Appointment to Parole Board

Wellington family lawyer Mary More has been appointed as a member of the New Zealand Parole Board. Mary More is a highly regarded practitioner who has wide experience in all aspects of family law and has represented many clients before the Parole Board. She was previously a member of the Wellington Branch Council. Parole Board members are appointed by the Governor-General on the recommendation of the Attorney-General. Mary is probably the first practitioner who regularly practises at the Parole Board to be appointed as a member.

She has been working most recently as a Director in The Law Store in Porirua, but is now moving to practice as a sole practitioner, and expects to continue working part-time in the family court. Having represented clients before the Parole Board for many years she is looking forward to the new challenge of working in shared decision making with at least two others in what is a quasi-judicial role.

She is also looking forward to having more time for herself and her family.

Mary More.

2016 Shirley Smith Address

The Women in Law Committee of the Wellington Branch NZLS invite you to the 2016 Shirley Smith Address

"Manliness, Male Right and Criminal law: The Uses of Criminal Law in the Formation of the Character of the Male Legal Person"

To be presented by:
Professor Ngaire Naffine
Bonython Professor of Law
University of Adelaide

When: Wednesday 23 November 2016
Formalities commence at 5.30pm

Where: Rutherford House Lecture Theatre 2, Victoria University of Wellington Pipitea Campus

Light refreshments follow the Address

This is a free public Address.

Comments at swearing in

At the swearing in of Judge Catriona Doyle recently, Wellington Branch Vice President Mark Wilton congratulated the judge and offered her the best wishes of the profession.

He praised the judge for her "keen sense of fairness, intelligence, pragmatism, sound judgment and balance...", and outlined aspects of her career, in particular her significant contribution to Family Law.

"You have been described by the [Family Law Section] executive as a tireless star who contributed at such a difficult time for family lawyers which came at the sacrifice of your own practice and personal life. Your service from 2010 was at a time of such significant and fundamental change to family justice and legal aid..."

"You went above and beyond as an advocate for family law practitioners representing and voicing the position of the Society regarding the then proposed Family Court reforms."

Judge Doyle’s “caring and compassionate nature” and her service to the profession transcended professional development, Mark Wilton said.
Members of the Wellington Branch Council who met in Masterton last month, before attending the Wairarapa Bar dinner in the evening. Seated: President David Dunbar, right, and vice president Mark Wilton. Standing: Christopher Griggs, Jessie Hunt, Steph Dyhrberg, Yemo Guo, Julia White, Megan Paish, Chris O’Connor and Cathy Rodgers.
The power of confident communication
By Caroline Sawyer

THAT confidence is probably more important than competence, was the most significant point made by Mary Scholtens QC when speaking recently to an audience of both men and women on "confident communication".

Mary’s address on Thursday 25 August, generously hosted by Chapman Tripp, was a repeat performance of her highly acclaimed talk of last year, again at the invitation of the Wellington Branch Women in Law Committee. Some of the audience – and indeed some of the committee – had had to wait a year to hear Mary’s talk, because it was so heavily oversubscribed last year. Others were returning for a refresher.

Research and statistics show that men score much better than women on self-belief and presentation. Women do not generally apply for a job until they feel 100 percent competent to do it. Men will take a more optimistic view and apply if they feel they can manage most of it. The difference interestingly reemerged the difference in the civil and criminal standards of proof, with men apparently feeling that the balance of probabilities would be enough. And, often, apparently it is.

Moreover, success may follow not merely confidence so much as the appearance of confidence. Mary spoke of the importance of walking tall, metaphorically and literally, and the effectiveness of approaching difficulties without undue flinching. If faced with a court that does not want to hear about the matter that constitutes most of what one has prepared, she assured the audience that one need not and should not panic. Accept the situation and move on: the court may well move with you, and in any event the crisis will pass.

Mary peppered her talk with studies that demonstrated the power of confidence, and its link with optimistic thinking and a growth mind-set. She suggested exercises for developing confidence and optimism. She emphasised the need to take risks, to step outside our comfort zone, in order to strengthen our own assessment of what we are capable of.

Mary’s key message was the importance of “backing yourself”.

New online library resources available
By Robin Andersen, Wellington Branch Librarian

WITH the new financial year and new contracts with LexisNexis and Westlaw we have some more very useful titles added to the databases available on the Library’s computers. There are four new LexisNexis Practical Guidance titles available – District Court Litigation, Family Dispute Resolution, Governance and Insurance.

Westlaw has also been adding more titles to their popular A-Z series, taken from books that they have published. This series is encyclopedic in character and gives you the basics in an area. With subjects ranging from Charities, Equity, Forensic Science and Trusts, it is definitely worth a look.

Lexis Red. We are trialling access to this online e-book borrowing platform. Once set up, you will be able to borrow an electronic version of LexisNexis looseleaf titles for two weeks. At the moment all of this is a manual process. You need to email wellington@nzlslibrary.org.nz giving your name, contact phone number, Registry ID number and the name of the title you want. We then need to set you up on the system and issue you the title. To view the title you need to have a pc, laptop or ipod and to download the Lexis Red app. There will be more publicity on this in the next few weeks.

District Courts Decisions website. There is a new website for District Courts decisions which makes them available free on the internet. The website is www.districtcourts.govt.nz and it covers criminal and civil decisions in the District Courts, Youth Court and Family Court decisions. If any suppression or prohibitions apply, these will have already been applied before the decisions are published.

Library research webinar available. The NZLS CLE webinar by Julia de Friet and Robin Andersen is freely available on the NZLS CLE website for anyone who missed it and would like to see it. Highly recommended! Go to the free recordings section. The seminar is the second one down. http://www.lawyerseducation.co.nz/Courses/Free+Recordings.html

From the Chief High Court Judge and Chief District Court Judge

Following the commencement of part 5A of the Criminal Procedure Rules 2012, the 2014 Practice Note on sentencing in the High and District Courts has been revoked.

From the Chief High Court Judge

16 August 2016

I recently met with High Court managers who advised me of two areas where the court could be assisted by practitioners.

Judgment embargo practices

Judgments are delivered to counsel by the registry via email immediately upon delivery. There is then a delay before the judgments are sent to the media and legal publishers. The purpose for the delay is primarily to allow counsel to identify any errors, omissions or suppression issues to be corrected.

Those delays are as follows:

• The registry waits one hour before sending the judgment electronically to the media and to legal publishing houses.
• There is generally a one hour delay before judgments to be published on the Courts of New Zealand Decisions of Public Interest webpage are posted (however sentencing notes and oral judgments are posted when signed).
• There is a three-day delay before decisions are published on Judicial Decisions Online (JDO) webpage to enable a final check of the decision.

It is very helpful when counsel point out any issues before wider publication. I ask that whenever possible following receipt of a judgment you promptly read it and, if necessary, advise the court of any concerns.

AVL bookings for overseas witnesses

In certain cases, the High Court may allow witnesses to give evidence via AVL (audio-visual link) from an overseas location. This is becoming a much more common practice.

In order to ensure that AVL links are available, registry staff require sufficient notice to obtain costings, organise an appropriate venue and practical arrangements at the venue, then set up and test the link prior to the AVL link itself.

Please ensure you provide the court with any at least five days notice of the need for an AVL link with Australia, and at least 10 days notice for any other jurisdiction, to ensure suitable arrangements can be made.

If you have any queries about using AVL in proceedings please contact your local court Auckland High Court: call 09 916 9600 or email AucklandHC@justice.govt.nz Wellington High Court: call 04 914 3600 or email WellingtonHC@justice.govt.nz Christchurch High Court: call 0800 208 787 or email ChristchurchHC@justice.govt.nz

For more information contact:
Debbie Iversen
Judicial Administrator to Chief High Court Judge
DDE: 914 3671
debbie.iversen@courts.govt.nz

New titles at NZ Law Society Library Wellington

Delegated legislation in Australia, Chapman Tripp, 4th ed 2012 KM302.2.K1 PEA
New residential withholding tax, Wellington: New Zealand Law Society 2016 KM357.L1 NEW
Privacy law in New Zealand, Wellington: Thomson Reuters 2nd ed 2016 KN809.A1 CV
Statutory interpretation in Australia, Chatswood, NSW: LexisNexis Australia 8th ed 2014 KJ35.3.A1 PEA

The law of insolventy in New Zealand, Wellington: Thomson Reuters 2016 KN512.L1 TAY
The law of proprietary estoppel, Oxford: Oxford University Press 2014 KN393.5.A1 MFA
Wars, laws and humanity: New Zealand’s engagement with international humanitarian law, Wellington: New Zealand Red Cross 2015 KC200.L1 NEW

The monthly newspaper of the Wellington Branch NZ Law Society
ISSN 2382-2333

Advertising Rates: casual or contract rates on application. Telephone Robin Reynolds, Reynolds Advertising, Kapiti Coast (04) 902 5544, e-mail: admir@paradise.net.nz. Rates quoted ex/GST.
Advertise Deadline: for the October 2016 issue is Tuesday 27 September, 2016.
Circulation: 3000 copies every month except January. Goes to all barristers and solicitors in the Wellington, Marlborough, Wairarapa, and Manawatu areas. Also goes to many New Zealand law firms, to law societies, universities, judicial officers, and others involved in the administration of justice.
Will Notices: $50.00 GST inclusive for each insertion.
Subscriptions: Annual subscription $60.00 incl. GST. Extra copies $5.00 each.
Subscription orders and inquiries to: The Branch Manager, New Zealand Law Society Wellington Branch, P.O. Box 494, Wellington.
E-mail: Chris Ryan, telephone (06) 378 7431 or 027 255 4027
E-mail: chris@wise.net.nz
Opinions expressed do not necessarily reflect those of the NZ Law Society Wellington Branch or the Editor.
Council Brief is published for the NZ Law Society Wellington Branch by Chris Ryan, and printed by Beacon Print, Hawke’s Bay.
Wairarapa Bar Dinner

Sue Shone, Mary More and Julia White.

Michael Bott, Chris O’Connor and Mike Lennard.

Wellington Branch President David Dunbar, and Council members Megan Paish and Yemo Guo.

Mark Hinton, guest speaker Justice Karen Clark QC, Michael Bale and John Pike QC.

Donna Watt, Jills Angus Burney and Christin Schetter.

Nerissa Barber and Penny Elliott.

Sir Ron Young, Judge Tony Walsh, Sija Spaak and Rohan Cochrane.

Amanda Courtney, Matt Adams and Adam Parker.

Bruce Logan and John Greenwood.

Jock Blathwayt and Michael Bott.

Aroha Black, Steph Dyhreberg and Andrew Beck.

Leah Kershaw, Jack Kershaw and Sonia Bannister.

Jock Kershaw and Jessie Hunt.

Wellington Branch Vice President Mark Wilton, the dinner organiser Mark Hinton, and Wellington Branch Manager Annelies Windmill.

Challenging and advancing the quality of forensic evidence

LINKED Forensic Consultants Ltd

www.linkedforensics.com

04 905 4611 | info@linkedforensics.com
John Burn is a retired barrister with over 20 years experience at the Christchurch Bar, then over 20 years at the New South Wales Bar, and now living back in Christchurch. Last month Council Brief published John’s thoughts on how the Courts and the Bar are, without any malicious intent, overloading the judicial process with minutiae of detail, and the consequent heavy costs burden which this causes to the community. He continues his discussion in this column.

There is, obviously, a further aim of any judicial process – not only time and cost, but also clarity. Those promoting perfectly phrased decisions always point out that lawyers can more easily advise their clients on their affairs if the law is clear. But I wonder how reliable, in an approach can be seen in Gideon v Wainwright, in which the Sixth Amendment to the Constitution guaranteed any accused “the assistance of counsel” and the question was whether the State had to fund that assistance. The originalists held that no funding was referred to in the Amendment, while the legal realists held that without funding the Amendment was useless to many citizens. The latter won, but narrowly. Of course we have no constitution (except for a ragbag group of statutes which some academics call a constitution) and the legal statements to be defined in our day come from statutes or regulations, to some extent, but so much more from earlier judicial pronouncements.

And this is where I feel we’re going wrong. At the risk of fraying the strength of stare decisis, I see the essential justice of disputes becoming too often obscured by a formulated framework which confines the discretion of each judge too narrowly for him or her to often achieve the justice they seek to apply. Lord Denning was much criticised for his approach, which was to work out what was a fair result, and then seek to establish whether the law would allow him to achieve it. But black letter lawyers, and Judges, and that today is probably the majority, will resist any temptation to divert from the static and established framework of the law. So their attempt to achieve justice is constantly hampered by previous decisions and the minutely-argued submissions which they have to surmount before feeling safe in their decisions.

We used to furnish our clients with impressive shelves of bound law reports from our own and (usually) the English Courts. Now they all lurk on computer screens, and may (unfortunately) be even more accessible. So the task of tunnelling into the mountain of precedent is even easier, and so many counsel delve, I think, a good deal further then they need to. Perhaps it is time to accept that the job of the Courts is to do justice, and not to add constantly to the growing mountain of earlier opinions. The client who pays your fee wants an answer – preferably in his favour, but at any rate an end to his dispute. He is not paying to contribute to a future world of legal wondernment, which may delight the academic lawyer but constitute a huge waste of effort for the rest of us. I am not saying that each case should be considered without precedent – that would be throwing out what judicial thought has achieved over the years. But I am saying that each judge should feel entitled to break with precedent in the appropriate case. It is hard to see how the strength of our legal framework can otherwise keep pace with the years. And if such an approach cuts down the constant tendency towards microscopic argument, with the attendant costs, what an achievement that would be. Clients want an answer, and not a delicate piece of reasoning which may make expensive appeals unavoidable. We are lawyers and we should be serving our clients, not priding ourselves on graceful and sinuous exercises of logic. But the lead has to come from the Judges, and the longer this ultra-precision approach goes on, in both the countries with which I am familiar, the more difficult it will be to make our judicial system relevant to the community once more.

This article is republished with permission from the April 2016 edition of Canterbury Tales.

Is there too much law?

By John Burn

The Attorney-General Christopher Finlayson QC was guest speaker at the Marlborough Branch Bar Dinner held at the Marlborough Vintners Hotel on 20 August.

NZ Law Society – Wellington Branch

Branch Manager: Annelies Windmill
Branch Administrator: Antoinette Lathbury-Axford
Librarian: Robin Anderson
Assistant Librarian: Julie Matthews
Research Librarian: Nicola Stedman
Library Assistant/LINX: Julie Kirkland
PO Box 494, Wellington
Phone: 04 472 7837
Email: Wellington@lawsociety.org.nz
Website: www.lawsociety.org.nz

NZ Law Society Library, Wellington
Phone: 04 473 6202
Fax: 04 471 2568
email: wellington@nzlslibrary.org.nz

Marlborough Bar Dinner

Attorney-General Christopher Finlayson QC with Marianne Startup and Nigel Timpson.

NZ Law Society President Kathryn Beck, Stephanie Marsden, NZ Law Society South Island Vice-President Andrew Logan, and NZ Law Society Wellington Branch President David Dunbar.

Hannah Arnett, Kent Arnett, NZ Law Society Marlborough Branch President Simon Gaines, Laura McFarlane and Andrew McFarlane.

Judge Richard Russell (left).

The Attorney-General Christopher Finlayson QC was guest speaker at the Marlborough Branch Bar Dinner held at the Marlborough Vintners Hotel on 20 August.
Benefit entitlement issues for survivors of domestic violence

By Sarah Crooksey-Hewitt, Community Lawyer

FINANCIAL independence is central to the decision-making and safety planning of survivors of domestic violence and is vital for those seeking to leave violent relationships. In light of the appallingly high rates of domestic violence in Aotearoa, one would hope that our welfare system would support survivors of violence to achieve self-sufficiency. Unfortunately, however, survivors of domestic violence who are in receipt of or applying for welfare benefits face a number of barriers to receiving their full entitlements. This article will provide a brief overview of three such issues recently encountered by Community Law Wellington and Hutt Valley.

Benefit fraud and ‘relationships in the nature of marriage’

A beneficiary’s failure to provide full and accurate information when in receipt of or applying for a benefit can result in a benefit fraud investigation. The outcome may be the establishment of a debt and, where the Ministry has been deliberately misled, criminal charges. The leading cause of benefit fraud investigations is alleged ‘relationship fraud’; that is, a failure to declare a ‘relationship in the nature of marriage’ to the Ministry.

The leading case on this issue, Ruka v Department of Social Welfare, found that both ‘emotional commitment’ and ‘financial interdependence’ are required for a relationship in the nature of marriage to exist.

Where domestic violence is present, the usual indicia of emotional commitment may be negated by the presence of violence, meaning that in many cases violent relationships should not be considered to be ‘relationships in the nature of marriage’ for benefit purposes. The implementation of the Ruka decision proved contentious. Barrister Frances Joychild finding that the Department of Work and Income's failure to properly implement the decision was so severe that a review of all marriage-type relationship cases since Ruka was required. The implementation of the Ruka decision remains problematic, particularly in the context of domestic violence. Great responsibility is placed on case workers to identify the presence of violence and, where violence is disclosed, there is an expectation that clients will provide pertinent information.

When one considers the usual dynamics of domestic violence this is understandably a challenge. Victims are often too fearful of the repercussions to seek assistance. Violence typically occurs when witnesses are not present, and violence can be perpetrated in ways which leave few physical signs or is psychologically traumatic.

Social Security Appeal Authority (SSAA) decisions about relationship status where violence is present appear to set a high threshold before violence is considered to impact upon the nature of the relationship. The extreme and sustained physical and sexual violence that was present in Ruka is presented as a benchmark against which other cases consistently fail. For example, the SSAA commented that an appellant who reported being repeatedly strangled, kicked and having her lip split by her partner, the acute and sustained physical and emotional violence reported in [Ruka]. This focus on the extent of the physical violence seems counter to the finding in Ruka that “[i]t is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent.”

Assessments of domestic violence accounts continue to display a reliance on myths about domestic violence, simultaneously expecting that a victim would leave a violent relationship if she were to choose to do so. Survivors may be described, while also treating active resistance strategies as implausible. For example, the SSAA commented in one case that “[i]t is difficult to understand why [the appellant] would want to live in the same house as [her abuser] in preference to the home of some other relative such as her daughter if violence was a significant issue.” Meanwhile, a beneficiary who describes violent and unsafe incidents, including being strangled, “attacked”, dragged, pinned down and having her pet shot, was found by the SSAA to nonethless be in a ‘relationship in the nature of marriage’ as “the sort of ultimate gain [to her abuser to leave] does not appear to be one that a woman trapped in a violent relationship would be capable of giving.”

Benefit deductions for failing to name a child’s father

A further entitlement issue faced by survivors of domestic violence is the deduction of sole parents’ benefits where the beneficiary fails to name the other parent. The Act requires a sole parent to identify the other parent of a dependent child, their rate of benefit will be reduced by $28 (with a further $22 for each subsequent child). The Act provides exemptions from this deduction if the chief executive is satisfied that the child was conceived as a result of incest or sexual violation or that naming the other parent would put the beneficiary or their child at risk of violence. Despite this, beneficiaries who have valid reasons for being unwilling or unable to name the father of their child are struggling to have these deductions lifted.

Having to ‘prove’ and re-live their experiences of domestic violence can be traumatising for the clients concerned, as raising such issues in Work and Income’s open plan offices in front of other staff and clients. Work and Income staff are expected to identify the presence of sexual or domestic violence, and may fail to use a language specific to the beneficiary. Many clients are forced to recount their experiences to multiple Work and Income staff members before obtaining the assistance they require. Our experience is that this process leaves many feeling judged, degraded and marginalised, acting as a barrier to having the deductions lifted.

Lack of assistance for non-residents

In addition to the immense hurdles faced by women seeking to leave violent relationships, migrant and refugee survivors face a specific set of challenges. For example, they may face pressure to maintain group cultural norms, language barriers may impede their ability to seek help, they may lack awareness of their legal rights or fear reporting to authorities, and the agencies to whom they do report may lack awareness of migrant and refugee survivor experiences and conditions. Where their immigration status is dependent upon their relationship with their violent partner this may be utilised as a tool of abuse. Many migrant and refugee survivors fear ostracisation and threats to their home country.

A specific class of visa has appeared which may encourage migrant survivors to obtain welfare benefits, remaining with a violent relationship may be the only viable option for these women.

Conclusion

This paper provides only a very brief summary of the barriers to obtaining welfare benefits for survivors of domestic violence. Nonetheless, the consequences of these barriers are clearly immense; a finding of benefit fraud may burden survivors with a debt that remains with them for life and a jail sentence will deprive their children of a parent. A weekly deduction of $28 or more means a beneficiary who has been in prison for 14 weeks is ready in financial hardship struggle to support their whanau. The lack of a means of independent financial support may encourage migrant survivors to remain in a violent relationship, it is imperative that consideration is given to the needs of whānau who have experienced or are experiencing domestic violence in the development and implementation of welfare policy.

Footnotes
1 The highest rate of reported intimate partner violence in the developed world; see ‘Strengthening New Zealand’s response to domestic violence – A public discussion document,’ Ministry of Justice, August 2015, at 4.
2 Social Security Act 1964, section 127.
5 Ruka v Department of Social Welfare 1997 1 NZLR 154 at 39.
7 The Ministry of Social Development provides that, where a client has disclosed domestic violence, the case worker “should encourage [the] client to provide proof of domestic violence ... [from] a reputable person or organisation that is in a position to support a client’s statement”.
8 See also [2006] 16 NZSSAA at 68, where an applicant who was being “controlled”, punched, throttled and thrown down stairs was found not to have indicated “a level of violence which might negate the proposition that this was a relationship in the nature of marriage.”
11 NZSSAA 7 at [31].
12 Her abuser further admitted to “smashing, pushing and throwing a bottle at her.”
13 NZSSAA 72 at [38]. See also [2008] NZSSAA 41 at 68, where the SSAA commented it “seems counter to the finding in Ruka” that “[i]t is the effects of the violence on the battered woman’s mind and will, as those effects bear on the particular case, which is pertinent.”
14 Social Security Act 1964, section 70A.
15 Social Security Act 1964, section 70A.

Register of Presenters for Continuing Professional Development (CPD)

The Wellington Branch is creating a register of practitioners prepared to volunteer their time presenting CPD to their colleagues.

We all recognise that CPD comes with a cost both in time and money so we are creating a register of practitioners and educators who would be available to present CPD if requested at no or low cost to their colleagues.

We remind you that CPD presenters can get time in their own right. Time is claimable for preparation of CPD presentations (usually at a ratio of two hours preparation for each hour of presentation) and time spent delivering. A typical one hour presentation would allow the presenter to claim three hours of CPD, ie, two hours for preparation and one hour for the delivery.

Any practitioners prepared to go on the Branch register please contact the Wellington Branch, Wellington branch, wellington@lawyersociety.org.nz

Please include your name, your area of expertise, your telephone number and your email address.

© Mark Gobbi 2016

MADeSIGN™ Answers: See page 2

1 Decode these rebus puzzles:
   STANCE
   CΗΟGυσεκ
   grWy
   SPIRED

2 It is black’s turn to move; what should black do?

3 The Wellington Branch is creating a register of practitioners prepared to volunteer their time presenting CPD to their colleagues.

4 We all recognise that CPD comes with a cost both in time and money so we are creating a register of practitioners and educators who would be available to present CPD if requested at no or low cost to their colleagues.

5 We remind you that CPD presenters can get time in their own right. Time is claimable for preparation of CPD presentations (usually at a ratio of two hours preparation for each hour of presentation) and time spent delivering. A typical one hour presentation would allow the presenter to claim three hours of CPD, ie, two hours for preparation and one hour for the delivery.

6 Any practitioners prepared to go on the Branch register please contact the Wellington Branch, Wellington branch, wellington@lawyersociety.org.nz

Please include your name, your area of expertise, your telephone number and your email address.

© Mark Gobbi 2016
Litigation funding arrangements – not a legal concern

By Lara Bird, Investment Officer, Woodsford Litigation Funding Limited, London

Litigation funding is an industry which has been hailed as a solution to the cost barriers facing impecunious claimants with meritorious claims.

While the industry is now well-established and multiple jurisdictions have opened the way for litigation funding, it is an industry that can still divide opinion. One of the reasons for this divide is the ethical and legal concern that litigation funding arrangements can breach the common law torts of maintenance and champerty.

Context

The tort of maintenance is the improper support of litigation in which the maintainer has no legitimate interest, without just cause or excuse. Champerty is described as a subspecies of maintenance or an aggravated form of maintenance where the maintainer receives a portion of the proceeds in the relevant action.

These torts are still part of the common law in New Zealand. However, judicial concern about funding arrangements has morphed into an issue of whether the funding arrangement is an assignment of a bare cause of action in tort and the courts only tangentially consider maintenance and champerty.

In Saunders v Houghton (2010) 3 NZLR 331, our Court of Appeal noted that, “until quite recently common law courts held the firm position that, in the absence of legislation to the contrary, funding of litigation for profit was an abuse of process, offending against ancient doctrines of maintenance and champerty, and was unlawful per se”.

In a more recent case (Waterhouse v Contractors Bonding Ltd (2014) 1 NZLR 91), while not a claim alleging maintenance and champerty, the Supreme Court needed to consider the circumstances in which a litigation funding arrangement could be an abuse of process. The Court held that “assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand”.

While it now seems this rule has been revised to an independent existence of its own, it had its origin in the torts of maintenance and champerty. The Court, in assessing whether a funding arrangement amounts to an assignment, noted it “should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder”.

It is now apparent that the courts have adopted a more liberal attitude towards the maintaining of litigation by a funder. In Saunders v Houghton, the Court stated that “the interests of justice require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance”. Litigation funding is ordinarily provided on a non-recourse basis. That means that if a case is not successful, the funder loses its investment and does not generate any return. The United Kingdom’s self-regulator, the Association of Litigation Funders (the ALF), defines litigation funding as follows: “Where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant.”

New Zealand does not yet have any regulations in relation to litigation funding or an independent body like the ALF, which has set a UK code of conduct for litigation funders binding on all members of the ALF.

However, the New Zealand courts have started to consider this code of conduct when assessing litigation funding arrangements, for example in Saunders v Houghton [2013] 2 NZLR 652, where the Court of Appeal noted that the funding agreement complied with the code. This code includes a rule preventing litigation funders from controlling the litigation or settlement negotiations.

Comment

In light of the abuse of process approach by the courts, the torts of maintenance and champerty are considered no longer fit for purpose and little may be lost by abolishing them, like other jurisdictions have done. The question remains as to whether the funding agreement is an assignment of a bare cause of action in tort.

It is understandable why there is a legal concern about litigation funders. However, this concern should be minimised, if not eliminated, by a carefully drafted and properly structured funding arrangement. Such funding arrangement will leave the claimant as the party in control of the conduct of the litigation and the party primarily interested in the result of the litigation. If the litigation arrangement achieves this, no abuse of process should arise.

Indeed, reputable funders actively avoid exercising undue control over the litigation and aim for the claimant to maintain the dominant economic interest. In New Zealand, litigation funders would be to control or seek to recover the majority of the proceeds, they risk the funding arrangement being declared an abuse of process (under maintenance or champerty or assignment), which may result in the proceedings being stayed or the litigation funding arrangement being declared void, after potentially having already invested a significant amount of money in the case. This would be a careless investment and would obviously not be beneficial to the funder or the claimant.

Similarly, litigation funders want active and quality claimants – if funders have the dominant economic interest it is likely the claimant would be less incentivised to cooperate with the funder or generally less motivated to take the matter to resolution whether that be settlement or trial. It is worth bearing in mind that disclosure of the funding arrangement may be required where an application is made to which the terms of the funding arrangement could be relevant. They ought therefore to be drafted with the presumption that they will at some stage be disclosed to the New Zealand courts. We have seen, in representative actions, that claimants are now (arguably) voluntarily disclosing the funding arrangement and seeking directions from the court for approval of the funding arrangement, as seen in the kiwifruit and bank fees claims. The fact of possible disclosure only strengthens the need for both the funded party and the funder to enter into appropriate funding arrangements.

Cases are already being funded in New Zealand and this will continue. If litigation funding is properly arranged by reputable and legitimate funders, the concern in relation to maintenance and champerty and/or assignment falls away and more claimants will gain the benefit of this legal innovation.

Lara Bird is an Investment Officer at Woodsford Litigation Funding Limited in London. She previously worked as a solicitor at Bell Gully in Auckland, largely in the area of competition litigation, before moving to global litigation firm Hausfield & Co LLP in London and then to Woodsford Litigation Funding, where her role includes reviewing cases for possible investment, managing funded cases and considering opportunities in various jurisdictions around the world.

This article first appeared in Law News Issue 27 (12 August 2016) published by Auckland District Law Society Inc., and is reproduced here with permission.
**THE scheme to assist law graduates into work is still being operated by the Wellington Branch.**

Law graduates seeking work leave their CVs at the Society. These are available to potential employers needing staff who can refer to the CVs and choose appropriate graduates.

The work offered need not be permanent. Any work in a law office will give graduates experience that may be helpful next time they make job applications.

---

**The answer is to please book early or you risk being disappointed.**

---

**Business for Sale**

After nearly 26 years Concept Secretarial Services is for sale as both Christine Crawshaw and Linda Sloan are retiring.

Concept is a great little business. It shares premises and provides full secretarial services to all at Capital Chambers (eight Barristers including three Queen’s Counsel).

Christine was working as a Legal Executive in a large Wellington firm when the business came on the market in 1990. She immediately saw the opportunity to be her own boss within an industry she knew intimately. This could now be your opportunity.

All expressions of interest should be directed to concept.sec@clear.net.nz

Alternatively, contact can be made direct with my accountant, Christie Burgess at chburgess@deloitte.co.nz