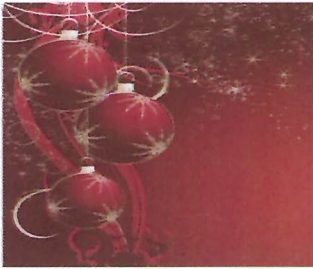


Summer 2009



*Our office will be closed from 12 noon on Wednesday 23 December 2009
& will reopen at 8:30 on Monday 11 January 2010.*

*The partners and staff wish everyone a happy
and safe festive season.*

The Partial Defence of Provocation

The debate over whether the partial defence of provocation should be abolished has gained significant attention since the Clayton Weatherston trial. Many people believe that the defence should no longer be available.

The partial defence of provocation is predominantly set out in section 169 of the Crimes Act 1961 and effectively reduces a charge of murder to manslaughter. In order for an accused to successfully argue provocation, he or she must prove:

- that the provocation in the circumstances of the case was sufficient to deprive a reasonable person of the power of self-control, and
- that the provocation did in fact deprive the offender of the power of self-control and so induced him or her to commit the act of homicide.

Provocation is a high test to satisfy and, although it is often raised, few offenders are successful. Critics of the partial defence argue that it is an archaic and outdated notion about violence. They claim the defence rewards a lack of self-control in offenders who intentionally take another person's life. Historically, the rationale for the defence of provocation was to avoid a mandatory sentence for murder (originally capital punishment and later life imprisonment) in cases where factors arising from the circumstances of the case may reduce the offender's sentence. However, life imprisonment for murder is no longer mandatory by

virtue of the Sentencing Act 2002, which begs the question, is the defence of provocation still necessary?

Many argue that claims of provocation can be taken into account by a judge during sentencing and have no place in the actual trial, which determines guilt or innocence. Once an offender has been convicted, a sentencing hearing is held where he or she presents mitigating factors (such as provocation) which may reduce the sentence.

In addition, the defence provides the offender with an opportunity to attack and tarnish their victim's character. The resulting experience can be very traumatic for the victim's family and friends. The dead victim cannot rebut the claims.

Not everyone, however, agrees that the defence of provocation should be abolished. Some argue that removing the defence would be interfering with the basic concepts of criminal law.

Parliament has already taken steps to remove the partial defence of provocation from the statute book. The Crimes (Provocation Repeal) Amendment Bill 2009 ("the Bill") was introduced to Parliament on 4 August 2009 and had its first reading on 18 August 2009. The Bill will effectively repeal sections 169 and 170 of the Crimes Act and abolish the defence of provocation in New Zealand.

It is clear that there is a lot of support from both Parliament and the general public for the change.

Rotary Junior Speech Challenge

We were pleased to again be involved this year in sponsorship of the Rotary Junior Speech Challenge. This is an annual event organised by the Kerikeri Rotary Club which encourages year 5 and 6 pupils to develop public speaking skills at an early age. Pictured are Owen Smith of Rotary and Sue Wooldridge with the successful children from Kerikeri Primary and Springbank Schools.



Trustee Duties

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against a trustee by a beneficiary who has suffered a loss as a result of your actions or failure to carry out your duties.

The list below, while not exhaustive, sets out some of the most important trustee duties.

The duty of efficient management

- Whether you are an original, substitute or additional trustee, you must first become familiar with, and abide by, the terms and conditions of the trust deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Ensure minutes of these meetings and all resolutions are recorded.
- Make sure that the administration costs of the trust are kept to reasonable levels.

The duty to keep and render accounts to beneficiaries

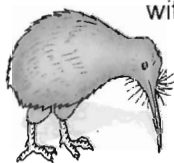
- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed. The extent to which information must be disclosed may depend on the deed.

Maori Land – Current Issues

Land Information New Zealand ("LINZ") is updating its records so that all current Maori land is identified clearly. Historically, it has been difficult for LINZ to maintain its records so that all Maori land is identified as such, following Maori Land Court orders being issued. The Maori Land Court can make orders converting general land to Maori land. When this has

Snippets

McLeods supports and sponsors the work of the Waimate North Landcare Trust in preserving the special environment of the Waitangi River catchment. Santa came early to the Trust with the relocation to within its area of 11 kiwi with the co-operation from local forestry owners. It is a vote of confidence in the Trust's work that it is able to provide a haven for this recently recognised Northland sub-species of North Island brown kiwi.



The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

The duty of loyalty

- Always act in the best interests of both present and future beneficiaries and be impartial between beneficiaries.
- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person managing the affairs of others. Of course a higher standard is required if the trustee is a professional person such as a lawyer or accountant.

The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. There is an increasing trend in relationship property cases to try to overturn trusts or set aside trustee decisions. It is important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs. If in doubt do not hesitate to ask for professional financial or legal advice, at the trust's cost. Talk to Graeme McLelland on 407 0179 or Sue Wooldridge on 407 0174 if you would like more information on your role as a trustee.

happened in the past, LINZ has not had a system in place to update its records. However, with the introduction of the electronic land transfer system, when Maori Land Court orders are made, the land will be flagged as Maori land. Check with Lisa Baker on 407 0175 or Simone Scully on 407 0177 as some of this is available online.

Our receptionist, Anna Edwards, left us early this year to study at Southland Polytech and is back to help us out over the summer. We have a position available in the new year when Anna returns to study. If you are interested, please contact Yvonne Burgham.

Disputes Tribunal

From 1 August 2009, the limit of claims which can be made in the Disputes Tribunal has been increased to \$15,000.00 or \$20,000.00 if both parties agree. Please contact us for more information.

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