Tomorrow's lawyers

Charlie Piho is one of 50 AUT law students who will complete their law studies this year.

Charlie who is of Cook Island (Rakahanga/Manahiki)/New Zealand descent came to Auckland from Dunedin aged 14 to complete his schooling. He will join Kensington Swan early in 2013 after finishing his LLB (Hons) degree.

Q What first attracted you to enrol in AUT's LLB?

A To be totally honest, I thought it looked 'cool'. The small, interactive classes with a commercial law focus were things that appealed to me and I was excited that I was going to be a part of something new and innovative.

Q What are your ambitions when you graduate?

A In March 2013 I will begin my law career in a graduate role at Kensington Swan. I am looking forward to working with leading practitioners and immersing myself in the law. I enjoy growing and learning and being in an environment where I am constantly challenged and pushed to develop new ways of thinking.

Q Where do you see yourself in 10 years' time?

A I would like to be a role model for Pacific and Maori students and lawyers, inspiring them to become leaders in the legal profession. I want to be able to use the law to make a positive change in our wider community.

Q What current legal issue do you find most fascinating?

A A very contentious legal issue at the moment is whether Maori Iwi can have ownership rights in water. This is a very important issue for New Zealand and it will have a long-lasting and huge impact on Maori development as an indigenous people going forward.

Q What are the most interesting developments in law you can see on the horizon?

A Possible constitutional reform is an interesting one. Some are proposing that we move towards a written constitution and this is something to watch out for over the next decade once the Waitangi Treaty settlements have been resolved.

Also, with the advent of the various Specialist Courts and the exponential growth of alternative dispute resolution, it will be interesting to see how the role of the lawyer adjusts to this trend away from the traditional adversarial approach.

Q What is the most surprising thing you have learned during your law degree?

A I was surprised to learn that criminal law only accounts for a small portion of the legal profession's work and that such large numbers of lawyers deal with commercial matters. Whenever I tell friends outside of University that I am studying law they assume that I am going to be a criminal lawyer. That couldn't be further from the truth!

Q Which heroes / mentors have inspired you?

A My dad is an inspiration for his work ethic and discipline. He has the ability to dream and think big, and that, alongside his self-belief and determination, allows him to believe he can achieve anything he puts his mind to. I admire my mother too for her constant optimism and positive outlook on life.

Also, I recently had the privilege of attending the World Indigenous Law Conference 2012 in Hamilton where the keynote speaker was Justice Joseph Williams. Judge Williams came from such humble beginnings and has achieved so much in his legal career by inspiring change in the law for the betterment of indigenous people. His humility and respect for others together with his passion for the law, which he expresses so eloquently, make him an amazing role model for a law student like myself.

Q If you had to choose a favourite saying, what would it be?

A "I've failed over and over and over again in my life... and that is why I succeed." (Michael Jordan)

AUT UNIVERSITY LAW

NEWS FROM AUT LAW SCHOOL / SPRING 2012

Our students

1. The Law School Awards Evening: Ed Scorgie from Chapman Tripp awarding Che Ammon the Chapman Tripp Prize for the Best Overall Combined Mark in the Law of Contract and the Law of Torts
2. AUT Law Students Society 2012 Executive: (from left) Anna Cherkasina, Ilinke Naude, Osei Owusu (President), Vanessa Jones, Dhayana Sena
3. At the Law School Ball: John Alcock, Jess Sewak, Charlie Piho, Marja Lubek, Sarah Hou, Annabelle Skadiang
4. Justin Maloney with Rachel Paris from Bell Gully at the "Shadow a Leader" event
5. Savannah Harder (centre) of AUT's Māori and Pacific Law Students Association at a haka and waiata practice prior to the 2012 World Indigenous Law Conference

Continued from page 01...

Acting Principal Environment Judge Newhook ruled in the miners' favour. He held that the RMA, as amended, contained no "ambiguity, uncertainty, or room for discretion or 'choice'..." regarding the ability to consider the effects on climate change. RFBS and West Coast ENT appealed to the High Court.

Whata J reached essentially the same position as the Environment Court, however his detailed judgment provides a more nuanced analysis of the issues that will be of interest to legal, planning and environmental practitioners.

His Honour concluded that under the RMA overseas discharges and their effects were not subject to the jurisdiction of a local authority and nor was it plausible that such an authority would be able to apply sustainable management principles extra-territorially:

"One leviathan of environmental law (i.e. the RMA) is more than enough for lawyers, experts, environmental managers, planners, the local authorities and the courts of this country. The prospect of a district council assessing whether an end use of coal... is subject to sustainable environmental policy... in ...foreign jurisdictions is palpably unattractive."

It has been reported that West Coast ENT will be appealing the High Court judgment.

Vernon Rive is a Senior Lecturer at AUT Law School. He teaches Resource Management Law, International Environmental Law and Judicial Review on the LLB.

Staying in touch

If you would like more information about AUT Law School and what we are doing contact: **Mike French**, Director of Undergraduate Programmes mfrench@aut.ac.nz

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AUT UNIVERSITY LAW

NEWS FROM AUT LAW SCHOOL / SPRING 2012

Carbon conundrum

High Court ruling on climate and coal consents

In a recent High Court decision, *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller Coal Limited* [2012] NZHC 2156, Whata J ruled that climate change considerations were legally irrelevant when assessing land-use applications connected with two South Island coal mining projects under the Resource Management Act.

In March the Royal Forest and Bird Protection Society of New Zealand Incorporated (RFBS) and West Coast ENT applied to the Environment Court for declarations that the effects on climate change from CO2 which would be emitted when coal from these New Zealand projects was burnt overseas should be considered during the land-use consent process.

Previously, in *Genesis Power Ltd v Greenpeace New Zealand Inc* [2009] 1 NZLR 730, a majority of the Supreme Court had held that, in light of the Resource Management (Energy and Climate Change) Amendment Act 2004, consent authorities could not consider adverse impacts on climate change when assessing an application for air discharge consent in relation to non-renewable energy generation projects. The Court found that the purpose of the amendments and associated provisions made it clear that Parliament intended climate change effects from such projects should be regulated at the national level and not on a case-by-case basis by regional councils when assessing discharge permit applications.

The Greenpeace litigation, however, did not explicitly deal with whether councils (and the Environment Court) could consider such effects on climate change when assessing land-use applications. Nor had the Supreme Court addressed the issue of whether, if the extracted coal was to be exported, that made any difference to the legal position under the RMA. Those issues were at the heart of the present case.

In the Environment Court, counsel for the environmental groups (which included Sir Geoffrey Palmer) argued that neither the 2004 amendments, nor the Supreme Court decision in *Greenpeace* had created any impediments to considering impacts of climate change from the ultimate burning of mined coal when assessing land-use consents. Counsel argued that the provision governing the assessment of land-use applications (s104(1)(a)) contained no prohibition - explicit or implied - on considering the downstream impacts of coal combustion.

Continued on p6

From the dean

First cohort of graduates about to enter the profession.

As the end of the 2012 academic year fast approaches, AUT Law School looks forward to marking an important milestone. This year will see our first cohort of around 50 graduates completing their degrees and moving on to life après law school. It is especially pleasing that a significant number have secured legal positions, including in larger law firms such as, Buddle Findlay, Chapman Tripp and Kensington Swan.

Our students will continue to be our greatest asset and it is important to us as a law school that we can boast graduates who will make their mark on the profession. In the end, they will be the best ambassadors for the AUT LLB.

Professor Ian Eagles

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Cryptic corner

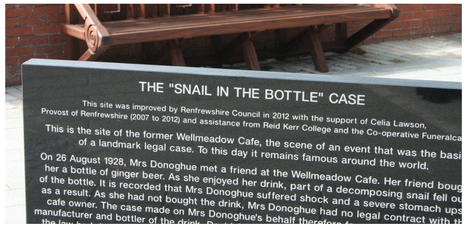
In keeping with our snail theme, 1972 marks the half-way point between *Donoghue v Stevenson* and today. 1972 was a significant year for the legal scene in New Zealand and some of the law-related events of that year provide the focus for our Cryptic Corner in this issue.

Answer the following questions and email your answers to mike.french@aut.ac.nz by 4pm on 31 October 2012. All correct answers go into the draw to win a bottle of champagne:

1. Whose nine-year tenure as President of the New Zealand Court of Appeal ended in 1972?
2. What piece of 1972 legislation changed the face of liability for the tort of negligence in New Zealand?
3. In what case reported in 1972 did the New Zealand Court of Appeal make clear that it was not bound by decisions of the House of Lords?
4. What well known house was built in 1972 at 67 Edinburgh Crescent, Invercargill?
5. This film, which was in production in 1972, starred Timothy Bottoms as a first year law student trying to balance study and his relationship with the daughter of one of his professors. What was the film?

Last issue's clue was: "Bill blocks local claim over car write-off creating classic contract cold case". The answer of course was *Carlill v Carbolic Smoke Ball Co* and the winner of the champagne was Melissa Allan, a Senior Associate at Kennedys.

What the snail taught us



2012 marks 80 years since five of the great and the good congregated in a hallowed hall and engaged in neighbourly debate to determine what ought be done concerning an uninvited guest found in the drink at a private party.

To commemorate the anniversary of the decision by the House of Lords in *Donoghue v Stevenson* on 26 May 1932, the University of the West of Scotland, Renfrewshire Law Centre, the Law Society of Scotland and the Faculty of Advocates, hosted an international conference, 'Who then in law is my neighbour?' to examine, discuss and celebrate the development of the law of torts, negligence and delict.

The conference was held over the 25-26 May 2012 in the Paisley Town Hall, just 500 metres from the site of the Wellmeadow Cafe where May Donoghue imbibed the drink which four years later led to arguably the most famous decision in the English common law. The cafe is no longer there but the Renfrewshire Council has erected a commemorative plinth, bench and plaques at the location in honour of the event.

The conference itself was a fascinating experience. It was attended by around 80 delegates from the common law jurisdictions and featured 25 papers on a wide variety of topics related to the case in general and Lord Atkin's famous statement of principle in particular. To describe *Donoghue v Stevenson* as serendipitous would perhaps be going too far, but there was certainly a coincidence of various factors which ensured, first, that the case got to the House of Lords, and then that the decision turned out the way it did. Some of the more interesting papers were those that explored the legal history and background to the case itself as well as the personalities involved. For example, the significance of a Celtic majority of Lords Atkin, Thankerton and Macmillan lining up against an English minority of Lords Buckmaster and Tomlin, is not something that you usually have time to explore in detail with undergraduate students in a Law of Torts paper.

The writer, who was the only delegate from New Zealand, presented a paper on the liability of territorial authorities in this country for negligently constructed buildings (a modified extract from which is included in this newsletter). The paper seemed to go down particularly well with the Scots who were attracted by the notion that a country around the same size as Scotland had judges who did not feel obliged to follow decisions of the House of Lords.

Mike French is the Director of Undergraduate Programmes for the AUT law school. He teaches on the Law of Torts paper and this semester is offering an elective paper on Remedies in Private Law.

Law school news

Law teachers meet in Sydney

The 2012 annual Australasian Law Teachers Conference was held at the University of Sydney's Law School from 1-4 July. The conference, which rotates around law schools in both Australia and New Zealand, provided Sydney with a great opportunity to show off its new law school, now repatriated at the main Camperdown campus. The theme of the conference was Legal Education for a Global Community, attracting 150 delegates from around the world. AUT Law School Senior Lecturers **Marnie Prasad** and **Mary-Rose Russell** presented a paper to the Criminal Law Section entitled 'The Pervasive Influence of Human Rights Jurisprudence on Domestic Criminal Law'.

Automation, title fraud and other aspects of property law

In July **Rod Thomas** attended the Australasian Property Law Teachers Conference at the National University of Singapore. He co-presented a paper on research he has undertaken with two Australian academics, comparing the New Zealand automated land registration system (Landonline) with the automated title system proposed for Australia. As we go to print Rod is a keynote speaker at the International Land Title Registrars' Conference in Amsterdam addressing automation issues for land dealings in New Zealand and Australia, together with associated issues of title fraud.

Reflecting on international law in Wellington

Professor **Julie Cassidy** recently attended the 20th annual conference of the Australian and New Zealand Society of International Law at the New Zealand Centre for Public Law, Victoria University of Wellington. The conference, held over 5-7 July 2012, gave participants an opportunity to reflect on the development of international law over the last twenty years and provided a forum for attendees to speculate on its future. Professor Cassidy presented a paper entitled 'Judicial Anxiety: Customary International Law's Protection of Human Rights in the Domestic Arena'. The paper included a comparative analysis of the reception of international law in New Zealand, Australia and South Africa.

20 year international environmental law and policy stock-take in Rio

In June, **Vernon Rive** attended the United Nations 'Rio+20' Earth Summit in Rio de Janeiro, commentating on proceedings for Idealog Magazine's Sustain environmental news service, blogging on his own website, and supporting the P3 Youth Delegation. While in Rio, Vernon met with and interviewed New Zealand's Minister for the Environment Amy Adams and Green MP Graham Kennedy along with other New Zealand and international delegates to the conference.

The numbers

Quick facts on the AUT Law School in 2012

319 Total number of students enrolled on the LLB

50 Students completing their law degree in 2012

twenty-two Staff teaching on the LLB

Students on the first year of the LLB aged under 20 years of age **27%**

8.5 percent Māori students on the LLB

51% Students under 25 years of age on the LLB

Pasifika students on the LLB **9%**

Looming large - *Spencer on Byron*

As AUTlaw goes to print we await the Supreme Court's decision in *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* that was heard in March. The issue for the Court is the troublesome one of whether the *Hamlin* duty extends to the owners of residential apartments in mixed-use developments.

Spencer on Byron is described and run as a hotel and contains 243 units that are individually owned and rented almost exclusively to paying guests. However there are also six residential penthouse apartments in the complex that are used as private dwellings. Soon after the Council issued code compliance certificates in 2001 the complex began to show signs of physical defects, apparently due to lack of weathertightness.

Extensive remedial work was required and the body corporate and the owners brought actions inter alia against the Council alleging negligence in the performance of its statutory functions of issuing building consents, inspecting and approving the development, and in the issuing of the code compliance certificates.

On an application by the Council, Potter J in the High Court struck out the claims in negligence by the body corporate and the owners of the hotel units on the basis that they were commercial properties and the Council could not arguably owe those owners a duty of care. However, Potter J refused to strike out the claims by the owners of the residential apartments that were used as private dwellings.

On appeal, the Court of Appeal was unanimous in finding that the residential apartments were no more than incidental to the hotel units or the commercial nature of the building as a whole and that the scope of the Council's liability could not be expanded to include a class which was not entitled to protection.

That begged the question of whether a separate duty could be owed to the residential apartment owners. The Court of Appeal was divided on this point. Significantly, counsel for both parties had agreed that either the Council owed a duty of care to all owners and the body corporate, or none, and the majority supported that position. It held that to impose a duty of care solely in respect of the residential component would not be fair, just and reasonable; to do so would be to impose different tortious duties on the Council in respect of the residential and commercial components of the building, with no logical justification given the acceptance by the parties of the integrated nature of building and the indivisibility of the watertightness issues affecting the entire building.

The majority did acknowledge that, "if the residential component is more than incidental to the commercial component and is a substantial component in its own right, different questions may arise and it is possible that the *Hamlin* duty may then be imposed". On the face of it, the approach taken by the majority is fraught with difficulties. There is the obvious problem of determining the point at which a residential component in a development constitutes the "substantial component" which will trigger a duty arising and the uncertainty this introduces to the consideration.

More crucially though, denying the Council's liability to residential home owners in the context of mixed-use developments on the basis that the proportion of residential accommodation has not reached the undefined threshold which makes it a "substantial component" has the effect of making the existence of a duty conditional upon arbitrary or variable factors. To that extent the reasoning of the majority would appear to run counter to the rationale of the *Hamlin* duty as explained by the Supreme Court in *North Shore City Council v Body Corporate 188529 (Sunset Terraces) [2011] 2 NZLR 289.*

In the writer's view, the approach taken by Harrison J dissenting on this issue is to be preferred. The learned judge considered that the articulation of the *Hamlin* duty by the Supreme Court in *Sunset Terraces* was absolute and did not allow for exceptions. Consequently, Harrison J concluded that the fact that the residential properties were within the same structure as commercial properties, that the building as whole was predominantly commercial in nature, and that the Council performed its statutory functions in relation to the building as a whole, could not operate individually or collectively at a policy level to displace the Council's liability to the apartment owners. Adopting Harrison J's approach may require some modification to the "bright line" test articulated in *Sunset Terraces* and there may be practical implications in finding a duty owed to just the residential owners in a mixed-use development. However, these difficulties are not insurmountable. As Harrison J pointed out, the division of ownership does not affect the ability to carry out the physical repair or maintenance, it will simply need to be reflected in the allocation of loss.

Mike French is the Director of Undergraduate Programmes for the AUT Law School.

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