status) and met with Phil Greenwood SC, Director of the ABA's Advanced Advocacy Course. Following our discussion, I received an invitation to join the teaching faculty for the ABA Advanced Advocacy Course in Brisbane in 2010. I attended with the support of the NZBA. The ABA course is an intensive week long course, teaching the full range of trial advocacy to Barristers with, in the case of a number of the participants, many years of experience at the Bar.

In recognition of the NZBA's commitment to providing a coach for the course, the ABA reserved two places on the course for New Zealander Barristers. The course offers 40 places to Australian Barristers.

Chris Gudsell QC at Keble College

The course opened my eyes to a particular philosophy of advocacy teaching. The ABA Advanced Trial Advocacy materials describe their philosophy, goals and objectives as follows:

> "The underlying philosophy of each ABA Trial Advocacy course is that the skills of a barrister are best learned through a deep understanding of the relevant objectives for each performance task, thoughtful preparation and an ongoing process of practice and review in an environment of interest, challenge and respect.
>
> The aim of the ABA Advanced Trial Advocacy Course is to provide a useful framework for each barrister to consider and develop as *they see fit* in their ongoing professional lives. The goal is to inspire the barristers to continually examine the way they practice during the whole of their careers and pursue excellence in their performances.
>
> Those objectives are best achieved when experienced practitioners provide assistance that is tailored for the individual barrister and offered as part of a respectful, supportive, professional, peer endeavour. The barristers, judges and other professionals who are invited to participate as coaches all respect and reflect those aims and objectives."

The Faculty comprised Judges, Silks and Senior Counsel from Australia and Silks from England, Scotland and South Africa. I have had the pleasure of teaching at this course on three occasions now, 2010, 2011 and 2014. I have also had the pleasure of introducing Les Taylor QC and Helen Cull QC as teachers at the Advanced advocacy course, and Judith Ablett-Kerr QC as a teacher for an Advocacy course run by the ABA in Perth earlier this year. The NZBA has supported the attendance of these Silks at the Australian courses. Members of the NZBA have attended as participants of the Advanced Advocacy courses since 2010.

Returning to my Keble

College experience: it was as a direct result of my involvement with the Australian courses, that I received an invitation to teach at Keble College, Oxford. It was a wonderful experience. There were 80 plus participants from England and Wales, Ireland, Pakistan and Hong Kong amongst other countries. The Faculty were from England and Wales, Ireland, Hong Kong, South Africa, Zimbabwe, Australia, and Pakistan and included approximately 30 Silks.

The course was divided into Civil and Criminal streams teaching the full range of trial advocacy, including expert evidence from Financial and Medical experts. The participants also took part in 'vulnerable witness' training and training sessions on Appellate advocacy and ethics. All of the sessions on the course were preceded by a presentation and demonstration by members of Faculty.

The guiding philosophy of the course is that 'you learn by doing'. Each participant is on their feet as an advocate a number of times each day and is personally critiqued and video reviewed by members of Faculty. One of the key components of the teaching method, in my view, is that following a participant's performance, one of the Faculty is required to stand up and 'demonstrate' how to improve the performance that he/she just critiqued. As a Faculty member, you subject yourself to analysis by the participants and indeed other Faculty in your group. As such, you are very much part of the learning experience.

As with the Australian course, the aim at Keble is to 'help each other in a "collegiate" environment'. The course materials describe the environment this way:

> "Faculty and participants learn together. Meals are taken together. Each Group has a dedicated Group Tutor and Group Helper throughout the Course, and a different Group Leader, in rotation, each day. Members of Faculty will be available in the evenings to answer questions."

This is a most supportive teaching environment and, in my experience, contributes greatly to the participants' development as advocates.

The commitment of both Faculty members and participants was impressive. I often remark at the courses I have had the privilege of teaching at that the calibre of coaches and their commitment to the participants is inspiring. This was no exception at Keble College, Oxford. My experience, both in Australia and at Oxford, is that Faculty "park their egos at the door" and commit to a process to ensure participants get the best from each individual performance.

The collegiality in this live in course is very evident, as it is in Australia. You have continual contact with not only the other coaches but also the participants. The opportunity for discussion of the various issues that arise during the course of each day enhances the relationship and the return that both the coaches and participants gain from the experience.

The course is definitely hard work for all involved. That is, both in preparation for the course and in the week's attendances, but it is highly enjoyable. There is time for some relaxation after dinner, and in the case of Keble College, this involves retiring to the "Lamb & Flag" local pub to talk about the day and matters social.

At the final dinner in the impressive dining hall at Keble College, the first country mentioned for its commitment to the success of the course was New Zealand. In my view, it is very important that we show our face on this international stage. The NZBA is certainly growing New Zealand's profile in this area, reflected in the above referred senior members of our Bar committing voluntarily to give of their time in Australia to this very worthwhile pursuit of excellence in advocacy.

Another example of the NZBA's recent commitment to Advocacy training is its affiliation to the International Advocacy Training Council (IATC) on which the NZBA has Advisory status. I am delighted to be NZBA's current representative, in that Advisory role. It is an organization dedicated to improving advocacy in many countries throughout the world. I had the pleasure of attending an IATC conference in Kuala Lumpur last year, which followed shortly after the World Bar Conference in Queenstown. A number of members on the IATC had been in Queenstown and had stayed on following the conference to assist the NZBA as faculty members at the Appellate Advocacy workshop.

There is no question that the NZBA's reputation for its ability to offer quality advocacy training was enhanced, on the International stage, by that course. A further example which reflects the NZBA's continuing commitment to Advocacy training was in supporting Kate Davenport QC to attend a 'Teach the Teachers' workshop run by the IATC in Hong Kong earlier this year.

The relationships/friendships that have grown over the years I have had the pleasure of teaching with International faculty have directly benefitted the NZBA advocacy courses. In developing the NZBA's Mastering Advocacy programme, Course Co-Director, Kate Davenport, and I have built on the knowledge and teaching philosophy acquired in our overseas experiences to ensure that the programme reflects best international teaching practice.

Most recently the commitment of the senior members of the Bar, along with the judiciary from the District and High Court, was apparent in an impressive faculty teaching at the NZBA Mastering Cross Examination Workshop held in Auckland on 6 November 2015. This reflects a willingness to commit to the future leaders of our profession. It is to be applauded.

I encourage members of the Bar to not only commit to teaching but also to take up the wonderful opportunities that are now being offered by the NZBA in its Mastering Advocacy workshops.

** If you have any comments or would like to know more about the NZBA Mastering Advocacy Programme, please email the Training Director, Jacqui Thompson at Jacqui.thompson@nzbar.org.nz.*

ETAC - Advocacy Training - Australian Style

By Judith Ablett-Kerr ONZM QC

As one of our senior advocacy coaches, the NZBA was happy to support Mrs Ablett-Kerr's involvement with the 2015 Essential Trial Advocacy Course in Perth. Mrs Ablett-Kerr was a coach for the NZBA Queenstown Appellate Advocacy workshop and will be joining the Wellington Mastering Cross Examination workshop on 8 April 2016.

This year I had the good fortune to be invited by the Australian Bar Association (ABA) to be an advocacy coach in their 2015 Essential Trial Advocacy Course (ETAC). I have been involved in coaching advocacy in New Zealand for over 20 years and I welcomed the opportunity to see how our friends across the 'ditch' approached the task and whether there was anything we might usefully consider. Thus it was that I blocked out a ten day period in July this year and set off for Perth.

Now, when I had accepted the invitation I confess to an expectation that it would probably be held in either Sydney or Melbourne (I demonstrate a somewhat myopic view of where such events are held) and when I learnt that it was to be in Perth I had thought twice about whether I should withdraw. After all Perth was nearly 5000 kilometres from Chambers and there was a five hour time difference, meaning that keeping effective contact with professional obligations in New Zealand would be difficult. However, as I had already signalled my acceptance I quickly put any thought of withdrawing to one side. Having done so July found me packed, ready to go and rather happy to leave a snow-bound Dunedin for a balmy 19 degrees in Perth.

I can say immediately and without doubt that I found the experience of being involved in this course as a coach most valuable and enlightening. I believe that the courses that both NZBA and NZLS, where I regularly teach on Advanced Litigation Skills and Expert Witness Courses, are excellent. I take great pleasure in participating in those courses and assisting the next generation of litigators to hone their skills but it must always be a good thing to be aware of how others attempt to achieve the same objective.

The ETAC Programme

This course is designed to complement the Bar Practice courses, conducted by the Bars of South Australia and Western Australia and is mandatory for barristers commencing practice in those jurisdictions. This does not mean however that the participants are necessarily new to trial advocacy as in-fact many will have practised for some years as solicitors and have very extensive trial advocacy experience. There will be those however who have done little or no trial advocacy. What is common to the majority, however, is the need to pass the course in order to practice as barristers. A somewhat different position to New Zealand where, despite recent changes which now require compliance with CPD, the concept of pass or fail is not part of the New Zealand equation. Rather, attendance is seen as sufficient.

The ETAC programme, which aims to provide barristers with the opportunity to receive training in the skills of presenting an application, opening a case, examining in chief a witness, cross examining and making a closing address, is based on "the underlying philosophy that the skills of a barrister are best learned through a deep understanding of the relevant objectives for each performance task, thoughtful preparation and an ongoing process of practice and review in an environment of interest, challenge and respect."[1]

The ETAC programme I attended was clearly well prepared and a month in advance I had received a rather substantial folder of background material and the case file. Importantly for me, coming to coach in Australia for the first time was that the material contained an excellent description of the approach and methodology adopted by the Australian Bar Association. While I have considerable experienced in coaching in New Zealand I recognised the need to ensure that what I did complemented the Australian methodology rather than conflicted with it.

I need not have worried, for although the Australian approach is in some ways closer to English practice (familiar to me from my UK practice) than that in New Zealand, being more formal in language and procedure, it presented no difficulty and was in fact a reminder of the need not to stray into the too casual mode.

[1]Greenwood, Philip ABA Essential Trial Advocacy Coaching – methodology (Advocacy Training Council)

Structure of Programme
ETAC runs over a period of five days with the first morning given over to training the trainers with an expectation that you, the coach, will demonstrate to your fellow coaches one of the tasks the barrister participants will be required to perform later in the week. Later in the afternoon the barrister participants join the coaches and introductions are made and a preliminary lecture/ discussion is had on the structure of the course and how to get the best out of it.

What is clear from the start is that the atmosphere is one of collegiality and respect. It is a learning environment where we are all brothers and sisters –in-law regardless of status within the profession and all with a mutual interest in achieving the objectives of the course.

The next three days follow a rigid pattern of a structured lecture and discussion on the task to be undertaken by the barristers that session. This is followed by a demonstration from two of the coaches of the task to be performed with the coaches providing explanations for the way they decided to approach the task. I was tasked with demonstrating the cross-examination of the main witness for the plaintiff, a somewhat hard-headed business woman who had failed to separate business from pleasure! I thoroughly enjoyed the exercise and it hopefully was of use to the participants.

The barrister participants then split into their groups (there being six participants to a group) and give a 10-15 minute performance of the task-in-hand. Following their performance, they are critiqued by an 'in-court' coach who also demonstrates how they might have approached the task. The participants then retire to a break-out room for a discussion with the second coach where the performance can also be reviewed on the DVD recording if necessary.

This provides an excellent opportunity for the barrister to discuss both his/her performance and the comments made by the 'in-court' coach. This exercise is valuable because it offers the opportunity for a participant to discuss in private his /her concerns about their performance and the critique they have received. What I found useful is that it allowed the less confident to ask for further explanation and assistance while it also provided the opportunity for the more experienced and confident to challenge the critique that they had received and come to understand why that critique may have been given and the value to their own development.

While the coaches alternate between groups there is a significant difference to the way we tend to do things and that is that a third coach remains with the one group through-out the week. This allows for monitoring on development and problems.

The final day is spent in trial before real Judges when each participant gets the opportunity to perform each task that had been covered.

Overall Impressions
In many ways the course is similar to the NITA programme offered here in New Zealand but its emphasis is perhaps more on learning through frequent demonstrations by the coaches and extended time on discussion after the barrister's own performance. The NZBA, in its Mastering Advocacy programme, has chosen to follow the ABA's approach rather than that of NITA because of this focus on practice and analysis.

I found the scheduled daily meeting between coaches, where the progress or otherwise of the participants was discussed, provided a sound basis for excellent pastoral care. Those that were struggling and in danger of dropping out or not passing the course were identified and given extra assistance. It is easy to forget just how stressful these intensive courses can be.

The spirit of collegiality was very strong on the course and that was obviously beneficial to the learning process. The Barrister participants who came from several different states in Australia, as well as overseas, were a great bunch to work with and my Australian hosts were generous and welcoming. The leadership provided by some of their very experienced coaches, including those from overseas, ensured that the programme ran smoothly and seemingly unhurried.

I am particularly grateful to Matthew Howard SC for making his Chambers available to me so that I could complete some pressing submissions (which I managed to do notwithstanding the fantastic, 19th floor view he has of the Perth waterfront) and also to Ian Robertson SC for his guidance on the ABA methodology and his forbearance of my sometime idiosyncratic approach. As was emphasised on this course its intention is not stifle individuality but provide a fundamental framework for each barrister to consider and to encourage the pursuit of excellence in their performances. Well worthwhile!

Law Society Complaints – PI Insurance Considerations

by Richard Hart BA LLB (Hons)*

As mentioned in David O'Neill's article earlier in this issue, one of the NZBA's member benefits is access to the NZBA Professional Indemnity Insurance Scheme. Richard Hart, a Scheme underwriter from AIG, outlines how to deal with complaints in the PI context.

In September's edition of At The Bar, Margaret Malcolm provided helpful advice for practitioners dealing with complaints to the Law Society (*"Law Society Complaints – Staying Sane Under Siege!"*). This article focuses on the role of Professional Indemnity (PI) insurance in what can frequently be a difficult, stressful and time-consuming process.

The need for professional indemnity insurance

Unlike many other jurisdictions, there is no compulsory requirement for lawyers in New Zealand to carry PI insurance (although those who choose not to must disclose that fact to clients under r 3.4(b) of the Conduct and Client Care Rules). Of course, the prudent practitioner will, with broker assistance, seek to ensure that he or she has a sufficient level of PI cover, based on an assessment of such factors as the type of work undertaken by the practice, the fee income, the risk management procedures in place, and the practitioner's claims experience.

The benefits of having PI cover are numerous: PI insurance not only enhances a practitioner's financial and reputational security, but serves the public interest by meeting liability claims which might otherwise be uncompensated, thereby maintaining public confidence in the integrity of the legal system. And, perhaps more importantly in the heat of a complaint situation, the support and guidance of an experienced and objective claims manager and insurance broker can be invaluable.

What cover does a PI policy provide?

At the most basic level, PI polices are typically designed to cover third party claims for breaches of professional duty (contractual, tortious, statutory and fiduciary). They respond by paying on the insured's behalf damages awarded by a court, settlements negotiated out of court, and defence costs – regardless of whether or not the insured is ultimately found liable (with some exceptions for fee disputes, fraud and other criminal conduct).

For practitioners, numerous extensions are available, providing cover for claims arising out of such matters as employee/partner dishonesty, loss of documents, trustee liability, and breaches of data security. For present purposes, cover is generally also available to assist with the investigation and defence of complaints to the Law Society about a practitioner's conduct or standard of service.

How should you respond to a Law Society complaint?

On receipt of a valid complaint, the Lawyers Complaints Service determines if the matter can be dealt with by referral to the Early Resolution Service. If the complaint is considered unsuitable for early resolution, it will be sent to a Standards Committee. At the same time, a copy will be sent to the practitioner, who will then have the right to make a written submission in response.

Should you receive a notice of complaint, we recommend taking the following steps in order to make the best use of your PI policy and your insurer's expertise.

Step 1: Notify your broker as soon as possible!

Because PI policies respond to third party claims made during the currency of the policy – even though any subsequent liability may not be determined for some time – an insured is typically obliged to notify the insurer as soon as practicable after becoming aware of a claim (or of circumstances which might give rise to a claim). Prompt notification is important – not because of a risk that the insurer will decline a late-notified claim (this rarely happens, except in cases where prejudice has resulted) – but because the insurer can better assist the practitioner if involved at the very outset.

Engaging with the process in a timely manner is, of course, a far better strategy than hoping that the matter will resolve itself – very few claims get better or disappear with the passage of time. By acting quickly in conjunction with the insurer, the amount of time that a practitioner spends on dealing with a complaint can be reduced, enabling the focus to remain on serving clients and building the business.

Step 2: Work with your insurer and broker to prepare a response and plan a strategy

At the outset, the process can appear formidable, and many practitioners complain of feeling isolated and unsupported. In addition to the usual network of colleagues, family and friends, an experienced claims manager can be a lifeline, guiding you through the process, and helping you to prepare a measured and proportionate response.

Once that response is made, the Committee will consider the matter and decide whether to:

- take no further action;
- invite the complainant and practitioner to consider resolving matters by negotiation, conciliation or mediation; or
- inquire further into the complaint.

Following an inquiry, the Committee may set the complaint down for a hearing conducted on the papers. Practitioners do not have the right to appear, but on occasion may be invited to meet with the Committee to help clarify matters. At the conclusion of the hearing, the Committee has the power to:

- take no further action;
- make a finding of unsatisfactory conduct (and impose one or more orders under section 156 of the Lawyers and Conveyancers Act 2006); or
- lay a charge before the Disciplinary Tribunal.

A Committee can also order the payment of costs where it considers that the proceedings were justified.

Whether the outcome is an attempt at a negotiated or mediated resolution, a hearing before the Committee, or a hearing before both the Committee and the Disciplinary Tribunal, your insurer will be able to assist with the process – by contributing to strategy discussions, reviewing submissions, and/or engaging defence counsel.

Step 3: Consider whether defence counsel is required, and at what stage

In some cases, your insurer may decide that it is best to appoint defence counsel at the outset, but this will not always be necessary or desirable. Sometimes, it will be appropriate to have legal support if the matter proceeds to a Committee hearing, to assist with reviewing the circumstances and preparing submissions. If the matter proceeds to the Disciplinary Tribunal, the appointment of defence counsel is almost always justified and recommended. Whatever the circumstances, practitioners should resist the idea that seeking outside help is a sign of weakness.

Identifying which lawyer can best assist can be a difficult task. There may be a temptation to engage the most experienced QC available – but this is rarely warranted or reasonable. Your insurer will have access to a panel of lawyers who, through wide experience, have developed an expertise in dealing with these matters. It is important to avoid the view that a particular firm or practitioner might be beneath one's stature, or to take an aggressive, overly-adversarial approach.

Step 4: Let your insurer deal with costs and compensation orders

If a Standards Committee ultimately determines that a practitioner's conduct has been unsatisfactory, it can make one or more of a range of orders available under section 156 of the Act. These include censuring or reprimanding the practitioner; ordering the practitioner to apologise to the complainant; or requiring the practitioner to pay a fine, costs and/or compensation.

If the Disciplinary Tribunal finds a lawyer guilty of unsatisfactory conduct or professional misconduct, it can make any order that a Standards Committee can make. It also has the power to strike off or suspend the practitioner.

Where the consequences are financial, a PI policy can assist. Although such policies do not as a rule cover fines, most will indemnify the insured for costs and compensation orders. It is worth remembering that costs are more commonly imposed than fines – for example, for the year ending 30 June 2014, the Disciplinary Tribunal imposed 122 penalty orders, of which 74 were cost-related, and only three were fines (source: New Zealand Lawyers and Conveyancers Disciplinary Tribunal Annual Report).

How can AIG assist practitioners with Law Society complaints?

At AIG, we assist practitioners on a daily basis as they face serious liability challenges that risk their professional reputations and good standing. AIG's Barristers' Professional Indemnity Insurance policy carries a "Quasi-Judicial Costs" extension, by which AIG indemnifies the practitioner against all reasonable costs and expenses, and any compensation order, incurred by the practitioner in the investigation and defence of Law Society complaints.

AIG's Financial Lines claims team is equipped to handle complaints rapidly, involving expert help early in the process, and working with the practitioner to minimise financial and reputational loss. We have relationships with the most capable legal representatives available in New Zealand and overseas, whose expertise we can enlist to help practitioners manage even the most difficult claims situation. And our ability to manage claims efficiently ultimately enables our premiums to remain competitively priced.

** Richard Hart Is an AIG Financial Lines Complex Claims Examiner, Australasia*

Book Review

By Jacqui Thompson*

LinkedIn for Lawyers
By Kirsten Hodgson
LexisNexis 2015, 2015**

Type "why should I use LinkedIn" into Google and you will get a list of results with headings such as "11 Reasons You Should Use LinkedIn for Your Business" or "10 Reasons Why ALL Professionals Should Use LinkedIn". In fact, the number of reasons ranges from five to 18 (Forbes.com). And then as you look down the list you discover that there are the tips for using LinkedIn. One site promises 35 of them.

An easier way of dealing with this is to read the second edition of Kirsten Hodgson's *LinkedIn for Lawyers*. It covers both the why and the how of LinkedIn. As its title suggests, it focusses on lawyers but the tips can be used by other professionals, including those associated with the legal industry. Hodgson has been in legal marketing for over 15 years and has worked with both large law firms and sole practitioners. She is especially well known for her expertise on LinkedIn.

Hodgson begins by defining LinkedIn in as a business network that provides a two-way channel to:

- manage your reputation;
- raise your profile;
- build your knowledge base in your area of expertise;
- position yourself as a specialist or expert;
- keep in touch and engage with current clients and referrers;
- meet and engage with prospects, potential referrers, colleagues and peers in industry sectors relevant to your clients;
- keep up to date with key issues in your area and industry sectors relevant to your clients;
- research clients, prospects and competitors;
- get the right people into your lead nurturing pipeline;
- generate new business.

Of course LinkedIn is also (as remarked on in one of the case studies in the book) a lazy person's address book. In the first few years of the platform, it used to be said that it was better not to be on the platform than have a half-hearted or inadequate profile. The problem is that with its growth, there has been a tendency to use LinkedIn to research people in business. In other words, it is used to check out people who have been recommended to you, those with whom you have a meeting planned, or even to decide if you want to take a meeting with someone. If you aren't on LinkedIn, the obvious question of "why not?" arises. You may well end up disregarded or overlooked. This is particularly so as a Google search frequently retrieves LinkedIn references in its first results page.

This book may focus on LinkedIn but it also considers the wider online business networking context. There is an excellent chapter on other social media, such as Twitter and Google+, with clear and concise explanations of how they work. Twitter for example can be a repelling prospect for those of us who keep our Facebook pages private and who don't believe in broadcasting the minutiae of our lives. However as pointed out by Hodgson, Twitter can now be used in sophisticated and professional ways to draw attention to your news and events. It can be an invaluable way to stay ahead of the news and to get on the radar of those you want to.

The majority of the book focusses on the how and why of LinkedIn. It is carefully set out and makes extensive use of illustrations. It is written in a manual style to give information which will allow you to maximise your use of the platform. For example, the chapter on participation and leveraging LinkedIn does not just explain how to publish material, but it identifies some hazards to be aware of and provides tips for optimising your material.

This second edition is well worth a read. It updates current users on changes in the LinkedIn platform. If you are a new or infrequent user of the network, it is well worth taking the time to read this book before going any further. Even if you are an extensive user, this edition will enable you to cross check what you are doing with Hodgson's marketing expertise.

** Jacqui Thompson compiles the NZBA's Newsletter. She is a legal researcher and has written marketing material for a number of lawyers over her 18 years working in the legal profession.*

*** Subscribers to the NZBA/LexisNexis plan are entitled to a discount on texts. Please check with Matt Pedersen at matthew.pedersen@lexisnexis.com*

Tips for High Performance

By Dr Frances Pitsilis
MB BS (Mon) Dip Obst, Dip Occup Med, FAARM, ABAARM, FRNZCGP*

This is the second of a two part series of articles in which Dr Pitsilis offers advice on ensuring optimal performance.

We have previously described the dire consequences of lack of self-care and lack of pacing your work, life and balance and in this article we will specifically discuss interventions that can keep your performance high while avoiding burnout. This is the Dr Pitsilis High Performance Programme.

Clean up your environment. Think about how many chemicals you are exposed to in the water, in the toothpaste, on anything that you put on your body, and in anything that you eat. Studies have shown that organic food and vegetables result in a reduction of pesticides in the body within one week. Chemicals in pesticides interfere with your biochemistry and deplete important minerals like zinc and magnesium. These are important for the function of your brain and body.

Be in bed and asleep by 10:30pm. If not, your body does not make the restorative melatonin that you need to heal and extend your life. Your body wants to be asleep generally between 10pm and 8am – if not, you are jet lagged and being a shift worker. We know that shift workers not only do not perform well but get cancer, heart attack and many illnesses. Getting to bed can be a real challenge for those who have a lot to do. A tip can be planning ahead so that there is winding down period away from work activities ahead of bedtime.

Exercise is important, not just for increasing fitness and muscle strength, but also for anxiety and stress release. Try to get 20-45mins of aerobic lightly puffing type exercise up to five times a week. Do some sort of stretching activities once or twice a week, and do some resistance training once or twice a week.

The high performance diet means that the diet is varied, with mainly a variety of vegetables and some fruits, and a good amount of nuts and seeds. There need not be too much meat but adequate protein in the form of fish, chicken and plant based proteins like avocado, nuts, seeds and tofu. People generally don't tolerate gluten in food very well and I suggest everybody should avoid gluten. Starchy and sugary foods make you tired, so to avoid the after lunch dip in energy and performance ensure your lunch is protein and vegetable based. Some should avoid milk, yoghurt and ice cream because of the effect it has on hay fever, asthma, migraine, irritable bowel, fatigue and your immune system.

The Mediterranean diet covers most areas for most people. This includes all of the above with a tendency to low end meat and protein and a lot of fruit and vegetables, nuts and seeds, as well as legumes and beans. You may want to take this further by going more "ketogenic" which means low carbohydrate and low end protein – this diet has been used in athletes to enhance their performance, keep them energetic and lean.

Do some form of meditation or relaxation activity - the best performers do this. These can include yoga, stretching, focusing on the breath, basic meditation or prayer. All of these activities help you to remain in the moment which is very important for busy people. Having a break from a busy mind and being at peace is very good for stress levels and has been shown to have multiple health and mental performance benefits.

Work with your mind. Remember to think about the way you think. Can a situation be seen in a different light? Why do some people catastrophise whereas other people will see an opportunity in the same situation? Professional counselling with a psychologist is tax deductible. This can be a very good investment for enhanced performance.

Rest and recreation are an important part of work/life balance. It is important to pace your work during the day in a micro manner and also over the year in a macro manner. During the day, take your breaks regularly because research has found that if you do, you will actually produce more than if you work continuously. When you return from your holiday, plan your next one.

Engage in health lifestyle behaviours. Everybody knows that smoking and drinking to excess is bad for you.

Nutritional supplementation for high performance – no one can eat an ideal diet all of the time and most of us are under some form of stress.

1. I recommend a multivitamin, about 2000mcg of fish oil and about 2000mg of vitamin C for all people, every day.

2. If there is more demand, add in a B complex and consider having a look at whether you need zinc or magnesium by talking to your local pharmacist.

3. Blood tests you can have with your family doctor include vitamin D – after all, people with inside jobs don't get enough sun and vitamin D is important for preventing 17 cancers and works on 913 genes.

4. Consider taking a probiotic regularly, especially if you are restoring a poor diet, or have been sick or on antibiotics.

5. Add in for extra stress resilience and enhanced performance and endurance - herbs like Ashwagandha, Rhodiola and Korean ginseng.

6. When everything seems to be a bit more on demand, increase the fish oil dose to 6000mg and increase the vitamin C.

7. If you are still not sleeping, you can ask your family doctor to prescribe melatonin for you. This is a safe supplement but not recommended in pregnancy. It is an antioxidant that actually extends your life just like resveratrol does. Start with a dose of 1mg and play with the dose until you get the right amount to put you to sleep for the whole night. Most people end up on a dose between 1-6mg and this supplement is safe with antidepressants and tranquilisers.

In summary, managing optimal performance involved managing your own thoughts and how you handle your life and work. It involves being smart about managing your time and being practical about what is really important. In addition, a bit of knowledge about diet, stress management techniques and special supplementation can make a real difference and give you the ultimate finishing touches.

New Members

Kate Dillon	AUCKLAND	Rob Latton	AUCKLAND
Linda Drummond	CHRISTCHURCH	Andra Mobberley	MASTERTON
Hon Justice Rebecca Ellis	WELLINGTON	Renée Riddell-Garner	WELLINGTON
Catherine Goode	AUCKLAND	Jodi Ryan	WELLINGTON
Julia Graham	CHRISTCHURCH	Sarah Saunderson-Warner	DUNEDIN
David Heaney QC	AUCKLAND	Steve Taylor	MASTERTON
Adam Holland	AUCKLAND	Judith Walshe	CHRISTCHURCH
Dala Huang	AUCKLAND	Rupert Ward	RANGIORA
Deborah (Deb) Inder	WANAKA	Michele Wilkinson-Smith	AUCKLAND
Honor Lanham	AUCKLAND		

Targa Report 2015

By David O'Neill*

This year was the 21st running of Targa NZ. The organisers promised it would be a biggie and they weren't wrong. Racing stretched over 1,000 kms and touring just over 1,400 kms. It is the first time in the World that a tarmac rally has exceeded 1,000kms (well that's what we were told). It is also the lowest ratio of special stage kms to touring stage kms. That is 1/1.4 - racing/touring. All you mathematicians out there can correct me if I'm wrong.

Documentation and scrutineering all took place on Sunday afternoon of Labour Weekend. It was a taste of things to come.

The next day was driver's briefing and then we were waved away from the Ellerslie Racecourse and travelled down towards Hamilton.

Prior to the event, one of my sponsors, Ebbett Audi, had run a Facebook competition and put it out there that anybody (who was brave enough) to "like" the Facebook would go into a draw for a special stage run in the left hand seat of my car.

Believe it or not, there were some foolhardy enough to do so, and the winner was (not a barrister), a lawyer by the name of Scott Young, from Hamilton, who was given a bag of goodies by Audi probably to make sure that he complained about me and not them! He was also loaned a race suit so he looked the goods. We didn't tell him it was for fire retardation – just a fashion statement.

My crew duly strapped him into the car at Ellerslie (we had to go straight to stage and I could see disaster looming if I had to get him dressed on the start line) and made sure that the helmet fitted him. Needless to say the helmet didn't fit him and he, sort of, protruded from the helmet rather like a grape being squashed between two fingers. This is not indicative of anything about Scott, but rather the fact that his head was bigger than the helmet cavity.

These special stages were to be run near Te Kauwhata.

What I didn't tell him was that this was also a speed stage to allow us to get as close to 200 kph as we could so that the GPS TrackIt people could ensure that their tracking devices were working correctly. I think we got up to around about 185 kph which I suspect was probably quick enough for my passenger. He didn't say anything but I'm not taking that as any indication he was either terrified or having a blast. I'll stay neutral on that point. I had new tyres on which were "green" so didn't want to go roaring around a corner and leave the road in a flurry of dirt, unused tyre bits etc.

I had it all teed up for another sponsor to come through on the second run, being one of the partners from Staples Rodway in Hamilton, but unfortunately a competitor decided that, because it was a non-competition stage and there were no points resting on placing, that he would spear off the road into a power pole taking out the power for the entire District, bringing the pole down across the road and closing the stage. It was a real let down for my soon-to-be anointed co-pilot, but he took it well. As they say – "that's racing".

However, I must admit he was a lot less annoyed than the wife and crew of the driver of the car that destroyed the power pole. They were easy to spot. They were the ones throwing tools into the service vehicle from several metres away. He also ruined his Targa by wrecking his car completely. He was last seen disappearing out fishing.

Monday had two extra stages which were competition events and then the cars all proceeded to Hamilton, washed at a local school and down to a local car park where we were parked up for the night. It was nice to get back to home base, even if only for one night.

The next day we proceeded down towards the King Country with a few special stages and then onto New Plymouth. There was a slight deviation out towards the Kawhia coast where the stages are isolated and rather desolate. These are great stages to drive on, but if you crash, you wait a long time before anybody comes along to get you because there is only one road which services these roads and that is the one you're racing on.

New Plymouth is one of the old stamping grounds for Targa. Targa always has an event or part of the event there and the roads are quite different to anywhere else in the country. The engineers, I suspect, took road building rather literally because they would follow the

contours of the land rather than cut through it.

If there was a hill, then they go over it and not through it. If there is a crest with a bendy bit over the other side, then the road follows the bendy bit. This makes for interesting driving, to such an extent that you cannot trust your instincts or anything else for that matter. You need to see what's over the crest, round the corner or over the brow – otherwise it's goodnight nurse. The New Plymouth stages are invariably damp with lots of lichen on the roads and somebody is always caught out.

A second night was spent in New Plymouth and the next day we took to the outskirts of Taranaki and raced the "Forgotten Highway" into Whangamomona. This is always a great favourite and the 39km trip takes around about anywhere between 22 – 26 minutes. Again, it usually catches out somebody and this year nothing changed. There were, from memory, a couple of cars that went out on the road going in and three cars parked into various bits of the scenery on the road going out.

The last stage of that third day saw us travelling well down past Whanganui (to be perfectly correct) to do a special stage which started in a small township called Ohura (for the non-criminal barristers – near the prison). It was wet and again, three cars managed to disappear into the shrubbery, with one car taking a power pole with him. They weren't coming back in a hurry!

We got to Palmerston North where it was pretty miserable, dark and set and the boys serviced the car and we went home for a well-deserved shower and meal.

My children managed to source a plucked rubber chicken (yes, it really was a plucked chicken), on a key ring for the car. The chicken, thinking better of this, tried to escape, was recaptured and was then tied to the front number plate with a cable tie. As you can see from the photograph, the chicken got the very best view of all special stages from thereon in.

No Targa is complete without a visit to the Mangatainoka Brewery. As you can see from the photograph, they probably heard I was coming. I kid you not; this was actually on the wall of the Brewery. I was the butt of plenty of lawyer jokes after that.

However, it wasn't all bad; we did Mangatainoka and then the Gentle Annie (the road from Taihape over the ranges to Hawkes Bay). That was probably the one "whoopsie" we had which was a slip coming down the Gentle Annie on a greasy road, a little bit fast, where we went sideways down a road for a little while, straightened up and then kept on going at a somewhat more sedate pace.

I find that the more driving I do the faster I get and the last stage was an absolute doozie. It is called the Pahiatua Track. It is the road from Pahiatua through to Palmerston North and is a steep ascent and descent, with really good roads, no bumps and the road in fabulous condition. We were tapping out at around about 190+ kph coming down to the finish.

The event finished on the Saturday night so the next day everybody got up and watched the All Blacks win the RWC final which capped off a very successful week. It was a long hard drive – don't get me wrong, it was enjoyable but by Saturday afternoon people were starting to fade and concentration (and machinery) was getting frayed at the edges. The last stage, which was incredibly quick and enjoyable, was a cracker but took a huge effort in terms of staying focussed.

It was made ever sweeter by the fact that we managed to win the Index of Performance for modern two-wheel drive cars. This is based on the age of your car, the size of the engine and your time in the category. The longer the event, the less impact and influence the age and size of the motor has on the time. I was very pleased to win this as we hadn't won this previously.

The Tour

I can't leave the article without saying something about the Tour. The Tour is an event which is part of Targa, but is not a competition. There are no required modifications to the car. The car can be a standard road going car and all it needs is a trip meter and a reasonably confident driver.

It gives drivers who don't wish to modify their cars an opportunity to allow the car to stretch its legs on country roads up to a maximum of 160 kph. Feel free to contact me for details at david.Oneill@nzbarrister.com.

This is my last event for 2015. Until the next Targa – safe driving.

** Petrol Head David O'Neill is a barrister practising in Hamilton. David is the NZBA Treasurer and writes regularly for* ***At the Bar.***

2015 - 2016 COUNCIL CONTACT DETAILS

PAUL MABEY QC - President
Ph: +64 7 577 1091; Fax: +64 7 577 1092
pgmabey@xtra.co.nz
PO Box 13199, Tauranga 3141

PETER DAVEY
Ph: +64 9 309 0475; Fax: +64 9 354 3850
peter@davey.co.nz
PO Box 1811, Auckland 1140

JOHN DIXON
Ph: +64 9 306 2775;
john.dixon@shortlandchambers.co.nz
PO Box 4338, Shortland Street, Auckland 1140

JONATHAN EATON QC
Ph: +64 3 372 3466;
j.eaton@bridgesidechambers.co.nz
PO Box 3180, Christchurch 8140

CLIVE ELLIOTT QC – President Elect
Ph: +64 9 307 9808; Fax: +64 9 366 1599
elliott@shortlandchambers.co.nz
PO Box 4338, Shortland Street, Auckland 1140

SIMON FOOTE
Ph: +64 9 307 8784
swbf@simonfoote.co.nz
PO Box 1121, Shortland Street, Auckland 1140

LISA HANSEN
Ph: +64 4 914 1052
l.hansen@barristerscomm.com
PO Box 5577, Wellington 6145

GREG HOLLISTER-JONES
Ph: +64 7 928 6202; Fax +64 7 578 1515
g.hollister-jones@rhjl.co.nz
PO Box 13063, Tauranga 3141

DENNIS JENKIN
Ph: +64 9 307 1769
djenkin@shortlandchambers.co.nz
PO Box 4338, Shortland Street, Auckland 1140

DALE LESTER
Ph: +64 3 366 1465
dale@canterburychambers.co.nz
PO Box 9344, Christchurch 8146

DAVID O'NEILL - Treasurer
Ph: +64 7 839 1745;
david.oneill@nzbarrister.com
PO Box 815, Hamilton 3240

ALICE OSMAN - Junior Barristers' Representative
Ph: +64 4 915 9278
alice.osman@stoutstreet.co.nz
PO Box 117, Wellington 6140

PAUL RADICH QC
Ph: +64 4 974 5951; Fax +64 4 974 5955
paul.radich@cliftonchambers.co.nz
PO Box 10731, Wellington 6143

ALEXANDRA SINCLAIR - Junior Barristers' Representative
Ph: + 64 9 354 1403
asinclair@shortlandchambers.co.nz
PO Box 4338, Shortland Street, Auckland 1140

STEPHANIE THOMPSON - Junior Barristers' Representative
Ph: +64 21 294 8928
stephanie@smthompson.co.nz
PO Box 405, Shortland Street, Auckland 1140

DEAN TOBIN
Ph: +64 3 477 8781; Fax: +64 3 477 8382
dean.tobin@princeschambers.net
P O Box 1424, Dunedin