

Miscellaneous 1186

Some Notes 1186

Meeting of Commonwealth Law Ministers, Kingstown, St Vincent
and the Grenadines, 18 to 21 November 2002 1186

Meeting of Law Ministers and Attorneys General of Small
Commonwealth Jurisdictions, Kingstown, St Vincent and the
Grenadines, 18 November 2002 1207

Meeting of Commonwealth Finance Ministers, London, 24 to
26 September 2002 1210

Delivering the Monterrey Consensus: A Commonwealth Action Plan 1214

Caribbean Herbs Business Forum 1220

Taking Action on the Digital Divide 1221

Reviews and Notices 1222

Law Reports of the Commonwealth 2002, Vols 1–5 (LexisNexis, UK) 1222

The Guyana Court of Appeal (*Dr Bertie Ramcharan*) 1257

The Law of Restitution (*Lord Goff of Chieveley and Gareth Jones*) 1257

Film Copyright in the European Union (*Dr Jur Pascal Kamina*) 1258

Asia-Pacific Constitutional Systems (*Graham Hassall and
Cheryl Saunders*) 1259

Democratic Accountability and the Use of Force in International
Law (edited by *Charlotte Ku and Harold K Jacobson*) 1259

Transboundary Damage in International Law (*Hanqin Xue*) 1260

Secretariat Legal Publications

**Inside
Back
Cover**

of <i>Police of the Metropolis</i> , Practice Note [2002] 1 WLR 2409 (CA); [2002] EWCA Civ 605	988
Privilege — legal professional privilege — documents — translations — whether translations of unprivileged documents in control of party claiming privilege to be treated differently from copies of such documents	
Discovery — legal professional privilege — extent of privilege — selection by solicitor of client's documents — whether legal professional privilege extending to copies made by lawyer of selected unprivileged own client documents if production of selection betraying trend of lawyer's advice (United Kingdom)	
<i>Sumitomo Corp v Credit Lyonnais Rouse Ltd</i> [2002] 4 All ER 68 (CA); [2001] EWCA Civ 1152	990
High Court — jurisdiction — application to reopen appeal — whether High Court having power to reopen appeal after final judgment given and drawn up (United Kingdom)	
<i>Seray-Wurie v Hackney London Borough Council</i> [2002] 3 All ER 448 (CA); [2002] EWCA Civ 909	991
Court of Appeal (Civil Division) — jurisdiction — application to reopen appeal — defendants unsuccessfully appealing from county court on ground that judge biased — defendants discovering further evidence relating to allegation of bias after judgment drawn up — whether Court of Appeal having power to reopen appeal	
Natural justice — bias — judge in own cause — judge having instructed claimants' solicitors many years previously — solicitors acting for judge without charge during trial — defendants alleging bias — extent of judge's duty to disclose relationship with solicitors — whether appearance of bias (United Kingdom)	
<i>Taylor and another v Lawrence and another</i> [2002] 3 WLR 640 (CA); [2002] EWCA Civ 90	992
Costs — unreasonable conduct — issue based costs order — applicability in absence of unreasonable conduct (United Kingdom)	
<i>Summit Property Ltd v Pitmans (Costs)</i> [2001] EWCA Civ 2020; [2002] CPLR 97; [2003] 1 CL 17 (§54)	993
Costs — interest — court's discretion as to date from which interest on costs should run (United Kingdom)	
<i>Powell v Herefordshire HA; sub nom Powell v Herefordshire Health Authority</i> [2002] EWCA Civ 1786; <i>The Times</i> , 27 December 2002; [2003] 1 CL 15 (§51)	994
Costs — discretion of court — indemnity basis — defendant inviting claimant to discontinue claim on terms — claimant refusing — defendant successful at trial and applying for costs on indemnity basis — whether costs to be awarded on indemnity basis — whether necessary to show moral lack of	

probity or conduct deserving of moral condemnation (United Kingdom)	
<i>Reid Minty (a firm) v Taylor</i> [2002] 1 WLR 2800 (CA); [2001] EWCA Civ 1723	994
Costs — discretion of court — payment into court — defendant making payments into court — claimants failing to accept payment in within prescribed period — defendant making amendment to case at trial on basis of information in his possession at date of payment in — claimants accepting payment in immediately after amendment — whether claimants to be treated as successful parties — basis on which judge to exercise discretion in costs (United Kingdom)	
<i>Factortame Ltd and others v Secretary of State for the Environment, Transport and the Regions</i> [2002] 1 WLR 2438 (CA); [2002] EWCA Civ 23	995
Costs — discretion of court — indemnity basis — defendant in libel case appealing against award of damages by jury — claimant offering to settle for lower sum prior to appeal — defendant rejecting claimant's offer — defendant's appeal unsuccessful — whether claimant entitled to indemnity costs and interest thereon on basis of defendant's unreasonable conduct (United Kingdom)	
<i>Kiam v MGN Ltd (No. 2)</i> [2002] 1 WLR 2810 (CA); [2002] EWCA Civ 66	996
Contempt of court — committals — summary detention pending trial — referral of matter to another judge — appeals from committal orders (United Kingdom)	
<i>Wilkinson v Lord Chancellor's Department; sub nom Wilkinson v Official Solicitor</i> [2003] EWCA Civ 95; <i>The Times</i> , 7 February 2003; [2003] 4 CL 15 (§51)	997
Costs — order for costs — payment of costs by non-party — whether "pure" funders generally exempt from liability for costs of successful unfunded party (United Kingdom)	
<i>Hamilton v Al Fayed (No. 2)</i> [2002] 3 All ER 641 (CA); [2002] EWCA Civ 665	998
Costs — security for costs — jurisdiction — whether court having jurisdiction to order security for costs outside provisions of CPR specifically relating to such security — approach to be adopted by court when making such orders (United Kingdom)	
<i>Olatuwura v Abiloye</i> [2002] 4 All ER 903 (CA); [2002] EWCA Civ 998	999
Costs — security for costs — claimant ordinarily resident out of the jurisdiction and out of the jurisdiction of a convention state — whether court precluded from ordering security for costs against such a claimant if he had assets in a convention state (United Kingdom)	
<i>De Beer v Kanaar & Co (a firm) and another</i> [2002] 3 All ER 1020 (CA); [2001] EWCA Civ 1318	1000
	xxix

- Arbitration — award — appeal — judge refusing permission to appeal to High Court — application for judge to state full reasons — whether duty to give full reasons — whether failure to give reasons infringing applicant's right to fair trial — whether Court of Appeal having jurisdiction to entertain appeal against adequacy of judge's reasons (United Kingdom)
North Range Shipping Ltd v Seatrans Shipping Corpn [2002] 1 WLR 2397 (CA); [2002] EWCA Civ 405 1001
- Arbitration — award — appeal — defendant challenging substantive jurisdiction of arbitrator — arbitrator rejecting challenge and finding for claimant — defendant's application to court to set aside award for want of jurisdiction refused — permission to appeal refused by judge but granted by single judge of Court of Appeal — whether jurisdiction to grant permission to appeal limited to judge hearing application to set aside award — whether grant of permission to be set aside (United Kingdom)
Athletic Union of Constantinople v National Basketball Association and others (No. 2) [2002] 1 WLR 2863 (CA); [2002] EWCA Civ 830 1002
- Costs — order for costs — group litigation — costs sharing in group actions — whether costs arising from trial of common issues to follow event or await outcome of individual cases — whether costs of discontinuing claimants to be determined after ruling on common issues (United Kingdom)
Sayers and others v Merck SmithKline Beecham plc and others; X and others v Schering Health Care Ltd; Afrika and others v Cape plc [2002] 1 WLR 2274 (CA); [2001] EWCA Civ 2017 1003
- Costs — assessment — standard basis — proportionality — requirement of proportionality in assessing costs on standard basis — approach to be adopted (United Kingdom)
Lownds v Home Office [2002] 4 All ER 775 (CA); [2002] EWCA Civ 365 1003
- Costs — order for costs — discretion — proceedings settled before trial save as to costs — whether there was a tradition in such cases that appropriate costs order was "no order as to costs" (United Kingdom)
Brawley v Marczynski and another [2002] 4 All ER 1060 (CA); [2002] EWCA Civ 756 1004
- Legal aid — costs — indemnity costs — whether court entitled to make award of indemnity costs in favour of assisted person notwithstanding that he would not himself recover difference between standard costs and indemnity costs (United Kingdom)
Brawley v Marczynski and another (No. 2) [2002] 4 All ER 1067 (CA); [2002] EWCA Civ 1453 1005
- Solicitor — clients' account — inspection of books of account — intervention by Law Society in solicitor's practice — whether availability of statutory remedy precluding solicitor from bringing

private law claim for negligence against Law Society arising from conduct of investigation leading to intervention (United Kingdom) <i>Miller v Law Society</i> [2002] 4 All ER 312; [2002] EWHC 1463 (Ch)	1006
Professional negligence — solicitors — duty of care — advice on title to client engaging in tax saving scheme <i>Michael Gerson (Investments) Ltd v Haines Watts</i> [2002] Lloyd's Reports P N 493; [2003] 4 CL 129 (§347)	1007
Law firms — costs — common law lien over unpaid bill — former client seeking order for delivery up of documents — no equitable basis to interfere with lien (United Kingdom) <i>Slatter v Ronaldsons</i> [2002] 2 Costs LR 267; [2003] 1 CL 128 (§388)	1008
Costs — wasted costs orders — pursuit of hopeless claim — test for negligence (United Kingdom) <i>Daly v Hubner (Wasted Costs)</i> [2002] Lloyd's Rep P N 461; [2002] 2 CL 16 (§45)	1008
Costs — discretion of court — search and seizure order — claimant's in-house experts investigating claim — whether cost of expert's investigations recoverable — whether costs incurred prior to instruction of solicitors recoverable (United Kingdom) <i>Admiral Management Services Ltd v Para-Protect Europe Ltd and others</i> [2002] 1 WLR 2722; [2002] EWHC 233 (Ch)	1009
Costs — assessment — detailed assessment — privileged documents — whether procedure relating to use of privileged documents in detailed assessments of costs compatible with human rights (United Kingdom) <i>South Coast Shipping Co Ltd v Havant Borough Council</i> [2002] 3 All ER 779	1010
Wasted costs orders — solicitors — comprehensive loss of action — claimant not believed at trial (United Kingdom) <i>Gandesha v Nandra</i> [2002] Lloyd's Rep P N 558; [2003] 1 CL 20 (§61)	1011
Professional negligence — solicitors — causes of action — knowledge — date of acquisition of broad knowledge of facts (United Kingdom) <i>Bowie v Southhorns</i> [2002] EWHC 1389; [2002] Lloyd's Rep P N 564; [2003] 4 CL 128 (§346)	1011
Professional negligence — solicitors — fire insurance — failure to advise on under insurance — causation (United Kingdom) <i>Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden and Johnson</i> [2003] 1 CL 136 (§416)	1012
Professional negligence — solicitors — barristers — advice within range of reasonable options (United Kingdom) <i>First City Insurance Group Ltd v Orchard, sub nom Firstcity Insurance Group Ltd v Orchard</i> [2002] Lloyd's Rep P N 543; [2003] 4 CL 128 (§345)	1012

Professional negligence — solicitors — failure to advise on potential claim to set aside charges on matrimonial home (United Kingdom) <i>McGregor v Michael Taylor & Co</i> [2002] 2 Lloyd's Rep P N 468; [2003] 4 CL 14 (§45)	1013
Disciplinary proceedings — Solicitors Disciplinary Tribunal — appeal against decision — failure to give reasons — parties to proceedings (United Kingdom) <i>Lucas v Millman</i> [2002] All ER (D) 52 (Nov); <i>Review</i> para 02/3230	1014
Prisoner — access to legal adviser — Italian lawyer — refusal of access to prisoner — right to fair trial (United Kingdom) <i>R (on the application of van Hoogstraten) v Governor of Belmarsh Prison</i> [2002] All ER (D) 123 (Sep); <i>Review</i> para 02/3194	1014
Costs — barristers — barrister carrying out work in own defence (United Kingdom) <i>Khan v Lord Chancellor</i> [2003] EWHC 12, <i>The Times</i> , 28 January 2003; [2003] 4 CL 15 (§52)	1015
Practice — discovery — privilege — “without prejudice” correspondence included in bundle before Master — Master reading correspondence after hearing but before writing judgment — writing of judgment deferred pending parties’ representations — defendant applying six months later for Master to recuse himself — Master reminded of content of correspondence immediately prior to recusal hearing — whether fair trial possible — whether Master to recuse himself (United Kingdom) <i>Berg v IML London Ltd</i> [2002] 1 WLR 371; [2002] 4 All ER 87	1015
Libel and slander — qualified privilege — common and corresponding interest — whether communications between Bar Council and Bar on matters of compliance with professional rules attracting qualified privilege without need to evaluate quality of information (United Kingdom) <i>Kearns and others v General Council of the Bar</i> [2002] 4 All ER 1075	1016
Costs — third parties — insurers indemnifying winning party (United Kingdom) <i>J v Oyston; sub nom J v Oysten</i> [2002] EWHC 819; [2002] Lloyd's Rep P N 427; [2003] 2 CL 16 (§44)	1017
Divorce — financial provision — legal advice — wife past retirement age — solicitor negligently advising clean break (United Kingdom) <i>Phippen v Palmers (a firm)</i> [2002] 2 FLR 415; [2003] 4 CL 78 (§210)	1018
Fees — legal aid — distinction between fees and outlays — cost of carrying out duplication (United Kingdom) <i>Crooks v Lawford Kidd WS</i> 2002 SLT 1346; [2003] 1 CL 219 (§651)	1018

<i>Industrial and Intellectual Property</i>	
Patents (Amendment) Act 2002 (Uganda)	756
<i>Insurance</i>	
Marine Insurance Act 2002 (Uganda)	757
<i>Privacy</i>	
Data Protection Act 2002 (Isle of Man)	757
Leadership Code Act 2002 (Uganda)	759
Inspectorate of Government Act 2002 (Uganda)	768
<i>Professions and Trades</i>	
Public Notaries Act 2001 (Australia — Victoria)	771

Judicial Decisions

775

(see also under Legal Profession, Ombudsmen and International Developments sections)

Administrative Law

Administrative law — evidence of principal witness rejected by tribunal as unreliable — whether tribunal erred in law by not taking corroborative evidence into consideration — whether tribunal denied applicant procedural fairness by finding that principal witness had duped corroborative witnesses without that matter being put during hearing (Australia)

Lidono Pty Ltd v Commissioner of Taxation (2002) 191 ALR 328(FCA)

775

Administrative law — patent application — claims in relation to purified thermostable DNA polymerase — appeal from decision of delegate of Commissioner of Patents — application pursuant to Patent Act 1990 (Cth) s.104 — legislative scheme left process of allowing amendments to regulations — distinction drawn between grant of leave to amend and allowance of amendment — patent applicant sought leave to amend patent application — opponent alleged inequitable conduct on part of patent applicant — whether amendments allowable under legislative scheme — whether commissioner has discretion to refuse to grant leave to amend — whether all steps of amendment process satisfied — whether failure to satisfy all steps fatal to amendment application (Australia)

New England Biolabs Inc v Commissioner of Patents and Another (2002) 191 ALR 673 (FCA)

775

Administrative tribunals — Superannuation Complaints Tribunal — role of tribunal — whether tribunal addressed correct question — structure of tribunal's reasons (Australia)

Haematite Pty Ltd v Ristevski (2002) 189 ALR 685 (FCA)

777

with pension scheme a person "concerned with the administration of the scheme" (United Kingdom)

R (on the application of Britannic Asset Management Ltd and others) v Pensions Ombudsman [2002] 4 All ER 860 (CA); [2002] EWCA Civ 1405

1025

International Developments

1027

Conventions and Agreements

Council of Europe: Additional Protocol to the Anti-Doping Convention

1027

Organisation of American States: Inter American Convention Against Terrorism

1030

Other Developments

African Union: The Durban Declaration

1037

EU-NATO: Declaration on European Security and Defence Policy

1040

OSCE: Declaration on Trafficking in Human Beings

1041

OSCE: Charter on Preventing and Combating Terrorism

1044

OSCE: Porto Ministerial Declaration

1046

UNESCO: Universal Declaration On Cultural Diversity

1049

UN: Security Council Resolution on the implementation of counter-terrorism obligations

1054

UN: Security Council Resolution on Iraq

1055

UN: Security Council Resolution on the International Tribunal for Rwanda

1068

World Trade Organisation: Doha Ministerial Declaration

1073

Articles

1083

The Unfinished Trans-Tasman Business (*Hon Justice Michael Kirby*)

1083

Developing a Concept of Judicial Accountability — The Judicial Integrity Group and The Bangalore Principles of Judicial Conduct (*Dr Nihal Jayawickrama*)

1091

Making Waves and Breaking the Mould in Civil Procedure in the Pacific: The New Civil Procedure Rules of Vanuatu (*Sue Farran and Edward R Hill*)

1108

Improving Legislative Drafting Capacity (*Bilika H Simamba*)

1125

Conundrum of the Refugee Status: Recent Changes in Judicial Trends in the United Kingdom (*Dr Amir A Majid*)

1142

Activities of the Commonwealth in the Legal Field

1161

- judge issuing order calling upon official to show cause why he should not be punished for contempt — whether summary procedure infringing fundamental right — whether limitation on fundamental right saved as reasonable and justifiable in an open and democratic society — appropriate test — relevant considerations
- Contempt of court — scandalising the court — ingredients of offence — whether statement impairing dignity, integrity or standing of judge or judiciary — whether expression of opinion only — whether offence proved (South Africa)
- State v Mamabolo (ETV, Business Day and the Freedom of Expression Institute Intervening)* [2002] 1 LRC 32 968
- State proceedings — tort, liability of state — moneys paid into court pursuant to court order — Assistant Registrar failing to place moneys in interest-bearing account — whether breach of statutory duty — whether breach sounding in damages — whether Assistant Registrar discharging responsibilities “in connection with the execution of judicial process” — whether state immune from liability (Trinidad and Tobago)
- Kirvek Management and Consulting Services Ltd v Attorney General of Trinidad and Tobago* [2002] 1 WLR 2792 (PC); [2002] UKPC 43 973
- Human rights — right to a fair hearing — impartial and independent tribunal — criminal proceedings — appellants being prosecuted before tribunals that were not impartial and independent for purposes of convention right to fair hearing — whether such prosecutions compatible with right to fair hearing if proceedings fair overall (United Kingdom)
- Millar v Dickson (Procurator Fiscal, Elgin) and other appeals* [2002] 3 All ER 1041 (PC); [2001] UKPC D4 974
- Right to a fair hearing — trial within a reasonable time — criminal proceedings — approach to adopted by court when determining whether there had been breach of right to trial within reasonable time (United Kingdom)
- Dyer (Procurator Fiscal, Linlithgow) v Watson and another; K v Lord Advocate* [2002] 4 All ER 1; [2002] UKPC D1 975
- Solicitor — costs — conditional fee agreement — success fee uplift — after-the-event (ATE) insurance premium — personal injury claims — modest and straightforward claims for personal injuries arising from road traffic accidents — claimant entering into conditional fee agreement with success uplift — claimant taking out ATE cover at outset for premium of £350 — Court of Appeal allowing success fee of 20 per cent and recovery of ATE premium in full — whether ATE insurance premium recoverable from defendant as reasonable disbursement if claimant paying premium at outset — whether amount of success fee and premium reasonable (United Kingdom)
- Callery v Gray (Nos. 1 and 2)* [2002] 3 All ER 418 (HL)(E) 976

Administrative law — judicial review — Ministerial decisions — standard of review — immigration — refugee — discretionary power to declare that refugee constituted danger to national security — review of such discretion — proper approach of reviewing court — circumstances in which court will set aside decision

Constitutional law — fundamental rights — right to life, liberty and security — principles of fundamental justice — immigration — refugee deportation — danger to national security — risk of torture — whether deportation for refugee infringing fundamental right — appropriate test

Legislation — constitutional requirements — statutory provisions — vagueness — “danger to the security of Canada” — “terrorism” — whether such terms vague — whether unconstitutional

Right to freedom of expression — right to freedom of association — immigration — refugee — deportation — danger to national security — alleged member of terrorist organisation — whether deportation infringing fundamental rights

Right to life, liberty and security — principles of fundamental justice — immigration — refugee — deportation — risk of torture — whether procedural safeguards satisfying requirements of fundamental justice (Canada)

Suresh v Canada (Minister of Citizenship and Immigration)
[2002] 4 LRC 640 (SC)

778

Administrative law — appeals — scope of appeal — farmers appealing board's decision to commission — asking commission members to recuse selves for bias — members refusing — farmers appealing refusal — statute providing for appeal from “decision” of commission — notice of appeal quashed — context indicated that “decision” referred only to final decision, not interlocutory one (Canada)

Mary and David Goodine Dairy Farm v New Brunswick (Milk Marketing Board) (2002) 217 DLR (4th) 708 (CA)

783

Bankruptcy and Insolvency

Bankruptcy — antecedent transactions — avoidance of preferences — payment of superannuation entitlement — whether “had the effect of giving the creditor a preference, priority or advantage over other creditors” — whether maintenance agreement (Australia)

Worrel (as trustee of bankrupt estate of Jones) v Kerr-Jones
(2002) 190 ALR 146 (FCA)

784

Children and Young Persons

Children — custody rights — breach — child habitually resident in Israel — mother bringing child to England without father's consent — father's application for child's return — escalation of terrorism and violence in Israel — evidence of breakdown in

mother's health — whether order for return would expose child to grave risk of harm (United Kingdom)

In re S (A Child) (Abduction: Custody Rights) [2002] 1 WLR 3355 (CA)

785

Constitutional Law and Human Rights

Constitutional law — inconsistency — implied freedom of communication — whether object of legislation compatible with maintenance of representative government — whether law reasonably appropriate and adapted to legitimate end

Criminal law — offences — whether offence of using threatening, abusive or insulting words to person in public place valid — whether offence of printing or publishing any abusive or insulting words valid — whether "truth" or "public interest" is defence to statutory offence

Words and phrases — "threaten" — "insult" — "abuse" (Australia)

Coleman v P and Another (2002) 189 ALR 341 (CA)

787

Constitutional law — local government charges and rates imposed on cables owned by telecommunications carriers — various entities excepted from liability — Commonwealth law that law of state has no effect "to the extent to which the law discriminates or would have the effect of discriminating against" telecommunications carriers — extent of immunity conferred by Commonwealth law — meaning of "discriminates" — whether state laws discriminate — whether Commonwealth law effective to exclude state laws authorising imposition of rates and charges — validity of Commonwealth law — whether Commonwealth law inconsistent with state law

Administrative law — local government charges and rates imposed on cables owned by telecommunications carriers — overhead cables — whether decision to make charges and declare rates invalidated by purpose of enticing carriers to place cables underground (Australia)

Telstra Corporation Ltd and Another v Hurstville City Council and Others (N33 of 2001); *Optus Vision Pty Ltd and Another v Warringah Council and Others* (No. 92 of 2001) (2002) 189 ALR 737 (FCA)

788

Human rights legislation — discrimination — marital status — provincial legislation providing pension for widows and widowers — discrimination on basis of marital status — not reasonable or justified — defences — no pressing and substantial concern — means not proportionate to objective — remedies — unjustified discrimination on basis of marital status — administrators required to cease denying pensions on basis of marital status — individual claimants' applications to be reconsidered (Canada)

Gwinner v Alberta (Minister of Human Resources and Employment) (2002) 217 DLR (4th) 341 (QB)

789

Human rights legislation — discrimination — handicap — man with bipolar affective disorder seeking employment as fishing guide — resort manager refusing to hire largely on basis of direct observation of man's behaviour — tribunal finding discrimination based on mental disability — rejecting defence of bona fide occupational requirement — tribunal erred in law in describing direct observation as irrelevant to defence — case remitted to tribunal for reconsideration of defence (Canada)

Oak Bay Marina Ltd v British Columbia (Human Rights Commission) (2002) 217 DLR (4th) 747 (CA)

793

Constitutional law — fundamental rights — right to fair trial — right to trial by impartial court — trial by jury — impartiality — civil proceedings — legislation effectively resulting in juries of all-male composition — female claimant in proceedings alleging domestic violence — claimant seeking trial other than by jury constituted under applicable legislation — whether female claimant would receive an impartial trial — whether legislation infringing fundamental right — fundamental rights — breach — legislation infringing fundamental rights — appropriate order — whether legislation to be read so as to conform with Constitution (Gibraltar)

Rojas v Berilaque [2002] 4 LRC 464 (SC)

796

Constitutional law — public officers — termination of employment — Commissioner of Police — contract of employment providing for termination without notice “in the best interest of Papua New Guinea” — employment terminated by National Executive Council following change of government — whether termination lawful — relevant considerations — personal and collective liability of Ministers

Contract — breach — damages — remoteness — contract of employment — public officer — Commissioner of Police — unlawful termination of contract without prior notice — plaintiff failing to find alternative employment — plaintiff claiming damages under various heads, including interest payable on housing loan — whether recoverable — whether exemplary damages recoverable — appropriate considerations (Papua New Guinea)

Aigilo v Morauta and Others (No. 2) [2002] 4 LRC 149

798

Constitutional law — fundamental rights — application — whether applying only as between state and individuals — whether applying also between private citizens — parties to action — application for redress — applicant seeking redress against individuals arising from election of Prime Minister — respondents sued in personal capacities — whether respondents properly joined as parties to action enforcement — *locus standi* — application for redress — election of Prime Minister — applicant having resigned office as Prime Minister under duress

— Governor-General summoning Parliament to elect new Prime Minister — applicant not a candidate or nominator of any candidate for election but voting at meeting — applicant seeking to impugn election of new Prime Minister on basis of threats made against his supporters and directly levelled against him — whether applicant having <i>locus standi</i> to impugn election — whether court having supplementary jurisdiction to entertain application — applicant seeking to impugn validity of election meeting and election of new Prime Minister alleging constitutional contraventions — applicant not raising concerns before Governor-General at election meeting — Constitution providing that Governor-General's determination of relevant matters to be final and conclusive — Governor-General not committing any jurisdictional error — whether court having jurisdiction to determine validity of election (Solomon Islands)	
<i>Ulufa'alu v Attorney General</i> [2002] 4 LRC 1	801
Constitution — human rights and fundamental freedoms — right to due process — court's jurisdiction to determine application for redress — whether subject to statutory limitation period applicable to claims against public authorities (Trinidad and Tobago)	
<i>Durity v A-G of Trinidad and Tobago</i> [2002] 3 WLR 955 (PC)	804
Prisons — prisoners' rights — media interviews — prisoner seeking permission to give telephone interviews to radio journalist concerning prison issues — prison rule that permission to be given only in exceptional circumstances — policy of Secretary of State on permission more restrictive than prison rule — whether prison rule and policy lawful — whether restriction on right to freedom of expression justified (United Kingdom)	
<i>Regina (Hurst) v Secretary of State for the Home Department and another</i> [2002] 1 WLR 2929 (QBD)	805
<i>Contract</i>	
Breach of contract — proof of intention to induce breach Trade and commerce — trade practices — deceptive practices — misleading and deceptive conduct — causation — negligent misrepresentation — effect of non-disclosure (Australia)	
<i>Australian Development Corporation Pty Ltd v White Constructions Ltd and Another; Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd (in liq) and Another</i> (2002) 189 ALR 266 (CA)	807
Contract — formation — consideration — sufficiency — soldier serving with special forces unit — Ministry order requiring soldier to sign confidentiality agreement or be returned to parent unit — Ministry forbearing from returning soldier to parent unit — whether such forbearance capable of constituting sufficient consideration — consent — military order — soldier required to sign confidentiality	

agreement or be returned to parent unit — whether requirement amounting to an order — whether therefore incompatible with consensual basis of contractual relations — validity — duress — soldier required by superior officers to sign confidentiality agreement or be returned to parent unit — whether such requirement constituting duress — whether soldier subject to undue influence in signing agreement — whether relationship between soldier and superior officers creating presumption of undue influence

Equity — contract — unconscionable bargain — soldier required to sign confidentiality agreement or be returned to parent unit — whether agreement constituting unconscionable bargain — whether liable to be set aside — remedies — breach of contract — specific performance — injunctive relief — soldier signing confidentiality agreement — enforcement — whether equitable relief available — relevant considerations (New Zealand)

Attorney General for England and Wales v R [2002] 4 LRC 347 (CA)

808

Courts Practice and Procedure

Practice and procedure — application to strike out statement of claim — leave to file amended statement of claim — withdrawal of admissions — whether arguable cause of action — whether amendment amounted to bringing of statute-barred claim

Costs — whether costs of interlocutory application recoverable forthwith — whether departure from general rule warranted (Australia)

Murran Investments Pty Ltd and Another v Aromatic Beauty Products Pty Ltd and Another (2002) 191 ALR 579 (FCA)

813

Practice and procedure — cost — indemnity costs — Calderbank offer by respondents rejected — applicants subsequently failed entirely at trial — whether respondents' offer reasonable — whether applicants acted unreasonably or imprudently in rejecting offer — onus upon respondents to show applicants' conduct unreasonable — applicants' conduct must be viewed in light of circumstances as they existed at time offer rejected

Alpine Hardwoods (Aust) Pty Ltd and Another v Hardys Pty Ltd and Another (2002) 190 ALR 121 (FCA)

815

Practice and procedure — costs — costs against stranger to litigation — discretion of court to award costs against stranger — discretionary principles discussed — costs — prior notice — whether failure to give prior notice of claim for costs deprives applicant of costs order against non-party

Gore and others (t/as Clayton Utz v Justice Corporation Pty Ltd (2002) 189 ALR 712 (FCA)

816

Practice and procedure — interlocutory remedies — *Mareva* injunction — availability — assets and parties subject to order — world-wide application — whether available — whether

Solicitors — convictions — application for removal from Roll of solicitors — refusal — procedural impropriety (United Kingdom)	
<i>Danskin v Council of the Law Society of Scotland; sub nom Danskin, Petitioner</i> 2002 SLT 900; [2003] 2 CL 222 (§628)	1019
Right to fair and public hearing — civil proceedings — independent and impartial tribunal — role of judge as lawmaker (United Kingdom)	
<i>Davidson, Petitioner</i> 2002 SLT 1231 (Inner House); <i>Review</i> para 02/3112	1019
Solicitors — defences — question as to mandate of solicitors — appropriate procedure (United Kingdom)	
<i>Davidson v Kilwinning Homing Society</i> 2003 SLT 268; [2003] 3 CL 226 (§685)	1020
Legal professional privilege — warrant for search of solicitor's office and seizure of documents — procedure — right to respect for correspondence (United Kingdom)	
<i>Tamosius v United Kingdom</i> [2002] STC 1307; <i>Review</i> para 02/3127; Application 62002/00, European Court of Human Rights	1020
Costs — assessment — suitability of telephone hearing — appropriate use of counsel — assessment of fee earner rates (United Kingdom)	
<i>Gill v South East Kent and London Bus Co Ltd</i> , 6 November 2002; [2003] 4 CL 19 (§54)	1021
Costs — conditional fees — appropriate success fee (United Kingdom)	
<i>Tanner v Kingfisher Stores</i> , 20 September 2002; [2003] 4 CL 19 (§55)	1022
Service — fax — failure to serve within prescribed period — entitlement to extend time for service by acquiescence (United Kingdom)	
<i>Dring v Wastepaper Products Ltd</i> , 15 May 2002; [2003] 2 CL 19 (§52)	1023
Payment into court — mistake — payment out made in error — jurisdiction of court to order repayment — exercise of discretion (United Kingdom)	
<i>Engraving Technology v Speller</i> [2003] 2 CL 19 (§51)	1023

Ombudsmen

1025

Judicial Decisions

Pension — pension scheme — jurisdiction of Pensions Ombudsman — jurisdiction of Ombudsman to investigate complaint against person “concerned with the administration of the scheme” — whether person carrying out administrative acts in connection

admittedly due and disputing other parts of claim — exemplary damages not appropriate (Canada)

Gerald Laplante v Grenville Ins Co (2002) 217 DLR (4th) 34

851

Land

Land law — purchase — compulsory purchase of land by Crown — reversion — compensation agreed and paid to owners — appellants claiming reversionary interest — Crown leasing land to US for military use — land subsequently vesting in government — lease later surrendered by US — land transferred to public authority — descendants of previous owners claiming reversion by operation of law when land no longer required for original purpose — whether land compulsorily acquired automatically reverting to owner when surplus to requirements — whether land vesting in Crown absolutely (Trinidad and Tobago)

Blanchfield and Others v Attorney General and Another [2002] 4 LRC 689 (PC)

852

Landlord and tenant — leasehold enfranchisement — adjoining properties — substantial house with basement area lying beneath adjoining mews property originally built for occupation by single household — demise of both properties under single head lease — tenant in occupation of part of house taking assignment of head lease — claim to enfranchise entire demised premises — whether entire premises “house” — claim to enfranchise tenant’s property alone — provision precluding enfranchisement of premises where “material” part underlying adjoining property — whether “material” determined by reference to property to be enfranchised or adjoining property (United Kingdom)

Malekshad v Howard de Walden Estates Ltd [2002] 3 WLR 1881(HL)(E)

854

Statutes and Statutory Interpretation

Statutes — interpretation — provision that Director-General may suspend or cancel licence on one or number of specified grounds — whether Director-General had discretion to suspend or cancel licence if ground existed or was established — whether “may” means “must”

Administrative law — judicial review — prerogative writs — whether decision of administrative tribunal or court based upon error of law — whether discretion to refuse relief should be exercised

Courts and judicial system — Supreme Courts — jurisdiction to grant relief in nature of *certiorari* (Australia)

Samad and Others v District Court of New South Wales and Another (2002) 189 ALR 1 (HCA)

856

Torts

Negligence — duty of care — psychiatric injury — Nervous shock — circumstances in which duty of care owed in respect of

xix

Commonwealth Law Bulletin

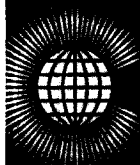
Volume 28

No. 2

2002

page

v	Contents
673	Legislation
775	Judicial Decisions
866	Law Reform
950	Legal Profession
1025	Ombudsmen
1027	International Developments
1083	Articles
1083	The Unfinished Trans-Tasman Business
1091	Developing a Concept of Judicial Accountability — The Judicial Integrity Group and The Bangalore Principles of Judicial Conduct
1108	Making Waves and Breaking the Mould in Civil Procedure in the Pacific: The New Civil Procedure Rules of Vanuatu
1125	Improving Legislative Drafting Capacity
1142	Conundrum of the Refugee Status: Recent Changes in Judicial Trends in the United Kingdom
1161	Activities of the Commonwealth in the Legal Field
1186	Miscellaneous
1186	Some Notes
1222	Reviews and Notices
IBC	Secretariat Legal Publications



Commonwealth Secretariat

Motor vehicles — impaired driving and “over 80” — care or control — where presumption of care or control inapplicable, Crown must prove risk of putting vehicle in motion to establish care or control (Canada)
R v Burbella (2002) 217 DLR (4th) 604 (CA) 822

Defence Forces and Police

Police — powers — trespassers — occupier requiring trespassers to vacate land within two days — police simultaneously directing trespassers to leave within two days — whether direction valid — whether statutory procedure incompatible with Convention rights (United Kingdom)
Regina (Fuller and others) v Chief Constable of the Dorset Police [2002] 3 WLR 1133 (QBD) 823

Police — powers — special procedure material — police seeking e-mail information from telecommunications company — company having to transfer e-mails to preserve information pending court hearing — whether unlawful interception (United Kingdom)
Regina (NTL Group Ltd) v Crown Court at Ipswich [2002] 3 WLR 1173 (QBD) 825

Evidence

Evidence — admissibility — collateral facts — whether evidence to show that witness was untruthful admissible — whether evidence to rebut opponent’s evidence about existence of collateral fact admissible — distinction between evidence relevant to credit and evidence relevant to fact in issue
 Practice and procedure — trial — application by plaintiff to reopen case to call witness who was previously unavailable — application by plaintiff to reopen case or recall witness to adduce evidence in rebuttal about existence of collateral fact — whether trial judge erred in refusing leave to reopen — whether error by trial judge caused miscarriage of justice (Australia)
Goldsmith v Sandilands and Others (2002) 190 ALR 370 826

Evidence — cross-examination — natural justice — whether right to cross-examine part of natural justice
 Administrative law — cross-examination — natural justice — Royal commissions — direction by Commissioner that persons will not be permitted to cross-examine witness until they have provided signed statement of evidence advancing material contrary to evidence of witness — whether beyond power of Commissioner (Australia)
Kingham and Others v Cole and Another (2002) 190 ALR 679 (FCA) 827

Family Law

Family Law — children — parenting orders — residence orders — contact orders — place of residence of child when one parent

wishes to relocate to another country — proposals of parents about residence of child and contact with child — wife acknowledged she would remain in Australia if her return to place of origin would result in order for child to reside with father — best interests of child paramount consideration

Practice and procedure — Family Court — children — parenting orders — residence orders — contact orders — proposals of parents — whether powers or discretions of court confined by proposals of parents (Australia)

U v U (2002) 191 ALR 289

829

Family law — support — child support — adults bringing action against putative father for damages — alleging failure to provide adequate support during dependency — basing claims, in part, on breach of fiduciary duty — statement of claim struck out as disclosing no reasonable cause of action — appeal dismissed — inappropriate attempt to obtain retroactive child support outside statutory scheme

Restitution — fiduciary duties — woman giving birth, while married, to two sons fathered by man with whom she was having affair — raising sons as part of family with husband — many years later, adult sons bringing action against putative father for damages — alleging failure to provide adequate support during dependency — basing claims, in part, on breach of fiduciary duty — statement of claim struck out as disclosing no reasonable cause of action — appeal dismissed — inappropriate attempt to obtain retroactive child support outside of statutory scheme — also, putative father had no fiduciary duty — mother's actions resulted in putative father never being in position of trust or authority over sons' lives

Civil procedure — pleadings — statement of claim — striking out — adults bringing action against putative father for damages — alleging failure to provide adequate support during dependency — basing claims, in part, on breach of fiduciary duty — statement of claim struck out as disclosing no reasonable cause of action — appeal dismissed — inappropriate attempt to obtain retroactive child support outside statutory scheme (Canada)

Louie v Lastman (2002) 217 DLR (4th) 257

830

Family law — removal from jurisdiction — Iowa court granting joint custody to father and mother — mother abducting child and moving to Canada — father learning about mother and child's whereabouts years later — bringing application against mother and new husband — mother required to pay father's costs on solicitor-and-client basis — mother required to pay husband's costs on party-and-party basis

Civil procedure — costs — solicitor and client — Iowa court granting joint custody to father and mother — mother abducting

child and moving to Canada — father learning about mother and child's whereabouts years later — bringing application against mother and new husband — mother required to pay father's costs on solicitor-and-client basis (Canada)

Aulwes v Mai (2002) 217 DLR (4th) 205

832

Confidential information — disclosure — public interest — adult in local authority's guardianship — adult's mother seeking disclosure of confidential information before deciding whether to discharge guardianship — risk of local authority applying to displace claimant as nearest relative — whether refusal to disclose information infringing Convention rights — whether right of access to information outweighing interest in confidentiality — whether disclosure to be ordered (United Kingdom)

R (S) v Plymouth City Council [2002] 1 WLR 2583 (CA)

833

Finance, Trade and Economic Development

Trade and commerce — trade practices — extraterritorial operation of Trade Practices Act 1974 (Cth) — jurisdiction of court in respect of cartel arrangement by foreign corporations — whether officers of Australian subsidiaries agents for foreign corporations — whether internal implementation of cartel arrangement by officers of Australian subsidiaries conduct within Australia by foreign corporations — whether communications from outside Australia and received within Australia give effect to cartel arrangement within Australia

Practice and procedure — leave to serve out of jurisdiction — whether proceeding under O 8 r 2(2) of Federal Court Rules interlocutory or final in character — whether court must forthwith hear and determine challenge to its jurisdiction

Evidence — whether s.75 of Evidence Act (Cth) applies to second-hand and more remote hearsay — circumstances in which court might dispense with compliance with rules of evidence in respect of matters that are not *bona fide* in dispute (Australia)

Words and phrases — “carrying on business in Australia”

Bray v Hoffmann-La Roche Ltd and Others (2002) 190 ALR 1 (FCA)

834

Trade and commerce — trade practices — cartels — antitrust contraventions — penalties — principles to be taken into account

Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No. 2) and Others (2002) 190 ALR 169 (FCA)

837

Trade and commerce — trade practices — misleading and deceptive conduct — comparative advertising — whether respondent should be restrained from broadcasting advertisements comparing its products with rival manufacturer — whether modifications

proposed by respondent overcome alleged problems with advertisement (Australia)

Energizer Australia Pty Ltd v Gillette Pty Ltd (2002) 189 ALR 480 (FCA)

837

Health, Education and Social Welfare

Medical practitioner — negligence — causation — surgeon negligently failing to warn claimant of risk of post-operative paralysis — operation conducted without negligence — paralysis occurring — claimant proving she would not have had operation at that time had she been informed of risk — whether causal link between failure to warn of risk and claimant's injury — whether defendant liable (United Kingdom)

Chester v Afshar [2002] 3 WLR 1195 (CA)

838

Immigration

Citizenship and migration — deportation — applicant in detention pending deportation — decision by Minister not to revoke order for deportation — whether decision improper exercise of power — whether failure to take into account best interests of applicant's children — detention — applicant in detention pending deportation — decision by delegate to not release or continue to detain applicant — whether decision improper exercise of power — whether failure to take in to account best interests of applicant's children's — detention — applicant in detention pending deportation — decision by delegate to not release or continue to detain applicant — whether decision improper exercise of power — whether failure to take into account best interests of applicant's children — whether detention not reasonably incidental to power to deport — whether scope of power to detain exceeded — whether decision *Wednesbury* unreasonable — whether delegate failed to direct himself to task required by statute

Constitutional law — Constitution — whether law authorising detention pending deportation invalid — indefinite detention (Australia)

Perez v Minister for Immigration and Multicultural Affairs (2002) 191 ALR 619 (FCA)

839

Immigration — asylum — fear of persecution — soldier witnessing corrupt and criminal activities of immediate superiors — subsequent threats made to soldier — State and army authorities not complicit in actions of persecutors but incapable of extending protection of soldier — whether persecution for imputed political opinion (United Kingdom)

Suarez v Secretary of State for the Home Department [2002] 1 WLR 2663 (CA)

842

Professional conduct — objection to opponent's counsel — inherent power of court to prevent abuse of its procedure (United Kingdom) <i>Skjevesland v Geveran Trading Co Ltd</i> [2002] All ER (D) 448 (Oct); Review para 02/3000	983
Measure of damages — professional negligence — solicitors — inadequate preparation of divorce case — damages for loss of chance, inconvenience and distress (United Kingdom) <i>Channon v Lindley Johnstone (a firm) (Measure of Damages)</i> [2002] EWCA Civ 353; [2002] Lloyd's Rep P N 342; [2003] 4 CL 56 (§147)	983
Limitations — professional negligence — solicitors — date when relevant knowledge obtained — client having poor recollection of events (United Kingdom) <i>Ezekiel v Lehrer</i> [2002] EWCA Civ 16; [2002] Lloyds Rep P N 260; [2003] 4 CL 25 (§66)	984
Conditional fees — champerty — impecuniosity of client (United Kingdom) <i>Times Newspapers Ltd v Burstein (Costs: Champertous Retainer); Sub nom Burstein v Times Newspapers Ltd (No. 2)</i> , [2002] EWCA Civ 1739; <i>The Times</i> , 6 December 2002; [2003] 1 CL 127 (§387)	984
Judge — circuit judge — jurisdiction — judge authorised to sit as judge of Technology and Construction Court — proceedings brought in Queen's Bench Division transferred to Technology and Construction Court — parties not notified of transfer — whether transfer to be invalidated — whether judge having jurisdiction (United Kingdom) <i>Fawdry and Co (a firm) v Murfitt (Lord Chancellor Intervening)</i> [2002] 3 WLR 1354 (CA); [2002] EWCA Civ 643	985
Practice — fast track — district judge — jurisdiction — whether district judge having jurisdiction to continue to hear trial of liability on fast track if allowing amendment taking value of claim over fast track limit — whether district judge should reallocate claim to multi-track if allowing such amendment (United Kingdom) <i>Maguire v Molin</i> [2002] 4 All ER 325 (CA); [2002] EWCA Civ 1083	986
Jury directions — verdicts — failure to give Watson direction to deadlocked jury in civil proceedings (United Kingdom) <i>Morrison v Chief Constable of West Midlands Police</i> [2003] EWCA Civ 271; <i>The Independent</i> , 28 February 2003; [2003] 4 CL 23 (§62)	987
Practice — judgment — duty to give reasons — requirement for reasoned judgment — extent of duty (United Kingdom) <i>English v Emery Reimbold and Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrichia v Commissioner</i>	

stating that packages exceeded provincial requirements — employer misrepresenting state of law — employee filing claim for severance pay after learning that other employees had successfully claimed it — employment standards referee holding that claim barred by two-year “cap” on claims and that he had no power to relieve against it — referee’s decision unreasonable — “cap” was limitation period and was applicable unless employee entitled to relief for fraudulent concealment — employee detrimentally relied on employer’s misrepresentation — limitation period did not begin to run until employee became aware of other employees’ claims — referee’s decision quashed

Employment — employment standards — severance pay — terminated employee choosing between retirement packages offered by employer — employer stating that packages exceeded provincial requirements — employer misrepresenting state of law — employee filing claim for severance pay after learning that other employees had successfully claimed it — employment standards referee holding that claim barred by two-year “cap” on claims and that he had no power to relieve against it — referee’s decision unreasonable — “cap” was limitation period and was applicable unless employee entitled to relief for fraudulent concealment — employee detrimentally relied on employer’s misrepresentation — limitation period did not begin to run until employee became aware of other employees’ claims — referee’s decision quashed (Canada)

Halloran v Ontario (Employment Standards Act Referee) (2002)
217 DLR (4th) 327 (CA)

849

Insurance

Insurance — liability insurance — exclusions — plaintiff suffering injury in university freshman activity — bringing action against university as well as student president of university residence responsible for overseeing freshman activities — university’s insurer settling action — seeking contribution from insurer who had issued homeowner’s policy to student president’s parents’ — policy covering relatives who lived in household — student president returning home in summers and holidays — resident at parents’ home for purposes of insurance coverage — homeowner’s policy excluding claims arising from business — student president receiving pay from university to supervise freshman activities — coverage excluded under exclusion for business activities (Canada)

Canadian Universities’ Reciprocal Insurance v Halwell Mutual Insurance Co (2002) 217 DLR (4th) 315 (CA)

850

Damages — exemplary damages — disputed claim against insurer — insurer paying substantial part, but not all, of amounts

- Court-martial — permanent president of court-martial — civil offence — fair hearing — whether role of permanent president precluding court-martial from being independent and impartial tribunal — whether trial of civil offence by court-martial in United Kingdom incompatible with right to fair hearing (United Kingdom)
R v Spear and another; R v Boyd; R v Saunby and other appeals [2002] 3 All ER 1074 (HL)(E); [2002] 3 WLR 437 (HL)(E); [2002] UKHL 31 978
- Solicitor — negligence — loss of cause of action — action struck out for want of prosecution — judge's finding on strike-out application that fair trial impossible — claimant's subsequent action against solicitors — evaluation of claimant's chance of success in original action — assessment of damages (United Kingdom)
Sharif and others v Garrett and Co (a firm) [2002] 1 WLR 3118 (CA); [2001] EWCA Civ 1269 979
- Solicitors — intervention — right to peaceful enjoyment of possessions — manner of Law Society's intervention (United Kingdom)
Holder v Law Society, The Times, 29 January 2003; [2003] 3 CL 120 (§362) 980
- Solicitors — fiduciary duty — loan arranged for client by solicitor — failure to reveal service charge payable to firm — client acting as surety — duty to account for value of charge (United Kingdom)
Johnson v EBS Pensioner Trustees Ltd; sub nom Johnson v EBS Pension Trustees Ltd [2002] EWCA Civ 164; [2002] Lloyd's Rep P N 309; [2003] 4 CL 118 (§321) 980
- Professional negligence — solicitors — failure to advise on timing of clinical negligence claim — nil prospect of success due to lack of medical evidence (United Kingdom)
Hatswell v Goldbergs (A firm) [2001] EWCA Civ 2084; [2002] Lloyd's Rep P N 359; [2003] 4 CL 130 (§351) 981
- Professional negligence — solicitors — duty of care — failure to tell purchaser full extent of indemnity to vendor in contract for sale of land (United Kingdom)
Petersen v Personal Representatives of Rivlin (Deceased); Sub nom Peterson v Personal Representatives of Rivlin (Deceased) [2002] EWCA Civ 194; [2002] Lloyd's Rep P N 386; [2003] 4 CL 129 (§349) 981
- Professional negligence — solicitors — duty of care — conduct of creditors' meeting (United Kingdom)
Prosser v Castle Sanderson Solicitors [2002] EWCA Civ 1140; [2002] BPIR 1163; [2003] 4 CL 129 (§348) 982
- Professional conduct — legal professional privilege — solicitor or clerk acting as police informant (United Kingdom)
R v Robinson [2002] EWCA Crim 2489; *The Times*, 7 November 2002; *Review* para 02/3231 982

psychiatric injury — whether need for “sudden shock” — whether need for “direct perception” of distressing event — whether plaintiff must be person of “normal fortitude” — discussion of “reasonable foreseeability” (Australia)

Tame v New South Wales (S83 of 2001); *Annetts and Another v Australian Stations Pty Ltd* (P97 of 2000) (2002) 191 ALR 449 (HCA)

858

Negligence — duty of care — economic loss — gaming machines and other forms of gambling — club cashing third party cheques as well as cheques drawn by member on own bank account — proceeds of cheques used for gambling in club premises — whether club liable to repay member amount of gambling losses — whether duty of care owed by club to member (Australia)

Reynolds v Katoomba RSL All Services Club (2002) 189 ALR 510 (CA)

860

Negligence — duty of care — scope — liability for social hosts — plaintiff bringing action against social hosts of intoxicated driver who caused her injuries — defendants hosting party at which guests brought and served own liquor — defendants failing to monitor alcohol consumption or to prevent obviously impaired driver from driving — reasonably foreseeable driver might cause injury — proximity of relationship existed between defendants and driver — public policy barred recovery — imposition of liability upon social hosts would create inordinate burden — action dismissed (Canada)

Childs v Desormeaux (2002) 217 DLR (4th) 217

861

Defamation — damages for libel — assessment by jury — whether jury’s award excessive — whether Court of Appeal to substitute lower award (United Kingdom)

Kiam v MGN Ltd [2002] 3 WLR 1036 (CA)

862

Transport

Air law — carriage — Warsaw Convention — plaintiff contracting with airline to ship perishable vaccine internationally — vaccine ruined because of delays and lack of refrigeration — plaintiff bringing action against airline for damages — claiming limited liability inapplicable — failure of airline to call evidence why refrigeration not used resulted in drawing of adverse inference — damage resulted from act done recklessly and with knowledge that damage would probably result — plaintiff awarded compensatory damages

Contracts — misrepresentation — plaintiff contracting with airline to ship perishable vaccine internationally — vaccine ruined because of delays and lack of refrigeration — plaintiff bringing action against airline for damages — airline arguing damages

apply — no misrepresentation as to capacity or policies regarding refrigeration — Warsaw Convention applicable regardless of material misrepresentation — Warsaw Convention exhaustive source of remedies for damage sustained as result of international carriage by air (Canada)

Connaught Laboratories Ltd v British Airways (2002) 217 DLR (4th) 717

863

Law Reform

866

Administrative Law

Civil and Administrative Penalties (Australia)

866

Criminal Law and Procedure

Fraud (United Kingdom)

873

Health, Education and Social Welfare

Protection of Human Genetic Information (Australia)

877

Housing and Construction

Renting Homes 1: Status and Security (United Kingdom)

891

Renting Homes 2: Co-Occupation, Transfer and Succession (United Kingdom)

910

Sharing Homes (United Kingdom)

923

Local Government

Publication of Local Authority Reports (United Kingdom)

933

Legal Profession

950

Legislation

Public Notaries Act 2001 (Australia — Victoria)

950

Judicial Decisions

Evidence — legal professional privilege — statutory notice to produce documents — whether statute abrogated legal professional privilege

Trade and commerce — trade practices — notice to produce documents to Australian Competition and Consumer Commission — Commission investigating whether Trade Practices Act 1974 (Cth) contravened — whether documents to be produced included those for which legal professional privilege claimed (Australia)

Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission (2002) 192 ALR 561; [2002] HCA 49

950

Discovery — legal professional privilege — correct test <i>Eso Australia Resources Ltd v Commissioner of Taxation</i> 2 ITR Rep 429; [2003] 1 CL 17 (§55)	951
Courts and judicial system — Magistrates — appointment of Magistrate with remuneration limited to two year period — whether appointment invalid on basis that it contravened principle of judicial independence — whether appointment <i>ultra vires</i> or beyond power	
Administrative law — judicial review — whether power to appoint Magistrate exercised for improper or extraneous purpose	
Constitutional law — judicial power — principle that courts exercising federal jurisdiction cannot be invested with functions or powers which are incompatible with court's exercise of judicial power of Commonwealth — whether principle applicable to territory courts	
Practice and procedure — costs — litigation brought in public interest — whether primary judge erred in relation to costs order (Australia — Northern Territory) <i>North Australian Aboriginal Legal Aid Service Inc v Bradley and Another</i> (2002) 192 ALR 701; [2002] FCAFC 297	951
Trial — fairness — disclosure — witness statement — identification evidence — burglary and robbery — victim making statement including description of assailant — statement not disclosed by prosecution to accused or judge — accused making specific request for statement — accused unrepresented at trial — accused deterred by judge from questioning victim about description given in statement — whether rendering trial unfair — whether material irregularity — whether appropriate direction given regarding identification evidence (The Bahamas) <i>Murphy v R</i> [2002] 3 LRC 530	953
Tort — negligence — duty of care — professional negligence — professional body — Law Society — funds deposited in solicitor's trust account subject to fraud — investors alleging that Law Society failing properly to monitor trust account — whether Law Society owing a private law duty of care to persons depositing funds into solicitor's trust account — relevant considerations (Canada — Ontario) <i>Edward and Another v Law Society of Upper Canada, Attorney General for Ontario and Another intervening</i> [2002] 2 LRC 523; 2001 SCC 80	954
Crime — practice — prosecution of offences — conduct of proceedings by counsel — departure from rules of practice designed to ensure fairness of proceedings — whether conviction to be quashed (Cayman Islands) <i>Randall v The Queen</i> [2002] 1 WLR 2237 (PC); [2002] UKPC 19	956

Contents

Legislation	673
(see also under Legal Profession section)	
<i>Administrative Law</i>	
Executive Documents Release Act 2001 (Australia — Australian Capital Territory)	673
<i>Constitutional Law and Human Rights</i>	
Legislative Assembly (Broadcasting) Act 2001 (Australia — Australian Capital Territory)	675
Political Parties and Organisations Act 2002 (Uganda)	676
<i>Courts Practice and Procedure</i>	
Court Security Act 2001 (Australia — Australian Capital Territory)	680
Judicature (Amendment) Act 2002 (Uganda)	687
<i>Criminal Law and Procedure</i>	
Cybercrime Act 2001 (Australia)	687
Measures to Combat Serious and Organised Crime Act 2001 (Australia)	703
Police Powers (Drug Premises) Act 2001 (Australia — New South Wales)	740
Police Powers (Internally Concealed Drugs) Act 2001 (Australia — New South Wales)	740
Crimes (Validation of Orders) Act 2001 (Australia — Victoria)	740
Financial Intelligence Unit Act 2002 (Belize)	740
Arms and Explosives (Amendment) Act 2002 (Singapore)	743
Prevention of Corruption (Amendment) Act 2002 (Singapore)	743
Anti-Terrorism Act 2002 (Uganda)	743
Amnesty (Amendment) Act 2002 (Uganda)	746
<i>Defence Forces and Police</i>	
Police Powers (Drug Premises) Act 2001 (Australia — New South Wales)	746
Police Powers (Internally Concealed Drugs) Act 2001 (Australia — New South Wales)	749
<i>Finance, Trade and Economic Development</i>	
National Planning Authority Act 2002 (Uganda)	752
Value Added Tax (Amendment) Act 2002 (Uganda)	754
<i>Health, Education and Social Welfare</i>	
Infertility Treatment (Amendment) Act 2001 (Australia — Victoria)	754
Prevention of Corruption (Amendment) Act 2002 (Singapore)	756

Courts — contempt of court — civil contempt — personal service of order on company officer prerequisite to enforcement against company under Grand Court Rules, O 45, r 5(1), unless (a) officer present in court when order made or (b) company expressly notified (r 7(6)) — company not notified of order's terms by service on attorneys or by attorneys' presence in court (Cayman Islands)

CVC/Opportunity Equity Partners LP and Four Others v Telesystem International Wireless Incorporated, TIW Do Brasil Limitada and Demarco Almeida 2002 CILR 591 (CA)

956

Attorneys-at-Law — remuneration — conditional fee agreement — normal and uplift fees valid and enforceable subject to court's approval, provided no agreement to share proceeds of action (outright contingency fee) — public policy objections based on maintenance outweighed by benefits of access to justice — need not provide for other side's costs — approval may be conditional, eg on taxation of costs

Contract — illegal contracts — agreements contrary to public policy — maintenance and champerty — champertous maintenance is giving of assistance to litigant by person without interest in action or legally recognised motive for doing so, in consideration for share of proceeds of action — attorney/client conditional (normal or uplift) fee agreement not contrary to public policy

Criminal law — maintenance and champerty — reception of English law — common law offences of maintenance and champerty part of Cayman law (although now abolished in England) — imported by original English settlers in 1734 as suitable to their circumstances (Cayman Islands)

Quayum and Six Others v Hexagon Trust Company (Cayman Islands) Limited 2002 CILR 161

958

Trial — judge and jury — direction to jury — murder trial — judge hearing applications of no case to answer in presence of jury — *Voire dire* — judge informing jury that statements voluntary and admissible — judge directing that jury might conclude that weapon was planted at scene after crime — no evidence for such inference — whether misdirection — proviso — whether applicable — whether substantial miscarriage of justice (Jamaica)

Adams and Another v R [2002] 5 LRC 592; [2002] UKPC 14

961

Appeal — Court of Appeal — practice — disposition of appeal — validity — appeals as of right — applications for legal aid — appellants exercising statutory right to appeal without leave against convictions — appellants applying for legal aid — Court of Appeal without hearings refusing applications for legal aid — court subsequently dismissing appeals *ex parte* without hearings — appellants unrepresented — whether practice in accordance

- with statutory procedure — whether in accordance with Bill of Rights — whether valid (New Zealand)
Taito v R; Bennett and Others v R [2002] 5 LRC 345; [2002] UKPC 15 962
- Costs — legal profession — defence to action lacking merit or basis in fact or law — whether costs to be awarded on solicitor-client basis — whether costs to be awarded against defendants' lawyers personally — whether costs improperly, unreasonably or unnecessarily incurred — appropriate considerations (Papua New Guinea)
Aigilo v Morautu and Others (No. 2) [2002] 4 LRC 149 965
- Judiciary — coroner — jurisdiction — inquest — verdict — inquest verdict naming persons who "caused" explosion resulting in deaths — application to quash verdict — whether verdict lawful — statute restricting form of verdict (St Lucia)
Conway Bay Ltd and Another v Coroner and Another [2002] 5 LRC 663 965
- Prosecutions — military justice system — Constitution establishing single national prosecuting post — role of military prosecutor — whether inconsistent with role of civilian National Director of Public Prosecutions — relevant test — appropriate considerations
- Prosecutions — military justice system — Constitution establishing single national prosecuting post — role of military prosecutor — whether military discipline subject to control of national prosecutor — relevant considerations — whether separate military prosecution system compatible with role of national civilian prosecutor
- Fundamental rights — right to equality — freedom from discrimination — Constitution establishing single national prosecuting post — separate military prosecution system — whether violating fundamental rights of soldiers — whether unfair discrimination — relevant test — appropriate considerations — whether differentiation rationally connected to legitimate purpose (South Africa)
Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others [2002] 3 LRC 579 966
- Fundamental rights — right to freedom of expression — limitation — protection of judicial independence — contempt of court — scandalising the court — whether offence continuing to exist — object, ingredients, scope and ambit of offence — whether infringing fundamental right — whether limitation on fundamental right saved as reasonable and justifiable in an open and democratic society — appropriate test — relevant considerations
- Fundamental rights — right to fair trial — limitation — contempt of court — scandalising the court — summary procedure — official issuing press release criticising decision by judge to grant bail —

applicable to residents and foreigners — criteria on which order will be made — arguable case — fiduciary duty owed to company by its officer — use of insider information to profit from dealing in false market in its shares — account for such profit — scope — litigation in foreign jurisdiction — restraint of dealing with assets world-wide — whether injunction to be granted to aid foreign litigation — discharge — grounds — restraint of dealing with assets world-wide — order made to aid litigation in foreign jurisdiction — whether ground to discharge order — delay in substantive litigation — effect (The Bahamas)

Walsh and Others v Deloitte & Touche Inc [2002] 4 LRC 454 (PC)

818

Privy Council — appeals — leave — *habeas corpus* application dismissed by Court of Appeal — applications for leave to appeal to Privy Council — whether appeal available — discretion to grant leave to appeal on public importance grounds — no live issue between parties — whether Court of Appeal having discretion to grant leave — Privy Council Rules — challenge — applicant for leave to appeal seeking to challenge validity of rules alleging discrimination — appropriate judicial body to hear challenge (New Zealand)

Bennett v Superintendent, Rimutaka Prison (No. 2); Karaitiana v Superintendent, Wellington Prison (No. 2) [2002] 4 LRC 329 (CA)

820

Criminal Law and Procedure

Sentencing — armed robbery — whether sentence manifestly excessive — “tariff” — whether sentence should be reduced due to errors of principle by sentencing judge — use of guideline judgments — weight given to guilty plea — discount for utilitarian benefit — synthesis and two-stage approach to sentencing — totality principle — general deference — whether contrition of offender should lead to reduced sentence (Australia)

R v Place (2002) 189 ALR 431 (CA)

821

Multiple counts of sexual offences — whether appellant denied right to trial by judge alone — appellant found not guilty on some counts — whether guilty verdicts inconsistent with not guilty verdicts — whether miscarriage of justice where evidence admissible to prove offences of which found not guilty not admissible to prove offence of which found guilty (Australia)

Evidence — whether evidence admissible on certain counts also admissible on other counts — “cross-admissibility” — whether trial judge should have ordered separate trials where no “cross-admissibility” — tendency evidence — coincidence rule — similar fact evidence — whether common law principles apply — directions to jury (Australia)

W v R (2002) 189 ALR 634 (FCA)

821

Immigration — asylum — fear of persecution — ethnic Kurd from autonomous region of Iraq — fear of persecution in Iraq outside autonomous region — directions for applicant's removal to Iraq via Baghdad — Secretary of State undertaking to ensure safe return to autonomous region — special adjudicator finding applicant's fear of persecution well founded if returned via Baghdad — Immigration Appeal Tribunal allowing Secretary of State's appeal without considering applicant's submissions on factual issues — whether applicant entitled to refugee status — whether procedural error requiring case to be remitted to appeal tribunal (United Kingdom)

Gardi v Secretary of State for the Home Department [2002] 1 WLR 2755 (CA)

843

Industrial Relations

Intellectual property — trade marks — alleged infringer used words "Cheezy Twists" on packaging of cheese-flavoured snack that was similar snack to cheese-flavoured snack called "Twisties" — whether deceptive similarity — possible defence under Trade Marks Act 1995 (Cth)

Words and phrases — "capable of distinguishing" — "inherently adapted to distinguish" (Australia)

Aldi Stores Ltd Partnership v Frito-Lay Trading Company GmbH (2002) 190 ALR 185 (FCA)

845

Intellectual property — copyright — whether respondents had licence to use works belonging to applicants or whether breached various sections of Copyright Act 1968 (Cth) — respondents failed to appear (Australia)

Zomba Music Production Music (Australia) Pty Ltd and Others v Roadhouse Productions Pty Ltd (in liq) and Another (2002) 190 ALR 288 (FCA)

846

Employment — contract of employment — overtime — employer engaged in stevedoring services — whether providing "port and dock services" — collective agreement between employer and port workers' union — union undertaking to provide overtime labour when required — union imposing overtime ban — employees not assigned by union for overtime work — whether failure to work overtime breach of employees' contracts of employment — whether "irregular industrial action short of a strike" — employer obtaining injunction against union officials and members restraining banning overtime — whether injunction to be discharged — subsequent dispute resulting in union imposing overtime ban — employer seeking committal for contempt — whether abuse of process (Bermuda)

Burgess v Stevedoring Services Ltd [2002] 1 WLR 2838 (PC)

847

Limitations — discoverability — terminated employee choosing between retirement packages offered by employer — employer