

# ETHICS IN MARITIME LAW – NEW ZEALAND

Judge Tom Broadmore\*

## The Uluburun Wreck

Perhaps it was a dark and stormy night. The ship was nearing harbour. It was carrying a range of industrial and commercial cargoes from a number of places. The helmsman seems to have lost situational awareness and the ship struck a rocky headland.

It's a story that sounds like it might end badly, and it does; but the situation does not differ markedly from those of hundreds of other casualties. For me, I am reminded of the stranding of *Pacific Charger* on Baring Head, at the entrance to Wellington Harbour, in April 1981.

The Uluburun ship sank. Sadly its crew seems to have perished and the cargo was lost. It had struck Cape Uluburun on the south coast of Turkey. Its wreck was not found until 1982. Give or take a few years, it sank in about 1300BC.

Seeing the remains of this ship and its cargo in the Underwater Archaeological Museum in Bodrum, Turkey, in June this year set me on a train of thought which has inspired part of what I have to say today. My hypothesis thus far is this. From the evidence of this ship and other recent discoveries in the Eastern Mediterranean region, inferences can be drawn as to the origins of maritime law. In particular, that it has a strong ethical foundation, which marks it out as different from other branches of the law.

So today I aim to develop this hypothesis by reference to examples. And, for those concerned about CLE points, I promise also to deal with ethics in a more traditional way, by discussing the topic with reference to lawyers and judges in New Zealand.

## What Do We Mean By 'Ethics'?

As lawyers, when we think of ethics in a legal context, our first thought is for the ethical standards expected of lawyers – in our case, lawyers practising maritime law. But that is too narrow a focus. Besides which, perhaps fortunately, there is not much material to work with. When we talk of ethics, we are, I believe, talking about the moral standards which govern behaviour. (I accept that these few words sweep lightly over two and a half thousand years of philosophical thought.)

In the context of maritime law, I address the way in which ethical considerations constrain behaviour in relation first to participants in the maritime sector – ship owners, cargo owners, insurers, charterers, officers and crew, port interests and all the other interests which go to make up the maritime world; secondly to maritime lawyers; and finally to judges.

## Ethics and Participants in Maritime Activity

Whether they be individuals or organisations, the moral constraints operating on the behaviour of participants in maritime activity come from a number of sources:

1. Immemorial constraints. An obvious example is the duty laid on seafarers to go to the aid of those in distress, which now has a statutory basis.
2. Constraints arising from international conventions, primarily the *United Nations Convention on the Law of the Sea*,<sup>1</sup> and international instruments of various kinds; and customary international law.

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\* Judge of the District Court in Wellington, New Zealand. This paper was presented to the 2014 Annual Conference of the Maritime Law Association of Australia and New Zealand, held in Queenstown, New Zealand from 10-12 September 2014. In addressing some aspects of this paper I have drawn inspiration from an article by Marko Pavliha, 'Essay on Ethics in International Maritime Law' (2012) 47 *European Transport Law* 461. I also express my thanks to Lucy Kean, Research Counsel at the District Court in Wellington, for uncovering Mr Pavliha's article and drawing my attention to other helpful material.

<sup>1</sup> (UNCLOS) 1982, 1833 UNTS 3.

3. National statute and case law.

### More About the Uluburun Wreck

Before discussing these topics, however, I want to return to the Uluburun wreck to consider the inferences which may be drawn as to the sources of the '*immemorial constraints*' to which I have just referred.

Analysis of the ship and its cargo suggest that it sailed from a Cypriot port or a port on the Levantine coast. The origins of the objects aboard the ship range geographically from the Baltic to Africa, and as far East as Mesopotamia. (Some writers say as far east as Afghanistan.) Items which were obviously cargo include ten tonnes of copper ingots and a further quantity of smaller copper ingots, and about one tonne of tin, again in ingots. (Alloyed with the tin, the copper would make about 11 tonnes of bronze). The tin must have come from the east. There were about 150 clay jars, packed for the most part with the resin of an ancient type of turpentine. There were about 175 glass ingots of a particular type matching those of Egyptian jars and Mycenaean pendant beads. Of the considerable quantity of miscellaneous cargo, I mention only logs of blackwood or ebony from Africa, ivory in the form of whole and partial elephant tusks, Cypriot pottery, and amber beads, obviously of Baltic origin. Significantly for me, there were a number of pan balance weights, implying a need to weight goods, presumably for the purposes of trade. Much of the cargo, or representative items from it, is displayed in the museum in Bodrum.

The strong inference to be drawn from the wreck and its cargo is that there was, nearly 3,500 years ago, an extensive commercial trade conducted by sea in the eastern Mediterranean. One writer asserts '[t]he scale of trade encompassing Egypt, the Near East, Italy and the Aegean in the late bronze age rivals that of today in economic complexity and political motivation.'<sup>2</sup> Other writers concur that the bronze age economy was a market economy in the formal sense. Discovery of the sets of balance weights points strongly in that direction.

So in summary there is a strong case to be made that by the end of the 13<sup>th</sup> century BC there was a vigorous commercial sea borne trade in the eastern Mediterranean; and moreover a trade with networks extending far beyond the eastern Mediterranean itself – to Iran or Afghanistan for the tin,<sup>3</sup> the Baltic for the amber, and Africa for the ebony and ivory.

It follows that we can look back at least 3,500 years to an era in which maritime trade was already flourishing. I ask myself, how was it organised? On what basis did owners of ships carry trade goods? Did they perhaps buy or sell on their own account? Did cargo owners accompany their goods on board? How were the goods bought, sold and paid for? What about insurance? These were the questions that came to mind as I stood before the cargo of the ship in Bodrum. They were, and remain, a mystery to me.

But I decline to believe that those matters were all left to chance or ad hoc arrangements. I opine that there were arrangements governing trade which were generally recognised by merchants and shipowners – essentially because there must have been. They might well have been oral, but no less well known throughout the eastern Mediterranean for that. By way of example, the stories of the *Iliad* and *Odyssey* were transmitted orally for centuries before being written down in the 8<sup>th</sup> century BC; and even as late as the 5<sup>th</sup> century BC it was the sign of a man of standing that he should be able to recite the *Iliad* and the *Odyssey* by heart. (But they may indeed have been written down, centuries before we have until now suspected, as I shall soon discuss.)

In this light, the proposition that the Rhodians wrote down the basis of the law of general average in the 6<sup>th</sup> century BC is by no means farfetched; and if they wrote down the law of general average, why would they not have written down an overall maritime or commercial code?

Since I delivered this paper in Queenstown in June, I have been able to dip into a fascinating text<sup>4</sup> which goes into some detail about trade in the Eastern Mediterranean in the Late Bronze Age, most vividly in its account of mercantile activity in the city of Ugarit in Northern Syria. The author speaks of clay tablets containing cuneiform texts which '...set out the regulations that defined the responsibility apportioned to owners, traders and crews for the safety of ships and cargo...'<sup>5</sup>

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<sup>2</sup> Eric H Cline, *Sailing the Wine-Dark Sea: International Trade and the Late Bronze Age Aegean* (1994) 106, (reprinted 2009) 164, quoted in Thomas Tartaron, *Maritime Networks in the Mycenaean World* (Cambridge University Press, 2013) 25.

<sup>3</sup> Copper was extensively mined in Cyprus during this period.

<sup>4</sup> Cyprian Broodbank, *The Making of the Middle Sea* (Thames & Hudson, 2013).

<sup>5</sup> *Ibid.*

So clearly there is much more to be investigated on this topic, and it is apparent that what I have said thus far is a hypothesis which remains to be tested.<sup>6</sup> A mould for casting copper ingots in the precise shape ('oxhide') of the Uluburun cargo has been found at Ugarit.

Having started off my journey with a lengthy diversion, let me now return to the constraints operating on the behaviour of participants in maritime activity which I identified earlier. In the light of the recent discoveries I have mentioned, however, there may be other and much earlier examples to consider.

### **Immemorial Constraints<sup>7</sup>**

The obligation to go to the aid of those in distress at sea is now contained in Article 10 of the Salvage Convention 1989 in the following terms: '[e]very master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea'.<sup>8</sup>

That is an obvious example; but it is by no means the only one. From the time when the owners of ships first carried the goods of others for reward, the owners of those goods had no alternative but to trust, and did trust, the ship owner to care properly for their goods and deliver them at their destination. The constraint on ship owners evolved so that they bore the absolute liability of bailees subject only to the narrow exceptions arising from events outside the ship owner's control, so the ethical obligation of the carrier as a trustee of his cargoes was reflected in the nature of the liabilities he bore.<sup>9</sup>

The third example is the obligation of *uberrimae fidei* – the obligation of the utmost good faith mutually owed between insurers and insureds. The relationship is built on trust as it has to be; and the law now recognises that trust, enforces it, and provides sanctions for its breach.

Fourthly there is the law of general average, which is arguably underpinned by the same ethical considerations. Some say that the principles of general average were first acknowledged in the laws of the Rhodians dating back to the middle years of the first millennium BC. That is at least possible in the light of what I have said earlier, but has not been conclusively demonstrated. But, almost as impressively, Justinian's Digest (6<sup>th</sup> century AD) states the core proposition of general average that sacrifices made by one party to a venture for the benefit of all parties should be shared proportionately by all; and the Rules (or Rolls) of Oleron (1160 AD) confirm that principle in a manner which leaves no doubt that its basis is one of fairness between participants.

Finally, I note the privileged position which most states accord to seafarers in relation to their wages. It is common to acknowledge the existence of a maritime lien over a vessel for the wages of seafarers serving on it; and to accord a high level of priority to that lien on the distribution of the proceeds of sale. In New Zealand, the maritime lien for crew wages and its high level of priority have been described as '*deeply embedded both in the common law and in New Zealand law*';<sup>10</sup> and s 28 of the *Maritime Transport Act 1994* (NZ) specifically provides that a seafarer cannot contract out of his rights of lien.

So it seems that some of the most fundamental aspects of maritime law have ancient foundations in the recognition of ethical obligations of trust, honesty, the protection of the disadvantaged, and fair dealing. I am not saying, of course, that in any particular case an individual participant in maritime activity will cheerfully accept an obligation to do the right thing: history, and cases such as that of the *Insung No 1*, discussed below, teach differently. But the important point I wish to make is that the fundamental principles of maritime law arguably derived not from imposition by rulers or legislators, or even judges in the sense we would think of them today, but from centuries, even millennia, of experience and dispute resolution within the maritime community. The codes and cases merely record an accepted position.

<sup>6</sup> I have read that some two or three million such clay tablets have been collected, but only about 30,000 translated. So the prospects are not good for early progress on this topic.

<sup>7</sup> Successive editions of the classic United States text, Gimore & Black, *The Law of Admiralty*, contain compact and readable accounts of the historical origins of maritime law, on which I have drawn in completing this section.

<sup>8</sup> *International Convention on Salvage*, 1989, 1953 UNTS 165. The Salvage Convention has the force of law in New Zealand: *Maritime Transport Act 1994* (NZ), s 216. Additionally, s 32 of the *Maritime Transport Act 1994* (NZ) contains detailed provisions as to the duties of masters of New Zealand ships to render assistance to persons and vessels in danger or distress at sea.

<sup>9</sup> *Coggs v Bernard* (1703) 2 Ld Raym 909, which explicitly notes the necessity for shippers to trust carriers.

<sup>10</sup> *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 at 125 (emphasis added).

## International Conventions and the Like

In the flood of international law making which has followed the adoption of the *International Convention for the Safety of Life at Sea 1974* ('SOLAS')<sup>11</sup> and UNCLOS (much of it driven by the International Maritime Organisation (IMO)), it would be easy to overlook the importance of ethical considerations.

Further, it must be accepted that longstanding principles of public international law, such as the freedom of the seas, cannot be curtailed without international agreement. As the Court of Appeal said of that principle in *Sellers v Maritime Safety Inspector*:

That freedom, including the freedom of navigation, is one of the longest and best- established principles of international law. An essential feature of the freedom is that the state of nationality of a ship (the flag state) has exclusive jurisdiction over the ship when it is on the high seas. That proposition, to be found in art 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which New Zealand is party and which in this respect is considered to be declaratory of customary international law, is subject only to 'exceptional cases expressly provided for in international treaties' (1982 Int Leg Mat 1261). The exceptions are to be related to the recognition in art 87(2) that the freedoms of the high seas are to be exercised by all states with due regard for the interests of other states in their exercise of the freedoms.<sup>12</sup>

Nevertheless, and despite that clear principle, the international community was prepared, in Articles 192 and 193 of UNCLOS, to assert baldly that, even though States had the sovereign right to exploit their natural resources, that right was constrained by their general obligation to protect and preserve the marine environment.

And Article 300 of UNCLOS states:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

SOLAS, UNCLOS and other instruments such as the CLC Convention<sup>13</sup> together provide a framework for international legislation on safety at sea, the protection of fish stocks, the protection and preservation of the maritime environment generally, and in respect of pollution in particular, the exploitation of states' Exclusive Economic Zones and appurtenant areas of continental shelf, and the recognition and exploitation of the seabed below the High Seas as the common heritage of mankind – to identify the major areas of direct importance to non-state interests. From these and other international instruments, it is clear that States are being called on, and promise, to recognise and enforce ethical standards and social responsibility.

And finally, let us not overlook the Rotterdam Rules, which in Article 2 provide that:

... regard is to be had to [the Convention's] international character and to the need to promote uniformity in its application and the observance of good faith in international trade.<sup>14</sup>

To come to a conclusion on this topic, it seems to me that public international law, in both its customary and treaty-based aspects, reflects respectively implicit understandings and explicit bargains reached between sovereign states exercising sovereign power, rather than the slow evolution of practices generally-accepted as fair into codes and statutes apparent in private maritime law. (As noted in *Sellers*,<sup>15</sup> even such unquestionably immoral and unethical practices as the slave trade could be made unlawful on the high seas only by international agreement, and then only as recently as the later years of the nineteenth century.) But, for some time past, those international bargains have expressly required the observance of ethical standards and social responsibility.

## New Zealand Statute Law

In this section I touch on a number of statutes bearing on maritime activity to identify their incorporation of international instruments into New Zealand law, or at least their reference to international instruments; and to note a common theme of recognition and enforcement of norms of social responsibility.

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<sup>11</sup> 1974, 1184 UNTS 278.

<sup>12</sup> [1999] 2 NZLR 44, 47 ('*Sellers*').

<sup>13</sup> *International Convention on Civil Liability for Oil Pollution Damage*, 1969, 973 UNTS 3.

<sup>14</sup> *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* ('Rotterdam Rules'), opened for signature 23 September 2009 (not yet in force).

<sup>15</sup> [1999] 2 NZLR 44, 47.

***Maritime Transport Act 1994 (NZ)***

The preamble to the Act describes its scope in these terms:

An Act—

- (a) (omitted)
- (b) To enable the implementation of New Zealand's obligations under international maritime agreements; and
- (c) To ensure that participants in the maritime transport system are responsible for their actions; and
- (d) (omitted)
- (e) (omitted)
- (f) To protect the marine environment; and
- (g) To continue, or enable, the implementation of obligations on New Zealand under various international conventions relating to pollution of the marine environment [and];
- (h) (omitted)
- (i) to regulate maritime activities and the marine environment in the exclusive economic zone and on the continental shelf as permitted under international law.

There are many provisions in the Act giving effect to these objectives. I have already mentioned s 28, as to seafarers' rights of lien: that section is in a group of provisions with a lengthy heritage designed to ensure the safety, protection and comfort of seafarers; and s 32, which deals with persons and ships in danger or distress. Other provisions reflecting the community's interest in ensuring that participants in the maritime industry behave in socially responsible ways deal with safety at sea, investigation of accidents, requirements as to survey, salvage, the carriage of dangerous cargo, deck cargo and livestock, extensive provisions concerning marine pollution, dumping and the like, the protection of the marine environment, and the organisation of the response to pollution incidents.

***Health and Safety in Employment Act 1992 (NZ)***

Much of this Act applies to New Zealand ships. Section 5 of the Act states:

[t]he object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.

***Fisheries Act 1996 (NZ)***

Section 5 of the Act states:

This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—

- (a) New Zealand's international obligations relating to fishing; and
- (b) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

And section 8 states:

**Purpose**

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

Ensuring sustainability means—

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment;

Utilisation means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

These provisions speak for themselves as to the underlying philosophy of the Act including the conservation of the fisheries resource in the interests of future generations and the protection of the environment: an approach which reflects the ethics of the international instruments to which I have already referred.

### ***Resource Management Act 1991 (NZ)***

Section 5 gives as the purposes of the Act the following:

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

### ***Employment Relations Act 2000 (NZ)***

Section 5 of the Act states its object as follows:

(a) to build productive employment relationships through the promotion of [good faith] in all aspects of the employment environment and of the employment relationship—

[(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and]

(ii) by acknowledging and addressing the inherent inequality of ... power in employment relationships; and

(some further material omitted)

(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Again the *Employment Relations Act* includes the features common to the statutes I have already referred to of ethical standards – in this case the observance of good faith and recognition of obligations of trust and confidence – and of reference to international instruments.

### ***A Recent Example***

That these statutes address real concerns can be illustrated by reference to a recent Coroner's report. The report revealed multiple failings in the navigation and management of a South Korean fishing vessel, *Insung No. 1*, in the Ross Sea, leading to the deaths of 22 crew members. The vessel capsized when three-metre seas flooded the upper deck through its net-hauler shutter, which had foolishly been left open whilst the vessel was under way between trawls.

The 40 crew members and two observers came from six countries, but the safety manual was written only in Korean and the emergency and lifeboat instructions were only in Korean and English. When notified of the incident, the Master failed to direct closure of the net-hauler shutter and did not check the operation of the pumps, which in fact did not work. It was revealed that there had been no onboard emergency drills, no evacuation drills, and no training or drills in any aspect of safety. A distress beacon was not activated (although another Korean vessel was nearby and came to assist). The vessel's stability had been compromised by the way in which fishing gear had been stowed on the upper deck. Those crew members who were unable to climb aboard a life raft soon perished in the freezing Antarctic waters.

The circumstances display a basic failure of morality and social responsibility on the part of the owners, never mind that they and the Master were no doubt in breach of numberless Korean requirements designed to prevent incidents of that kind from occurring, and to ameliorate the consequences if they did. Those requirements flow logically from the introduction of the Plimsoll line in 1874 over the determined opposition of British ship owners. The existence of those requirements, and their enforcement, bear witness, in my view, to the sense of social responsibility of enlightened ship owners as well as to the demands of the community; and the circumstances of the *Insung No. 1* bear witness to the need for continued engagement by the community to ensure that the ethical standards of the majority are not subverted by the unscrupulous few.

## Ethics in New Zealand – The Lawyers

For New Zealand lawyers, ethical standards are now contained in statutory rules made under the *Lawyers and Conveyancers Act 2006* (NZ). The formal title of these rules is 'Rules of Conduct and Client Care for Lawyers' ('the Rules'). They extend over nearly 60 pages. I do not propose to discuss the rules in any detail, as their broad thrust will be familiar not only to New Zealand lawyers, but also to lawyers from other jurisdictions.

I mention in detail only Chapter 13 of the Rules. That chapter emphasises the overriding duty to the Court of a lawyer acting in litigation, the lawyer's absolute duty of honesty to the Court and obligation not to mislead or deceive the Court, nor to act in a way that undermines the processes of the Court or the dignity of the judiciary.

Subject to those considerations, the Chapter emphasises the lawyer's duty to act in the best interests of his or her client, to treat others involved in court processes with respect and to obtain and follow a client's instructions on significant decisions in respect of the conduct of the litigation.

In my personal experience both as a lawyer and a judge, these requirements are observed without question by most lawyers most of the time (I express this cautiously only because of the possibility, which I cannot recall having encountered in practice or on the Bench, of anything other than an inadvertent breach of the rules) The fact that the rules are so universally accepted and observed indicates, I believe, that their ultimate source and foundation is the ethical and moral standards of the profession as developed over many years, informed by the accumulated wisdom of practitioners wrestling with the day to day problems thrown up by their profession.

I acknowledge that maritime lawyers face a special hazard not often encountered by others. This hazard is their exposure to risk when their instructions come from overseas lawyers – or direct from overseas clients – seeking their assistance urgently to arrest a ship or take some other immediate action to protect the client's interests. These risks include liability on undertakings (including to the Registrar under r 25.34(4)(b) of the High Court Rules for fees and expenses in connection with the arrest), for disclosure or non-disclosure under r 25.34(4)(a)(vi) in the context of an arrest, and on promises or representations made in affidavits or memoranda. There is no need for further exposition of this hazard.

Finally on this topic, I mention a New Zealand case<sup>16</sup> in which a lawyer bravely commenced an admiralty action *in rem* in the High Court at Auckland naming as first defendant a foreign owned aircraft.

The circumstances were that a printing company called Hally Press had imported a printing press from Switzerland. The press was carried by air, and carriage was subject to the Warsaw Convention.<sup>17</sup> Hally alleged that the press was damaged in transit, and advanced a claim of nearly NZ\$ 1 million. It commenced an Admiralty action *in rem* and *in personam* against the carrying aircraft, Danzas as the freight forwarders, and

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<sup>16</sup> *Danzas AG v Hally Press* [2005] 3 NZLR 146 (CA).

<sup>17</sup> *Convention for the Unification of Certain Rules Relating to International Carriage by Air* ('Warsaw Convention'), 1929, 137 LNTS 11.

Malaysian Airlines Systems (MAS) as owners of the aircraft. Fortunately no attempt was made to arrest the aircraft.<sup>18</sup>

It was quickly made clear to the plaintiff's solicitors that a claim in rem against the aircraft could not succeed, and an arrangement was made for discontinuance against the aircraft, acceptance of service by MAS and a transfer of the claim to the ordinary civil jurisdiction of the High Court. The case is reported on the validity of the purported transfer of the proceedings to the civil jurisdiction.<sup>19</sup> In the circumstances there can have been no doubt whatsoever but that there was no basis at all for invoking the admiralty jurisdiction of the High Court, or for naming the aircraft itself as a defendant - as of course would have been entirely permissible in the case of a ship had the press been shipped by sea.

In those circumstances, there seems to me to have been a question as to the ethical responsibilities of the plaintiff's lawyers. It is hardly surprising that Chapter 13 of the Rules does not in terms specify that lawyers must not join parties to litigation when there is no basis in law for so doing; but (depending on what was known by the lawyer and what the client's instructions were) the lawyer was arguably in breach of the absolute duty of honesty to the Court and of misleading or deceiving the Court under r 13.1 of the Rules.

## Ethics in New Zealand – The Judges

The community expect judges to be independent, impartial, fearless, fair, firm but courteous, and diligent. I think that judges themselves hold that view of their obligations. Moreover I think the community would hold the view that most Judges observe most of those attributes most of the time. Or, perhaps more realistically, that there are few transgressions that come to notice.

The basis for these expectations is elusive, and perhaps not authoritatively articulated until as recently as 2003. In that year, the Bangalore Principles of Judicial Conduct (to which I shall soon return) were endorsed by the United Nations Human Rights Commission in Geneva.

Since I became a judge, I have operated on the basis that there are two cardinal obligations that I am legally bound to observe.

First, I must play my part in implementing the promise of King John in Article 40 of Magna Carta that '[t]o no-one will we sell, to no-one deny or delay right or justice.'

Secondly I must observe the oath which I took in the presence of some of you when I took office in 2005. By that oath I made this affirmation:

... that I will well and truly serve Her Majesty, her heirs and successors, according to law, in the office of District Court Judge, and that I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.

There is a wealth of material outside of those two core obligations, by or about judges, discussing the judicial process and community expectations of judges. For a judge whose judgments are subject to appeal, however, the judicial writing which makes the most impact is always the judgment of the appellate court on a judgment which one has written.

For the purposes of this paper, I intend to refer only to the Bangalore Principles and to the current Guidelines for Judicial Conduct prepared by and for the New Zealand judges and extending over some 25 pages.

## Bangalore Principles

As summarised in the Guidelines, the stated intention of the Bangalore Principles is:

... to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist

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<sup>18</sup> I confess to having attempted to arrest an aircraft myself, but in that case the basis was that it was part of the cargo on a ship in distress, and my client had salvaged it: *Buckingham v Aircraft Hughes 500D Helicopter Registration Mark C-GPNN* [1982] 2 NZLR 738.

<sup>19</sup> See the detailed critique of the Court of Appeal decision by Paul Myburgh, elegantly entitled *Admiralty in Wonderland* [2005] LMCLQ 302.



members of the Executive and Legislature, and lawyers and the public in general, to better understand and support the judiciary.<sup>20</sup>

And the Principles themselves are, in summary, as follows:

(i) **Judicial independence** is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

(ii) **Impartiality** is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also the process by which the decision is made.

(iii) **Integrity** is essential to the proper discharge of the judicial office.

(iv) **Propriety**, and the appearance of propriety, are essential to the performance of all of the activities of the judge.

(v) **Ensuring equality of treatment** to all before the courts is essential to the due performance of the judicial office.

(vi) **Competence and diligence** are prerequisites to the due performance of judicial office.<sup>21</sup>

I do not intend to go through the Guidelines in any detail – the full text can be found online<sup>22</sup> – but I will make some comments about aspects which seem particularly relevant to the issue of ethics, and about personal experiences which might illuminate some aspects of the Guidelines.

Judicial independence covers both constitutional independence – the independence of the judiciary from the legislative and executive arms of Government – and independence in the discharge of judicial duties.

I consider that judges in New Zealand (and no doubt Australia as well) are in a privileged position in that the principle of judicial independence is honoured in practice as well as in theory. As a District Court Judge, I often preside over Judge Alone Trials in which I not infrequently dismiss criminal charges laid by the police; and in reaching those decisions I sometimes have cause to disbelieve elements of the police case, and occasionally what I have been told by police officers. When I read or hear of what happens to judges in other countries whose decisions do not please the government, I am glad, not to say relieved, that I may make findings of that kind, adverse to the government or a government agency, but go home completely confident that no stones will be thrown through my windows, I will not be harassed in my personal life, my salary will not be stopped, and I will not be detained from pursuing my lawful activities. Sadly there are not many countries where the judges can confidently say that.

In New Zealand, there is potentially a problem about impartiality and disqualification for conflict of interest. New Zealand is a small country and Wellington is a small town. I have spent my entire university education and practising life in Wellington with the exception of 5 years in my late 20s when I was overseas. In that time, I have come to know many lawyers and many people and organisations who sometimes find themselves involved in litigation. Sometimes my next door neighbour, who is a capable lawyer, appears before me and sometimes lawyers I have known for 40 or more years. I have made a practice of ensuring that litigants know about those connections. I also sometimes say to them that just because I know someone, it doesn't mean that I like them. As to the litigants themselves, or witnesses, I have to deal with issues on a case by case basis. In some cases, it is obvious that I should not hear the case. But most of the time there does not seem to be any real difficulty about my presiding – providing of course that all parties are aware of the connection. In the 9 years I have been on the Bench, I can recall only two or three cases where I have felt it advisable to disqualify myself.

As to behaviour in the courtroom, the Guidelines start with the observation that:

The primary obligation of a judge is to determine the case before him or her according to law without being deflected from that obligation by desire for popularity or fear of criticism.<sup>23</sup>

<sup>20</sup> Courts of New Zealand, *Guidelines for Judicial Conduct* (2003) <https://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct>, 4 [8].

<sup>21</sup> *Ibid* 5 [9].

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* 13 [46].

The Guidelines also emphasise the importance of maintaining an acceptable standard of behaviour in Court. At the same time, however, it emphasises that it is necessary for judges to:

...display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. Any trial is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided it does not embarrass a party or witness or give the impression to a litigant that his or her case is not being taken seriously. Indeed, it sometimes relieves tension and thereby assists the trial process.<sup>24</sup>

I well recall Sir Thomas Eichelbaum, formerly Chief Justice of New Zealand and, as it happens, a foundation member of the New Zealand Branch of this Association, remarking that the main difference a lawyer from the early 20<sup>th</sup> Century would find upon observing a case today, would be that the judges were so courteous and good-humoured. But sometimes, alas, the reverse is true, even of me. I refrain from giving particulars in writing.

A particular feature of maritime litigation is that one or more parties may be foreign companies or individuals; and that evidence might be given in a foreign language, or in English by a witness for whom English is a second language. (There are now detailed requirements for the translation of all parts of criminal trials where defendants are not fluent in English.) When I was in practice, I represented a number of clients in cases of this kind. I recall several occasions when my clients were concerned about their prospects in defending criminal charges or in litigation involving New Zealand parties. Although I cannot say my clients succeeded in all of those cases, what I can say is that I never felt that national origin, language, or race had any bearing either on the attitude of the judge or on the outcome. And, of greater importance, neither did my clients so far as I am aware.

Before concluding, I record that litigants, and the public generally, have the right under the *Judicial Commissioner and Judicial Conduct Panel Act 2004* (NZ) to make a complaint to the Judicial Conduct Commissioner about the conduct of a judge. Obviously enough, dissatisfaction with the legality or correctness of judicial decisions, where there is a right of appeal, is not a ground of complaint.

Over the last five years, complaints have ranged from 152 to 358 in number, of which only a tiny handful have proceeded beyond the Commissioner - that is, by referral of the complaint to the Head of Bench of the court in which the judge sits; or, in cases considered to be serious, by referral to a Judicial Conduct Panel for formal hearing, most likely in public.

If the decision of the panel is unfavourable to the judge, it is for the Attorney General to decide whether to initiate a process for removal of the judge. In the case of judges of the High Court and above, that requires Parliament to pass an appropriate motion addressed to the Governor General. There has been one instance in which the Commissioner considered that a complaint should be referred to a panel, but matters did not reach that stage as the judge chose to retire.

## Conclusion

In all three aspects of the topic I have examined, I think it is possible to discern a clear ethical basis as a starting point for the evolution, first, of increasingly well-understood informal approaches to recurring problems, secondly of customary and increasingly written practices, leading ultimately to explicit and comprehensive codes which are the basis of our law today. I acknowledge the different evolution of international conventions, nevertheless leading to a similar outcome owing much to ethical considerations and perceptions of social responsibility.

What seems to me to be unique, certainly unusual, about this process is that in each of the three cases it has had its origins not in law-making by governments but in the collective and evolving experience of practitioners, increasingly documented and recorded, and only at a late stage of that evolution receiving the imprimatur of the state and, latterly, the global community.

For me, maritime law has always been different, challenging and engaging. I am glad to have had this opportunity of exploring another of its many facets.

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<sup>24</sup> Ibid 14 [49].

(**Note:** My paper, as originally posted on the MLAANZ website, did not include the material about the Uluburun wreck or the evidence of developed commercial trade in the eastern Mediterranean. I had intended to preface the written paper simply by one or two short comments about the wreck; but I became fascinated by the topic. This paper reflects my presentation at the conference).