THE CONSEQUENCES OF NON-COMPLIANCE WITH PROCEDURAL AND FORMAL RULES

I. INTRODUCTION

In four recent decisions of the New Zealand Courts the question of the effect of non-compliance with legislative procedural and formal rules has arisen.[1] This subject is one on which the authorities present an unclear picture. Indeed, the late Professor S. A. de Smith commented that this part of the law "resembles an inextricable tangle of loose ends".[2] In what circumstances will breach of procedural provisions invalidate action taken, and when will breach be overlooked? Any attempt to answer this question in general terms seems doomed to failure, for in each case the court's task is to examine the particular requirement which has not been complied with, in the context of its unique legislative setting. It seems possible to distinguish at least four factors which militate against the existence of clear-cut, readily ascertainable, and universally applicable criteria for determining the effect of non-compliance.

(a) There is a wide range of bodies — for instance courts, administrative tribunals, registrars, local authorities, trustees, litigants — which are required to adhere to legislative procedural requirements in the performance of at least some of their activities. The roles performed by these bodies are equally wide-ranging. That of, for instance, a district legal aid committee investigating an application for legal aid, is qualitatively different from that of a municipal corporation exercising its by-law making powers. This difference in roles is reflected in their dissimilar procedural requirements.

(b) The import of procedural rules is also diverse. Thus, a requirement that an inquiry be held prior to committal for trial on a criminal charge is of a different order from a requirement relating to some particular aspect of that preliminary inquiry, for instance, that the defendant have the charge read to him and be asked to plead to it.

(c) It is well-established at common law that some requirements may be waived by the parties, whereas others will not be susceptible to waiver.

(d) In many enactments the legislative intention is made explicit, it being expressly provided that non-compliance with procedural requirements may be ignored or cured, or that compliance may be waived.

Matters are made worse by the fact that the courts themselves have done little to dispel the confusion which afflicts this area of the law.

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1. *Transport Ministry* v. *Picton Carriers Ltd.* [1973] 1 N.Z.L.R. 353 (S.C.); *Re Wellington Central Election Petition, Shand* v. *Comber* [1973] 2 N.Z.L.R. 470 (F.C.); *R* v. *Kestle* [1973] 2 N.Z.L.R. 606 (C.A.); *Transport Ministry* v. *Hamill* [1973] 2 N.Z.L.R. 663 (C.A.).
2. *Judicial Review of Administrative Action* (3rd ed. 1973) 122.

The effects of disregard of procedural rules are frequently analysed in terms of the so called "mandatory-directory" distinction: failure to comply with a mandatory requirement invalidates the action, while disregard of a directory requirement does not usually vitiate it. The confusion could, it is submitted, be dissipated if the courts ceased to categorize provisions in terms of this distinction. An alternative approach, based on the weighing and balancing of various factors, which is suggested by the recent decision of the Full Court,[3] appears to offer clearer guide-lines for dealing with cases of non-adherence to procedural rules, and this will be expounded. Although, for the reasons already mentioned, anything approaching complete clarity seems a forlorn hope and universally applicable standards do not appear attainable, it may be possible to indicate what the consequences of non-compliance are likely to be in particular circumstances.

In the final part of this paper a few of the problems which have arisen in the interpretation of selected statutory curative provisions will be discussed.

II. A CRITIQUE OF THE MANDATORY-DIRECTORY CLASSIFICATION

In one of the leading cases on the subject[4] Lord Penzance said:

> Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster . . . A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be . . . directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail.

This passage has often been approved.[5] But the dictum gives no assistance in determining whether any particular provision is imperative or merely directory. It sets out only the consequences once that determination has been reached. So the question arises: in what circumstances will a provision be construed as mandatory, and in what circumstances as directory? In answering this question the court's enquiry is directed towards ascertaining the intention of the legislature. But one of the confusing aspects of the mandatory-directory classification stems from the fact that there is no single formula for ascertaining what the

3. In *Re Wellington Central Election Petition, Shand* v. *Comber* [1973] 2 N.Z.L.R. 470.
4. *Howard* v. *Bodington* (1877) 2 P.D. 203, 210.
5. For instance, per Richmond J. in *Transport Ministry* v. *Hamill* [1973] 2 N.Z.L.R. 663, 666; and per Lord Denning M.R. in *Howard* v. *Secretary of State for the Environment* [1974] 1 All E.R. 644, 647.

legislature intended. This has led the courts to take divergent paths in the interpretation of requirements as mandatory or directory. And these different ways of dealing with the problem have generated some confusion. There is, moreover, a second source of confusion. Although Lord Penzance said that disregard of a mandatory provision would render the proceedings void, and non-compliance with a directory requirement would not, the courts have never, in practice, drawn such a sharp distinction between the two categories to the extent that it auomatically follows from disregard of a mandatory requirement that the proceedings are nullified, or that disregard of a direction leaves them intact.

The Full Supreme Court of Queensland recently remarked that the decisions of the mandatory-directory categorization "are confusing and to some extent apparently inconsistent".[6] This may be attributed to the two causes just referred to: first, the varying approaches which the courts have taken in the classification of particular provisions and secondly, the blurring of the distinction with respect to the consequences of each. These aspects will be discussed in turn.

A. The Varying Approaches Taken by the Courts in Classifying Provisions as Mandatory or as Directory

Essentially, the task of a court confronted with the problem of classifying a provision as mandatory or directory is to ascertain how important that provision is in relation to the objects of the legislation. Is it so important that it must not be disregarded? But, behind this fairly simple statement of the court's task there exist complex divergencies in the ways it may be examined. It seems possible to distinguish five approaches which the courts regularly adopt.

1. The wording of the requirement

On first learning that the courts have drawn a distinction between provisions which are termed, respectively, "mandatory" and "directory", one would naturally assume that the distinction was based on differences in terminology, and that directory provisions were expressed in less forceful or imperative language than mandatory ones. This assumption would be reinforced by dicta to the effect that directory provisions are only "informative"[7] or are "mere advisory directions"[8] or "simple counsels of perfection".[9] It is true that in some cases one need go no further than the actual wording used. Thus, the language of the provision in question may be contrasted with that used in related procedural provisions or in earlier enactments dealing with the same

6. *Plastic Enterprises Ltd.* v. *Southern Cross Assurance Co.* [1968] Qd. R. 401, 404.
7. Per Lord Denning M.R. in *Howard* v. *Secretary of State* [1974] 1 All E.R. 644, 647.
8. *Plastic Enterprises* case, at 406.
9. Per Bowen L.J. in *R* v. *London Justices and L.C.C.* [1893] 2 Q.B. 476, 491.

subject matter. For instance, under the Transport (Breath Tests) Notice 1969 several steps had been prescribed in the taking of breath samples. In the first three steps the word "shall" was used, but the terminology of the fourth step was: "As far as possible, this should be done . . . " So the Court of Appeal had little hesitation in construing this fourth step, which had not been strictly complied with, as directory only.[10] However, only seldom is it possible to draw a distinction between mandatory and directory provisions solely by virtue of the terminology used. Many a procedural provision is expressed in obligatory language, but this "does not necessarily mean that it is mandatory, in the meaning of that word as contrasted with directory".[11]

2. The purpose of the particular provision in the context of the legislation

Lord Penzance has said:[12]

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

In considering a procedural requirement from this angle, a court is likely to construe it as mandatory if it seems to be of particular importance in the context of the enactment, or if it is one of a series of detailed steps, perhaps in legislation which has created a novel jurisdiction,[13] or if non-compliance might have penal consequences for one of the parties. A recent decision of the Court of Appeal illustrates all these points.[14] There the question arose as to the interpretation of ss. 47 and 48 of the Transport Act 1962 (ss. 44 to 51 of which deal with the "demerit points" system), which impose on the Secretary of Transport certain duties which he is required to perform at successive stages in the build-up of demerit points against the record of any driver. Under s. 47(1) the Secretary must notify the individual concerned when his total demerit points reach sixty to seventy-five. This is to inform him both of the number recorded and of the consequences of more points being accumulated. Section 47(2) provides that when the person's total reaches between seventy-five and one hundred points, the Secretary is to send him a notice requiring him to attend before a traffic officer for an interview, with the object of assisting him to improve his

10. *Simpson* v. *Police* [1971] N.Z.L.R. 393.
11. Per Stanton and Hutchison JJ in *Simpson* v. *Attorney-General* [1955] N.Z.L.R. 271, 281.
12. *Howard* v. *Bodington* (1877) 2 P.D. 203, 211.
13. This type of legislation will usually be strictly construed: *Warwick* v. *White* (1722) Bunb. 106; 145 E.R. 612.
14. *Transport Ministry* v. *Hamill* [1973] 2 N.Z.L.R. 663. See also, *Scurr* v. *Brisbane C.C.* (1973) 1 A.L.R. 420.

driving habits and his knowledge of traffic laws. The respondent, Hamill, was given the notice required by s. 47(1) but subsequently, when his demerit points increased to a figure between seventy-five and one hundred, he was not given the second notice as required by s. 47(2). Eventually, his points totalled 115, and he was given a notice purporting to suspend his licence. He sought a declaration that the suspension was invalid and, at first instance, this was granted. On appeal by the Secretary, Lord Penzance's criteria were applied. Richmond J. (delivering the judgment of the Court) pointed out that the Transport Act had prescribed a series of steps to be followed in temporal succession, and went on to say that s. 48 "gives teeth to the demerit points system by providing drivers . . . a motive to avoid a further build-up of demerit points".[15] The deterrent object of s. 48 could best be achieved by giving the notices under s. 47, for this would ensure that convicted drivers were both aware of the operational details of the system, and receptive to the warning (under s. 47(1)) and the instruction (under s. 47(2)). Accordingly, it was held that the provisions of s. 47 were mandatory. Compliance with them was a prerequisite for valid suspension or disqualification under s. 48. This result was supported "by the fact that s. 48 is a penal provision which interferes with the liberty of the subject".[16]

The converse situation — of a requirement being held directory on the ground that it is of relatively minor importance — is exemplified in a decision of the English Court of Appeal.[17] After the determination of an appeal by taxation commissioners, the appellant, if dissatisfied with that determination, could "[i]mmediately" declare his dissatisfaction to them and, having done this, could require them to state a case for the opinion of the High Court. In the instant case, a period of thirteen days had elapsed from the determination of the appeal to the giving of the notice of dissatisfaction. Was the requirement as to immediacy mandatory or directory? Salmon L.J. (with whom the other members of the Court agreed) thought that this requirement was "of no discernible material importance" to the subject-matter of the legislation and, accordingly, it was held to be merely directory.[18] Non-compliance with it could not deprive the appellant of his right to come before the High Court by way of case stated.

3. **The consequences, particularly to the community at large, of classifying a provision as mandatory or as directory**

A third approach has been to look at the consequences of non-compliance.[19] Accordingly, when statutory provisions relate to the performance of a public duty, and if to hold null and void acts done in neglect of this duty would work serious public inconvenience, or

15. Ibid., 667.
16. Ibid., 668.
17. *R* v. *Inspector of Taxes, Ex parte Clarke* [1974] 1 Q.B. 220.
18. Ibid., 228.
19. See, especially per Denman J. in *Caldow* v. *Pixell* (1877) 2 C.P.D. 562, 566.

injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, the courts have usually held the provisions to be directory only. This was stated in a leading case,[20] where a sheriff had not complied with a requirement to revise annually the list of jurors for civil actions. The Privy Council noted that great inconvenience would ensue if it were held that non-compliance made the verdicts of all juries taken from the unrevised list null and void. Moreover, a directory interpretation was consistent with the objects of the Act.

The possibility of public inconvenience may also be a factor in influencing the court to construe a requirement as mandatory, for one of the factors which was taken into account in construing as mandatory a time requirement relating to the service of an election petition was that

> It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.[21]

Also coming under this head are cases where the court has taken into account the practical inconvenience of holding a requirement to be mandatory. The case under the breath test legislation has already been referred to. There, the requirement was that the subject being tested had to blow through the mouthpiece of the testing apparatus until it inflated, and, as far as possible, "this should be done in one single breath in 10 to 20 seconds". Richmond J. based his decision on an alternative ground to that already discussed. He said:[22]

> Apart from the language difference, I am reinforced in that view by a consideration of the practical problems which could otherwise arise. How could it be shown as a matter of proof to a nicety whether a particular person being tested had done what was possible, so far as he was concerned, if in a given case for example he took 25 seconds instead of 20 to inflate the bag?

Thus, practical convenience afforded a second reason for construing the requirement as directory only.

4. The impact on the interests of the individual

A procedural provision which is an important safeguard to the rights or interests of individuals is likely to receive a mandatory construction, and strict compliance will be necessary.[23]

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20. *Montreal Street Railway* v. *Normandin* [1917] A.C. 170, 175. Two other important cases on this approach are *Simpson* v. *Attorney-General* [1955] N.Z.L.R. 271 (S.C. and C.A.), and *Clayton* v. *Heffron* (1960) 105 C.L.R. 214.
21. *Nair* v. *Teik* [1967] 2 A.C. 31, 45 (P.C.).
22. *Simpson* v. *Police* [1971] N.Z.L.R. 393, 399. Neither North P. nor Turner J. referred to this ground.
23. See, especially, *Marshall* v. *Presbyterian Social Service Association (Inc.)* [1969] N.Z.L.R. 604, a difficult case involving proprietary rights.

In one English decision[24] the defendant local education authority, on ceasing to maintain several schools, submitted its proposals to the Minister but did not comply with a requirement to advertise them in order to give individuals the opportunity to submit objections to the Minister. The Court of Appeal construed the requirement as mandatory. Danckwerts L.J. said[25]

> in cases of this kind, it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.

Similar considerations apply to notifications of rights of appeal.[26]

5. Interpretation of technicalities

Although there are dicta[27] which favour strict adherence to procedural formalities, the present tendency seems to move away from strict exaction of compliance with them[28]. This has led the courts more readily to construe them as directory. In one case[29] a town planning application contained defects, and these were reproduced in public notifications. The upshot was that a number of people were left unaware of the application and so had no opportunity to present their objections. Having noted the individual's "fundamental" right to object, Roper J. continued[30]

> but I think it is equally important that the implementation of meritorious proposals should not be frustrated by an unduly strict and rigid adherence to formalities.

Accordingly, the requirement was interpreted as directory only. (However, since this was a case where substantial compliance was required, but had not been achieved, the proceedings were invalid).

There is such considerable overlap between these five different approaches and their differences may have been exaggerated. But in an area of the law remarkable for its intractability, it is, perhaps, conducive to greater clarity to overstate rather than to risk understating the differences in approach adopted by the courts.

One reason for the confusion surrounding the mandatory-directory classification is that a line taken in one case will not necessarily be taken in another of a prima facie similar nature.

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24. *Bradbury* v. *Enfield L.B.C.* [1967] 1 W.L.R. 1311.
25. Ibid., 1325.
26. *Agricultural, Horticultural and Forestry Industry Training Board* v. *Kent* [1970] 2 Q.B. 19 (C.A.).
27. E.g., per Viscount Simonds in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.* [1957] A.C. 223, 233 (H.L.).
28. See dicta of Singleton L.J. in *Finnegan* v. *Cementation Co.* [1953] 1 Q.B. 688, 699, and of Lord Denning M.R. in *Munnich* v. *Godstone R.D.C.* [1966] 1 W.L.R. 427, 435.
29. *Godber* v. *Wellington City Council* [1971] N.Z.L.R. 184.
30. Ibid., 191.

For instance, *Godber* v. *Wellington City Corporation*[31] and *Scurr* v. *Brisbane City Council*[32] may be constrasted. In each case, there had been non-compliance with a requirement to advertise particulars of town planning applications. The requirement was held directory in the former case, and mandatory in the latter. These conflicting interpretations may be attributed to the different approaches taken by the respective Courts. Roper J. emphasized what he considered to be the technical nature of the requirement, and this influenced him to place a directory construction on it. The High Court, on the other hand, laid stress on the importance of the provision in relation to the general objects of the legislation.

In *Montreal Street Railway* v. *Normandin*[33] the requirement was construed as directory, principally on the reasoning that public inconvenience would otherwise result. By contrast, in *Bradbury* v. *Enfield London Borough Council*[34] the Court rejected the defendant's submission that chaos would ensue from a mandatory interpretation and that, therefore, it should be taken as directory. "Even if chaos should result," said Lord Denning M.R., "still the law must be obeyed."[35] The Court was here concerned to ensure that valuable procedural safeguards to citizens' rights were observed.

These two examples of cases in which approaches which appear to be at variance with each other have been taken, illustrate one aspect of the confusion which permeates the mandatory-directory classification. For it is difficult to predict which view will be favoured by the court in a particular case. Part of the trouble seems to arise from the fact that the courts are working in the dark. Although, superficially, the effects of non-compliance are dealt with in terms of the mandatory-directory classification, the courts really seem to be engaging in a process of weighing and balancing various factors — such as public inconvenience, the importance of the provision as a safeguard, the technical nature either of the breach or of the requirement itself, and so forth. If this is so, then nothing seems to be gained by using the mandatory-directory classification.

B. The Blurred Nature of the Mandatory-Directory "Distinction"

The second cause of the confusion and inconsistency which afflicts the mandatory-directory classification arises from the failure of the courts to subscribe to Lord Penzance's statement that non-compliance with a mandatory provision invalidated the proceedings, while non-compliance with a directory one meant that the subsequent proceedings did not fail.[36] But, in actual fact, there is no such sharp distinction between mandatory and directory provisions that it automatically

31. See n. 29.
32. (1973) 1 A.L.R. 420.
33. See n. 20.
34. [1967] 1 W.L.R. 1311.
35. Ibid., 1324.
36. See n. 4.

follows that non-compliance with a mandatory provision renders the proceedings invalid, or that non-compliance with a directory provision leaves them intact. Breach of a directory provision may cause a nullity, either if the non-compliance prejudiced (or may have prejudiced) an interested party, or if the non-compliance was substantial; and conversely, breach of a mandatory requirement may not invalidate the proceedings if it is possible to read into it an implied exception. These three situations are now discussed in turn.

1. Breach of a directory provision whereby prejudice can be shown to result, or might possibly result

In *Montreal Street Railway* v. *Normandin*, the Judicial Committee, having held that the provision was directory only, went on to say that if the appellant could have shown that he was prejudiced by the sheriff's non-compliance, a new trial would have been ordered.[37] It was envisaged that the onus would be upon the appellant to show that prejudice. But, on occasion, the courts have indicated that they are prepared to grant relief as a matter of discretion if it seems that prejudice *may* have resulted from non-compliance. Thus, Turner J. has stated that the court must be satisfied that the particular deviation from a directory provision which is a necessary step towards a conviction would not result in a reasonable possibility of a miscarriage of justice.[38] More recently, it has been held that a provision which was interpreted as giving a right to a social worker to be present at the sitting of a juvenile court was directory. However, since in the circumstances of the particular case, justice had not been seen to be done by the fact that the social worker was excluded from the court, the conviction against the appellant was quashed.[39]

From these decisions and dicta, it appears that even non-compliance with a directory provision may invalidate the proceedings, provided that the applicant for relief can show that he suffered prejudice, or if the court considers it possible that he may have done so.

2. The doctrine of substantial compliance with directory requirements

In some cases the courts have insisted that a breach of a directory provision will result in invalidation if the provision has not been substantially complied with.[40] But in what circumstances will substantial compliance be necessary? This question seems never to have been unequivocally answered by the courts. In one recent case it was said:[41]

37. [1917] A.C. 170, 176, 177. See also *Pope* v. *Clark* [1953] 2 All E.R. 704, 705 (Div. Ct.), and *Ex p. Tasker; Re Hannon* [1971] 1 N.S.W.L.R. 804, 810 and 816, where there are dicta to similar effect.
38. *Simpson* v. *Police* [1971] N.Z.L.R. 393, 398-399.
39. *R* v. *Southwark Juvenile Court, ex p. N.J.* [1973] 3 All E.R. 383 (Div. Ct.).
40. For instance, *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 733; *Simpson* v. *Police, supra.*
41. *Scurr* v. *Brisbane C.C.* (1973) 1 A.L.R. 420, 429, per Stephen J. Emphasis added.

> It is well established that a directory interpretation of a statutory requirement *still necessitates, as a condition of validity,* that there should be substantial compliance with the requirement.

This seems to indicate that substantial compliance with a directory provision is always necessary. On the other hand, the cases in which the provision in issue was held directory on the ground of public convenience appear to suggest otherwise. In the *Montreal Street Railway* case, for instance, the sheriff was required to carry out an *annual* revision of the jury list, but according to the evidence before the Judicial Committee, the requirements had for several years been neglected by the sheriff. There had been no revision at all, and old lists had been used.[42] So it is difficult to see how the sheriff could have "substantially" complied with the requirements on this evidence. Yet his neglect was not held to invalidate the many jury trials that had taken place.

A recent decision of the English Court of Appeal has thrown some doubt on the validity of the doctrine of substantial compliance.[43] A requirement to indicate, by notice in writing to the Secretary of State, the grounds of an appeal against an enforcement notice was held to be directory. The question which then arose was whether any grounds at all had to be stated in the notice of appeal. The Court held that no grounds need be stated. Lord Denning M.R. said:[44]

> Take first the requirement as to the "grounds" of appeal. The section is either imperative in requiring "the grounds" to be indicated, or it is not. That must mean all or none. I cannot see any justification for the view that it is imperative as to *one* ground and not imperative as to the rest.

Roskill L.J. also refused to countenance any such "intermediate view".[45] Although these dicta seem wide enough to cast doubt on the correctness of the substantial compliance doctrine, it should be noted that failure to comply with the requirement considered in this case would probably not prejudice the interests of individuals. It was simply a matter between the Secretary of State and the person appealing to him. There was no suggestion either that anyone else might be affected by non-compliance or that serious public inconvenience might result. Perhaps the courts will be more likely to insist upon substantial compliance if the requirement is one which affects the individual's interests. Thus, in the breath test case North P. appeared to accept the submission of the defendant that "having regard to the fact that this is a criminal case with serious consequences it was important that there should be clear evidence brought by the police to show that the provisions . . . were

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42. [1917] A.C. 170, 174.
43. *Howard* v. *Secretary of State for the Environment* [1974] 1 All E.R. 644.
44. Ibid., 648.
45. Ibid., 650; Stamp L.J. also concurred.

substantially complied with".[46] However, the fact remains that the situations in which substantial compliance is necessary have never been clearly formulated by the courts.

3. Where implied exceptions are read into mandatory requirements

So far, it has been argued that no clear-cut consequence necessarily follows from classifying a provision as directory; in principle, it always seems open to the court to hold that even though a provision is directory, it should have been complied with, and that failure to comply invalidates the proceedings. Conversely, non-compliance with a mandatory requirement does not necessarily invalidate the proceedings. Two types of situation may be distinguished. First, in some situations a mandatory requirement need not be obeyed simply because it cannot be obeyed; it is inappropriate to the facts. In such cases no problems arise in terms of the consequences of "non-compliance"; if a requirement is inappropriate to the facts, it is scarcely meaningful to speak in terms either of compliance or of non-compliance with it. Secondly, the courts have sometimes read implied exceptions into mandatory requirements. In such cases the courts say, in effect, that although the requirement is mandatory, exceptional circumstances may permit non-compliance.

As an example of the first type of situation, the case under the demerit points legislation indicates factual circumstances where the legislation would be inappropriate. Even though the Court of Appeal held that the section requiring notification of demerit points was mandatory, it recognised that compliance with that section is not always a condition precedent to the validity of suspension or disqualification (under s. 48). As many as sixty demerit points could be scored for some offences and, therefore, a person's total might leap from say, forty to one hundred points without his qualifying for either of the notices under s. 47. In these circumstances, the requirement would be dispensed with.[47]

An example of the second type of situation is provided by an English case where ratepayers sought to appeal against a valuation made by an assessment committee.[48] The appeal was entered in due time to be heard at the February Quarter Sessions. There was a requirement that the Justices hold the assessment sessions "at any time after February 1 in the same year, which will enable them to determine all appeals before the ensuing March 31." Due to the pressure of business before the Court, the appeal could not be heard before March 31. Was the time provision mandatory or directory? The Divisional Court held

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46. *Simpson* v. *Police* [1971] N.Z.L.R. 393, 397.
47. [1973] 2 N.Z.L.R. 663, 667-668.
48. *R* v. *Justices of London and L.C.C.* [1893] 2 Q.B. 476 (Div. Ct. and C.A. The decision was affirmed by the H.L., but this part of it was not challenged there: [1894] A.C. 600). See also, per Menzies J. in *Clayton* v. *Heffron* (1960) 105 C.L.R. 214, 276-277.

that it was mandatory and that no rating appeals could be heard after March 31. In the Court of Appeal Lord Esher M.R. thought that the provision was mandatory but that it was subject to a "practical limitation",[49] this being that if the hearing was prevented only by problems facing the Court itself, then the appeal could be heard. Bowen L.J. took a similar view, finding that there was "an exception from the imperative language of the Act (which is intended to be imperative as regards the voluntary action of the parties, and of the Courts) where the block of business is such, or such events happen, that the Court cannot conclude its business before March 31."[50] Thus, although the requirement was mandatory, it was subject to an implied exception. This seems to be yet another instance where confusion has arisen from the mandatory-directory classification. The Court did not comply with a mandatory requirement to hear rating appeals by a certain date, and yet this non-compliance did not invalidate proceedings which were out of time. A clearer approach would be to treat the reason for non-compliance in this case (that is, pressure of court work) as a factor to be weighed and balanced, together with other factors, in deciding whether or not breach vitiates the proceedings. There appears to be no need to resort to the mandatory-directory classification.

C. Towards a Factorial Approach

In the preceding parts of this section the writer has attempted to make two points. In Part A it was argued that the varying approaches that have been adopted by the courts in classifying provisions as mandatory or as directory generate confusion and inconsistencies. In Part B it was seen that even when a provision is classified in terms of this dichotomy, uniform consequences do not necessarily follow, for it is not every non-compliance with a mandatory provision that causes the proceedings to be nullified and nor will non-adherence to a directory provision always leave them intact.

The distinction between Parts A and B itself highlights a further source of confusion. For the possibility of prejudice may be relevant both in deciding whether to classify a provision as mandatory or as directory[51] and in determining whether breach of a directory provision causes a nullity.[52] This problem could be avoided if the courts jettisoned the mandatory-directory classification lock, stock and barrel, and treated prejudice as a factor to be taken into account along with other factors in determining whether or not breach of a particular requirement caused a nullity.

That there is no compulsion on the courts to use the mandatory-directory classification is shown by a case which came before the Judicial Committee where there had been non-compliance with a

49. Ibid., 488.
50. Ibid., 493; Kay L.J. took the view that the provision was directory.
51. See n. 23.
52. See n. 37.

requirement that criminal proceedings be "carried on . . . in open court". It was held that although disregard of this provision would, prima facie, cause the impugned proceedings to be nullified, nevertheless, if it clearly appeared that there had been no miscarriage of justice, they might be allowed to stand.[53] Thus, the Judicial Committee was here prepared to take absence of prejudice to the accused into account as a factor militating against invalidation. Lord Atkin made no mention of the mandatory-directory classification in his judgment. It is submitted that this is a better approach.

The substantial compliance doctrine[54] also raises the question of the usefulness of classifying provisions as mandatory or directory. This is well-illustrated by a case before the High Court of Australia in which the defendant local body, required to advertise particulars of a planning application, did so in a misleading and inadequate fashion. The requirement was held to be mandatory, but in the circumstances Stephen J. could see no difference between a mandatory and a directory interpretation. He stated:[55]

> When the requirement is that "particulars of the application" should be given by public advertisement and when once it is accepted that there must be an advertisement which gives some such particulars, it is difficult to discern any distinction between a strict observance of this requirement, such as a mandatory interpretation would call for, and the substantial observance of it, as called for by a directory interpretation . . . The particulars of the advertisement will either be sufficient to effect the legislative purpose of giving notice to the public of the application or, if not, will not amount even to a substantial compliance with the statute.

Accordingly, whether the requirement was interpreted as mandatory or directory the result would be the same. Of course, this dictum is inapplicable to some other types of procedural provisions, such as time requirements, and Stephen J. recognised this in his judgment. Nevertheless, it would seem to be applicable to many other procedural requirements, for instance, to give grounds of objection under planning legislation,[56] or to advertise particulars of a charitable scheme,[57] or to give a notice specifying defaults complained of.[58] If it is assumed that a directory provision must be substantially complied with, then the mandatory-directory "distinction" is blurred in relation to such requirements as these. There seems to be no point in analysing non-compliance with them in terms of this classification, for whether mandatory or directory the consequences of non-compliance will be the same — nullity.

53. *Mahlikilili Dhalamini* v. *The King* [1942] A.C. 583 (where the proceedings were actually nullified).
54. See n. 40.
55. *Scurr* v. *Brisbane C.C.* (1973) 1 A.L.R. 420, 429-430. Stephen J.'s judgment was concurred in by the other members of the Court.
56. See Town and Country Planning Act 1953, s. 23.
57. See Charitable Trusts Act 1957, s. 36(2).
58. See Property Law Act 1952, s. 92(1).

Although the substantial compliance principle gives the courts some flexibility in determining the consequences of non-compliance with directory provisions, there is no corresponding flexibility with regard to mandatory provisions. Subject both to any implied exception that may be read into a mandatory requirement and to the possibility that it may be waived,[59] breach always results in nullification. This is so no matter how minor or excusable the breach. Bodies which have committed trivial or faultless breaches will be deterred from seeking to uphold the validity of their actions in the courts. A better approach would be to hold that the trivial nature of the breach is a factor which tells in favour of leaving the proceedings intact. Again, there seems no need to resort to the mandatory-directory classification.

The unsatisfactory nature of the mandatory-directory categorization raises the question whether a more useful and less obscure manner of analysing non-adherence to procedural provisions can be formulated. At several points throughout this part it has been suggested that a clearer approach might be one whereby the various competing factors are weighed and balanced against each other. What is wanted is an approach which provides a combination of flexibility and certainty. The factorial approach appears to give a reasonable measure of each and it will now be further discussed.

III. THE ALTERNATIVE APPROACH BASED ON THE BALANCING OF FACTORS

Two questions will be considered. First, on what basis are the courts entitled to disregard non-compliance under the factorial approach? And secondly, what are the relevant factors in determining whether non-compliance should be disregarded or whether it causes a nullity?

A. The Basis of the Factorial Approach

Some judges have expressed doubts on the validity of the mandatory-directory classification.[60] But if it is to be discarded the problem arises as to the basis of a court's power to excuse non-compliance. This problem does not arise when non-compliance is analysed in terms of the mandatory-directory classification because, by definition, a directory provision need not be strictly adhered to. However, more difficulty arises in determining the basis upon which the courts are entitled to disregard non-compliance, when a factorial approach is adopted. Reviewing courts do not appear to possess an inherent power to excuse non-compliance with procedural provisions.

59. In *Reckitt & Colman* v. *Taxation Board of Review* [1966] N.Z.L.R. 1032, both North P. (at 1037) and Turner J. (at 1040) considered that a mandatory provision could be waived.
60. See Bowen L.J. in the *London Justices* case [1893] 2 Q.B. 476, 491; (1893) 63 L.J.Q.B. 148, 155; he is slightly misreported in the *Law Reports*. See also, Middleton J. in *R* v. *McDevitt* (1917) 28 Can. Cr. Cas. 352, 354-355.

An answer to this problem is indicated by the *London Justices* case;[61] there the majority (Lord Esher M.R. and Bowen L.J.) in the Court of Appeal read into the requirement an implied exception which accorded with the legislative intention. Similarly, the factorial approach may be based upon the interpretation of implied exceptions in the legislation. For example, in a particular set of circumstances it may be held that, because great public inconvenience would result if disregard of some provision was held to cause a nullity, the legislature must have intended that that breach could be excused. In another set of circumstances, involving the same provision, public inconvenience might not be caused by a decision that non-compliance invalidated the proceedings and, accordingly, no implied exception may be applicable. This view appears to be supported by the speech of Lord Diplock in *Kammins Ballrooms (Torquay) Co.* v. *Zenith Investments Ltd.*[62] There, the issue was whether the Court could entertain an application by a tenant before the prescribed time. The relevant provision read (in part):

> No application . . . shall be entertained unless it is made not less than two nor more than four months . . . after the making of the tenant's request for a new tenancy.

The application which was the subject of the litigation had been made less than two months after the tenant's request. The tenant submitted that the landlord had waived this statutory condition. On the assumption that it had been waived, could the Court go ahead and entertain the tenant's application? By a majority,[63] the House of Lords held that it had power to do so. Lords Reid, Morris and Pearson each took what McCarthy J. in an earlier New Zealand case had described as the "conventional route",[64] drawing a distinction between requirements regulating the rights and obligations between private litigants, and requirements which had been enacted for the public benefit. A person for whose sole benefit a requirement of the former type had been enacted could waive it. If waived, it did not go to the Court's jurisdiction but was purely procedural. Lord Diplock's approach, on the other hand, is more fundamental than this. He explored the circumstances in which it was possible to disregard the literal language of an unequivocally expressed requirement. Adopting a purposive approach, he investigated the purpose and policy of the legislation. On this basis, he was able to read an implied exception into the requirement, this being "that it can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words".[65] Thus, although Lord Diplock came to the same conclusion on this aspect of the case as the majority, he did so by a different route. He pointed out that if statutory procedural pro-

61. See n. 48.
62. [1971] A.C. 850.
63. Viscount Dilhorne dissenting.
64. *Reckitt & Colman* v. *Taxation Board of Review* [1966] N.Z.L.R. 1032, 1046.
65. [1971] A.C. 850, 881.

visions which impose a prohibition in themselves contain no indication that an exception to the prohibition was intended, then[66]

> It is . . . impossible to arrive at the terms of the relevant exception by the literal approach. This can be done only by the purposive approach, viz., imputing to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention.

It is, therefore, possible to read procedural requirements subject to implied exceptions where this seems to be demanded by the purpose of the statute. Thus, non-compliance may cause a nullity in some cases but not if it is possible to imply an exception to the unequivocal language of the provision. It may, perhaps, be contended that if an exception is implied it becomes inappropriate to speak in terms of either compliance or non-compliance; the occasion for either, it may be said, never arises. However, this overlooks the point that, in practice, before a court could say whether the implied exception was applicable it would first have to determine the nature of the non-compliance.

In this section a possible foundation for the factorial approach has been outlined: the courts may read implied exceptions into procedural provisions and whether this is done in a particular case depends upon the presence of various factors.

B. The Concept of a Nullity and Factors which the Courts Take Into Account

Generally, it will be unclear from the particular legislation itself whether deviance from its procedural provisions causes a nullity or merely an irregularity. Some courts have attempted to lay down guidelines as to when non-compliance results in nullity. A dictum of Lindley L.J.[67] is frequently cited:

> I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls . . .

Sir George Baker P., on the other hand, recently said that he found it impossible to discover any clear and logical principle from the decisions on this question, but, on reviewing the authorities, he outlined four sets of circumstances which, in the context of a matrimonial proceedings case, could give rise to a nullity. In brief, these are: (i) where the statute so provides, (ii) where there has been a complete lack of jurisdiction, (iii) where the irregularity is such that it undermines the

66. Ibid., 881. In *Public Prosecutor* v. *Teng* [1973] A.C. 846, the P.C. declined to read an "implied reservation" into a requirement that there be a preliminary inquiry prior to committal for trial, on the ground that it provided valuable safeguards for a defendant.

67. *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 398.

adversary procedure for the entire proceedings, and (iv) where there has been a failure to comply with a statutory requirement which is a condition precedent to the right to a decree.[68] Sir George Baker P. conceded that his fourth category was "controversial" and, with respect, it is best discarded. The terminology of "condition precedent" and "condition subsequent" is ambiguous. It is often employed in the context of inquiries as to whether the tribunal whose actions are under review had jurisdiction to determine a matter. It has jurisdiction only if it has complied with all "conditions precedent" to that jurisdiction. But, since the jurisdiction aspect is already covered in his Lordship's second category, he was probably not using the terminology in this sense. It seems more likely that "condition precedent", as used in the fourth category, is of equivalent meaning to "mandatory requirement"[69] and, if so, it is subject to all the concomitant confusions.

At least three other tests to determine what type of procedural error constitutes a nullity have been suggested.

Lord Goddard has said that "one test is to inquire whether the irregularity has caused a failure of natural justice".[70] It is, however, open to doubt whether this suggested test is still good law, for it is now clear that failure to observe the rules of natural justice does not render a decision, order or report absolutely void in the sense that it is a nullity.[71] Nevertheless, Lord Goddard's test still provides a guideline.

Lord Denning has suggested that a useful test was to ask whether one party, having taken some fresh step after knowledge of the flaw could, in justice, afterwards complain of it.[72]

A third possible criterion — applicable to judicial tribunals — is to ask whether the non-compliance relates to a matter of procedure or to a matter of jurisdiction. According to this view, non-compliance with a procedural requirement can never cause a nullity; it is only jurisdictional errors that are capable of invalidating the proceedings.[73]

The question also arose in the recent decision of the Full Court in *Re Wellington Central Election Petition, Shand* v. *Comber*,[74] a decision which also involved the exercise of the Court's discretionary powers under r. 599 of the Code of Civil Procedure. The petitioner, an unsuccessful candidate in the 1972 General Election, complained that

68. *Dryden* v. *Dryden* [1973] Fam. 217, 236-237.
69. These two expressions were treated as synonymous in *R* v. *Freeman* [1955] N.Z.L.R. 718, 728 (C.A.).
70. *Marsh* v. *Marsh* [1945] A.C. 271, 284 (P.C.).
71. Per Lord Denning M.R. in *Secretary of State for Trade* v. *Hoffman-La Roche* [1973] 3 All E.R. 945, 953; see also *Durayappah* v. *Fernando* [1967] 2 A.C. 337.
72. *Macfoy* v. *United Africa Co.* [1962] A.C. 152, 160.
73. *Posner* v. *Collector for Inter-State Destitute Persons* (1946) 74 C.L.R. 461; but the proceedings might also be set aside, *ex debito justitiae:* per Starke J. at 477.
74. [1973] 2 N.Z.L.R. 470.

numerous votes had been wrongly disallowed, but in his original petition, which was filed in time, he did not join the Returning Officer or the Registrar of Electors as was required by s. 156(2) of the Electoral Act 1956. The petitioner subsequently filed a notice of motion for an order that the Returning Officer and the Registrar be joined as respondents, and he also sought amendments to his petition. Could the Court grant the relief sought? Cooke J. delivering the judgment of the Court, said:[75]

> This turns on whether the petition is a nullity or whether there has been no more than an irregularity which could be waived or if appropriate cured.

The Court held that there had been no more than an irregularity, primarily on the ground that "nullity or not is partly a question of degree" and the failure here was not very serious since the successful candidate had been served in time and the officers would not object to being joined. Having decided that it had power under the ordinary rules of the Supreme Court (in particular rule 599) to excuse the irregularity the Court turned to the "crucial" question, that is, whether its discretion should be exercised in the petitioner's favour. It is of some importance that one of the factors taken into account by the Court in deciding this, was the need for a speedy determination of an election petition. This was one of the factors which had influenced the Judicial Committee in an earlier case[76] to hold that the rule under consideration there was mandatory. Thus, the Full Court's judgment indicates that public convenience can be taken into consideration under the factorial approach to the question of the effects of non-compliance. For it is treated as a factor to be weighed by the Court in deciding whether to exercise its discretion in favour of one of the parties. A second factor which influenced the Court not to cure the irregularity was that the petitioner had not shown that he had a reasonable chance of success. And thirdly, he was, in effect, attempting to set up a new case. These three factors "far outweighed" two other points which "could be urged in favour of granting the indulgence sought", namely, that the non-compliance resulted from a bona fide mistake on a debatable point of statutory interpretation, and that the officers did not object to being joined.

This decision exemplifies the approach which has been proposed, an approach based on the weighing and balancing of competing factors. What are these factors? At this point it may be possible to formulate a list of those factors which are commonly taken into account by the courts (whether under the mandatory-directory classification or under the factorial approach itself). The factors may be divided into two groups, first, those which will tend to cause a nullity and secondly, those which will influence the court to read an implied exception into the requirement so that the proceedings do not fail.

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75. Ibid., 474.
76. *Nair* v. *Teik* [1967] 2 A.C. 31, 44-45.

1. **Factors tending to cause a nullity**

(i) Where the statute expressly provides.

(ii) Where there has been non-compliance with a jurisdictional requirement.

(iii) Where there has been a failure of natural justice, for instance, where the irregularity undermines the adversary procedure.[77]

(iv) Where, in criminal cases, there is a reasonable possibility of a miscarriage of justice. A fortiori, if prejudice is actually shown.[78]

(v) Where the requirement is a valuable safeguard to the individual's rights.[79] This factor will carry considerable weight in criminal cases.[80]

(vi) Where the individual does not suffer injustice, but is, nevertheless, inconvenienced by the non-compliance.[81]

(vii) Where public inconvenience would (or might) result from upholding the proceedings.[82]

(viii) Where, in litigation, the applicant cannot show that he has a reasonable chance of success if his non-compliance is excused.[83]

(ix) Where the objects of the provision would be thwarted if non-compliance was excused.[84] This factor may overlap with several of the other factors.

2. **Factors which may lead the Court to read an implied exception into the requirement**

(i) Where the applicant for relief has suffered no prejudice of any kind.

(ii) Where the applicant has taken some fresh step after knowledge of the non-compliance.[85]

(iii) Where practical problems could arise from holding that non-compliance vitiated the proceedings.[86]

(iv) Where substantial public inconvenience would otherwise result.[87]

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77. *Marsh* v. *Marsh* [1945] 2 A.C. 271.
78. *Simpson* v. *Police* [1971] N.Z.L.R. 393, 398 per Turner J., and *Montreal Street Railway* v. *Normandin* [1917] A.C. 170, 176-177.
79. *Bradbury* v. *Enfield L.B.C.* [1967] 1 W.L.R. 1311.
80. *Public Prosecutor* v. *Teng* [1973] A.C. 846, 851, 853.
81. *Kingstone Tyre Agency P./Ltd.* v. *Blackmore* [1970] V.R. 625, 640 (dicta).
82. *Re Wellington Central Election Petition* [1973] 2 N.Z.L.R. 470, 477-478, and *Nair* v. *Teik* [1967] 2 A.C. 31, 44-45.
83. *Wellington Central* case, at 478.
84. *Ministry of Transport* v. *Hamill* [1973] 2 N.Z.L.R. 663.
85. *Macfoy* v. *United Africa Co.* [1962] A.C. 152, 160.
86. *Simpson* v. *Police* [1971] N.Z.L.R. 393, 399 per Richmond J., and *P* v. *P* [1971] P. 217.
87. *Montreal Street Railway* v. *Normandin* [1917] A.C. 170, and *Simpson* v. *Attorney-General* [1955] N.Z.L.R. 271.

(v) Where it is factually impossible to comply.[88]

(vi) Where there are hardships which, while not making it impossible or impracticable to comply, nevertheless, would make compliance more difficult.[89]

(vii) Where the non-compliance is due to the default of someone over whom the applicant had no control (particularly, judicial officers).[90]

(viii) Where the non-compliance resulted from a bona fide mistake of law.[91]

(ix) Where innocent third parties have acquired rights as a result of the proceedings which are impugned.[92]

(x) Where the non-compliance is highly technical.[93]

These lists appear to contain the most important factors.

IV. LEGISLATIVE CURATIVE PROVISONS AND SOME PROBLEMS WHICH HAVE ARISEN IN THEIR INTERPRETATION

The factors just listed may not be applicable where the legislature has expressly provided that disregard of procedural provisions may be cured, overlooked or waived.[94]

One such curative provision (r. 599 of the Code of Civil Procedure) has been mentioned already in connection with the *Wellington Central Election Petition* case.

The only generally applicable provision which exists is s. 5(i) of the Acts Interpretation Act 1924:

> (i) Wherever forms are prescribed, slight deviations therefrom, but to the same effect and not calculated to mislead, shall not vitiate them.

In the most recently reported decision under this provision it was held that the non-adherence by a controlling authority to a regulation prescribing the dimensions for weigh-bridge signs was not saved by it.[95] There was a deviation of about fifty per cent in length and height from the prescribed dimensions, and the authority "has no right to depart so drastically from the clearly prescribed dimensions."[96] Nobody had

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88. As in the hypothetical situation referred to in *Hamill's* case.
89. *R* v. *Funnell* (1973) 10 C.C.C. (2d) 445, 453 (dicta).
90. *R* v. *London Justices and L.C.C.* [1893] 2 Q.B. 476; *R* v. *Funnell* (1973) 10 C.C.C. (2d) 445 (where the cases are reviewed).
91. *Wellington Central* case, at 478.
92. *F* v. *F* [1971] P. 1.
93. *R* v. *Dacorum Gaming Licensing Committee, ex p. E.M.I. Cinemas and Leisure Ltd.* [1971] 3 All E.R. 666.
94. See K. J. Keith *A Code of Procedure for Administrative Tribunals?* (Legal Research Foundation, pamphlet no. 8), p. 40-41 for examples.
95. *Transport Ministry* v. *Picton Carriers Ltd.* [1973] 1 N.Z.L.R. 353.
96. Ibid., 356.

been misled by the fact that the sign was smaller than the prescribed dimensions. While there could be little doubt that a fifty per cent deviation is a drastic one, it is worth noting that s. 5(i) has always received a restrictive interpretation. In only one reported case has it been held to save an irregular form.[97] Indeed, in another case Cooper J. interpreted the word "slight" to mean "immaterial".[98] Edwards J. said that "the deviation must be so trifling as to leave the form in substance the form prescribed",[99] and Hoskings J. took the view that it saved only "trifling clerical errors" and compared it with the principle *de minimis non curat lex*.[100] These restrictive interpretations may, no doubt, be attributed to the presence of "slight" in the provision. Perhaps a case could be made out for the amendment of s. 5(i). The corresponding provisions in the Interpretation Acts of some Canadian jurisdictions do not contain this word or any language to similar effect:[101] this enables the courts to look at non-compliance in terms of whether it caused the applicant to be misled, rather than in terms of the magnitude of the error. If the defendant is not misled it seems unfortunate that he be able to escape conviction.

Most of the other legislative saving provisions relate to a particular court, tribunal or body.[102] Although there is no uniform terminology used in these provisions, one point in particular, has caused difficulty in the interpretation of most of them. This is the question whether those provisions whch are worded in such a way that their application is not confined simply to irregularities or slight deviations can operate to save what would otherwise be a nullity.

This question appears to have arisen most often in connection with r. 599 of the Code of Civil Procedure. This provides:

> Non-compliance with any of these rules shall not render the proceedings in which such non-compliance has occurred void, unless it is expressly so stated by these rules, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and in such terms as the Court or a Judge on any motion with reference to such non-compliance may deem just.

In the *Wellington Central Election Petition* case the Full Court, by implication, appears to have taken the view that the rule could save only irregularities, for otherwise there would have been no need to inquire whether the particular non-compliance caused a nullity. But in an earlier case F. B. Adams J. said that his impression was that there

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97. *R* v. *Habgood* [1934] N.Z.L.R. 73. Other cases under s. 5(i) are *R* v. *Smith* (1909) 29 N.Z.L.R. 244, and *Ryan* v. *Evans* [1946] N.Z.L.R. 75.
98. *R* v. *Haynes and Haynes* [1916] N.Z.L.R. 407, 418 (C.A.).
99. Ibid., 416.
100. Ibid., 421.
101. See Interpretation Act 1967-1968 (Can.) s. 26(5); The Interpretation Act (Alberta) s. 18(1)(g); The Interpretation Act (Ontario) s. 27(d). For an application of the Alberta provision, see *Melnychuk* v. *Heard* (1963) 45 W.W.R. 257.

could be no "nullity" where there was mere non-compliance with a rule unless there was an express provision to that effect or unless the Court, in its discretion, so decided.[103] Although the concept of a discretionary nullity seems odd, this appears to be what r. 599 envisages. So it is unfortunate that the decision of the Full Court has left the effect of the rule in doubt.

In this respect, the decision of the Court of Appeal in *R* v. *Kestle*,[104] which gave a very literal interpretation to a curative provision, may be contrasted with the rather non-literal approach taken in the *Wellington Central* case. The issue was whether a Magistrate had validly committed the appellant for trial in the Supreme Court, although he had omitted to ask him how he pleaded in accordance with s. 168 (1)(a) of the Summary Proceedings Act 1957. Section 204 of that Act provides (in part) that no order is to be held invalid by any Court "by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice". On the basis of several earlier decisions[105] in which it had been held that failure to comply with the requirements of s. 168 nullified the committal, the Court of Appeal might have been tempted to hold that the non-compliance in the instant case caused a nullity, and that s. 204 could not save the committal because there had been no "order". However, the Court could "see no reason why full effect should not be given to the ordinary and natural meaning of the language of s. 204"[106] and accordingly, dealt with the Magistrate's non-compliance as an "omission" which could be saved by the provision since there had been no miscarriage of justice. The earlier decisions were distinguished on the ground that s. 204 had not been enacted when they were decided. On this basis, it seems implicit in the Court's decision that, but for s. 204, the Magistrate's non-compliance with s. 168 would have caused a nullity. From this, it follows that s. 204 may be invoked to save what could otherwise be a nullity.

The interpretation placed on s. 204 is supported by that given to a similarly worded provision in a case which came before the Judicial Committee.[107] In holding that it was capable of excusing non-compliance with "essential requirements" their Lordships appear to have recognised

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102. See, for instance, Armed Forces Discipline Act 1971, s. 143; Police Act 1958, s. 62; Town and Country Planning Act 1953, s. 40(a); Inferior Courts Procedure Act 1909, s. 3. An important exception is s. 5 of the Judicature Amendment Act 1972.

103. *Johnstone* v. *Johnstone* [1950] N.Z.L.R. 1016, 1020; see also, *Bergman* v. *Bergman* [1968] N.Z.L.R. 1181. In *Re Pritchard (dec'd)* [1963] Ch. 502, the C.A. held that the corresponding provision in the English Rules would not save a nullity. This prompted an amendment so that "purported" proceedings, etc. would be covered by the provision.

104. [1973] 2 N.Z.L.R. 606.

105. *R* v. *Kohi Moka Wirori* (1911) 14 G.L.R. 129; *R* v. *Birmingham* (1912) 15 G.L.R. 168; *R* v. *Halkett* [1954] N.Z.L.R. 943.

106. [1973] 2 N.Z.L.R. 606, 609.

107. *Sameen* v. *Abeyewickrema* [1963] A.C. 597.

that such a provision could operate to save what would otherwise be a nullity.[108]

V. CONCLUSION

In this paper it has been suggested that the topic of non-compliance with procedural rules would be clarified if a different approach were taken by the courts. Accordingly, an approach based on the balancing of various competing factors has been proposed in preference to that now used. It involves reading exceptions into the unequivocal language of procedural requirements. For example, if prejudice would be caused to a party by non-compliance, no exception may be implied; but if the breach is non-prejudicial or trivial the court may read into the relevant prvision an implied exception, on the basis that, prima facie, the legislature would not have intended non-compliance to be fatal in those circumstances. The writer has termed this the "factorial" approach.

In the final part of this paper some of the problems which arise in the interpretation of legislative curative provisions were discussed. Section 5(i) of the Acts Interpretation Act 1924 may be of greater efficacy if amended so that it contained no reference to the magnitude of the error. The interpretation of other curative provisions is dominated by the question whether they can operate to save what would otherwise be a nullity. Throughout this paper a flexible approach to the effects of non-compliance with procedural requirements has been advocated. It is submitted that a literal interpretation of curative provisions is generally conducive to greater flexibility. In *Kestle's* case the Court emphasized the "ordinary and natural meaning" of the particular curative provision, and this may indicate a more literal interpretation of such provisions in future.

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108. Ibid., 612.