

WAIKATO LAW REVIEW

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Editor: Professor Peter Spiller

Editorial Committee: Peter Spiller, Al Gillespie, Brenda Midson, Gay Morgan, Linda Te Aho and Leah Whiu.

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The Editor
Waikato Law Review
School of Law
Waikato University
Private Bag 3105
Hamilton
New Zealand

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EDITOR'S INTRODUCTION

I am pleased to present the tenth edition of the *Waikato Law Review*. I thank the authors who submitted articles to the *Review*, the referees to whom articles were sent, and the members of the editorial committee.

The *Review* is proud to publish the Harkness Henry Lecture of the Right Honourable Justice Tipping, a Judge of the Court of Appeal. His lecture on "Striking the Right Balance Between Citizens and the Media" was highly topical, and was enriched by his recent experience as a member of the Privy Council which heard litigation in this area.

The growing prestige of the *Review* in New Zealand continues to be reflected in the articles received from outside the University of Waikato. The *Review* is pleased to publish an article on damages by a former academic staff member of the University of Papua New Guinea, and an article on the battered woman's syndrome by an academic staff member of the University of Auckland.

There are two student publications in the *Review*. One, by Thomas Gibbons, is an opportune review of the *Waikato Law Review* over its first ten years. The other, by Jane Walker, is the winning submission in the annual student advocacy contest kindly sponsored by the Hamilton firm McCaw Lewis Chapman.

The other contributions to the *Review* were written by staff at the University of Waikato. These submissions, and the others noted above, underline the *Waikato Law School's* continuing commitment to its foundation goals.

Professor Peter Spiller,
Editor, *Waikato Law Review*.

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Address

KPMG Centre
85 Alexandra Street
Hamilton
New Zealand

Postal Address

Private Bag 3077
Hamilton
New Zealand

Communication

Telephone (07) 838 2399
Facsimile (07) 839 4043
DX GP 20015
Email harkness@harkness.co.nz
Website www.harkness.co.nz



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THE HARKNESS HENRY LECTURE

JOURNALISTIC RESPONSIBILITY, FREEDOM OF SPEECH AND PROTECTION OF REPUTATION – STRIKING THE RIGHT BALANCE BETWEEN CITIZENS AND THE MEDIA

BY THE RIGHT HONOURABLE JUSTICE TIPPING*

Section 14 of the New Zealand Bill of Rights Act 1990 states that:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

But the freedom of speech which is there affirmed is subject to any reasonable limit prescribed by law which may be demonstrably justified in a free and democratic society. Section 5 of the Bill of Rights is the vehicle which thereby allows freedom of speech to be curtailed to the extent appropriate to accommodate other rights and values. Hence the law of defamation can co-exist with section 14, albeit in difficult cases there will always be tension between the two, which the Courts must resolve. Freedom of speech does not in general terms entitle people to speak falsely of others to the detriment of their reputations. That would not be for “the common convenience and welfare of society”, as Parke B described the rationale for what became an occasion of qualified privilege, in the influential early case of *Toogood v Spyring*.¹

Hard-won reputations are entitled to protection as well as freedom of speech. Nevertheless the common law right to protect your good name must co-exist with the right of others to speak freely about you and thus, in some circumstances, falsities will not be actionable. In the days before mass media communication had developed to its present extent, the accommodation of the competing interests was relatively straightforward. Historically it developed largely through the doctrines of fair comment and qualified privilege. In respect of the latter, the law came to recognise that there were circumstances in which the malice that would ordinarily be inferred from the speaking of falsehoods about another person could not reasonably be inferred. I developed this theme in my separate judgment in the first *Lange* case.²

* A Judge of the Court of Appeal of New Zealand.

¹ (1834) 1 Cr M & R 181, 193 and 194; 149 ER 1044, 1050; [1824-34] All ER Rep 735.

² *Lange v Atkinson* [1998] 3 NZLR 424, 471-472.

The familiar duty/interest test for qualified privilege grew up on this basis. It was based on the notion of reciprocity of interest and duty between the speaker or writer and the person or persons to whom the words were addressed. The privilege could be defeated if the malice which was not presumed could be expressly proved. Such malice was called express or actual malice to distinguish it from the malice that would otherwise have been presumed from the speaking of the falsehood. Express or actual malice in this sense can now be regarded as subsumed in the concept of misusing the occasion of privilege adopted in section 19(1) of the Defamation Act 1992. Misuse of the occasion is deemed to have occurred if spite or ill-will can be demonstrated but is not confined to those concepts. Section 19(1) provides:

(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

By dint of its historical origin and the associated criteria, qualified privilege was, until recently, seldom available for publications directed to a wide audience. It was difficult under the traditional approach to the privilege to conclude that the public at large, or a substantial section of the public, had the necessary legitimate interest in the publication to raise in the publisher a reciprocal duty to publish. A matter which was of interest to the public was not one which per se invested the publisher with a duty to publish it to the general public.

But the historical approach to the interest/duty equation has had to respond to two relatively recent phenomena. The first is the rise of the mass media. The second is the growing emphasis which both the common law and constitutional or quasi-constitutional instruments have been giving to freedom of speech. The response of the law of qualified privilege to these developments has been influenced also by the significant fact that malice in the traditional sense is usually difficult to demonstrate when the publication is one involving the mass media. And of course at common law (as under section 19) the onus is on the plaintiff to show that the defendant publisher was actuated by malice (or now its statutory equivalent).

The challenge of accommodating all these strands into a coherent legal structure, which adequately balances the competing interests, reached the top Courts in Australia, England and New Zealand at much the same time. David Lange, the former Prime Minister of New Zealand, has been the leading contributor to the jurisprudence in the Antipodes. Albert Reynolds, a

former Prime Minister of Ireland, has been the main contributor in the United Kingdom. It is not my purpose to survey in any detail the judgments in the various cases.

The Australian cases came first. The decisions of the High Court of Australia were influenced by constitutional factors and also by the particular terms of the Defamation Act 1974 (NSW). It can fairly be said that the High Court laid special emphasis on the idea that “freedom of communication on matters of government and politics is an indispensable incident of [the] system of representative government”.³ A counterbalance to that freedom, namely, the taking of reasonable care, was able to be found in the statute, either directly or by analogy, so the High Court was not faced with the difficulties other Courts have faced in finding an appropriate control.

In my judgment in the first *Lange* case in New Zealand, I introduced the idea that responsibility ought to be the price of the expanded freedom of expression being given to the mass media.⁴ I said:

If the community could feel confident that all those exercising their right to freedom of expression would show the responsibility which is the price of that freedom, the decision which we must make on behalf of the community would be easier. But it is a sad fact that the necessary responsibility is not always shown.

This use of the concept of responsibility derived in part from Article 19 of the International Covenant on Civil and Political Rights 1966. Because of difficulties I then saw,⁵ I stopped short of suggesting that the necessary responsibility should embrace the taking of reasonable care by the publisher. I did, however, record that I remained anxious lest the balance be found wrong without such an ingredient. My concern was assuaged to some extent by the possibility of developing the section 19 concept of misusing the occasion by treating as relevant to that issue the amount of care which the publisher of the defamatory statement had taken to verify the facts. In words which were cited by Lord Nicholls of Birkenhead,⁶ I said in *Lange No 1*:

While the news media are not generally liable for negligence as such in what is published, the issue here relates to the availability of a defence to a claim for defamation, not to liability for negligence as a cause of action in itself. It could be

³ *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 106.

⁴ [1998] 3 NZLR 424, 473.

⁵ [1998] 3 NZLR 424, 474-475.

⁶ *Reynolds v The Times Newspaper* [2001] 2 AC 127, 202.

seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media. But these are issues for another day.⁷

I there reverted to the idea that qualified privilege should not be available if the publisher did not use the power in its hands in a responsible way.

The judgments in *Lange No 1* were delivered on 25 May 1998, argument having taken place on 10 November 1997. The judgment of the Court of Appeal in England in *Reynolds*⁸ was delivered on 8 July 1998 by Lord Bingham of Cornhill, the then Lord Chief Justice. The other members of the Court were Hirst and Robert Walker LJ. The Court of Appeal introduced into the familiar interest/duty dichotomy a third criterion which they called the circumstantial test. What the Court effectively did was to isolate as a separate ingredient factors which would earlier have been subsumed under the duty/interest inquiry. But there was, however, some lack of clarity in relation to the traditional divide between occasion and misuse. I am inclined to think that no substantial change in the law was thereby involved, only an analytical shift which served to highlight that the “occasion” had to be one which attracted privilege.

When *Reynolds* reached the House of Lords, their Lordships disapproved of the addition by the Court of Appeal of the so-called circumstantial test. But they themselves substantially merged factors which had hitherto been regarded as relevant to misuse into the question whether the occasion was privileged at all. The most significant factor which led their Lordships to adopt this approach was, at least implicitly, a concern that the onus of proving misuse lay on the plaintiff. If misuse-type considerations were addressed earlier, at the existence stage of the inquiry, the onus would be on the defendant. Hence in this respect a better balance was seen as having been achieved between the parties, albeit the traditional role of the jury was thereby severely emasculated.

The *Reynolds* privilege in England now treats considerations which would hitherto have been addressed in the context of “malice” as part of the

⁷ [1998] 3 NZLR 424, 477.

⁸ [1998] 3 All ER 961.

question whether the occasion is one of qualified privilege at all. In short, that question, under *Reynolds*, involves the defendant in showing (1) that the subject matter is of sufficient public concern; and (2) if so, that a sufficient degree of responsibility has been shown in making the publication.

The subject was recently addressed by the Privy Council in an appeal from Jamaica.⁹ I had the privilege of sitting as a member of the Judicial Committee in this case and contributing to the judgment which was delivered by Lord Nicholls, the author of the leading speech in *Reynolds*. The relevant passage in the *Bonnick* judgment, for present purposes, is at paragraph 23 and reads:

Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.

As a result of *Lange No 2*,¹⁰ the structure of the necessary analysis is different in New Zealand. This follows largely from our section 19(1), of which there is no legislative counterpart in England. Both countries now have a clear focus on the need for journalists to exhibit the necessary degree of responsibility before they can claim the benefit of qualified privilege. We in New Zealand view that issue as one affecting whether the occasion of privilege has been misused. In England it is part of the inquiry whether the occasion exists. Nevertheless, subject to questions of onus, in most, if not all, cases the substantive result ought logically to be the same.

What is more, the Privy Council has now moved to accept that the concept of exhibiting the necessary responsibility involves what was described as the “exercise [of] due professional skill and care”. Thus, the “objective standard of responsible journalism”, as it was put elsewhere in *Bonnick*, has now developed so as to require of journalists that they take appropriate care before they can avail themselves of the defence of qualified privilege.

Lord Cooke of Thorndon who, along with the rest of their Lordships in *Reynolds*, rejected the argument of the appellant for a generic or subject-

⁹ *Bonnick v Morris & Others*, unreported, PC 30/2001, 17 June 2002.

¹⁰ *Lange v Atkinson* [2000] 3 NZLR 385.

matter based privilege for political speech, spoke of the power of the media and the much-increased facility for communicating information to the public, especially by television. His Lordship saw that feature of modern society as adding to the principles aimed at ensuring “journalistic responsibility”, a phrase which I have borrowed for the title to this lecture.

Where does this all leave us in New Zealand? In *Lange No 2*, when discussing the question of misuse of an occasion of qualified privilege, the Court of Appeal of which I was a member (post-*Reynolds* but pre-*Bonnick*) said that the purpose of the newly recognised privilege was to facilitate responsible public discussion of the matters which it covered. Being reckless as to the truth of what was published was regarded as a misuse of the privilege. Recklessness was said to include a failure to give such responsible consideration to truth or falsity as was appropriate in the circumstances. A cavalier approach to truth would result in the loss of the privilege. The privilege was given in the public interest on the basis that it would be responsibly used.

The Court acknowledged that the need to be responsible might in some circumstances come close to a need for the taking of reasonable care. That rather cautious statement should now be viewed in the light of *Bonnick*.

Let me try to summarise the position to this point. The traditional theory of qualified privilege distinguished between the occasion of privilege and misuse of it. The distinction was between the circumstances in which the privilege existed and those in which it was lost. That is the premise upon which the partial codification of this subject in section 19(1) of the Defamation Act 1992 proceeded. If an occasion of privilege exists, section 19(1) tells us when the privilege deriving from the occasion will be lost. In the case of *Reynolds* privilege most, if not all, of the circumstances giving rise to the loss of the privilege are now subsumed in the criteria for determining whether it exists. A *Reynolds*-type privilege, once found to exist, can hardly be lost. If the person seeking to establish the existence of the privilege has exercised the necessary responsibility to justify the privilege in the first place, it is difficult to conceive of circumstances in which that privilege, once justified for the particular occasion, could nevertheless be lost through misuse.

In New Zealand, substantially on account of section 19(1), we have a discrete two-step process. The first question is whether the occasion is a privileged one. The second is whether, if so, the privilege has been abused and hence lost. A defendant asserting the privilege in New Zealand must establish that the occasion justifies the privilege. If it does, the plaintiff can

defeat the privilege by establishing misuse. That is a jury question, whereas the earlier question, whether the occasion was privileged in the first place, is for the Judge. It is possible to take the view that, although doctrinally inconsistent, the English approach which essentially involves the defendant having to prove proper use in order to obtain the privilege at all, represents a better balance between protection of reputation and freedom of speech.

In a piece on Media Law, Professor John Burrows has suggested that “the unitary test of *Reynolds* is altogether cleaner and easier to apply [than the *Lange* dual test]”.¹¹ Perhaps the way in which New Zealand law has developed shows the dangers of partial codification of the common law. The *Reynolds* unitary approach is difficult, if not impossible, to reconcile with section 19(1). There may be a lesson here for law reformers. Either leave the common law on a particular topic alone, or codify it completely. Partial codification may have unexpected and unfortunate effects on the way in which the common law can respond to changing social conditions.

There is a further point I wish to mention and it derives from the terminology adopted by the Privy Council in the *Bonnick* case. That terminology built on Lord Nicholls’ language in *Reynolds*.¹² You may recall that the *Bonnick* judgment, in summarising the *Reynolds* privilege, defined the subject-matter of the privilege as “matters of public concern”. The choice of the words “public concern” rather than the more familiar “public interest” was deliberate. The expression “in the public interest”, although capturing the rationale for the privilege, carries the risk of subject-matter slippage to “matters of public interest”. It is not necessarily in the public interest to publish to the world at large matters which are of interest to the public.

The concept behind the expression “matters of public concern” is designed to convey more exactly what the privilege is about. The use of the word “concern” does not necessarily signify worry, but it does signify that the subject-matter of the publication must be something about which the public is entitled to be informed. The subject-matter must be something about which the public has a right to know, as Lord Nicholls put it in *Reynolds*. The best composite phrase, in my view, is the one chosen in *Bonnick*, with the addition of the word “legitimate”, which was also used in this context in *Bonnick*, that is, the *Reynolds* privilege is available for a publication which deals with a matter of legitimate public concern.

¹¹ “Review: Media Law” [2002] 2 New Zealand Law Review 217, 221.

¹² [2001] 2 AC 127, 203E.

I should note in passing that the expression “public concern” is used in clause 8 of Part II of the First Schedule to the Defamation Act 1992, and other comparable provisions overseas, with reference to qualified privilege for reports of public meetings. If the discussion at the meeting relates to any matter of public concern, a fair and accurate report will attract qualified privilege.¹³ It seemed to me that the idea of a matter of public concern, used by Parliament in that context, was apt to capture rather nicely the ambit of what journalists should be able to publish under *Reynolds* qualified privilege, if acting responsibly.

What of the future in New Zealand? *Lange* privilege is subject-matter specific; it relates to political speech as there defined. *Reynolds* privilege is less specific. All it requires is that the subject-matter be of legitimate public concern. With the counterbalance of the need to show responsibility, which includes the exercise of due professional skill and care, I would not be surprised if we see developments in New Zealand expanding the *Lange* subject-matter to coincide with that in *Reynolds*, coupled with an overt acceptance that the price of the privilege, as expanded, is the need to show responsibility by taking appropriate care.

Although I can envisage an expansion of the present relatively narrow subject-matter of the *Lange* privilege to or towards the subject matter of *Reynolds* privilege, I can foresee problems in moving New Zealand law towards the more unitary approach of *Reynolds*. By using the word “problems” I am not to be understood as implying that a move towards a unitary type of approach would necessarily be desirable. I would keep an open mind on that. My point is that, whether desirable or not, the structural approach in New Zealand has been influenced, indeed largely dictated, by section 19(1), with ramifications in respect of onus of proof and the role of the jury. As to onus of proof, we will need to ask ourselves, when considering further developments, whether the plaintiff should have to prove misuse as opposed to the defendant having to prove proper use. In that respect section 19 would require amendment because at the moment it precludes any common law development on this point in New Zealand.

In England both aspects of qualified privilege (occasion and misuse) are now for all practical purposes in the hands of the Judge. In New Zealand occasion is for the Judge but misuse is for the jury; that was one of the fundamental premises on which the pre-*Reynolds* common law was based. In England the shift in onus has been accompanied by the erosion, one might

¹³ For a recent authoritative discussion of this privilege, see *McCartan Turkington Breen v Times Newspapers Ltd.*[2001] AC 277.

say eradication, of the jury's traditional role. It would, however, be possible in New Zealand to retain jury consideration of misuse issues but, subject to amending section 19(1), place the onus of showing responsibility (effectively negating misuse) on the defendant. The Judge would then rule, as always, on whether the occasion was privileged. If it was, the defendant would have to persuade the jury that the occasion had been responsibly used. That would involve the defendant in showing that it had exercised all reasonable skill and care and should therefore be excused from publishing what, *ex hypothesi*, was defamatory of the plaintiff. These are just some thoughts which may or may not be found worthwhile after fuller examination.

Before closing this discussion I thought it would be interesting to try framing a modern definition of or test for a privileged occasion. What I am about to propose is not intended to reflect exactly the present state of the law in New Zealand. It is designed to indicate the direction in which New Zealand law may develop, albeit further consideration and argument may change my present perception. I suggest that a succinct definition might be that an occasion of qualified privilege exists when the words in question are written or spoken on a subject which is of legitimate concern to the person or persons to whom they are addressed.

The rationale for the privilege is that it is more valuable to society as a whole to give protection to defamatory words in such circumstances than it is to protect individual reputations. The privilege will, however, be lost if the occasion is not responsibly used. That last sentence reflects the duality of the current New Zealand law. For the unitary *Reynolds* privilege the occasion can be described in a single sentence. It is when the words are responsibly written or spoken on a subject of legitimate concern to their addressee(s).

I should make it clear that I think that these definitions could apply to publications of differing widths; from the public at large to one-to-one communications. In this respect I envisage a synthesis between narrower and wider publications. The test of "legitimate concern" seems to me apt for a narrower communication as well as for communications involving the news media. Legitimate concern as between publisher and audience is the modern equivalent of the old duty/interest touchstone. The concept of responsibility is, in a sense, shorthand for proper use and not taking improper advantage of the occasion in terms of section 19(1). It is a concept of sufficient flexibility to be appropriate for all publications, whatever their width. Furthermore, it incorporates both the concept of honesty of purpose, which has been a feature of qualified privilege ever since Parke B used that

expression in *Toogood v Spyring*,¹⁴ and the need to take such care in making the statement as the occasion reasonably requires.

I appreciate that these definitions are at a high level of generality. So too was the earlier reciprocal duty/interest test. I doubt whether it is possible or indeed helpful to try to frame a more specific modern definition. Any definition must necessarily have sufficient generality to have general utility.

I would like to mention one further matter before I conclude. It concerns the relationship of the newspaper rule to qualified privilege as it affects the news media. The so-called newspaper rule protects all sections of the news media (not just newspapers) from having to reveal their sources. As was said in *Lange No 2*, the rule is designed to promote freedom of speech by allowing people to speak to the news media in confidence.¹⁵

Rule 285 of the High Court Rules, consistently with the newspaper rule, prohibits interrogatories which are designed to elicit sources. At trial the same general subject is dealt with by section 35 of the Evidence Amendment Act (No 2) 1980. Rule 285 is couched in absolute terms whereas section 35 is discretionary. The newspaper rule itself is not completely absolute; there is a special circumstances exception, albeit Woodhouse P saw the rule as almost absolute.¹⁶

At the end of our judgment in *Lange No 2* the Court indicated that the absoluteness of Rule 285 should be the subject of further consideration. I understand that the Rules Committee is engaged on that exercise at the moment. The context of the Court's suggestion was whether a media defendant should be allowed to have the benefit of both qualified privilege and the newspaper rule. As to that the Court said:

[56] During the course of argument in the present case the question arose whether a news media defendant could rely on a defence of qualified privilege, while at the same time maintaining its reliance on the newspaper rule. On an occasion of qualified privilege the onus is of course on the plaintiff to demonstrate misuse of the occasion in terms of section 19 of the Defamation Act 1992. At issue may be the basis for an asserted belief in truth, or whether that belief was responsibly formed, but in any event the plaintiff is already at something of a disadvantage in having to establish the negative. We were pressed with the view that to allow a media

¹⁴ *Supra* note 1.

¹⁵ [2002] 3 NZLR 385, 404.

¹⁶ *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163.

defendant the benefit of both qualified privilege and the newspaper rule would be to place an unfair hurdle in the plaintiff's path. It is apparent that some of Their Lordships in *Reynolds* were opposed to the qualified privilege sought by the newspaper in that case because of the difficulties which they considered the newspaper rule would create for plaintiffs.

[57] The whole question whether sources should be identified before trial is very much influenced by public policy as seen in the particular jurisdiction. Such policy is not immutable and both judicial and legislative reflections of it can change over time. The approach of this Court in the *Broadcasting Corporation* case and of the Rules Committee in Rule 285 should not therefore be regarded as set in stone. The relevant policy considerations must now recognise the ramifications of the extended range of qualified privilege as affirmed in this judgment. As has been pointed out by Michael Galooly in his *The Law of Defamation in Australia and New Zealand ...*, the Courts in Australia have recognised that inroads into the newspaper rule can be justified in the interests of achieving justice between plaintiff and defendant when qualified privilege is in issue. For example, in *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 the High Court has held that a departure from the rule was permissible when it was "necessary in the interests of justice". Reference can also be made to the 1995 "Report on Defamation" published by the New South Wales Law Reform Commission at para 10.21 under the heading "Revelation of Sources".¹⁷

If in New Zealand the onus to show proper use of the privilege were to be placed on the media defendant, as is effectively the case with *Reynolds* privilege, the question whether, and if so how, to develop the newspaper rule and Rule 285 would be of less moment. A failure or unwillingness to disclose a source might mean that the media defendant could not satisfy the onus. But, as things stand at present, some might say that a plaintiff suing a media defendant which pleads qualified privilege, ought to have at least a Court-controlled opportunity to ascertain upon what basis the publication was made and thus be in a better position to establish irresponsibility, or to resist the defendant's assertion of having acted responsibly. The Court could decide whether disclosure of sources was necessary to do justice in the particular case. If disclosure was ordered and the media defendant still remained unwilling to disclose, it could always avoid the need by withdrawing the plea of qualified privilege. I recognise that that would have tactical and substantive consequences but it might have to be the price of not revealing the source.

May I conclude by saying that I am pleased that the idea which I advanced in *Lange No 1*, that the price of qualified privilege for mass media communications should be an appropriate level of journalistic responsibility, now seems to have become accepted in the common law jurisprudence. I

¹⁷ [2000] 3 NZLR 385, 404-405.

consider that that is about as good a balance as can be struck when reconciling the competing interests. In addition, the concept of legitimate public (or individual) concern seems to me to be as good a general subject-matter touchstone for mass media (or individual) qualified privilege as can be devised. Hence journalists would be protected from liability for defamation when writing or speaking on matters of legitimate public concern, provided that they have shown an appropriate level of responsibility and exercised due professional skill and care. Their right to freedom of expression in these circumstances would therefore be limited only by the reciprocal requirement of responsible and careful use of the power in their hands.

That seems to me to be a reasonable limitation on freedom of speech and one which is entirely justified in a free and democratic society. To assert otherwise would be to treat qualified privilege as a licence to be irresponsible and careless. In that observation I am building on the judgment of McKay J in *Television New Zealand Ltd v Quinn*.¹⁸ That said we still have challenges in New Zealand as to how the law will develop from its present state. I have identified some of them and some of the options which will require careful attention as individual cases are decided.

¹⁸ [1996] 3 NZLR 24, 45.

WHERE ARE THE NEGOTIATIONS IN THE DIRECT NEGOTIATIONS OF TREATY SETTLEMENTS?

BY CRAIG COXHEAD*

I. INTRODUCTION

Treaty of Waitangi grievances¹ are matters that Māori,² the Crown,³ the general public and political parties⁴ want, for varying reasons, to see resolved and settled. The current settlement processes provide that Māori enter Direct Negotiations (“Negotiations”) directly or after a Waitangi Tribunal (“Tribunal”) hearing. This process has been evolving since 1975, with both Māori and the Crown continuing to examine the processes:

The policy framework continues to be examined critically by both claimants and the Crown to ensure it is working to meet the aims of the settlement process. It will continue to be improved and refined ...⁵

* BSoc Sci, LLB (Hons), LLM , Lecturer in Law, University of Waikato, is of the tribal groups of Ngati Makino, Ngati Pikiao, Ngati Awa and Ngati Maru.

1 Claims by Māori that they have been prejudicially affected by legislation, policies, acts or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi.

2 Prior to European contact, the word Māori simply meant normal or usual. There was no notion of a dominant Māori hegemony. There was no concept of a Māori identity predicated around cultural or national semblance. Instead, the distinguishing features, which demarcated groups, were mainly attributed to tribal affiliations and the natural environment. For further discussion refer to Meredith, P *Understanding the Māori Subject* (unpublished paper, 1998) and Durie, M *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (1998).

3 For the purposes of this article the words Crown and Government will be used interchangeably, recognising that “[t]he Crown refers to the executive arm of Government and symbolises the historical authority of the sovereign as head of the state. While the Crown is a convenient way of referring to one party involved in the settlement negotiations, in practice there are a number of agencies and positions within the Crown that are significant in the Treaty settlement process” (Office of Treaty Settlements at <http://ots.govt.nz/crown.html>).

4 For further discussion on political parties’ Treaty policies see “Parties show diverse range of policies” *Waikato Times*, 9 July 2002, 7, <http://www.labour.org.nz>, <http://www.national.org.nz>, <http://www.greens.org.nz>, <http://www.alliance.org.nz>, <http://www.nzfirst.org.nz>, <http://www.libertarianz.org.nz> and <http://www.act.org.nz>.

5 Media briefing by Office of Treaty Settlements on the “Treaty of Waitangi Settlements Process”, at <http://www.liveupdater.com/ots/DocumentLibrary/TreatyofWaitangiSettlementsProcess.html>, 9 July 2002.

This article continues the critical examination of settlement processes by looking at the process of Negotiations currently used for the resolution of Treaty of Waitangi grievances. The primary purpose of this article is to examine aspects of the Negotiations process in contributing to resolving Treaty claims.⁶ It is also my intention to recommend required principles for the development of a more effective claims resolution process. It is my contention that the Negotiations process has limitations, deficiencies and inadequacies for the resolution of Treaty claims.

II. THE WAITANGI TRIBUNAL

An understanding of the Tribunal is required in order to understand the context of Negotiations. The Tribunal has been recognised as the first stage in the development of Treaty settlements, with Negotiations being the second stage.⁷

1. Nature of Waitangi Tribunal

Since 1975, Māori have taken their claims for dispossession and alienation to the Tribunal. Since the early 1990s Māori have been able to negotiate the settlement of claims directly with the Crown. These two non-Court processes were instigated by the New Zealand Governments of the time and progressed through local political pressure and international influences. Wickliffe recognised the international dynamics when stating:

It would be a mistake to believe that Governments and the courts have always acknowledged the need to protect indigenous rights and settle indigenous claims fairly and equitably. The movement towards the recognition of indigenous rights has occurred because the countries concerned have been encouraged to change their approach since the establishment of the United Nations and the alignment of indigenous rights issues with human rights and equality.⁸

⁶ For the purposes of this article the term “Treaty claims” refers to any claims lodged with the Waitangi Tribunal. This phrase is used interchangeably with the term “Māori claims”. The terms are consistent with each other as at present only persons of Māori descent are able to lodge Treaty claims.

⁷ Media briefing on the “Treaty of Waitangi Settlements Process” at <http://www.liveupdater.com/ots/DocumentLibrary/TreatyofWaitangiSettlementsProcess.htm>, 9 July 2002, 2.

⁸ Wickliffe, “Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions” in McLay, G (ed) *Treaty Settlements: The Unfinished Business* (1996) 114.

Some have commented that the Tribunal was a political response to increased Māori nationalism⁹ while others have hoped that the Tribunal would be the vehicle by which justice might at last be done under the Treaty.¹⁰ A recent Crown document on the settlement of claims notes:

Dissatisfaction with such settlements and lack of action by the Crown on outstanding grievances led to the increasing calls during the 1960s and early 1970s for a forum where Māori claims against the Crown could be heard.¹¹

The Tribunal was set up in 1975 with the following functions: to hear claims by Māori against the Crown concerning breaches of the principles of the Treaty of Waitangi, to determine the validity of these claims, to make recommendations to the Crown on redress for valid claims, and to examine and report on any proposed legislation referred to the Tribunal by the House of Representatives or a Minister of the Crown.¹² The Chairperson of the Tribunal at the time noted:

In carrying out those functions, the Tribunal has exclusive authority, for the purpose of the 1975 Act, to determine the meaning and effect of the Treaty of Waitangi, as embodied in the English and Māori texts, and to decide upon issues raised by the differences between them.¹³

With clear and precise statutory purposes the Tribunal has been seen to play a role beyond the inquiry and reporting of historical and contemporary treaty claims.¹⁴ The Tribunal has been part of a process of resolution and

⁹ McDowell, M & Webb, D *The New Zealand Legal System – Structure, processes & legal theory* (2 ed, 1998) 220.

¹⁰ Kelsey, “The Treaty Contradiction” in Kelsey, J *Rolling Back the State – Privatisation of Power in Aotearoa/New Zealand* (1993) 286.

¹¹ Office of Treaty Settlements, *Healing the Past, Building a Future – A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (1999) 17.

¹² Treaty of Waitangi Act 1975, s 7.

¹³ Department for Courts, *Waitangi Tribunal – Te Roopu Whakamana i te Tiriti o Waitangi – Business Strategy 1998* (1998) 3, and the preamble of the Treaty of Waitangi Act 1975.

¹⁴ Historical grievances relate to past actions or omissions of the Crown and are mostly associated with the way in which land was acquired from Māori through direct purchase, legislation such as the Public Works Act, the Māori Land Court, or confiscation. Contemporary claims relate to current Crown actions or omissions.

reconciliation.¹⁵ The Waitangi Tribunal's stated vision supports the move towards reconciliation. It states:

Having reconciled ourselves with the past and possessing a full understanding of the Treaty of Waitangi, Māori and Non-Māori New Zealanders will be equipped to create a future for the two peoples as one nation.¹⁶

In order to equip New Zealanders to create a future as one nation, part of the Tribunal's role is to educate people and enhance awareness of the Treaty of Waitangi. At times, although the political and legal prominence of the Tribunal has generated some understanding of the role of the Tribunal, understanding of its processes and Treaty grievances has been misconceived by many New Zealanders. The Tribunal therefore takes on a function of laying out history and exposing what has happened to provide an adequate base for people to talk about what can be done by way of reparation.¹⁷ This educative role also serves the function of explaining the Māori world to a predominantly non-Māori society.¹⁸ Through its hearings and reports, the Tribunal has examined New Zealand's historical past and presented its findings to Māori and non-Māori.

The Treaty of Waitangi Act 1975 referred to a Tribunal and provided for individual tribunals to be established for the purpose of hearing claims.¹⁹ When claims come to hearing the Tribunal operates through these individual tribunals.²⁰

There is some misunderstanding in relation to the Tribunal in that people think that it operates as a separate Court. Instead, the Tribunal operates as a Commission of Inquiry and, like most Commissions of Inquiry, it is not a Court of Law. The Tribunal inquires, but it does not decide issues between

¹⁵ Department for Courts, *supra* note 13, at 4, and the preamble of the Treaty of Waitangi Act 1975.

¹⁶ Department for Courts, *supra* note 13, at 4.

¹⁷ Durie, "Not standing apart" in Capper, R in conversation with Brown, A and Ihimaera, W (ed) *Vision Aotearoa – Kaupapa New Zealand* (1994) 22.

¹⁸ Theron, L *Healing the Past: A Comparative Analysis of the Waitangi Tribunal and the South African Land Claims System* (1997) <<http://www.kennett.co.nz/law/indigenous/2000/52.html>, 25 July 2002; and Durie, "The Waitangi Tribunal: Its Relationship with the Judicial System" [1986] NZLJ 235.

¹⁹ Treaty of Waitangi Act 1975, Second Schedule, cl 5.

²⁰ Carter, N *Key Issues in processing Claims through the Waitangi Tribunal – A Chairman's Perspective – Key Issues that Claimant Solicitors should be aware of when progressing claims* (1998) 1.

parties and it does not adjudicate. Its reports do not have legal effect in the way in which Court judgments do; it can conduct hearings but these hearings are not judicial proceedings; it is not required to follow the rules of evidence applicable to civil litigation; and it is not entitled to make investigations outside the scope of the specific Inquiry at hand.²¹

2. Stages of Tribunal Process

Once a claim is lodged, the Tribunal process follows five stages. The first stage is where research is undertaken by the Tribunal, the Crown Forestry Rental Trust²² or claimants themselves.²³ The research will form the basis of the evidence to be presented at the third stage, being the hearing stage. The second stage is where prior to a hearing the Tribunal carries out a five-step judicial-conference approach to ensure that all issues for consideration at the hearing are clear and ready to be heard. The judicial-conference approach also seeks to have claims heard and reported more quickly than has been the case in previous Tribunal claims. The steps to this process, each marked by judicial conferences, are as follows:

1. An early conference sets out a district boundary and establishes which claimants are going to be heard.
2. The research for the casebook is defined and a dead line set for the completion of all research reports.
3. All claimants and their counsel, assisted by historical experts, are required to file comprehensive and fully particularised statements of claim. These statements establish the scope and nature of the grievances to be heard.
4. The Crown is required to respond to the statements of claim. The Crown should give advance warning of its stance on the issues raised. It should also indicate points of agreement and commonality between the parties, where the Crown concedes to matters in the claimants' case, or where it disagrees.
5. Before hearings commence, another judicial conference will be held. This conference will set out the hearing programme, specifying which witnesses will be heard. Parties are encouraged to cooperate with one another to reduce

²¹ Wickliffe, C *The Waitangi Tribunal Procedure* (unpublished paper delivered to Māori Claims Process class, School of Law, University of Waikato, 1999).

²² Established by the Crown Forest Assets Act 1989, s 34.

²³ Office of Treaty Settlements, *supra* note 11, at 45.

unnecessary repetition in their cases. The length of time claimants spend in hearing is no longer significant,²⁴ but the quality of their submissions is.²⁵

The Tribunal hearings usually take the form of a series of week-long hearings where both claimants and the Crown may give evidence to the Tribunal. The fourth stage is the release of the Tribunal report. The report sets out:

... whether or not the claims are well founded. It makes recommendations on how relief might be provided. A typical recommendation if a claim is well founded is that the claimants and the Crown negotiate a settlement.²⁶

At this point claimants may enter into negotiations with the Crown in the Negotiations process. If Negotiations are not successful then the claimants may return to the Tribunal for a Remedies hearing, the fifth stage, where claimants and the Crown present detailed submissions as to what they perceive to be appropriate remedies for the claim. The Tribunal will then make detailed recommendations on redress.

Whatever the recommendations of the Tribunal, the claimants will need to negotiate, with the Crown, a resolution to their claim. These negotiations are referred to as Direct Negotiations.

III. DIRECT NEGOTIATIONS PROCESS

1. *Nature of Direct Negotiations Process*

The New Zealand Government originally formulated the Direct Negotiations process in the early 1990s. The process was part of the Crown settlement policy which had been developing since 1975.²⁷ Since 1990 the Crown's Proposals for the Settlement of Treaty of Waitangi Claims have been developed, changed and modified²⁸ to a situation where the Crown

²⁴ By way of example, the Tauranga Moana inquiry took over 4 years to complete the hearings, while the Gisborne inquiry, under the new process, was completed within 8 months of hearing the first claim in the inquiry.

²⁵ Te Roopuu Whakamana i Te Tiriti o Waitangi, *Te Manutukutuku* (May/June 2001) 2.

²⁶ Office of Treaty Settlements, *supra* note 11, at 45.

²⁷ For a chronology of the developments of the Crown's settlement policy since 1975 see Office of Treaty Settlements, *Healing the Past, Building a Future – A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (1999) 20.

²⁸ See Office of Treaty Settlements, *Treaty of Waitangi Claims – Direct Negotiations Process* (1994); Office of Treaty Settlements, *Crown Negotiations Work Programme: How to Get There – A Guideline to the Negotiations Work Programme for claimants*

recognises that its aims for Direct Negotiations for settlements of Treaty grievances are:

1. To negotiate a fair, comprehensive, final and lasting settlement of all the claims of the claimant group for breaches of the Treaty up to at least 21 September 1992;
2. To reach a settlement that restores and increases the mana and tino rangatiratanga of the claimant group and will restore and increase the honour of the Crown; and
3. To reach a settlement that provides a basis for a new and continuing relationship between the claimant group and the Crown based on the principles of the Treaty of Waitangi.²⁹

Further, the Government in July 2000 adopted six principles to guide it in negotiating settlements of historical claims under the Treaty of Waitangi. These principles in summary are:

1. Good Faith – The negotiating process is to be conducted in good faith based on trust and cooperation towards a common goal.
2. Restoration of relationship – The strengthening of the relationship is an integral part of the settlement process and will be reflected in any settlement.
3. Just Redress – Redress should relate fundamentally to the nature and extent of breaches suffered. Existing settlements will be used as benchmarks for future settlements where appropriate.
4. Fairness between claims – There needs to be consistency in the treatment of claims.
5. Transparency – The Government will give consideration to how to promote greater understanding of the issues.
6. Government-negotiated – The Treaty settlement process is necessarily one of negotiation between claimants and the Government as the only two parties who can, by agreement, achieve durable, fair and final settlements.³⁰

The Office of Treaty Settlements (“OTS”) negotiates the settlement of all historical Treaty of Waitangi claims on behalf of the Crown.³¹ OTS also

and counsel (1996); and Office of Treaty Settlements, *Treaty of Waitangi Claims – Direct Negotiations Process* (1997).

²⁹ Office of Treaty Settlements, *Treaty of Waitangi Claims – Direct Negotiations Process* (1999) 1.

³⁰ Te Puni Kokiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi – A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) 114.

³¹ The Office of Treaty Settlements at <http://www.ots.govt.nz/crown.html> records the settlement of 14 claims since 1989 totalling approximately \$594.8 million in settlement redress.

manages the implementation of Treaty settlements, that is, the way in which the settlements are to be actioned. Claims need to be lodged with the Waitangi Tribunal before OTS can consider them. Once a claim is lodged, claimants can seek Direct Negotiations straight away, or may choose to have their claims heard by the Tribunal before entering negotiations.³²

2. Steps in Direct Negotiations Process

The Direct Negotiations of Treaty claims can be seen as a series of four steps. The first step has been appropriately named “Preparing a claim for negotiations”. Claimants seek Direct Negotiations, and the Crown will agree or not agree to enter into Negotiation after assessing the validity of the claimant’s claim. Most claimants prove their claim via the Waitangi Tribunal. There are certain aspects, such as confiscation, which the Crown readily accepts as breaches of the Treaty. The Crown also assesses whether the claimant group and claim meet the criteria for comprehensive and iwi-level negotiations. Further, the group must show that Negotiators are mandated.³³ The decision to accept or reject a group’s mandate is left to the Minister in Charge of Treaty Negotiations and the Minister of Māori Affairs.³⁴

The second step is referred to as “Pre-negotiations”. The aim of this step is for the Government and the claimants to prepare for formal negotiations. At this stage the Crown decides how much funding it will provide to help the claimant group with the cost of negotiations.³⁵ Funding is normally linked to milestones so that once a claimant group reaches certain milestones they receive funds. Both parties then look at terms of negotiation to be set out in Negotiation Briefs. A number of Crown terms are non-negotiable. In a comprehensive report prepared by the Office of Treaty Settlements entitled *Healing the Past, Building a Future – A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*, it was clearly stated that:

Each claimant group negotiates the wording of their Terms. However, parts of the Terms outline the Crown’s fundamental approach to Treaty settlements, and negotiations can only proceed if the claimant group accepts that this is the Crown’s approach.³⁶

³² Office of Treaty Settlements, *supra* note 29, at 2.

³³ *Ibid.*, 7.

³⁴ Office of Treaty Settlements, *supra* note 11, at 54.

³⁵ *Ibid.*, 58.

³⁶ *Ibid.*, 60.

The range of matters that claimants must accept include *inter alia*:

- (a) to settle all of the claimants' historical claims arising from Crown actions in breach of the Treaty, statute, and common law (including claims arising from aboriginal title);
- (b) not to pursue the claims by other means (for example, through a Waitangi Tribunal hearing or in any Court of law) while in Direct Negotiations;
- (c) that after a settlement has been agreed and ratified, any Treaty of Waitangi memorials placed on the titles of properties within the claim area will be lifted;
- (d) negotiations will be conducted in good faith;
- (e) negotiations are conducted in private and remain confidential, and media statements will only be made when the parties agree; and
- (f) negotiations are "without prejudice" (that is there is no admission of liability; also neither party is bound until the Deed of settlement is signed and they can go back to legal proceedings if negotiations break down).³⁷

What is left to negotiate? The Crown's requirements for negotiations are comprehensive and leave only administrative matters to be negotiated, such as where, when, and how often negotiation meetings will be held.

It is the Crown's view that, to start the formal negotiations, the Crown and the claimant group both need to be able to discuss particular options for redress. They need to prepare for these discussions by gathering information about what is wanted (by claimants) and what is available (from the Crown). Once the Crown has some idea about the most important wishes of the claimant group, the Crown consults with other government departments about the types of redress that may be available to settle the Treaty claim. This is called the Crown Negotiating Brief. Ministers must approve the Crown Negotiating Brief.³⁸ The Crown negotiators can then propose settlement options for the claimants to consider.

The third step in the four-step process is termed "Formal Negotiations". During negotiations, the Crown and claimant representatives put forward their proposals for settling the claim and try to reach an agreement. The Crown's proposals for redress will be within the limits of its approved Negotiating Brief. The claimants put forward their proposals based upon what they have prepared in pre-negotiations. If there is broad agreement, the discussions concentrate on the details of those proposals.³⁹ If negotiations are successful, parties will proceed to draft and finalise a Deed of

³⁷ For the key requirements for Terms of Negotiations, see Office of Treaty Settlements, Office of Treaty Settlements, *supra* note 27, at 60.

³⁸ Office of Treaty Settlements, *supra* note 31, at 1.

³⁹ Office of Treaty Settlements, *supra* note 11, at 62.

Settlement, which then needs to be approved by both Cabinet and the claimant group's constituents.

The last step in the Direct Negotiation process is labelled "Ratification and Implementation". This step involves claimants and the Government obtaining support for the Deed of Settlement. The claimants need to obtain enough support for the Deed to satisfy the Crown before it will proceed to implement settlement legislation.

This step also requires the claimant group to agree on a way of holding and managing lands, cash and other resources that they will acquire through the settlement. Although the Crown claims that it is not its wish to tell groups how to manage their own affairs, it has set criteria for governance structures with which groups must comply before the transfer of any settlement assets occurs. The Crown's expectations of claimants are clear:

The Crown must be sure that the claimant group has approved a governance structure that:

- adequately represents all members of the claimant group,
- has transparent decision-making and dispute resolution procedures,
- is fully accountable to the whole claimant group.⁴⁰

IV. POSITIVE ASPECTS OF DIRECT NEGOTIATIONS

1. Acknowledgment and Addressing of Grievances

Although it is my view that the Direct Negotiations process is far from perfect or even acceptable, I recognise that the process is some attempt to:

- remove the sense of grievance,
- [achieve] fair, comprehensive, final and durable settlement[s] of all historical claims of the claimant group,
- provide a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty of Waitangi.⁴¹

A positive step towards the reconciliation of the relationship between Māori and the Crown is the acknowledgment that grievances exist and need to be addressed. The Crown's aims and objectives of the Direct Negotiation process are about redressing Māori grievances and the economic and social disparities between Māori and non-Māori, and providing an economic base

⁴⁰ Ibid, 73.

⁴¹ Ibid, 81.

for Māori future development. The process, although faulty in many respects, is nonetheless an acknowledgment by the Crown that there are important matters to be determined.

2. *Speed and Effectiveness of Settlements*

The Direct Negotiations process is quicker than the Tribunal process for the Crown and Māori claimants in achieving settlement and resolution of claims. The process enables claimants the option of dispensing with the need to take their claims through the Tribunal. The comment has been made that the Crown preference is for Direct Negotiation. Many MPs wanted:

...the process to be completed quickly. To this end, they wanted claims settled where possible by direct negotiations between the claimants and the Crown, without having to go through expensive and protracted Tribunal hearings.⁴²

It is accepted that many groups and especially Māori want to see Treaty grievances settled as quickly as possible.

It is also acknowledged that the Direct Negotiations process is working in terms of settling claims. According to the Office of Treaty settlements, fourteen claims have been settled and approximately \$594.8 million has been allocated in settlement redress.⁴³

V. NEGATIVE ASPECTS OF DIRECT NEGOTIATIONS

In my view the Direct Negotiations process is unacceptable as a process for the resolution of Treaty claims. It is true some Iwi have seen the benefits of settlements achieved through Direct Negotiations and have settled their claims.⁴⁴ However, I perceive major negative aspects within the process.

1. *Process Imposed on Māori*

In 1994 the Crown published the *Crown Proposal for the Settlement of Treaty of Waitangi Claims* and proceeded to meet with Māori groups throughout New Zealand to discuss the proposal. This proposal was the

⁴² Ward, A *An Unsettled History – Treaty claims in New Zealand today* (1999) 41.

⁴³ The Office of Treaty Settlements at <http://www.ots.govt.nz/frameset-sdocs-agreements.html>, 23 July 2002.

⁴⁴ For discussion of claims that have been settled, such as the Fisheries settlement, the Tainui Settlement, and Ngai Tahu settlement, see Office of Treaty Settlements, *supra* note 11, and Ward, *supra* note 42.

result of three years' work by Government officials.⁴⁵ Approximately 2077 submissions relating to the proposals were submitted to the Crown.⁴⁶ Many of the submissions categorically rejected the Crown's proposals.

Of the 2077 submissions received, approximately 869 were cards which rejected the *Proposals* as flawed because of their unilateral development; the fiscal envelope as unjust; and recommended re-negotiation with Iwi.⁴⁷

The rejections outlined in the submissions were made on two levels. At one level, there was opposition to the Crown's proposal as it was conceived and developed in a unilateral manner by the Crown.⁴⁸ There had been a total lack of consultation with Māori regarding the development of the proposals. Māori had not been involved at all in the planning or design of the Crown's proposals.

On a second level the rejections focussed on the Crown's lack of commitment to partnership and the unilateral approach planned for the settlement process.⁴⁹ The Crown proposed that it would make unilateral decisions in a number of steps within the settlement process.

Further opposition to the Government's policy was expressed at a hui called by Sir Hepi Te Heuheu in January 1995.⁵⁰ The hui expressed a number of concerns about the Government policy including inter alia:

- The government's proposals had been developed in a climate of secrecy without any consultation with the Māori Community.
- They were seen as a unilateral declaration of how claims would be settled.
- The bulk of the settlement principles were seen as designed to protect the government and provide assurances for the general populace. They did not reflect a primary focus on justice as a means of remedying injustices of the past. Most noticeable to the hui was the near absence of the Treaty of Waitangi from the settlement principles.⁵¹

Durie's observations of the situation were summarised as follows:

⁴⁵ Roberts, J H *Politics not Justice - The government's treaty settlements policy* (1999) 3.

⁴⁶ *Report of Submissions – Crown Proposal for the Treaty of Waitangi Claims* (1995) 4.

⁴⁷ *Ibid*, 5.

⁴⁸ *Ibid*, 22.

⁴⁹ *Ibid*, 23.

⁵⁰ For discussion of the hui see Roberts, J H *Alternative vision – He moemoea ano: from fiscal envelope to constitutional change: the significance of the Hiriangi Hui* (1996).

⁵¹ Roberts, *supra* note 45, at 4.

What we seem to have is a government deciding what the process will be, what the negotiating structure will be, setting the terms, then deciding who it will deal with and how it will deal with them.⁵²

Kelsey, when discussing the Government's proposal for the settlement of claims which included a fiscal cap,⁵³ noted:

A genuinely Treaty based settlement would involve dialogue between sovereign representatives of the Crown and Iwi on terms of parity, each of whose constituencies would have the right to mandate their own representatives in their own way. Instead Pakeha government is claiming the right unilaterally to decide what the Treaty means; what the process will be used to settle grievances; what is a reasonable outcome on a take it or leave it basis.⁵⁴

While the overwhelming Māori rejection of the Government's proposal was a blow to the Government of the time, it did not prevent the Government from continuing with the implementation of its policy, without any substantial changes.⁵⁵

The unilateral approach by the Government for the introduction of the Direct Negotiation process has continued, with changes to the process. In July 2000 the Government announced changes to the settlement process with the adoption of a "principles framework".⁵⁶ Further, the Minister in Charge of Treaty Negotiations announced moves to streamline Treaty Settlements in February 2002.⁵⁷ Both changes have been implemented without consultation with Māori.

The process for Negotiations has been framed and changed in a unilateral manner by one party to the Negotiations. It is difficult to see how a process aimed at achieving a better relationship between Māori and the Crown will be successful when the process to achieve this has been imposed on Māori, rejected by many Māori, and changed without any input from Māori.

⁵² Durie, supra note 17, at 21.

⁵³ For further discussion of the "fiscal cap policy" see Gardiner, *W Return to Sender – What really happened at the fiscal envelope hui* (1996).

⁵⁴ Kelsey, "The Mystery Envelope: What is the Government up to?" in Kelsey, J *The Fiscal Envelope – Economics, Politics & Colonisation* (1995) 21.

⁵⁵ Roberts, supra note 45, at 6.

⁵⁶ Supra note 30, at 7.

⁵⁷ "Moves to streamline Treaty claims", *The Dominion*, 20 February 2002, 11.

2. *No Negotiations in the Negotiations*

Where the Direct Negotiations process is most flawed is in the non-negotiable aspects of the process. Negotiation denotes bargaining with a view to reaching agreement. Hooper noted:

At its best, negotiation is a creative process in which the parties involved in an issue discuss their positions, needs and interests in order to find a positive, realistic and wide ranging solution.⁵⁸

When we think of negotiation, words such as compromise, bargaining, competition and cooperation come to mind.⁵⁹ However, there is a lack of negotiation in the Direct Negotiations process. The Government has set the procedures to be followed from step one to four. This is not negotiable and as stated above was essentially imposed on Māori.

The Government has set the total pool of money that it is prepared to spend. This means that, once the first claim is settled, other claims that follow are not negotiated on the basis of loss of land or loss of lives but on relativity to other claims.⁶⁰ The Tainui claim was negotiated in relation to the Sealords deal. Other claims such as Ngai Tahu and Ngati Awa have been negotiated in terms of Tainui. Ward noted:

Graham apparently considered that the settlement was not for \$170 million as such, but rather 17 percent of whatever total sum the government allowed. He therefore agreed to write into the settlement the provision that, should the \$1 billion ceiling be raised over the next 50 years, Tainui would always get 17 percent of the additional amount.⁶¹

While the current Labour Government has abolished the fiscal cap,⁶² the relativity clauses in the Tainui and Ngai Tahu settlements mean that other settlements will surely be negotiated in relation to those claims. The

⁵⁸ Hooper, Spiller, and Macduff, "Negotiation" in Spiller, P (ed) *Dispute Resolution in New Zealand* (1999) 23.

⁵⁹ For further discussion on negotiations see Fisher, R and Ury, W *Getting to Yes – Negotiating agreement without giving in* (1983), Macduff, "The Role of Negotiation: Negotiated Justice?" in McLay, G (ed) *Treaty Settlements: The Unfinished Business* (1996) 54, and Weeks, D *The Eight Essential Steps to Conflict Resolution – Preserving Relationships at Work, at Home, and in the Community* (1994).

⁶⁰ See Principle 3 at page 19 above.

⁶¹ Ward, *supra* note 42, at 55.

⁶² For further discussion on the fiscal cap, see Gardiner, *supra* note 53.

language of the fiscal cap may have disappeared from Government policy but the actions of settlements within a fiscal cap remain.

Further, the Crown is specific about the claims with which it wishes to deal and in what order. The Crown is also clear about its intention to negotiate historical claims.⁶³ The Government also decides if a claimant is ready for negotiations and whether the group is mandated to the Government's requirements. After negotiating a settlement the Government will not proceed with the settlement until it is satisfied with an Iwi's plan for settlement.

Going through the above steps, the only part negotiations will play in any of the process is how the package, the value of which the Government has already decided, will be composed.⁶⁴ Kelsey was critical of the Government proposal for the settlement of claims and questioned whether "negotiations" actually existed in the settlement process.

Where does "negotiation" come in once the settlement process is under way? The Government:

- sets the procedure to be followed,
- sets the total pool of money it is prepared to spend,
- decides whether iwi have proven their grievance,
- selects which grievances have high enough priority to be dealt with,
- sets the price they are prepared to pay for those grievances they are willing to address,
- decides whether a negotiator has a proper mandate to represent a iwi or hapu,
- decides whether the plan for distributing the outcome is acceptable,
- can abolish the 'bank' of the Crown-held land earmarked for possible return, at any time.⁶⁵

The process is more in line with "take it or leave it" than negotiation. To package the process as one of negotiation is misleading. The reality is that the process contains very little scope for negotiating a settlement and yet it is supposed to be the process which is important to achieving just, fair and durable settlement.

Macduff acknowledged the importance of the negotiation process in discussing the role of negotiations in a Treaty context:

⁶³ Office of Treaty Settlements, *supra* note 11, at 22.

⁶⁴ Kelsey, *supra* note 54, at 21.

⁶⁵ *Ibid*, 22.

... what seems equally important – both in terms of the outcomes and with a view to the ongoing relationship of the negotiating parties – is the protection and management of the process of the negotiations.⁶⁶

Certainly the outcome of settlements is important. How those settlements are achieved and through what processes matters are progressed is equally important if negotiated settlements are to be truly fair, just and durable.

3. Focus on Negotiations has Marginalised the Waitangi Tribunal

The Waitangi Tribunal has been marginalised by the Government's preference for Direct Negotiations.⁶⁷ Claimants are making the decision that they want a quicker path to a settlement. This normally means by-passing the Tribunal and going straight to Direct Negotiations. The Direct Negotiations' process is preferred by the Government, with many MPs wanting the quick settlement of Treaty claims. It may be asked whether MPs seek just and fair settlements or merely quick settlements, given the comments of Ward who recognised that the marginalisation of the Tribunal has not happened by accident:

Many members of the National government taking office in late 1990 were, at best, lukewarm about the Treaty claims process, and saw the Tribunal as fostering new grievances rather than resolving old ones....Virtually all of them – and many Labour MPs too, in response to their electorates – wanted the process to be completed quickly. To this end, they wanted claims settled where possible by direct negotiations between the claimants and the Crown, without having to go through expensive and protracted Tribunal hearings.⁶⁸

Fleras and Spoonley were of the view that MPs had actually conspired to undermine the Tribunal's role as a mechanism for justice.⁶⁹ With Government attitudes as such it is no wonder that the Government has and continues to under-fund and under-resource the Tribunal.

⁶⁶ Macduff, "The Role of Negotiation: Negotiated Justice?" in McLay, *supra* note 8, at 57.

⁶⁷ Fleras, A and Spoonley, P *Recalling Aotearoa – Indigenous Politics and Ethnic Relations in New Zealand* (1999) 22.

⁶⁸ Ward, *supra* note 42, at 40.

⁶⁹ Fleras and Spoonley, *supra* note 67, at 22.

National Party Member of Parliament Georgina Te Heuheu was of the view that the Government was marginalising the Tribunal in an effort to force claimants into negotiations:

... the Government might be trying to create a backlog to force claimants into direct negotiations. But without an independent quasi-judicial body for claimants to turn to the negotiations would be weighted solely in the Government's favour.⁷⁰

Roberts was also of the view that the preference for direct negotiations resulted in the marginalisation of the Waitangi Tribunal and was also in order that the Government retained full control of the settlement process.

This is clearly in the government's interest because it has more resources at its disposal in the negotiation process, and will ultimately determine the nature of any settlement and what state assets will be returned. In other words, it keeps the upper hand. ...This latest move can also be seen as a further marginalisation of the Waitangi Tribunal.⁷¹

4. Presumed Acceptance of Process

It has been noted above that Māori initially rejected the Negotiation process. With the passing of time the Government now appears to have assumed that, with the settlement of some claims and the increase of new claimants looking to settle grievances, Māori have now accepted the Negotiations process. Part of the justification for the implementation of the Negotiation process used by the then Minister of Treaty Negotiations, Douglas Graham, was the fact that the Government was currently in negotiations with claimants,⁷² and there were "individual iwi and hapu coming in all the time waiting to get on with the resolution of their particular claim".⁷³

Current reading of the Office of Treaty Settlements' quarterly report reveals the Government's perception of acceptance of the negotiation process by Māori:

⁷⁰ Berry, "Treaty stalling claims denied, but no extra cash", *The Evening Post*, 28 May 2001, 2.

⁷¹ Roberts, *supra* note 45, at 17.

⁷² The Tainui and Ngai Tahu claims.

⁷³ Roberts, *supra* note 50, at 12.

Since late 1998 there has been an increased level of interest in direct negotiations by claimant groups with 13 groups in the negotiations phase. A number of other groups are seeking a negotiating mandate.⁷⁴

The perception is that, because Māori are participating in the process and have achieved settlements through the process, Māori have accepted the process. This is not so. The first major tribal settlements of Tainui and Ngai Tahu rejected the Government's policy:

Both Tainui and Ngai Tahu maintained that they had begun negotiations outside of that policy and would continue negotiations on that basis. Both had rejected the policy at consultation hui and said they were not negotiating within the parameters of the government's new policy.⁷⁵

Groups entering the negotiation process have been categorical that their entry into the process should not be seen as acceptance of the process.

Taranaki tribes were in a similar position when they expressed their willingness to enter into negotiations with the Government. Their claims' co-ordinator, Peter Adds, made it clear that this was not to be interpreted as acceptance of the Government's proposal for settling claims, stating that in a very united way they had rejected the policy at a consultation hui.⁷⁶

Māori have no alternative but to enter into negotiations if they are wanting to settle their Treaty claims. Therefore the mere fact that Māori are entering into negotiations cannot be seen as an endorsement of the negotiation process.

5. The Crown as the Final Judge of its Own Court

The Crown at Tribunal level is one of the parties presenting evidence before the Tribunal and refuting allegations made by Māori claimants. At Negotiation stage it is the Crown that determines what Māori claimants may receive in settlement. Such a situation caused Henare to comment that, in reality, the Government is the judge and jury in its own case.⁷⁷ Josie Anderson, now a member of the Waitangi Tribunal, put matters differently but conveyed the same message when she stated:

⁷⁴ Office of Treaty Settlements, *Quarterly Report to 31 March 2002* (2002) 3.

⁷⁵ Roberts, *supra* note 45, at 9.

⁷⁶ *Ibid.*

⁷⁷ Henare, "Carrying the burden of arguing the Treaty" in Capper, *supra* note 17, at 128.

By whose law does a thief get to steal a car, admit later that he has stolen it, then decide when, how, and what part of the vehicle he will give back to the owner.⁷⁸

An important issue is that settlements must be completed in a fair and just manner. Quick settlements may not necessarily equate to just settlements. The danger is that hurried settlements could lead to further injustices. This was acknowledged by Annette Sykes when she recognised that trying to settle matters cheaply and in a hurry could lead to further injustices.⁷⁹ The negative aspects identified within the Direct Negotiations make this process unfair and unjust to the Māori participants of the process.

VI. WHERE TO FROM HERE?

There is very little argument that the processes should continue to develop and need to be developed.⁸⁰ Ward is of the view that, while there have been difficulties with the development of a process for settling Treaty claims, there is a “manageable and effective process taking shape”.⁸¹ In 1995 a publication entitled *Treaty Settlements: The Unfinished Business*⁸² contained a number of articles looking specifically at the developing settlement process.

From the above examination I contend that there are a number of factors or principles which need to be applied within the development of resolution processes for Treaty claims.

I do not intend to propose changes to rectify or improve each of the negative aspects identified above. From a practical and realistic perspective I do not foresee the Crown making major changes to the present processes. It would take a significant amount of lobbying for the Crown to consider major changes to these processes. The following principles I perceive are base-line imperatives in order to avoid the negative aspects of the process identified

⁷⁸ Gardiner, *supra* note 53, at 125.

⁷⁹ Roberts, *supra* note 45, at 12.

⁸⁰ For insight into the Crown’s changing policies for direct negotiations, see Office of Treaty Settlements, *Treaty of Waitangi claims – Direct Negotiations Process* (1994); Office of Treaty Settlements, *Crown Negotiations Work Programme: How to Get There – A guideline to the Negotiations Work Programme for claimants and counsel* (1996); Office of Treaty Settlements, *Treaty of Waitangi claims – Direct Negotiations Process* (1997); and Media briefing on the “Treaty of Waitangi Settlements Process” at <http://www.liveupdater.com/ots/DocumentLibrary/TreatyofWaitangiSettlementsProcess.htm>, 9 July 2002.

⁸¹ Ward, *supra* note 42, at 70.

⁸² McLay, *supra* note 8.

above. The following factors I have identified are in no particular order of priority or preference.

1. All Participants Must be Involved in the Future Development of the Process

Māori have not been involved in the planning, establishment or development of the current claims processes. Comments from Denese Henare in regards to Crown Direct Negotiations and also the Waitangi Tribunal reflect this fact:

The partnership set up by the Treaty is not a true partnership in the sense that Māori have not fully participated within the processes to achieve resolution.⁸³

In 1994/95 the Crown took its proposal for settlement of Treaty claims to Māori around the country. The resentment to and rejection of the proposal was discussed above.⁸⁴ The dominant reason for the rejection of the Crown's proposal was due to the substance of the proposal and also the unilateral development of the proposal.⁸⁵

For a claims process to obtain some acceptance and approval from Māori, given past experience, it would seem certain that Māori will need to be involved in the future development of the claims process. As a major partner within the settlement process Māori need to be afforded the opportunity to participate in the development of settlement processes. Māori participation in the development of the processes will assist Māori acceptance of the processes.

2. Clear Purpose of the Process Needs to be Identified

It needs to be asked why there are both the Waitangi Tribunal process and the Direct Negotiations process. The Māori view and the Crown view differ in relation to why the two processes are necessary. The current processes are dominated by the Crown view.

For the Government the settlement of grievances is part of the reconciliation of the Crown and Māori with a view to achieving better relations between

⁸³ Henare, *supra* note 77, at 127.

⁸⁴ *Supra* pages 23-25.

⁸⁵ See the analysis of submissions regarding the Crown's proposal compiled in Crown, *Report of Submissions – Crown Proposal for the Treaty of Waitangi Claims* (1995) 107.

Māori and the Crown. The resolution of historical grievances is a necessary first step towards establishing a healthy and robust relationship.⁸⁶ It is recognised that:

The settlement of grievances of the indigenous people arising from colonisation is not an easy task. Yet to ignore valid grievances is not only unjust but leaves unreconciled the relationship between the descendants of the settlers and the tangata whenua. Race relations in such a climate will always be fragile.⁸⁷

Racial harmony is but one reason given by the Government to justify the resolution of historical Treaty grievances. The Government also sees settlements assisting Māori economically. There is the hope that future development will address the many inequalities between Māori and non-Māori in areas such as education, health, housing, employment and imprisonment rates. Recognising that settlements will not by themselves solve Māori social issues, the Government does seek “to provide Māori communities with tangible recognition of their mana and a resource base for future development”.⁸⁸

Others, such as Coates, have viewed the Government’s objective of settlements in a different light. Coates viewed the Government attempts to address historical and legal obligations as merely moves to escape international pressure and condemnation, or to find solutions to the critical problems of the indigenous minorities.⁸⁹

The Waitangi Tribunal has seen the need to address Treaty grievances from a slightly different point of view. In the *Waitangi Tribunal Business Strategy 1998* there was recognition that economic benefits from settlements will assist in forming an economic base from which to address some of the negative statistics pertaining to Māori. The Tribunal then proceeded to identify the importance of addressing historical grievances in order to allow Māori to focus on pressing social and economic needs.

The focus on the past grievances is diverting the energies of many Māori away from pressing social and economic needs and is preventing Māori from taking control of

⁸⁶ Office of Treaty Settlements, *supra* note 11, at 16.

⁸⁷ *Ibid*, 3.

⁸⁸ *Ibid*, 16.

⁸⁹ Coates, “International Perspectives on Relations with Indigenous Peoples” in Coates, K S and McHugh, P G *Living Relationships – Kokiri Ngatahi* (1998) 29.

their futures. However, it is difficult to move beyond a sense of grievance if that grievance is not acknowledged.⁹⁰

For Māori the resolutions of Treaty grievances are about justice, future survival and self-determination. The settlement of historic Treaty claims for Māori is part of the process towards tino rangatiratanga or self-determination. Williams summarised Māori attitudes to the Treaty resolution processes as follows:

To Māori, their survival as a discrete cultural, linguistic, political, and economic group within New Zealand is the purpose of the process.⁹¹

Williams, cited by Kelsey, also saw the goals of Treaty claims for Māori as three-dimensional. Williams stated that they:

are a response to current feelings of cultural, economic, and political powerlessness. They are not purely backward looking. They have three dimensions. First, Māori seek to use the claims process to secure the just settlement of historic wrongs. Usually those historic wrongs are argued to have grievously injured the cultural and economic well being of the tribe. Second, Māori seek to use the claims process to protect and enhance their cultural base. That is to affirm and enhance the Māori sense of separate identity. Third, Māori seek to use the claims process as a means to participate in mainstream economic activity. The aim is to secure an economic base to benefit Māori collectively and to ensure their survival as a distinct people.⁹²

Māori and the Crown have different objectives and expectations in relation to the claims processes. For a process to be effective Macduff identified that:

as a preliminary point, the issue is simply one of clarifying what the expectations of all the participants are in taking part in this process.⁹³

In a critique of the claims settlement process, Coates identified the difference in expectations as the “root problem” within settlement processes throughout the world. Coates argued that “indigenous groups and

⁹⁰ Department for Courts, *supra* note 13, at 3, and the preamble of the Treaty of Waitangi Act 1975, 6.

⁹¹ Williams, J V “Quality Relations: The Key to Māori Survival!” in Coates and McHugh, *supra* note 89, at 262.

⁹² Kelsey, *supra* note 10, at 270.

⁹³ Macduff, *supra* note 66, at 55.

governments the world over have different goals and are thus talking past one another".⁹⁴

As I see it the problem is simple enough. While the Crown continues to dominate what the settlements are about, it is highly unlikely that Māori and the Crown will be able to develop the current processes with like purposes and expectations in mind. If the Crown opened its view to include Māori aspirations and expectations, the end result might be surer and swifter. I would anticipate that the processes by which any such settlements are achieved would be markedly different from current processes.

Māori also need to be clear what the "Māori" purpose is. For as long as we have mandated negotiators who sign settlements for something based on Crown-dominated views, this will be an uphill battle. The courtroom litigation regarding the fisheries settlement is proof that Māori are divided by the Crown's approach.⁹⁵

3. *Change in Focus*

The current focus of the claims processes is adversarial. The processes accentuate a competitive approach and conflict in shaping the relations between Māori and the Crown.⁹⁶ Current settlement processes are inherently confrontational. Parties are involved in a protracted struggle in which participants are galvanised into opposing corners, each seeking to concede as little as possible and gain as much as possible.⁹⁷

A preoccupation with contesting claims has also had the consequences of glossing over the key element in any productive interaction: the managing of a relation in the spirit of cooperative engagement rather than by the letter of the law or terms of a contract.⁹⁸

The settlement processes dominate Māori-Crown relations and are therefore influential in setting the parameters and make-up of the Māori-Crown relationship. If the settlement processes focus on a contest, involving a competitive, adversarial approach, it is no wonder that the Māori-Crown

⁹⁴ Coates and McHugh, *supra* note 89, at 10.

⁹⁵ For discussion of the Fisheries settlement see Durie, M H *Te Mana, Te Kawanatanga – The Politics of Māori Self-Determination* (1998) 149.

⁹⁶ Fleras & Spoonley, *supra* note 67, at 140.

⁹⁷ *Ibid*, 142.

⁹⁸ *Ibid*, 140.

relationship reflects such a situation. This tends to “distract from the possibility of a relationship based on coexistence rather than conflict”.⁹⁹

A reorganisation of the present processes focussing on relationships rather than contestation is seen as a positive move towards racial harmony and better relations between Māori and the Crown. These factors are identified as important outcomes of the settlement process by the Crown, Māori and the Waitangi Tribunal.¹⁰⁰ Fleras and Spoonley assert that:

Pressure is mounting to transcend claims-making as the exclusive model for Māori-Crown relations. The preference is to focus instead on a more flexible approach that emphasises engagement rather than autonomy, relationships rather than rights, interdependence rather than opposition, and power-sharing rather than an elite game of resource re-allocation.¹⁰¹

Māori have sought to emphasise a Māori-Crown relationship for many years. Williams in reviewing the articles by Coates and McHugh stated:

All this brings me to the issue of relationships and the strong call in both papers for a shift from full and final to organic agreements which emphasise the ongoing quality of the relationship between the parties rather than the value of the settlement. Without wishing to detract from the importance of that message and the intellectual underpinning that each writer brings to it, the Māori leadership has been saying this for some considerable time now.¹⁰²

The change in focus, from the current competitive adversarial one to a relationship focus, appears essential for developing better relations between Māori and the Crown.

4. Process Needs to be Based on the Treaty

The principles of the Treaty of Waitangi are central to the Waitangi Tribunal process. However, the Treaty principles are not mentioned in either the Direct Negotiations process itself or the Crown’s principles for achieving the settlement of Treaty grievances.¹⁰³ Within a process for the settlement of

⁹⁹ Ibid, 144.

¹⁰⁰ Wickliffe, *supra* note 21.

¹⁰¹ Fleras and Spoonley, *supra* note 67, at 144.

¹⁰² Williams, *supra* note 91, at 264.

¹⁰³ Durie, *supra* note 95, at 190. For a comprehensive list of the Crown’s principles, see Office of Treaty Settlements, *Healing the Past, Building a Future – A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (1999) 22.

Treaty grievances it seems odd to say the least that the process itself is not based on the Treaty or Treaty principles at a minimum. Further, the Treaty principles have not appeared in settlement documents.¹⁰⁴

Māori concerns regarding this issue were raised in 1995. The Government's disregard for the principles of the Treaty, and what Durie referred to as the "implicit discounting of the Māori version of the Treaty",¹⁰⁵ saw the Government moving "away from any recognition of the Treaty as a broad guide to future national development".¹⁰⁶ Once again the Crown views outweighed Māori views.

With the Treaty of Waitangi playing such an essential part in the formation of the relationship between Māori and the Crown, it is not surprising that Māori called for the principles of the Treaty of Waitangi to be included in any proposal to settle Treaty claims.¹⁰⁷

Support and recognition of the importance of the Treaty came from Sir Geoffrey Palmer in his discussion regarding Treaty settlement processes, where he stated:

Surely the main business must be, as it always had been, to make progress under the Treaty of Waitangi to ensure that Māori grievances are addressed and that justice is done. Certainly we must look forward as Chief Judge Durie said yesterday. But let us keep the focus on the Treaty.¹⁰⁸

The Treaty is about the past but has also always been about the future.¹⁰⁹ The Treaty is also about the relationship between Māori and the Crown. I addressed the need to change the focus of the claims process to a concentration on relationships.¹¹⁰ The Māori-Crown relationship will need to be based on the Treaty. It therefore makes sense that the development of the current claims processes be based at least on the Treaty relationship as identified in the Treaty.

¹⁰⁴ Durie, *ibid.* 205.

¹⁰⁵ Durie, "Proceedings of a Hui held at Hirangi Marae, Turangi" in McLay, *supra* note 8, at 24.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 27.

¹⁰⁸ Palmer, "Where to from Here?" in McLay, *supra* note 8, at 152.

¹⁰⁹ Durie, "The Treaty Was Always About the Future" in Coates and McHugh, *supra* note 89, at 189.

¹¹⁰ Durie and Orr, *The Role of the Waitangi Tribunal and the Development of Bicultural Jurisprudence* (1990) 14 NZULR 64.

VII. CONCLUSION

Through an examination of the positive and negative aspects of the Direct Negotiations for the resolution of Treaty claims, I have identified a number of elements which will assist the progress of settlements and resolutions. There are however major impediments that continue to hinder the settlement processes.

From this examination I have proposed some fundamental shifts that are necessary for the improvement of relations between Māori and the Crown. The development of a more equitable Treaty relationship is an imperative of the claims settlement process.

WAIKATO LAW REVIEW: THE FIRST TEN YEARS

BY THOMAS GIBBONS*

1. INTRODUCTION

This is the tenth volume of the *Waikato Law Review*. As such, it is an appropriate time to take stock of the *Review* and to contribute to the literature of law reviews.

In the early 1980s, it was possible to suggest that North America had “no jurisprudence of legal scholarship”.¹ This is no longer the case. In North America there is now a considerable literature on the nature, role, form, and function of the university law review.² As one commentator puts it, “[l]egal academics in the United States seem endlessly intrigued by the subject”,³ and Canadians are also paying more attention to their law reviews.⁴

Things are different in New Zealand. Law reviews – and legal scholarship – have attracted little academic attention thus far. To be sure, law lecturers, professors, Judges, students, and practitioners all write *for* the reviews, but few write *about* them. With the fiftieth anniversary of New Zealand’s first university law review due in 2003,⁵ it is possible that more attention may be paid to the law reviews in the near future. But this is no certain thing.

This article begins by placing the *Waikato Law Review* in context as a mixture of English and American law review traditions. It then goes on to explore how the *Waikato Law Review* reflects the Waikato Law School’s three pedagogical goals of professionalism, biculturalism, and law in context. The article continues by considering some particular features of the *Review* and its citation in other sources, and concludes by assessing the past and future of the Waikato Law School’s flagship publication.

* Final year BSoc Sci/LLB Hons student, University of Waikato.

¹ Fletcher, “Two Modes of Legal Thought” (1981) 90 *Yale Law Journal* 970.

² See eg the bibliography compiled by Scott (2001) 39 *Alberta Law Review* 690.

³ Ziff, “The Canadian Law Review Experience: Introduction to the Symposium” (2001) 39 *Alberta Law Review* 611.

⁴ See eg “Symposium: The Canadian Law Review Experience” (2001) 39 *Alberta Law Review* 611-694.

⁵ The Victoria University of Wellington Law Review.

II. THE WAIKATO LAW REVIEW IN CONTEXT

The Waikato Law School is the newest in New Zealand: while all the other New Zealand law schools began offering lectures in the 19th century, Waikato opened only in 1990. The first edition of the *Review* appeared in 1993, before the School had yet produced its first graduates.⁶ It has been said in the North American context that “the existence of a law review ... is considered to be the mark of a mature educational institution”,⁷ but despite the School’s young age there has never been any suggestion that the establishment of the *Waikato Law Review* was premature.

In the United States, most university law reviews - and there are over 250 of them - are edited by students.⁸ Law reviews with university affiliations have been published in the United States since 1852.⁹ The most famous is probably the *Harvard Law Review*, established in 1887. Some see the primary reason for the creation of the *Harvard Law Review* as being to “convey to the professional world the message and the scholarship of the Law School’s faculty”,¹⁰ while others have emphasised the strong scholarly and professional skills gained by students on the law review team.¹¹ In any case, law reviews caught on quickly at other leading law schools, and many other such publications followed.¹²

The student-edited law reviews have not been without their critics. In 1936, for example, Yale law professor Fred Rodell remarked that “[t]here are two things wrong with almost all legal writing. One is its style. The other is its content”. Having criticised legal writing, Rodell went on to be even more scathing about law reviews in particular.¹³ In recent years, criticism has

⁶ Bailey, “Foreword” (1993) 1 *Waikato Law Review*.

⁷ Swigert and Bruce, “The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews” (1985) 36 *Hastings Law Journal* 739, 779. See also Noonan, “Law Reviews” (1995) 47 *Stanford Law Review* 1117, which describes law reviews as “a necessary element of every respectable law school”.

⁸ See Cramton, “‘The Most Remarkable Institution’: The American Law Review” (1986) 36 *Journal of Legal Education* 1, 2.

⁹ This is the *American Law Register*, which survives as the *University of Pennsylvania Law Review*, the “oldest continuously published legal periodical in America” (Swigert and Bruce, *supra* note 7, at 757).

¹⁰ *Ibid.*, 778.

¹¹ Cramton, *supra* note 8, at 3-4.

¹² See Swigert and Bruce, *supra* note 7, at 779.

¹³ See Rodell, “Goodbye to Law Reviews” (1936) 23 *Virginia Law Review* 38, 38. At one point, Rodell called law reviews “spinach” (at 45).

grown. One United States judge has lamented the idea that law reviews are now full of “mediocre interdisciplinary articles”,¹⁴ when law schools “should be ... producing scholarship that judges, legislators and practitioners can use”.¹⁵ Another commentator has described a state of “general agreement” that law review articles “lack originality, are boring, too long, too numerous, and have too many footnotes, which are also boring and long”.¹⁶ Nonetheless, the United States law reviews have survived, and prospered. As one scholar has put it, they are “a real fact of life”.¹⁷

English law reviews are a very different sort of publication. In the words of one English scholar, they have been “somewhat overshadowed by their American cousins”.¹⁸ The *Law Quarterly Review*, “traditionally the most prestigious”,¹⁹ first appeared in 1885. Before this time, there were “few outstanding English legal periodicals ... [while] America could boast scores of legal journals, several of which were being edited with a high degree of professionalism”.²⁰ While the *Harvard Law Review* and its followers were edited by students, the *Law Quarterly Review* was established under the editorship of Frederick Pollock, one of the most renowned jurists of the age. The English law reviews have continued to be edited primarily by academics rather than by students, and they are much fewer in number. In the main, they have avoided many of the features that law reviews are criticised for in the United States: the articles are rarely particularly long, footnotes are generally kept to a minimum, and most scholarship continues to serve judges and the profession.²¹ But while some in the United States bemoan the number of interdisciplinary, non-doctrinal articles and the paucity of profession-oriented scholarship, others in Britain have complained of just the opposite.²²

¹⁴ Edwards, “The Growing Disjuncture Between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review* 34, 36.

¹⁵ *Ibid.*, 34.

¹⁶ Zenoff, “I Have Seen the Enemy and They Are Us” (1986) 36 *Journal of Legal Education* 21. See also Lasson, “Scholarship Amok: Excesses in the Pursuit of Truth and Tenure” (1990) 103 *Harvard Law Review* 926.

¹⁷ Martinez, “Babies, Bathwater, and Law Reviews” (1995) 47 *Stanford Law Review* 1139, 1145.

¹⁸ Twining, *W Blackstone's Tower: The English Law School* (1994) 110.

¹⁹ *Ibid.*

²⁰ Swigert and Bruce, *supra* note 7, at 763 (footnote 205).

²¹ See Twining, *supra* note 18, at 110-111.

²² See eg Murphy and Roberts, “Introduction” (1987) 50 *Modern Law Review* 677

In New Zealand, the first issue of the *Victoria University College Law Review* appeared in 1953. This was, at the beginning, “primarily for student consumption”, and its *raison d’être* was educational.²³ By the late 1960s, however, it was considered increasingly important that the *VUWLR* (as it had by then become) should be useful to the legal profession.²⁴ Following the lead of New Zealand’s first university law review, the *New Zealand Universities Law Review* appeared in 1963, the *Otago Law Review* in 1965, the *Auckland University Law Review* in 1967, the *Canterbury Law Review* in 1980, and, of course the *Waikato Law Review* in 1993. Since the early 1990s, a number of journals have appeared which deal with specific areas of law. The *New Zealand Business Law Quarterly* first appeared in 1993, followed by various others, including *Human Rights Law and Practice* in 1995, the *New Zealand Journal of Taxation Law and Policy* in 1994, and the *New Zealand Journal of Environmental Law and Yearbook of New Zealand Jurisprudence* in 1997. Specialisation in law journals is clearly on the rise, and some, at least, think that specialised journals can better serve the profession.²⁵ Nevertheless, the “generalist” university law reviews continue to serve scholarly, educational, and public relations ideals, and it is probably safe to say that they are here for good.

As a publication, the *Waikato Law Review* lies part-way between the American and English conceptions of a law review. In length and style, most articles are closer to the English approach: the 490 pages and 4800 footnotes of one US article is palpably inconceivable in the *Waikato* publication.²⁶ The *Review* is edited by faculty rather than students, and many of the articles are written to serve the profession. However, the *Waikato Law Review* also shares some common ground with US publications. For one, it is a *university* law review rather than a more general publication.²⁷ Furthermore, the *Review* has not shied away from interdisciplinary scholarship. Among the pages of the *Review* are articles written by sociologists and economists as well as law graduates.²⁸

²³ McGechan, “Foreword” (1953) 1 *Victoria University College Law Review* 3.

²⁴ Aikman, “Preface” (1968) 5 *Victoria University of Wellington Law Review*.

²⁵ See eg Ryder, “The Past and Future of Canadian Generalist Law Journals” (2001) 39 *Alberta Law Review* 625, 636-637.

²⁶ The article in question is Jacobs, “An Analysis of Section 16 of the Securities Exchange Act of 1934” (1987) 32 *New York Law School Law Review* 209, cited in Rhode, “Legal Scholarship” (2002) 115 *Harvard Law Review* 1327, 1334-1335.

²⁷ Note, however, that a number of English law reviews have, traditionally at least, had strong connections with a university law school. See Twining, *supra* note 18, at 110.

²⁸ See eg West-Newman, “Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference” (2001) 9 *Waikato Law Review* 231; and

III. THE GOALS OF THE SCHOOL

The Waikato LLB was specially designed to fulfil three objectives: to provide a professional legal education which would allow its graduates to practise law; to teach law in its social, economic and political contexts; and to develop a bicultural approach to legal education.²⁹ This section will look at how the *Waikato Law Review* has fulfilled these goals. The choice of topics and the emphasis placed upon certain matters is necessarily selective. Nonetheless, the articles discussed should give some idea of how the *Waikato Law Review* helps to serve the pedagogical goals of the school.

1. Professionalism

One of the key objectives for the Waikato law degree was to provide a professional legal education providing for those who wish to practise law.³⁰ But professionalism is not solely evident in the curriculum. One of the ways in which the *Waikato Law Review* has exhibited professionalism is by publishing doctrinal scholarship. In general terms, doctrinal scholarship emphasises legal doctrine, and is generally designed to serve – or at least be useful to – the legal profession. For example, a case note which criticises aspects of a particular decision may later be used to encourage judges to overturn or distinguish that decision. Longer articles which examine bodies of law as a whole can help to give coherence to seemingly incoherent fields.

A considerable number of doctrinal articles have appeared in the *Waikato Law Review*. There have been case notes, such as Peter Fitzsimons' comment on *Securities Commission v R E Jones*,³¹ Trish O'Sullivan's appraisal of *Ruxley Electronics v Forsyth*,³² and Ruth Wilson's critique of *Fortex Group Ltd v Macintosh*.³³ Each has analysed one particular decision

Dawson, "Artificial Selection in Colonial New Zealand" (1999) 7 *Waikato Law Review* 73.

²⁹ Wilson, "The Making of a New Legal Education in New Zealand: Waikato Law School" (1993) 1 *Waikato Law Review* 1, 4. While the Auckland, Victoria, Canterbury and Otago LLB degrees consist of an intermediate year (a number of non-law papers, plus Legal Systems), a second year of compulsory law papers, and third and fourth years consisting mainly of optional papers, the Waikato LLB has no intermediate year, includes law and non-law papers in both the first and second years of the degree, and has a number of compulsory papers in its third year.

³⁰ *Ibid.*

³¹ Fitzsimons, "Case Note" (1993) 1 *Waikato Law Review* 165.

³² O'Sullivan, "Case Note" (1996) 4(2) *Waikato Law Review* 154.

³³ Wilson, "Case Note" (1998) 6 *Waikato Law Review* 127.

(or series of decisions in appealed cases) in terms of what it adds to existing law, whether the decision fits in with existing law, and whether the decision is a good one. There have also been longer studies of legal doctrine, extending beyond a single case to wider fields of analysis. Simon Upton's erudite analysis of "Purpose and Principle in the Resource Management Act" drew upon his insights as a Minister for the Environment. Not surprisingly, the article was an important benchmark document about sustainability of the environment in New Zealand.³⁴ Winnie Chan's article on "Land as Trading Stock" discussed a number of cases and proposed legislative reforms.³⁵ Wendy Ball's commentary on evidence reform similarly looked at both statutes and cases in order to describe a body of law and then suggested reform.³⁶ More recently, Noel Cox and Joel Manyam have analysed elements of succession and taxation law respectively.³⁷

Matters of professionalism, curriculum and scholarship come together in the McCaw Lewis Chapman Advocacy Contest. Within the Waikato Law School, professionalism is instilled in students in a number of ways, and one of these is an advocacy component in the compulsory Dispute Resolution course. Since 1995, the winning entry in the Contest (an offshoot of the course) has been printed in the *Review*. The first three examples of these were all arguments about key legal issues, such as the role of the Privy Council and the uses of alternative dispute resolution methods.³⁸ Since 1998, the emphasis has been on a more focussed (though perhaps more practical) form of advocacy, where the writer imagines himself or herself as counsel for an appellate decision, and presents an argument accordingly.³⁹

³⁴ Upton, "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato Law Review 17.

³⁵ Chan, "Land as Trading Stock" (1994) 2 Waikato Law Review 69.

³⁶ Ball, "The Law of Evidence relating to Child Victims of Sexual Abuse" (1995) 3 Waikato Law Review 63.

³⁷ Cox, "Conditional Gifts and Freedom of Testation" (2001) 9 Waikato Law Review 24; and Manyam, "Extensive Powers of the Commissioner of Inland Revenue" (2001) 9 Waikato Law Review 91.

³⁸ See Wilkins, "Judicial Legislation in New Zealand and the Privy Council's Role" (1995) 3 Waikato Law Review 57; North, "ADR: Appropriate Dispute Resolution?" (1996) 4(2) Waikato Law Review 56; and Baker, "Legislated Court Authority to refer to Mediation of Arbitration?" (1997) 5 Waikato Law Review 65.

³⁹ See eg Peterson, "*R v Rongonui*" (2000) 8 Waikato Law Review 167; Usher, "*Harley v McDonald*" (2001) 9 Waikato Law Review 315.

2. Biculturalism

The impetus to develop a bicultural approach to law (and legal education) was one of the driving forces behind the establishment of the Waikato Law School. It should come as no surprise, then, that articles by Māori and on Māori legal issues have been a staple of the *Review*. To begin with, the subtitle of the *Review* is “Taumauri”. In the first issue, editor Peter Spiller noted that this meant “to think with care and caution, to deliberate on matters constructively and analytically”. Spiller’s first introduction went on to state that the *Review* “cherishes the goal of biculturalism”.⁴⁰

Both Māori and Pakeha have written in the field. Among Pakeha, examples include Paul Havemann’s article on Māori rights and Pakeha duties in the first *Review*. This canvassed a number of “paradigms” present in Treaty discourse, illustrating how easy it was for people to talk past each other.⁴¹ Sir Robin Cooke’s Harkness Henry Lecture discussed the “challenge” of Treaty of Waitangi jurisprudence,⁴² and former Dean and current Attorney-General Margaret Wilson wrote about constitutional change for Māori.⁴³

Contributions on Māori issues by Māori have been more numerous. Annie Mikaere has written about the effects of colonisation upon Māori women,⁴⁴ and Stephanie Milroy’s article on Māori women and domestic violence included an interesting discussion on methodology in research which also gave weight to the nature and effects of Pakeha colonisation.⁴⁵ Issues for Māori women have also been discussed in articles by Leah Whiu and Linda Te Aho.⁴⁶

⁴⁰ Spiller, “Editor’s Introduction” (1993) 1 *Waikato Law Review*.

⁴¹ Havemann, “‘The Pakeha Constitutional Revolution?’ Five Perspectives on Māori Rights and Pakeha Duties” (1993) 1 *Waikato Law Review* 53.

⁴² Cooke, “The Challenge of Treaty of Waitangi Jurisprudence” (1994) 2 *Waikato Law Review* 1.

⁴³ Wilson, “The Reconfiguration of New Zealand’s Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality” (1997) 5 *Waikato Law Review* 17.

⁴⁴ Mikaere, “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 *Waikato Law Review* 125.

⁴⁵ Milroy, “Māori Women and Domestic Violence: the Methodology of Research and the Māori Perspective” (1996) 4(1) *Waikato Law Review* 58.

⁴⁶ Whiu, “A Māori Woman’s Experience of Feminist Legal Education in Aotearoa” (1994) 2 *Waikato Law Review* 161; and Te Aho, “EEO for Māori Women in Māori Organisations” (2001) 9 *Waikato Law Review* 187.

Not all the articles by Māori focussed on women's issues. In the 2001 *Review*, Leah Whiu, a former student and now a Lecturer at the School, published an article arguing that the school – and one could possibly add the *Review* – should not get complacent about the fulfilment of biculturalism. Whiu made a number of critical comments about the “biculturalism” of former Dean Margaret Wilson, suggesting that Wilson interpreted biculturalism as “accommodation” of Māori concerns rather than real change.⁴⁷ But Whiu did not think biculturalism was something to be abandoned. Rather, she wrote, “the bicultural commitment and its accompanying challenges continue to provide a way forward”.⁴⁸

3. *Law in Context*

It is difficult to single out any particular articles as evidence of a “law in context” approach: almost every article published in the *Review* would provide a good example. Nonetheless, some articles are more explicitly *about* law or jurisprudence than others. And some articles are more explicitly written for scholarly readers. To put it another way, “law in context” articles can be seen to serve the academy rather than the practicing profession.

Of course, “law in context” can mean different things to different people. In discussing his role in the Waikato Law School's pedagogical framework, Paul Havemann has written that “[t]he essence of teaching ‘law in context’ for critical literacy is ‘to ground all knowledge of social life in human history, culture and relations of power’”. He went on to observe that not everyone understands “context” the same way.⁴⁹

This is indeed the case. Another way of understanding “law in context” could be to see it as emphasising less a critical perspective than simply a broad approach to the legal system. Kevin Glover's 2000 article on the Privy Council, for example, is clearly not doctrinal scholarship because it is about a “big picture” issue rather than any specific point of law.⁵⁰ The same could be said for many of the Harkness Henry lectures. They are about legal issues

⁴⁷ Whiu, “Waikato Law School's Bicultural Vision – Anei Te Huarahi Hei Wero I A Tatou Katoa” (2001) 9 *Waikato Law Review* 265, 286.

⁴⁸ *Ibid.*, 292.

⁴⁹ Havemann, “‘Law in Context’- Taking Context Seriously” (1995) 3 *Waikato Law Review* 137, 158-159.

⁵⁰ Glover, “Severing the Ties that Bind: The Development of a Distinctive New Zealand Jurisprudence” (2000) 8 *Waikato Law Review* 25.

rather than points of law and, as such, represent something of a “law in context” approach.⁵¹

Still another way of seeing “law in context” was suggested by the first editorial. There, Peter Spiller emphasised the importance the *Review* “attached to examining the law in the context of its historical, social, economic and political background”.⁵² It is this conception of “law and context” that features in nearly every *Waikato Law Review* article, from the narrowly doctrinal to the deeply theoretical. This may to some be stretching the meaning of the term, but it is also probably the most pervasive kind of “law in context” scholarship in the *Review*.

IV. PARTICULAR FEATURES OF THE REVIEW

1. *The Harkness Henry Lectures*

One of the most important features of the Waikato Law School calendar is the annual Harkness Henry lecture, delivered by a prominent New Zealand legal figure on a topic of New Zealand jurisprudence. The first of these published in the *Review*⁵³ was delivered by Sir Robin Cooke, then President of the New Zealand Court of Appeal.⁵⁴ Here, Cooke traced the history of the Treaty in the Court of Appeal before commenting on more recent cases, including (perhaps most importantly) the *New Zealand Māori Council v Attorney-General* “lands” case.⁵⁵ Cooke concluded that “[t]he challenge of Treaty of Waitangi jurisprudence has been two-fold: to define the principles of the Treaty and to do what the courts can to ensure that they are given practical effect”.⁵⁶

The Harkness Henry lectures are often interesting for the insights that they provide into the attitudes of leading legal figures. In his lecture on private interest litigation, for example, Sir Ivor Richardson commented:

⁵¹ See eg McGrath “The Crown, the Parliament and the Government” (1999) 7 *Waikato Law Review* 1; and Cartwright, “Some Human Rights Issues” (2001) 9 *Waikato Law Review* 1.

⁵² Spiller, *supra* note 40.

⁵³ Note that this was not the first lecture delivered; that honour belongs to Gault J who spoke on “The Development of a New Zealand Jurisprudence” (1992).

⁵⁴ Cooke, *supra* note 42.

⁵⁵ [1987] 1 NZLR 641.

⁵⁶ Cooke, *supra* note 42, at 11.

Judges make law and are expected to make law and in doing so necessarily weigh public policy considerations. ...[t]he notion that the common law is a seamless web is as unrealistic as the view that on their appointment judges obtain the password to the correct common law answer.⁵⁷

In her address on the judicial function, then newly appointed High Court Judge (and now Chief Justice) Sian Elias advocated the expansion of administrative law to meet human rights needs.⁵⁸ In 1997, then Governor-General Sir Michael Hardie Boys, noting that constitutional law “is inextricable intertwined with politics”, discussed his role in the formation of the National–New Zealand First coalition government.⁵⁹ Court of Appeal judge and former Law Commissioner Sir Kenneth Keith wrote on international law in the New Zealand context, calling particularly for LLB courses to address international developments.⁶⁰ Solicitor-General John McGrath examined a number of key recent constitutional issues, with an emphasis on the important role played by conventions in New Zealand’s unwritten constitution.⁶¹ McGrath, now a judge of the Court of Appeal, wrote of the Alamein Kopu affair that:

there is scope for the view that as a matter of principle the right of a person to act as a Member of Parliament raises an issue that the courts rather than Parliament should resolve. ... Whether an elected legislator remains qualified to sit in a legislative house is ... inherently a question that calls for an independent decision according to law.⁶²

More recently, Thomas J of the Court of Appeal endeavoured to find a “conscience” in the common law.⁶³ He suggested that “[t]here is a sense in which the law’s conscience is larger than the judges”,⁶⁴ and that “the notion of an altruistic premise underlying the law cannot be debunked”.⁶⁵ Governor-General Dame Sylvia Cartwright discussed the increasing importance of human rights on both the domestic and international legal

⁵⁷ Richardson, “Public Interest Litigation” (1995) 3 *Waikato Law Review* 1.

⁵⁸ Elias, “‘Hard Look’ and the Judicial Function” (1996) 4 *Waikato Law Review* 1, 22.

⁵⁹ Hardie Boys, “Continuity and Change: The 1996 General Election and the Role of the Governor-General” (1997) 5 *Waikato Law Review* 1, 2 and generally.

⁶⁰ Keith, “The Impact of International Law on New Zealand Law” (1998) 6 *Waikato Law Review* 1, 35.

⁶¹ McGrath, *supra* note 51.

⁶² *Ibid.*, 10.

⁶³ Thomas, “The Conscience of the Law” (2000) 8 *Waikato Law Review* 1, 3.

⁶⁴ *Ibid.*, 22.

⁶⁵ *Ibid.*, 23.

stage.⁶⁶ Tipping J examined the topical issue of balancing freedom of speech with journalistic responsibility and the need to protect reputations.⁶⁷

Read together, the Harkness Henry lectures represent a substantial corpus of work on New Zealand law. The wide range of topics, including jurisprudence, international law, public law, the Treaty of Waitangi, and private law issues, and the prestige and experience of the speakers, have ensured that every edition of the Review has started with a scholarly high note.

2. Legal Education

Given that the Waikato Law School was forged in debates about the role, purpose and ideals of legal education, it is hardly surprising that articles on such issues have been a regular feature of the *Review*. Indeed, when looking over the first ten years of the *Review*, the prominence of matters of legal pedagogy is inescapable.

The first, by the then Dean and current Attorney-General Margaret Wilson, was on the establishment of the Waikato Law School and its LLB degree.⁶⁸ Wilson's unique inside view provides a useful background to the School, and her conclusion set strong goals for both the School and the *Review*:

The challenge for the Waikato Law School is to play a relevant and constructive role in the development of a New Zealand jurisprudence, that reflects not only the current economic policy, but that is inclusive of the social and cultural values and experiences of all people within the New Zealand community.⁶⁹

Immediately following this article was one by two lecturers and a student at Waikato on teaching law in context, particularly from feminist and bicultural perspectives.⁷⁰ Teaching practice was also a theme in Kaye Turner's article in the next year's *Review*,⁷¹ and the role of students in the

⁶⁶ Cartwright, *supra* note 51.

⁶⁷ Tipping, "Journalistic Responsibility, Freedom of Speech and Protection of Reputation – Striking the Right Balance Between Citizens and the Media" (2002) 10 *Waikato Law Review* 1.

⁶⁸ Wilson, *supra* note 29.

⁶⁹ *Ibid.*

⁷⁰ Seuffert, Milroy and Boyd, "Developing and Teaching an Introduction to Law in Context: Surrogacy and *Baby M*" (1993) 1 *Waikato Law Review* 27.

⁷¹ Turner, "Teaching Professional Responsibility: The Waikato Experience" (1994) 2 *Waikato Law Review* 151.

construction of an appropriate (or inclusive) legal pedagogy was developed further in the same issue.⁷²

Paul Havemann contributed an article on the importance of context in law studies in the next edition of the *Review*. Havemann gave considerable attention to the design of the “Law and Societies” course for the first year LLB curriculum.⁷³ Peter Jones discussed student writing as well.⁷⁴

It is perhaps a reflection of the increasing maturity the School was experiencing that legal education matters were ignored for the next few years. In the 2000 *Review*, however, Dorothy and Peter Spiller examined the need for diverse educational environments, such as the Waikato Law School, “to be responsive to and respect different identities”.⁷⁵ The Spillers’ discussion was in many ways complementary to Havemann’s, as it emphasises the curriculum and teaching styles of another first-year law course, Legal Systems.⁷⁶

Matters were brought full circle in 2001. As mentioned above, Leah Whiu, who had earlier contributed to the *Review* while a student and was now a Lecturer, offered criticism of Margaret Wilson’s bicultural vision for the School.⁷⁷ Express reference was made to the article which began the first *Review*,⁷⁸ and, with Wilson now departed to Parliament, it was seen to be worth reflecting on how the *Review* articles reflected her vision.

3. *Legal History and Comparative Law*

Articles about legal history and comparative law have been a common feature of the *Review*. Following the notion that “[t]he past is a foreign country”,⁷⁹ these two topics have been grouped together in this section. Of course, many articles in the *Review* have drawn on elements of history or international comparison: as such, only articles specifically directed to these topics are discussed in this section.

⁷² Whiu, *supra* note 46.

⁷³ Havemann, *supra* note 49.

⁷⁴ Jones, “A Little Something about Writing” (1995) 3 *Waikato Law Review* 181.

⁷⁵ Spiller and Spiller, “Teaching Law in the Context of Student Diversity” (2000) 8 *Waikato Law Review* 106.

⁷⁶ *Ibid.*, 113-116.

⁷⁷ Whiu, *supra* note 47.

⁷⁸ *Ibid.*, 274 at note 45.

⁷⁹ Hartley, LP *The Go-Between* (1953) 9: “The past is a foreign country: they do things differently there”.

Peter Spiller wrote in the initial *Review* about the work of the Court of Appeal in its early years as a “separate” court.⁸⁰ Drawing on interviews, cases, and commentary, Spiller showed how the foundations of the modern Court of Appeal were laid in its first 18 years.⁸¹ A more recent period in New Zealand’s legal history was examined in Peter Fitzsimons’ article on the Securities Commission.⁸² Comparative law made an appearance in Chris Cunneen and Julie Stubbs’ article in the 1996 special issue on domestic violence.⁸³ Peter Spiller followed this in 1997 with a comparison of small claims bodies in South Africa and New Zealand.⁸⁴ In 1998 an article by Anna Kingsbury considered the similarities and differences between Australian and New Zealand law in regard to funding the remediation of chemically contaminated land.⁸⁵

This outline gives a picture of some years of legal history followed by several of comparative law. In more recent years, however, the two have often stood side by side, reflecting a growing interest in placing law in these kind of contexts. Richard Dawson’s analysis of “artificial selection” in colonial New Zealand drew on aspects of economics and jurisprudence as well as legal history.⁸⁶ The article by Michael Spisto and Fran Wright in the same year followed Spiller’s example of comparing elements of New Zealand and South African law.⁸⁷ In 2001, Derek Round took a biographical look at former Attorney-General and Minister of Justice Henry Mason,⁸⁸

80 Spiller, “Judges at Work: The New Zealand Court of Appeal (1958-1976)” (1993) 1 *Waikato Law Review* 79.

81 *Ibid*, 106.

82 Fitzsimons, “The New Zealand Securities Commission: The Rise and Fall of a Law Reform Body” (1994) 2 *Waikato Law Review* 87.

83 Cunneen and Stubbs, “Violence Against Filipino Women in Australia: Race, Class and Gender” (1996) 4(1) *Waikato Law Review* 131.

84 Spiller, “The Small Claims System: A Comparison of the South African Small Claims Court and the New Zealand Disputes Tribunal” (1997) 5 *Waikato Law Review* 35.

85 Kingsbury, “Funding the Remediation of Contaminated Land in Australia and New Zealand: The Problem of Orphan Sites” (1998) 6 *Waikato Law Review* 37.

86 Dawson, *supra* note 28.

87 Spisto and Wright, (Justifiable) Homicide Whilst Effecting an Arrest: When is this Lawful? A Comparison Between the South African and New Zealand Systems of Law” (1999) 7 *Waikato Law Review* 147.

88 Round, “Henry Greathead Rex Mason KC CMG: An Outstanding Law Reformer” (2001) 9 *Waikato Law Review* 131.

closely followed in the pages of the *Review* by another article using South African law to shed light on options for New Zealand.⁸⁹

The 2002 *Review* continues the trend developed in previous issues. Peter Spiller discusses the recent judicial career of Lord Cooke, probably New Zealand's foremost jurist.⁹⁰ This is recent history, but legal history nonetheless. Doug Tennent takes us to Papua New Guinea for a look at damages issues in subsistence-based communities,⁹¹ and Julia Tolmie draws on various other jurisdictions in her analysis of the law relating to battered defendants.⁹² These articles, like those in preceding years, show how comparative law and legal history can help our understanding of New Zealand law today.

IV. CITATION OF THE *REVIEW*

As noted above, the *Waikato Law Review* is New Zealand's newest university law review. As such, it has published fewer articles than New Zealand's other university law reviews and has had less opportunity to be cited in courts or in other scholarship. Nevertheless, judges and academics from outside the Law School have relied on articles from the *Review* from time to time. This section discusses some of these occasions.

The *Review* has been cited in the High Court. In the *New Zealand Public Service Association* case,⁹³ Hammond J made reference to Sian Elias' Harkness Henry lecture in the 1996 *Review*, where she spoke in favour of a "hard look" doctrine in administrative law. Hammond J also favoured such a doctrine, and it is entirely appropriate that this case was heard in Hamilton, the home of the *Review*. Another occasion on which the *Waikato Law Review* formed part of a High Court decision was in the *Fatupaito* case,⁹⁴

⁸⁹ Spisto and Samujh, "Close Corporations in South Africa: A Viable Option for New Zealand Small Business Corporate Law?" (2001) 9 *Waikato Law Review* 153.

⁹⁰ Spiller, "Lord Cooke of Thorndon: The New Zealand Dimension" (2002) 10 *Waikato Law Review* 55.

⁹¹ Tennent, "Law in Context: The Awarding of Damages to People Living a Part Subsistence Village Lifestyle in the Highlands of Papua New Guinea" (2002) 10 *Waikato Law Review* 67.

⁹² Tolmie, "Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas" (2002) 10 *Waikato Law Review* 91.

⁹³ *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 NZLR 30, 34.

⁹⁴ *Fatupaito v Bates* [2001] 3 NZLR 386, 399-400.

where O'Regan J referred to Tompkins J's 1994 Stace Hammond Grace Lecture in Commercial Law.⁹⁵

Items from the *Waikato Law Review* have also attracted attention outside the courtroom. Articles on family law and domestic violence, for example, have been cited in Canadian⁹⁶ and Australian⁹⁷ law reviews. Within New Zealand, the *Review* has been referred to in such publications as the recent *Legal Method in New Zealand*,⁹⁸ as well as a number of other books⁹⁹ and law review articles.¹⁰⁰

V. CONCLUSION

The *Waikato Law Review* represents something of a hybrid of American, English, and New Zealand university law review models. It continues to serve the School's pedagogical goals of professionalism, biculturalism, and law in context, though the precise nature of these terms remains contested. The *Review* has also played an important role in presenting scholarship on a wide range of topics, notably New Zealand jurisprudence (through the

⁹⁵ Tompkins, "Directing the Directors: The Duties of Directors under the Companies Act 1993" (1994) 2 *Waikato Law Review* 13. It should be noted that O'Regan J declined to follow Tompkins J's interpretation of s 135 of the Companies Act 1993.

⁹⁶ Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 *Canadian Journal of Family Law* 215, 236 note 44, citing Busch and Robertson, "I Didn't Know Just How Far I Could Fight: Contextualising the Bristol Enquiry" (1994) 2 *Waikato Law Review* 41.

⁹⁷ Seuffert "Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law" (1999) 23 *Melbourne University Law Review* 211, 213 note 14, citing Busch and Robertson, "'What's Love Got To Do With It?' An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 *Waikato Law Review* 109. See also note 27 of Seuffert's article for further citations.

⁹⁸ See Fisher, "New Zealand Legal Method: Influences and Consequences" in Bigwood, R (ed) *Legal Method in New Zealand* (2001) 25, 70 note 194, citing Glover, *supra* note 50; Keith, "Sources of Law, Especially in Statutory Interpretation" in Bigwood, *ibid*, 94 note 76, citing Keith, *supra* note 60.

⁹⁹ See eg Dawson, R *The Treaty of Waitangi and the Control of Language* (2001) 247, citing Havemann, *supra* note 45; and Spiller, P, Finn, J, and Boast, R *A New Zealand Legal History* (2nd ed, 2001) 207 note 136, citing Havemann, *supra* note 41, and 228 note 266, citing Spiller, *supra* note 80.

¹⁰⁰ See eg Upston-Hooper, "Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi" (1998) 28 *Victoria University of Wellington Law Review* 683, note 1, citing Havemann, *supra* note 41; and Dunworth, "Public International Law" [2000] *New Zealand Law Review* 217, 224, citing Keith, *supra* note 60.

Harkness Henry lectures), legal education, and legal history/comparative law issues.

It is to be expected that the *Review* of the future will continue in the tradition already established. Doctrinal scholarship is unlikely to disappear, as the *Review* continues to serve the profession. The more academically-oriented articles are unlikely to disappear either. The *Review* will probably continue to publish articles from both within and outside the School, all the time providing a voice for the School and its values. Citation of the *Review* is also likely to increase as both the body of work published in the *Review* and the stature of the *Review* itself increase.

In the first editorial, Gerald Bailey, then the Chancellor of the University of Waikato, commented that “this publication will, I am sure, take its place as an important contribution to New Zealand’s legal literature”.¹⁰¹ In the tenth year of publication of the *Waikato Law Review*, there can be no doubt that in this the School has succeeded, and the volume in your hands is a testament to this success.

¹⁰¹ Bailey, *supra* note 6.

LORD COOKE OF THORNDON: THE NEW ZEALAND DIMENSION

BY PETER SPILLER*

In 1996, Sir Robin Cooke, President of the New Zealand Court of Appeal, was elevated to the peerage and assumed the title of Lord Cooke of Thorndon.¹ As a peer of Parliament who had held high judicial office, Lord Cooke became a Lord of Appeal.² From 1996 until he retired in May 2001 (on reaching the age of seventy-five years), Lord Cooke adjudicated on nearly a hundred cases in the House of Lords and the Privy Council.³

This article will explore the New Zealand insights and experience which Lord Cooke contributed to his judicial work. The first part of the article will examine the New Zealand dimension he brought to the hearing of New Zealand appeals in the Privy Council. The second part of the article will focus on the New Zealand dimension that he brought to the work of the House of Lords.

I. NEW ZEALAND DIMENSION IN NEW ZEALAND PRIVY COUNCIL CASES

Lord Cooke was no stranger to New Zealand appeals in the Privy Council. He had been a member of the Privy Council since 1977 and had intermittently sat in the Privy Council and delivered landmark judgments.⁴ Indeed, at the time of his retirement, he was the longest-serving member of the Board.⁵ An ironic aspect of Lord Cooke's time as Lord of Appeal in the Privy Council was that, during the early period of his tenure, he heard few New Zealand appeals and delivered no judgments of the Board.⁶ This was because of the expressed wish from a source in New Zealand that he not sit

* BA LLB PhD (Natal), LLM MPhil (Cantab), PhD (Cantuar); Professor of Law, University of Waikato, Hamilton, New Zealand. I thank the 15 Lords of Appeal whom I interviewed and the 28 counsel in England and New Zealand who contributed their views on Lord Cooke's work as a Lord of Appeal.

¹ *The Times (London)*, 9 April 1996. Thorndon was the part of Wellington where Lord Cooke was brought up, married and worked for most of his time in the Court of Appeal.

² Appellate Jurisdiction Act 1876, s 5.

³ Lord Cooke saw this part of his career as a "judicial Indian summer" which he greatly valued (*McGuire v Hastings District Council* [2002] 2 NZLR 577, 586).

⁴ See eg *In Re Welch* [1990] 3 NZLR 1.

⁵ *McGuire v Hastings District Council* [2002] 2 NZLR 577, 586.

⁶ See *Goss v Chilcott* [1996] 3 NZLR 385, *Rangatira v CIR* [1997] 1 NZLR 129, and *Cussons (NZ) v Unilever Plc and Unilever NZ* [1998] 1 NZLR 396.

in New Zealand cases. It was only in the last two years before his retirement that he sat more regularly in New Zealand cases and delivered judgments of the Board in them.⁷

In cases where Lord Cooke did not give the judgment of the Board, he could play a valuable behind-the-scenes role in the judicial discussions leading up to the judgment.⁸ An example of this was in the *Lange v Atkinson* case, where Lord Cooke in fact wrote some of the judgment of the Board delivered by Lord Nicholls of Birkenhead.⁹ Here the key issue was whether the Board should recognise the New Zealand Court of Appeal's new generic head (in defamation) of qualified privilege for political discussion. Lord Cooke and the other members of the Board were clear that English law should not recognise such a defence, and reflected this in their judgments in *Reynolds v Times Newspapers*, a similar case contemporaneously under appeal to the House of Lords.¹⁰ However, in the *Lange* case, the Board did not reject the Court of Appeal's approach, but decided to refer the case back to the New Zealand Court of Appeal, to reconsider its response in the light of the House of Lords' decision in the *Reynolds* case.¹¹ In the *Lange* decision, Lord Cooke exercised a decisive role. He believed that there was a high element of judicial policy in the resolution of the issue, and that the possibility of a difference between English and New Zealand common law on the issue had to be accepted.¹²

In New Zealand cases where Lord Cooke delivered judgment, his New Zealand insights could be highly influential in the final outcome. In *Manukau City Council v Ports of Auckland*,¹³ the Board had to consider whether the Minister of Transport had erred in law in considering an application made by the Auckland harbour board as to the fate of certain assets. The statute in question was the Port Companies Act 1988. The Minister had decided that certain assets were not port-related commercial undertakings in terms of the Act and that they should not be included in the harbour board's port plan. Sir Robin Cooke (as he then was) had presided

⁷ See *Auckland Gas Co v CIR* [2000] 3 NZLR 6, *CIR v Auckland Harbour Board* [2001] 3 NZLR 289, *Dilworth Trust Board v Counties Manukau Health* [2002] 1 NZLR 433, and the cases cited below.

⁸ Interview, Lord Bingham, House of Lords, 11 June 2002.

⁹ *Lange v Atkinson* [2000] 1 NZLR 257.

¹⁰ *Reynolds v Times Newspapers* [2001] 2 AC 127.

¹¹ *Lange v Atkinson* [2000] 1 NZLR 257, 262-263.

¹² See *Reynolds v Times Newspapers* [2001] 2 AC 127, 223.

¹³ [2000] 1 NZLR 1. I am grateful to Robert Fardell QC, Alan Galbraith QC, Mary Scholtens QC, and Gerard van Bohemen for their helpful recollections of this case.

over the Court of Appeal in an Auckland case which had involved the same Act and somewhat similar issues.¹⁴ Lord Cooke, in hearing the *Manukau* case, was familiar with the geographical location of the case, the terms of the Act, the purpose of the economic reforms expressed in the Act, and the exercise of Ministerial discretion in New Zealand. He was also able to explain to the Board the Court of Appeal's thinking in the prior Auckland case, and the implications of the New Zealand Bill of Rights Act 1990 for Ministerial consultation. No doubt these insights gave his views high credibility in the eyes of his brother Judges and it is not surprising that he was asked to deliver the judgment of the Board.

In his judgment allowing the appeal and upholding the Minister's decision, Lord Cooke pointed out that the Act was one of a number of New Zealand Acts effecting a policy of "corporatising" functions hitherto discharged by central or local government. He noted the Minister's reasons for not including the assets in the port plan, including that the assets had primarily recreational or retail uses without direct association to the port activities, and that no significant benefits would result from the unified management by the port company of the assets. Lord Cooke remarked that, in the light of the policy and terms of the Act, the assets in question fell into something of a grey area. He described the view that the assets were within the definition of port-related commercial undertakings of the harbour board as a "somewhat literal or technical approach", and said that there was ample room for the view that the pervading purpose of the Act did not embrace the assets.¹⁵

Another case where the New Zealand dimension was much in evidence was *McGuire v Hastings District Council*, the last case heard by Lord Cooke in the Privy Council.¹⁶ The New Zealand dimension was expressed in the actions of the participants at the close of the hearing. Eulogies were led by counsel for the respondents, Sir Geoffrey Palmer, who as Attorney-General at the time had political responsibility for Sir Robin Cooke's appointment as President of the Court of Appeal. Senior counsel for the appellants, Paul Majurey, addressed the Board in Māori and then paid tribute to Lord Cooke as "a mountain of a man in our country" and who held "a lofty position in the world of Maoridom". Majurey, junior counsel Christian Whata and the

¹⁴ *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264. This involvement by Cooke P prompted the Board to ask counsel in the *Manukau* case if they had any objection to Lord Cooke sitting in the case. Counsel agreed that they had no objection.

¹⁵ [2000] 1 NZLR 1, 18, 40.

¹⁶ *McGuire v Hastings District Council* [2002] 2 NZLR 577, 584. I am grateful to Christian Whata, Sir Geoffrey Palmer and Mark von Dadelszen for their helpful recollections of this case.

tangata whenua of Karamu, Hastings, then sang “E Toru Nga Mea”, a Māori hymn. Lord Bingham of Cornhill, the senior Lord of Appeal, then testified to Lord Cooke’s “long and broad experience, his humane and radical vision”, and concluded that “the law is yet another field in which the southern hemisphere has proved itself a world beater”.¹⁷

The *McGuire* case concerned Māori land rights, and required an understanding of these rights in terms of the Resource Management Act 1991 (“RMA”) and Te Ture Whenua (Māori Land) Act 1993 (“MLA”). The Hastings District Council (“Hastings”) proposed to issue a notice under the RMA for the designation of a road which would run through Māori freehold lands. Margaret Akata McGuire and Frederick Pori Makea, as representatives of the owners, filed in the Māori Land Court applications for injunctions under the MLA preventing Hastings from so designating their lands. The Court granted interim injunctions until the further order of the Court, to enable further discussion by the applicants with Hastings. Hastings then filed a judicial review application in the High Court seeking declarations that the Māori Land Court had acted ultra vires and an order setting aside its decision. The High Court decided in favour of Hastings. The Māori applicants appealed to the Court of Appeal, where the appeal was dismissed. The Māori applicants then appealed to the Privy Council by leave granted by the Court of Appeal.

The Board comprised Lord Cooke and four English Judges.¹⁸ Lord Cooke had extensive experience in adjudicating Māori issues and knowledge of Māori jurisprudence. During the hearing of the case, Lord Cooke was able to assist the other Judges with explanations or with questions of counsel to elicit information for the benefit of the other Judges. At the end of the hearing, it was appropriate that he be designated the task of writing and delivering the judgment.

Lord Cooke’s insights into the matters at hand were evident in a number of respects. First, they were seen in his presentation of the provisions of the MLA. Here, he provided explanations of Māori terms (while acknowledging that “some meanings are or may be contentious”),¹⁹ and then outlined the

¹⁷ [2002] 2 NZLR 577, 584-586. *The Times (London)*, 15 May 2001, in its report headed “Cooke bows out with a Maori swan song”, noted: “The oak-panelled rooms of the Privy Council chamber in Downing Street had never heard anything like it”.

¹⁸ Lord Bingham, Lord Hobhouse and Lord Millett (Lords of Appeal in Ordinary) and Sir Christopher Slade (a Lord Justice of Appeal)

¹⁹ [2002] 2 NZLR 577, 588. Lord Cooke completed the writing of the Board’s judgment in New Zealand.

history and emphasis of the Act. He noted in passing that, in the context of the Act, “with its emphasis on the treasured special significance of ancestral land to Māori, activities other than physical interference could constitute injury to Māori freehold land”. He gave as an example that “activities on adjoining land, albeit not amounting to a common law nuisance, might be an affront to spiritual values or to what in the RMA is called tikanga Māori (Māori customary values and practices)”. However, his overall conclusion was that the Māori Land Court was a specialised Court of limited jurisdiction, and that the fundamental difficulty for the appellants was that this Court had not been given judicial review jurisdiction. He observed that the Board was “unable to stretch the scope of the MLA so far as would be needed to uphold these interim injunctions”.²⁰

Secondly, Lord Cooke’s New Zealand insights were seen in his examination of a line of English cases relied upon by the appellants. Amongst the reasons for distinguishing this authority was his insight that “[a]lthough dressed up as a claim for an injunction against a threatened injury to Māori freehold land, the pith and substance of the present proceeding is a contention that express or implied requirements of consultation in the RMA have not been or will not be complied with”. He added:

The facts of this case relating to Māori land and the structure of the New Zealand judicial system are remote from anything under consideration in the *Boddington* line of cases. In the opinion of their Lordships, both the substance of the proceeding in question and the background judicial system have to be taken into account in deciding whether those authorities apply; and this case is outside their purview and spirit.²¹

Thirdly, Lord Cooke’s New Zealand insights were evident in his discussion of the RMA, which discussion he conceded was strictly not necessary to decide the case. He expressed the Board’s view that, faithfully applied, the RMA code should provide redress and protection for the appellants if their case proved to have merit. He was careful to add that “[i]t would be a misunderstanding of the present decision to see it as a defeat for the Māori cause”. He noted that the Act was concerned not only with economic considerations, but contained many provisions about the protection of the environment, social and cultural well-being, and heritage sites. He said that the authorities were bound by requirements which included particular

²⁰ [2002] 2 NZLR 577, 590.

²¹ [2002] 2 NZLR 577, 591. See also Lord Cooke’s comment in passing that whether New Zealand was in the category of a ceded territory “has long been the subject of academic controversy” (at 592).

sensitivity to Māori issues and taking into account the principles of the Treaty of Waitangi. He stressed that these were strong directions, to be borne in mind at every stage of the planning process. He noted that special regard to Māori interests and values was required in such policy decisions as determining the routes of roads. He concluded by noting that the RMA, in dealing with the powers and procedure of the Environment Court, included an express direction that the Court should recognise “tikanga Māori” where appropriate. He noted that this was further evidence of Parliament’s mindfulness of the Māori dimension and Māori interests in the administration of the Act. He expressed the Board’s hope that a substantial (qualified) Māori membership would prove practicable if the case reached the Environment Court.²²

The New Zealand dimension which Lord Cooke brought to the *McGuire* case was certainly coloured by his own views of Māori jurisprudence.²³ Not surprisingly, the Board’s judgment aroused controversy, and the call for greater Māori judicial representation attracted adverse comments.²⁴ What cannot be challenged is that he brought to the case an understanding (not possessed by his fellow Judges) of the cultural, social and legal context in which the relevant statutes operated. In the course of his judgment, Lord Cooke expressly affirmed the view of his colleague, Lord Steyn, that in law “context is everything” and that statutes were to be interpreted in the light of the legal system and norms currently in force.²⁵ Both the MLA and the RMA were statutes steeped in the New Zealand context and contained significant Māori concepts and terms. Without the presence of Lord Cooke, the Board would have been hard-pressed to understand the issues involved and to adjudicate appropriately.

²² [2002] 2 NZLR 577, 596. The Hastings District Council is at present still reviewing the justification for the designation of the road and possible alternative routes.

²³ He believed that Māori were to be encouraged to resort to legal remedies for what could fairly be seen as legal, as well as social, grievances (letter, Lord Cooke of Thorndon, 3 September 1997).

²⁴ See eg *The Dominion*, 7 November 2001.

²⁵ [2002] 2 NZLR 577, reference to *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 296 and *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433, 447.

II. NEW ZEALAND DIMENSION IN HOUSE OF LORDS' CASES

Lord Cooke was the first Commonwealth Judge to sit in the Appellate Committee of the House of Lords on United Kingdom appeals.²⁶ He brought with him a wealth of New Zealand knowledge and judicial experience and raised the profile of New Zealand law in England. It is true that New Zealand and other Commonwealth cases had been cited and relied upon in the House of Lords well before Lord Cooke's time.²⁷ But the unique advantage that he brought to the House of Lords was to have someone engaged in deciding cases who could share the experience of having decided similar matters in a different setting and who understood a different legal environment.

Lord Cooke was willing to share his New Zealand experience. His approach was evident in his last speech delivered on behalf of the Committee in a controversial nuisance case.²⁸ He headed a section of his speech "A world elsewhere", in which he traced support in Australasian and American jurisprudence for the views that he had expressed earlier in the judgment. He remarked that "[a]lthough counsel evidently preferred a more insular approach, it can be useful to remember that there is a common law world elsewhere which may provide some help, particularly on issues where English law is not yet settled".²⁹

During Lord Cooke's time in the House of Lords, he repeatedly referred to and relied upon New Zealand precedents. These included his own judgments but also extended to other New Zealand precedents such as judgments beyond his time in office in New Zealand.³⁰ Furthermore, there were judgments where he reflected his New Zealand experience without explicit references to New Zealand law.³¹ For example, in a contentious case, his conclusion was reached by starting from the principle (repeatedly-expressed

²⁶ Lord Cooke followed in the footsteps of Lord de Villiers of South Africa who was ennobled in 1910, but he did not sit in the Appellate Committee of the House of Lords.

²⁷ See eg *Bratty v A-G for Northern Ireland* [1963] AC 386, 401-402, 404, 413, reference to *R v Cottle* [1958] NZLR 999.

²⁸ *Delaware Mansions v Westminster City Council* [2002] 1 AC 321, 335.

²⁹ [2002] 1 AC 321, 335. "A world elsewhere" was a quote from Coriolanus.

³⁰ See eg *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 120-121, reference to *R v Grayson and Taylor* [1997] 1 NZLR 399.

³¹ Cf *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398 and *R (Daly) v Secretary of State* [2001] 2 AC 532, 548 (HL) as to fundamental common law rights.

in New Zealand) that no legal discretion can be exercised for purposes contrary to those of the instrument by which it was conferred.³²

Lord Cooke's knowledge of New Zealand and other Commonwealth jurisprudence meant that he could usefully discern broader patterns at work. In one case his fellow Lord of Appeal had pointed out that there was no principle in European Convention law that unlawfully obtained evidence was not admissible. Lord Cooke complemented this speech with an outline of the law in Commonwealth countries including New Zealand. He thought it worth adding that, apart from express statutory provisions, "nowhere in the Commonwealth does there appear to be any remorseless principle of the exclusion of evidence unlawfully obtained".³³ Lord Cooke's fellow Lords of Appeal also found his experience of adjudicating upon the New Zealand Bill of Rights Act 1990 extremely helpful in cases involving human rights and in due course the Human Rights Act 1998 (UK).³⁴

Lord Cooke's in-depth knowledge of New Zealand jurisprudence meant that he could draw upon apt expressions of legal principles in New Zealand judgments.³⁵ On one occasion he quoted McCarthy P's proposition as the "standard formulation of the test" for allowing absolute immunity.³⁶ Some of the New Zealand references that Lord Cooke introduced were by way of added support or illustration.³⁷ On other occasions, the New Zealand dimension could play a role in pivotal speeches. In a case which raised the question of the jurisdiction of the English Court to hear the matter, and where Lord Cooke was part of a majority of three Judges out of five, he

³² *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 460 (HL). Cf *Petrocorp v Minister of Energy* [1991] 1 NZLR 1, 34, 37.

³³ *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 120-121, reference to *Howden v MOT* [1987] 2 NZLR 747.

³⁴ Interview, Lord Hutton, House of Lords, 13 June 2002. See eg *Kebilene* [2000] 2 AC 326, 372-373. Lord Hope of Craighead said that without Lord Cooke's insight there would have been a lighter treatment of human rights issues before their true significance was appreciated on the coming into force of the Human Rights Act (interview, House of Lords, 11 June 2002).

³⁵ *Johnson v Gore Wood & Co* [2001] 2 WLR 72, 102-104, extended reference to *Christensen v Scott* [1996] 1 NZLR 273.

³⁶ *Darker v Chief Constable of West Midlands* [2001] 1 AC 435, 453, reference to *Rees v Sinclair* [1974] 1 NZLR 180, 187.

³⁷ *Johnson v Gore Wood & Co* [2001] 2 WLR 72, 108, reference to *Mouat v Clark Boyce* [1992] 2 NZLR 559.

drew by analogy on New Zealand precedent as to the natural forum for the determination of the relevant disputes.³⁸

There were occasions where Lord Cooke was influential in presenting to the House a view of New Zealand law which differed from the views of other New Zealand Judges. This occurred in the *Reynolds* case, noted above.³⁹ In an earlier stage in the proceedings, the English Court of Appeal had described the New Zealand Court of Appeal's recognition of a new head of qualified privilege as "the sheet anchor" of the respondent's arguments.⁴⁰ This recognition was at variance with an earlier decision of the Court of Appeal, given by Sir Robin Cooke (as he then was). The earlier decision had declined to introduce a new generic privilege, taking the view that privilege was already available in appropriate cases.⁴¹ Lord Cooke, in his separate speech in the *Reynolds* case, declared that, as the authorities supporting the earlier case stood at the time, he continued to regard the decision in this case as inevitable.⁴² Here, his stance on the relevant New Zealand law played a role in the House of Lords' rejection of a new head of qualified privilege.

At times the New Zealand dimension that Lord Cooke brought to the House of Lords did not prevail and it formed part of dissenting speeches. In arguing for a more flexible approach to the law of nuisance, he cited a judgment of Hardie Boys J as an admirable example of the use of nuisance law as a "potent instrument of justice throughout the common law world".⁴³ In suggesting that their Lordships should be allowed to refer to Hansard reports for guidance as to the intention of Parliament, he referred to a landmark judgment in New Zealand to this effect.⁴⁴ Certain of his dissenting speeches were found to be useful in later English cases, not least in providing references and insights for Judges.⁴⁵ His speeches were also welcomed by

³⁸ *Agnew v Lansforsakringsbolagens AB* [2001] 1 AC 223, 247 (HL), reference to *Society of Lloyd's and Oxford Members' Agency v Hyslop* [1993] 3 NZLR 135, 137-154.

³⁹ *Reynolds v Times Newspapers* [2001] 2 AC 127. See above p 56.

⁴⁰ *Reynolds v Times Newspapers* [1998] 3 WLR 862, 906, reference to *Lange v Atkinson* [1998] 3 NZLR 424.

⁴¹ *Templeton v Jones* [1984] 1 NZLR 448, 458.

⁴² [2001] 2 AC 127, 222.

⁴³ *Hunter v Canary Wharf* [1997] AC 655, 711, reference to *BNZ v Greenwood* [1984] 1 NZLR 525.

⁴⁴ *R v Secretary of State, ex parte Spath Holme* [2001] 2 AC 349, 403, reference to *Marac Life Assurance v CIR* [1986] 1 NZLR 694.

⁴⁵ *Wildtree Hotels v Harrow London Borough Council* [1999] QB 634, 662.

some English commentators for their fresh approach and for providing flexible principles more in tune with current societal needs.⁴⁶

An example of where Lord Cooke brought a New Zealand dimension to bear in the House of Lords was the case of *White v White*.⁴⁷ Martin and Pamela White farmed in equal partnership after they married in 1961. Following the breakdown of their marriage in 1994, Mrs White petitioned for divorce and applied for ancillary relief so as to cede one of the farms to her husband and obtain a lump sum of £2.2 million to enable her to continue farming on her own. The Judge found that the net assets were £4.6 million, of which £1.5 million belonged to the wife. He declined to break up the farming enterprise and, having capitalised the wife's income needs and assessed the cost of buying a home for her, awarded her a lump sum of £800,000 on a "clean break" basis, leaving the farms and business with the husband. The wife appealed, contending that the Judge had failed to give sufficient weight to the duration, extent, diversity and value of her contribution to the partnership. She also argued that the Judge had failed to recognise that her contributions were the dominant factor in the balancing act required by section 25 of the Matrimonial Causes Act 1973, and that an award of one-fifth of the total net assets was manifestly unfair and plainly wrong. The Court of Appeal held, allowing her appeal, that an approach based on the wife's future needs or reasonable requirements was inappropriate. The Court held that, having regard to all the circumstances of the case in accordance with section 25 of the 1973 Act, she was entitled to a lump sum of £1.5 million reflecting her contribution both to the business and to the family. Mr White appealed and Mrs White cross-appealed.

In the House of Lords, a central feature of the argument was whether the Court should adopt equality as the starting point of the division of matrimonial property. This was the standard enshrined by statute in jurisdictions such as Scotland and New Zealand, and one favoured by Lord Cooke. However, his views were counter-balanced by certain members of the bench who favoured Mr White's appeal. The Committee ultimately reached a compromise position and dismissed both the appeal and the cross-appeal.

⁴⁶ See eg J Wightman "Nuisance - the Environmental Tort?" (1998) 61 *Modern Law Review* 870, 875, 885, J O'Sullivan, "Nuisance in the House of Lords - Normal Service Resumed" [1997] *Cambridge Law Journal* 483, 485, and M Elliott, "Human Rights Review: Raising the Standard" [2001] *Cambridge Law Journal* 455, 456-458.

⁴⁷ *White v White* [2001] 1 AC 596. I thank members of the bench, Nicholas Mostyn QC and Rebecca Bailey-Harris for their helpful recollections of this case.

The leading speech was given by Lord Nicholls. In his opening paragraph, he remarked that different countries had adopted different solutions to achieving a generally accepted standard of fairness in the division of matrimonial property. He explicitly referred to the approach of the New Zealand legislature, with its detailed prescriptions and scope for the exercise of judicial discretion. He remarked that the English statute gave the Courts largely unrestricted discretion, and that the present case was the first occasion when broad questions about the application of these powers had been considered by the House.⁴⁸ The solution adopted by Lord Nicholls was that, while there was no legal presumption of equal division:

a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.⁴⁹

Lord Cooke, in his supporting judgment, explicitly referred to the New Zealand statutory regime of matrimonial property and its emphasis on equality. He explained the rationale behind the detailed New Zealand regime, including Parliament's disappointment with the performance of the Courts in undervaluing the non-monetary contributions of a wife and mother. He added that, if the spirit of Lord Nicholls' speech was followed by the English Courts, "there should not be solid ground for such criticism here".⁵⁰ Lord Cooke gratefully adopted and underlined Lord Nicholls' approach to equality, and remarked that "[w]idespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions".⁵¹

The *White* case was a landmark in English matrimonial property law. The speeches of Lord Nicholls and Lord Cooke proved to be controversial, and provoked criticism by some commentators.⁵² However the case was soon

⁴⁸ [2001] 1 AC 596, 600.

⁴⁹ [2001] 1 AC 596, 605.

⁵⁰ [2001] 1 AC 596, 613.

⁵¹ [2001] 1 AC 596, 615. Lord Cooke also added a reference to the landmark Privy Council decision on appeal from New Zealand in *Haldane v Haldane* [1977] AC 673.

⁵² See eg C Barton and M Hibbs, "Ancillary Financial Relief and Fat Cat(tle) Divorce" (2002) 65 *Modern Law Review* 79, 81, and R Bailey-Harris, "Fairness in Financial Settlements on Divorce" (2001) 117 *Law Quarterly Review* 199, 203.

cited by Judges as a precedent of major significance.⁵³ The New Zealand dimension was certainly a factor in the outcome of the case. Lord Nicholls later commented on Lord Cooke's role in this case, that he brought the great advantage of coming from another part of the common law world and presenting solutions that others had considered in relation to common problems. He added that, although insights could be conveyed by reading reports, there was the added advantage of Lord Cooke sitting with the Committee and being involved in the outcome of a particular case.⁵⁴

III. CONCLUSION

Lord Cooke brought to his work as Lord of Appeal a clearly-definable New Zealand dimension. This dimension was inevitably influenced by his own strongly-held views, and particularly in grey-area cases his stance was sometimes controversial and not universally shared by other New Zealand jurists. Overall, however, the New Zealand dimension that Lord Cooke brought to his work as Lord of Appeal greatly benefited both the Privy Council and the House of Lords. The benefit that he brought was not simply that he knew New Zealand law, but that he had the intellect and judicial stature to make this knowledge applicable and credible in his new environment. Sir Geoffrey Palmer, at the end of the *McGuire* case, asserted that "Lord Cooke is the greatest Judge that New Zealand has produced and his qualities have been recognised far beyond New Zealand's shores".⁵⁵

In the Privy Council, Lord Cooke brought to the hearing of New Zealand appeals an understanding of content and context that was helpful and at times essential to the appropriate adjudication of the case at hand. In the House of Lords, Lord Cooke contributed a breadth of outlook and an important comparative dimension. His colleague, Lord Steyn, commented:

[Lord Cooke] helped in making the House of Lords more internationalist. There was an earlier era when lip service was paid to comparative law and English solutions were found to be best. Lord Cooke helped to change that, and now there is greater debate between the House of Lords and other superior Courts. Lord Cooke understood that comparative law involved assessing different feasible solutions in their cultural contexts and refining solutions.⁵⁶

⁵³ See eg *Cowan v Cowan* [2002] Fam 97 (CA) and *Cordle v Cordle* [2002] 1 WLR 1441.

⁵⁴ Interview, Lord Nicholls, House of Lords, 13 June 2002.

⁵⁵ *McGuire v Hastings District Council* [2002] 2 NZLR 577, 584. Similarly, Alan Galbraith QC remarked that Lord Cooke "was a judicial figure who transcended the New Zealand context" (e-mail, 1 August 2002).

⁵⁶ Interview, Lord Steyn, House of Lords, 11 June 2002.

AWARD OF DAMAGES TO PART-SUBSISTENCE VILLAGERS IN PAPUA NEW GUINEA

BY DOUGLAS TENNENT*

One of the great challenges to Courts in civil claims is to award damages in an appropriate manner which as far as possible place the plaintiff in the position that he or she would be in but for the injury. The awarding of appropriate damages to a person leading a part-subsistence village lifestyle presents the Courts with a special challenge.

This article considers the attempts that the Courts in Papua New Guinea have made to award appropriate damages to people living this lifestyle. The article attempts to bring together the common principles that emerge through the cases. It also outlines some of the important issues that still need to be addressed by the Courts to ensure that the actual needs of plaintiffs living a village lifestyle are addressed.

I. NATURE OF DAMAGES

The award of damages by civil Courts in common law jurisdictions is the most frequently used remedy imposed in civil actions, once civil liability has been established against the civil wrongdoer. The defendant through the payment of damages is required to compensate the plaintiff for the loss and the suffering that have occurred because of the civil wrong. Through the payment of damages the defendant indemnifies himself or herself from the responsibility for that wrong which is the result of his or her negligent actions.

With the exception of exemplary damages, the primary purpose of damages is to compensate the plaintiff.¹ Damages are not a compassionate payment. The basic purpose of awarding damages is expressed in the Latin phrase *restitutio in integrum*. Basically this means to restore to the former position. The relevant application of this principle to the Papua New Guinea situation was aptly expressed Miles J in the *Kaka Kopun* case, when he stated that the purpose of damages is to place the plaintiff (as far as money can) in the position that he or she would have been in but for the injury.² What are the implications of this? Basically, when a person suffers a serious personal injury or the loss of a partner, a major gap is created in the person's life.

* Former Lecturer in Law, University of Papua New Guinea.

¹ *Kerr v Motor Vehicle Insurance Trust* [1979] PNGLR 251, 268.

² *Kaka Kopun v Independent State of Papua New Guinea* [1980] PNGLR 557.

This gap is significant because the person loses vital resources which allow that person to function adequately and to obtain a reasonable standard of living. In the case of personal injury, if the plaintiff becomes paralysed he or she loses mobility and independence, and life expectancy is greatly reduced. If the plaintiff loses the use of an arm, then he or she is very limited in the different manual tasks that are to be performed. If the plaintiff loses the use of a leg, then his or her mobility and agility are greatly affected. If the plaintiff loses the use of an eye, then the ability to perform certain tasks that require reading and writing is greatly reduced. If, as the result of an accident, the members of a family lose a husband and father they lose not only the principal provider (this is especially the case in a village situation) but also the person who gives important support, guidance and encouragement. Clearly a gap is created in the plaintiff's life, a gap which makes the performance of essential life tasks very difficult. The gap has been created by a civil wrong caused by the defendant. If justice is to be achieved then this gap has to be filled. The method developed by the common law to fill this gap is the award of monetary damages. Money will not restore lost mobility, nor will it restore lost sight. Further, it will not bring to life a person killed as the result of an accident. But it will give the plaintiff resources to enable him or her to deal with the loss of mobility or sight. Damages in the form of money will provide the surviving members of the family of a husband and father killed in an accident with resources to continue to live their life in a reasonable manner.

Damages form a part of the common law, which has been adopted in Papua New Guinea by virtue of Schedule 2.2 of the Constitution. If damages are to be an effective remedy to compensate the victim of a civil wrong, they must be flexible and adapt to changing social and economic circumstances. As Lord Denning has stated, the common law principles (which include damages) need to be moulded and shaped to meet the social necessities and social opinions of the present day.³ Kapi DCJ supports these observations when he states that the common law must be fluid and progressive.⁴ The fluidity, adaptability and effectiveness of the common law are especially tested in the efforts of Courts to award damages in Papua New Guinea to people living a traditional village part-subsistence lifestyle. Such damages are claimed by people who receive an injury which greatly inhibits their ability to function effectively in this life situation, or who lose a relative, husband, wife, father, mother, son or daughter whose contribution to the village lifestyle was essential for the family.

³ Lord Denning, *The Discipline of Law* (1979).

⁴ *The State v Bisket Uranquae Pokia* [1980] PNGLR 97, 100.

If the Courts are to achieve the goal underpinning damages, which is to place the plaintiff in their original position but for the accident, they must try to understand the realities and hardships of living a traditional part-subsistence lifestyle. Courts must also appreciate the impact of a permanent injury, with differing degrees of seriousness, on a person living in this situation, or the impact of the death of a father, husband, mother, son or daughter on the surviving family members in the village.

II. DAMAGES FOR PERSONAL INJURY

The effects of personal injury caused by an accident for which another party is responsible are very serious. The true effect can only be determined by analysing the plaintiff's life-style and situation, and how the permanent injury of the hand arm, leg, spine or eye affects this. Once this has been established, the common law, if flexible, can award appropriate damages. In personal injury cases, damages are awarded under two broad headings. These are damages for pain and suffering and the negative impact that the injury has on the plaintiff's lifestyle, and the economic loss which has come about as a result of the injury.⁵

1. Damages for Pain and Suffering and Negative Impact on Lifestyle

How is it best to describe the real-life situation of people living in a village? Miles J provides a clear explanation in the *Kaka Kopun* case.⁶ According to Miles J, people living a village lifestyle (in the 1980s) follow a part-subsistence lifestyle. Part-subsistence means that people produce their own food and collect firewood and other items to enable them to live a basic lifestyle. Over and above this, there is the cash income gained from the sale of vegetables and coffee, which are surplus to the subsistence needs of the family. The cash obtained from the sale of these items is sufficient to satisfy the minimum needs for clothing, transport and sundry items. Also, a family has to fulfil its traditional obligations by contributing to bride-price payments, compensation and moka exchanges.⁷ To be able effectively to carry out a village lifestyle it is essential that a person is fit, has the full use of hands, arms and legs, and is fully agile. Village life is very difficult. All work is done manually on what is difficult terrain to manage, and there are

⁵ Under these two headings fall interest, costs and the assessment of past and future economic loss.

⁶ *Supra* note 2, at 560.

⁷ A moka exchange refers to a traditional exchange of pigs and other valued commodities in the Western Highlands between clans which have certain traditional relationships and obligations. The purpose of this exchange is to create and cement good relationships.

also the uncertainties of flood, drought and frost. Further, there is the need to respond to significant traditional obligations often without any warning. It is for this reason that Miles J noted in the case of *Kaka Kopun* that the impact of an injury on a person who depends upon his own labours to derive a living from the land can be very severe indeed.⁸ This point was also acknowledged by Prentice J in the *Raquel* case. He noted that a person who is used to a full range of village activities, including hunting, gardening, fishing, carrying timber, and house construction, would find that the loss of the use of an arm or a leg could cause a more severe invasion of his life than a similar loss to an urban dweller. This is because he would be less able to cope with the hazards of nature, fire and flood and to perform the activities which are essential when living in a village.⁹

A survey of the cases would suggest that there are three types of negative effects that a permanent personal injury can have on a person leading a traditional village lifestyle. First, the loss of the use of limbs makes physical work very difficult if not impossible depending on the seriousness of the injury. A person living a part-subsistence traditional village lifestyle is dependent upon the full use of his or her limbs. Through an injury, a person can partially or completely lose the use of the limbs. The effects that the differing severity of injury has on a person's lifestyle are revealed through the different cases which deal with injuries of differing degrees of severity. In the *Kokonas Kandapak* case, the plaintiff, as the result of an accident, lost 50 percent use of his hand. The Judge took this as meaning that he would be totally incapacitated for the first year of his injury but that over the next four years he would be able to adapt his manual activities in a manner which would enable him to function in a way which would not result in any economic loss.¹⁰ More serious was the case of *Kaka Kopun*. As a result of an injury to his left forearm and wrist, the plaintiff was no longer able to grip the handle of a spade or to hold an axe. The person's situation was aggravated by the fact that as a boy he received an injury to his other hand as a result of which he was not able to obtain its full use. This made manual work in the village virtually impossible for him.¹¹ The effect was even more severe in the *Seke Opa* case. In this case a fit young village person with coffee gardens and a young family to support received a severe head injury, an eye infection resulting in blindness, total paralysis in one arm, partial paralysis of one leg, and loss of ability to eat caused by decreased muscle

⁸ *Supra* note 2, at 559.

⁹ *Tali Kaipeng Raquel v Smerdon*, unreported, National Court Judgement, 1972/706.

¹⁰ *Kokonas Kandapak v The Independent State of Papua New Guinea* [1980] PNGLR 573.

¹¹ *Supra* note 2.

power. The plaintiff had become a virtual invalid.¹² More tragic still was the *Andak Kupil* case. As a result of a car accident the plaintiff was paralysed from the lumbar curvature down. The result of this was that he lost the complete use of his legs, was unable to control his urine or his faeces, and was bed-ridden even finding it difficult to sit up.¹³

These four cases illustrate the differing degrees of severity of impact that an injury has upon a person's physical functioning. From not being able to hold a spade to being completely bed-ridden, these injuries in differing degrees all have a very negative effect upon a person's life functioning and make it very difficult, if not impossible, for a person to perform work obligations. The victims are not able to clear the bush, turn the ground, dig the drains, build and repair the house, manage the coffee gardens, or do any casual work, and as a result would find it difficult to contribute to moka exchanges, compensation and bride price payments. As Miles J noted, the effect is devastating.¹⁴

A second negative effect of permanent personal injury is the loss of social status and standing in the community. In accordance with custom, a village person (especially in the Highlands) gains his or her identity from two activities. The first is being able to work the soil and to use the natural materials in the surroundings to secure an adequate standard of living for one's family. Secondly, identity is gained through being able to fulfil one's traditional obligations to the clan. This includes contributing to moka, bride price and compensation payments, and taking an active part in traditional ceremonies.

What is the effect of this inability to perform these two activities for the plaintiff? Miles J in the *Kaka Kopun* case best describes this. The injury to the plaintiff's hand, aggravated by a pre-existing disability to his other hand, meant that the plaintiff could not work in the gardens, do any work on his house or even be able to cook for himself. This reduced the plaintiff to a person of no standing in the community. This was because he was unable to respond to community demands of bride price, compensation payments and moka exchange.¹⁵ Such failure gives a person a sense of shame. A village person's sense of identity is undermined. Identity comes from being able to work the ground and from feeling a part of one's community. To feel a part

¹² *Seke Opa v The Independent State of Papua New Guinea* [1987] PNGLR 469.

¹³ *Aundak Kupil and Kauke Kensi v The Independent State of Papua New Guinea* [1983] PNGLR 350.

¹⁴ *Supra* note 2, at 559.

¹⁵ *Ibid*, 561.

of a community one must be able to contribute to it. One of the implications of this loss of sense of identity is that village people tend to sit around the village feeling very depressed and having no motivation.¹⁶ This is quite understandable in that they have lost their sense of identity and fear that any further activity will only aggravate the injury. They lack will-power, motivation and initiative. There is a lack of rehabilitation facilities and programmes in the villages, and in the country generally, which are enjoyed by people in the same position in other countries. This means that the award of damages must aim to fill a larger gap in these circumstances than in comparative situations overseas or even in urban situations in Papua New Guinea.

A third negative effect of permanent personal injury is that a plaintiff's marriage prospects can be significantly undermined. A crucial quality that a woman is looking for in a marriage partner is a person who is able to do all of the work required in the village situation. In the *Kaka Kopun* case, the Court acknowledged that the plaintiff's marriage prospects were greatly undermined because of the injury suffered.¹⁷ In the *Seke Opa* case, the plaintiff was an energetic young village person with a young family and became a virtual invalid because of the injury. His wife had to assume a great many extra activities, virtually doing the work of two people. She complained about being overworked and that having to work around a husband who was always depressed with no motivation made life very difficult for her.¹⁸ In the *Pangia Toea* case, the female plaintiff had as the result of an accident lost the full use of her left arm and 70 percent of the use of her left leg, with the leg also being vulnerable to infection. One of the unfortunate consequences of this accident was the break-up of the plaintiff's marriage. Los J noted that as a result of the injuries inflicted by the accident the husband did not like her. The reason for this was that she could no longer be a wife and mother as expected in the tough village life where she was required to garden, carry heavy loads and feed many close and distant relatives of her own and her husband. In short, she was no longer able to fulfil her traditional obligations.¹⁹

The reactions of the spouses to their partners' injuries certainly appear harsh and extreme. However, when one considers the difficulty of village life and the need for the husband and wife to perform complementary work roles, the

¹⁶ *Anis Wambia v The Independent State of Papua New Guinea* [1980] PNGLR 567.

¹⁷ *Supra* note 2, at 565.

¹⁸ *Supra* note 12.

¹⁹ *Pangis Toea v Motor Vehicles Insurance (PNG) Trust and The Independent State of Papua New Guinea* [1986] PNGLR 294, 299.

reaction can be understood. The co-operative performance of complementary work-roles in accordance with custom is the key to a successful Highlands' marriage.²⁰ The performance of complementary roles enables the couple to obtain an adequate subsistence existence for themselves and their families as well as being able to contribute to their traditional obligations. The failure or inability on the part of one of the parties to perform his or her role places unexpected and unreasonable demands upon the other party. What is already a hard and demanding lifestyle becomes even more so. Practicality and survival, by necessity, must be given priority. While traditionally the extended family is supposed to assist, in reality this often does not occur.²¹

Thus, the effects of an injury upon a village person performing a traditional lifestyle can be very severe indeed. It is evident that, in some cases, the impact of the injury on a person living a traditional part-subsistence village lifestyle is more severe than on a person living in an urban or some other situation in which he or she is able to enjoy the modern amenities of life. The Courts need to take this added severity experienced by a village person into account when determining the assessment of damages. This is not being patronistic but rather acknowledges the point made by Miles J in the *Koko Kopun* case that methods of awarding damages in industrialised countries may not be appropriate for Papua New Guinea.²² Further, Courts need to be careful when using the damages awarded to injured expatriates as a guide to determining the appropriate amount of damages for the pain and suffering and negative impact of lifestyle on a traditional village person. Damages must be fair and have full regard to the living standards and situation of such people.

The danger of using damages awarded to an expatriate as a guide to those which are awarded to a village person is revealed in the *Andak Kupil* case. The plaintiff was totally and permanently paralysed. In determining the appropriate damages for pain and suffering, Bredmeyer J was strongly influenced by the *Kerr* case.²³ Allowing for inflation, Bredmeyer J was of the opinion that the award of damages for pain and suffering for Kerr would have been K75,000. While Kerr was paralysed, he was able to return to

²⁰ This point has been strongly emphasised by writers such as Strathern. Feelings of affection come about as the result of the couple working together co-operatively over a number of years.

²¹ This is because the extended use family is continually having to cope with many other demands on its resources and services.

²² *Supra* note 2, at 561.

²³ *Kerr v Motor Vehicle Insurance (PNG) Trust Ltd* (1979) PNGLR 251.

Australia. Here, through the assistance of an effective rehabilitation programme, he was able to shower and dress himself, take responsibility for his own evacuations, use a wheel chair, drive a vehicle, and maintain a clerical job. In comparing Kupil's situation with that of Kerr's, Bredmeyer J noted that Kupil's situation was far more serious because Kupil was permanently bedridden, could not use a wheelchair and had continual bed sores. For that reason Bredmeyer J made an award of damages for pain and suffering of K90,000.00. The significant point here is that in comparing the situation of Kupil with that of Kerr, Bredmeyer J took into account only physical pain and discomfort. He did not acknowledge nor take into account the added severity that paralysis would have on Kupil as a villager and the fact that he would no longer be able to do any kind of work and that his identity had been undermined.²⁴

The *Kupil* case needs to be compared with that of *Kaka Kopun*, where Miles J did acknowledge the severity of a serious injury on a villager's life and social status in the village. In acknowledging the impact of this injury both physically and socially, Miles J decided that it was necessary to award a substantial sum of damages for pain and suffering and for the negative impact of the injury on a plaintiff's lifestyle. He saw this award of a considerable sum as providing the plaintiff with some working capital to rehabilitate his coffee garden and buy himself back into the favour of his people within the village. The villagers would then see that he was tending to his coffee garden through paid labour which he supervised and was therefore once again able to respond to community obligations.²⁵

Thus, the award of damages for pain and suffering to a person living a traditional village lifestyle should focus on two factors. These are, first, the severe impact of an injury upon a village person who relies upon the use of his or her hands and legs for manual work, and, secondly, the fact that damages should provide the plaintiff with some working capital to buy his or her way back into favour with the community. Through acknowledging these two factors in the assessment of damages, Courts would show a genuine understanding of the reality of the life situation of a village person.

2. Damages for Economic Loss

Under this heading the Court includes damages relating to loss of income which is the direct result of the injury, medical expenses (past and future), and costs relating to any items which have to be purchased because of the

²⁴ Supra note 13, at 373.

²⁵ Supra note 2.

injury. When considering the question of economic loss to a village person, the issue which creates difficulty is that of income. How can this be determined? Here we are referring to a person who gains some income from the sale of vegetables and coffee over and above what that person and his or her family need to retain for their subsistence needs.

In determining the loss of income derived from coffee in the *Kaka Kopun* and *Seke Opa* cases, counsel for the plaintiffs called coffee experts as witnesses. In the *Seke Opa* case, which was heard a number of years after the accident had occurred, the expert witness was able to indicate how much the coffee income had been reduced as the result of the plaintiff's inability to tend and maintain the garden.²⁶ In the *Kaka Kopun* case, the Court considered both the loss of coffee income and the loss of food production (for consumption and sale). The combined loss was assessed at K30.00 per week (in 1980). Here Miles J took into account the full impact of the loss of income resulting from the plaintiff being unable to work in the garden. If because of an injury a person cannot produce food for his or her consumption, it is necessary to purchase the food, hence the importance of damages being assessed appropriately.²⁷

In the *Pangis Toea* case, Los J considered every aspect of the plaintiff's pre-accident economic situation. The plaintiff had assisted her husband in the coffee garden. Because of this, whenever the husband sold the coffee he would give the plaintiff K20.00. After carefully considering the evidence, Los J decided that this should be taken into account as loss of income and valued the loss at K80.00 per year.²⁸

These cases reveal the lengths to which Judges have gone to ensure that all assessable lost income resulting from the injury is acknowledged and provided for in the award of damages. However, to ensure that every relevant factor is taken into account with regard to economic loss suffered by the plaintiff, Miles J and Bredmeyer J developed in their assessment of the award of damages three principles. These are to ensure not only that every relevant factor is provided for in the award, but that the award is tailored in such a manner as to ensure that the needs of the plaintiff are provided for in the most appropriate manner.

The first principle is the acknowledgment of the loss of earning capacity which comes about as the result of the injury. According to Miles J, once a

²⁶ *Supra* note 12, at 471.

²⁷ *Supra* note 2, at 563.

²⁸ *Supra* note 19, at 479.

loss of earning capacity is established, even if there is no evidence as to pre- and post-accident potential earnings, a trial Judge must in general assess and award some compensation in this regard.²⁹ How is earning capacity to be assessed? In the *Kokonas Kandapak* case, Miles J again said that the Court has to do its best to quantify the loss even if the evidence does not enable it to be satisfied as to an exact figure. A Judge may use local knowledge, imperfect as it may be, of things such as wage rates and market prices.³⁰

Woods J adopted Miles J's reasoning in the *Make Kewe* case.³¹ In this case the plaintiff was injured in a car accident. The injuries were spinal and affected both his back and his legs. These injuries had a significant effect on his ability to perform his normal village work and activities. In determining the award of damages for economic loss, Woods J, following the precedent set by Miles J, was prepared to take account of two factors. First, he was prepared to place some value on the plaintiffs' role and work as a villager. Secondly, he was prepared to take account of the fact that because of the injury the plaintiff could no longer get a casual labourer's job.³² In other words, Woods J was noting the earning capacity which had been lost as a result of injury.

Why should Courts take into account the loss of earning capacity? Careful consideration of the matter reveals that this is completely in line with the underlying principle of the award of damages, which is to place the plaintiff in the situation that the plaintiff would have been in but for the injury. Before the accident giving rise to the injury, a plaintiff would have been able to take advantage of the part-time labouring opportunities as they arise. Because of the injury he is no longer able to take advantage of this. It is just and proper that this should be taken into account in the award of damages. I suggest that this principle of earning capacity should be applied when determining the economic loss resulting from the loss of production of a plaintiff's coffee garden. The Judge should consider if the garden can be extended and developed and the production improved. If so, this would no longer be possible because of the injury incurred by the plaintiff.

In the *Seke Opa* case, where the accident made the plaintiff into a virtual invalid, the plaintiff was no longer able to maintain or develop the coffee garden. The expert evidence called to assess the economic loss determined that the production would gradually decrease and that after 10 years'

²⁹ *Supra* note 2.

³⁰ *Supra* note 10, at 472.

³¹ *Make Kewe v Kudip Independent State of Papua New Guinea* [1986] PNGLR 279.

³² *Ibid*, 281.

production would cease. The Court followed this evidence in determining damages for economic loss. No account was taken of earning capacity. Yet, in another section of the judgment, the point was made that prior to the accident the plaintiff was a healthy, hardworking young person in his early twenties with a good opportunity to extend what appeared to be a prosperous coffee garden.³³ The key phrase here was “opportunity to extend”. Is this not earning capacity? Should this not be taken into account in the award of damages? Given the picture painted of the plaintiff as a keen energetic young villager, could not it be inferred that but for the accident he would have extended and developed the garden? Is the Court not supposed to take the plaintiff as it finds the plaintiff? It can be argued therefore that there remains scope for Courts to develop the extent of the principle of earning capacity further.

The second principle or tool was developed by Bredmeyer J in the *Kupil* case. Both of the plaintiffs had been paralysed and bed-ridden as the result of the accident. After awarding considerable damages for pain and suffering and the negative impact of the injury on the plaintiffs’ lifestyle, Bredmeyer J then proceeded to determine appropriate damages for economic loss. One important factor which Bredmeyer J saw to be relevant was that neither plaintiff could contribute to the manual tasks in the village which were traditionally the work of the male. Bredmeyer J was of the opinion that there needed to be compensation for this loss of labour. The method of providing this compensation was both innovative and appropriate. He chose to allow for funds in the award of damages to employ a labourer to do the manual work which the plaintiffs could no longer do. This allowance was assessed at K15.00 per week which was at the time of the judgement the current rate for the hiring of a labourer.

It would be good to use this method of award in the situations of people who are injured and who are no longer able to tend to their gardens. To village people, their coffee and other gardens are central to their being. They have put much time, energy and resources into developing these gardens. This method if used properly is able to compensate for not only the loss of production and income but also of earning capacity. Provision for the hiring of a labourer would enable the gardens which the plaintiff has worked so hard to develop to be maintained and even extended, and the injured plaintiff would be able to see the fruits of his labour and be able to respond in some way to traditional obligations through money earned from produce.

³³ Supra note 12, at 472.

The third principle which has been developed to assist in the assessment for the award of damages in injury cases is to allow for gradual improvement of a plaintiff's functioning if it is appropriate to do so. Obviously this would only be appropriate in cases where a plaintiff has received partial loss in one arm, hand or leg. Miles J developed this idea in the *Kokonas Kandpak* case. Here the plaintiff lost the use of his right hand to the extent of 50 percent. The other limbs were functioning normally. Miles J decided that the injury would have an effect on earning capacity in the following way. For the first year after the injury the plaintiff would be totally incapacitated. For the second year the plaintiff would regain his earning capacity by a third. In the next three years the earning capacity would be a half. No further allowance was made for loss. The reasoning behind Miles J's award here was that, if the loss of the use of the hand was only partial and the other hand was functioning normally, over time the plaintiff would be able to adapt his work methods to cope with this partial loss. As this adaptation occurred he would also gain more confidence. The award ordered by Miles J gave the plaintiff plenty of time to do this.³⁴

Thus, Courts have been prepared to place an economic value on the plaintiff's work as a villager; take into account the loss of earning capacity; and make provision for the hiring of a labourer to do the manual work which the plaintiff is no longer able to undertake (especially in the gardens). In this way, Courts have made significant efforts to award damages which can best place the plaintiff in the same position that the plaintiff would have been in but for the accident leading to the injury.

III. DAMAGES FOR DEATH

The death of a person as the result of an accident has a severe impact on the deceased's surviving family members. The surviving spouse becomes the plaintiff and the Court has the very difficult task of assessing and awarding damages in a way that can place the plaintiff and her children, as far as money can, in the same position as they would have been had the death not occurred. The death of a person with surviving dependants living a traditional village lifestyle presents the Court with a real challenge to determine appropriate damages.

When considering damages awarded for death arising out of a civil wrong it is again important to emphasise the point that the purpose of damages is

³⁴ *Supra* note 10, at 577.

compensatory and not a compassionate payment.³⁵ The compensatory emphasis of damages even in the case of death is emphasised by Bredmeyer J in the *Mave Koko* case.³⁶ In this case, damages had to be assessed for two children for the loss of their mother in a motor vehicle accident.³⁷ Bredmeyer J started his judgment by saying that, in a dependency claim for the loss of a mother, no damages are payable for the loss of their mother's love and affection nor for the grief that they suffered.³⁸ He said that damages are awarded for the pecuniary benefit that the children might have expected to enjoy had their mother not been killed. This may seem to be harsh but those people who have contributed to the development of principles governing the awards of damages over the years have not felt it necessary to allow damages for grief in the case of death. However, it could be argued that this forms a definite contrast with the damages that are awarded in personal injury cases for pain and suffering and the negative impact of the injury on a plaintiff's lifestyle. There is also a direct contrast with damages that are awarded for breach of contract, which may include distress and frustration.

1. Domestic Support Claims

Courts in Papua New Guinea, when awarding damages for the death of a father and husband living a traditional village lifestyle, have developed the principle of domestic paternal support. This principle, while not departing from the general principle of damages, allows the Court to take into account the loss of the emotional support of a husband and father to a family which comes about as the result of a death. This principle was developed by Amet J (as he was then) in the *Pike Dambe* case.³⁹ In this case the plaintiff's husband had been shot by a policeman during a police operation in the deceased's area. Amet J found the killing to be unjustified and the State liable for damages. The plaintiff claimed general damages, damages for economic loss, exemplary damages and interest thereon, plus the cost of the proceedings. For the purpose of this article, the award of general damages and damages for economic loss and the method of award are of interest.

³⁵ The one exception to this is the payment of *solatium* to the parents for the loss of a child (provided for in the Wrongs (Miscellaneous Provisions) Act, Chapter 297, s 29).

³⁶ *Mave Koko v Motor Vehicles Insurance Trust* [1983] PNGLR 167.

³⁷ The father was not able to bring a claim because it was his negligent driving which was responsible for the accident.

³⁸ As to the award of damages in breach of contract for mental distress, frustration or upset, see *Harding v Teeroi Timbers Pty Ltd* [1988] PNGLR 128.

³⁹ *Pike Dambe v Augustine Peri and The Independent State of Papua New Guinea* [1993] PNGLR 4, 12.

In the *Dambe* case, the lifestyle followed by the deceased and his family fell into Miles J's description of a part-subsistence villager. He and the plaintiff planted kaukau and vegetables, plus a reasonably sized coffee garden, which provided them with a shared income of K800.00 per year. The Judge acknowledged that the deceased had performed all of the manly physical work and that the fact that he could no longer provide this would significantly reduce the production of the gardens and the subsequent income. Having acknowledged this, the Judge awarded damages for economic loss of only K300.00 per year, which was less than half of the total income. The assessment of economic loss here was difficult because the surviving wife would still gain some income albeit a substantially reduced income. How big was the reduction? An expert witness who was from the Hagen area made the observation that, in a traditional village situation where the husband and wife co-operatively performed their complementary roles in the garden, the production would be more than double that which the individual partners could produce themselves. The fact that the joint work of the partners would be more than double that of an individual contribution should mean that the award of damages for economic loss in a situation such as this where the husband is killed should be just over a half of the amount that was earned jointly by the husband and wife.

As already noted, in his award of damages in the *Dambe* case, Amet J went further than just acknowledging economic loss. He gave recognition that the loss of the family through the death of a husband and father was a loss of both the tangible and the intangible. He brought all of this under the heading of domestic paternal support. This included three forms of support given by a husband and a father to his family in a traditional village situation. First, there were the heavy manual tasks. These included clearing the ground and turning the earth in preparation for both subsistence and cash cropping, digging drains, and building and maintaining the family house. Secondly, there was the physical, practical and emotional support that a husband and father gave to a family living a traditional lifestyle. Thirdly, the man ensured that the family fulfilled the traditional obligations to its clan and community in exchanges which included bride price, compensation and moka exchange. In so doing the man ensured that the family felt part of the community.⁴⁰

It was only proper that the Court acknowledged the significance of the loss of the husband and father. The Court was not awarding damages for grief or consolation but was compensating the family for the loss of practical and emotional support. How was this acknowledged? The Court made an award

⁴⁰ Ibid, 11.

of K14.00 per week. K5.00 went to the mother and this was awarded until she reached the age of 55. The remainder was divided evenly amongst the children (K3.00 per week) up until each child reached the age of 18. While this might not seem to be a large amount, it needs to be remembered that in this case exemplary damages were awarded to the value of K30,000. It is true that the award of exemplary damages should not influence the amounts of other damages. However, the Court does have to ensure that the plaintiff is not unjustly enriched. The award of exemplary damages would therefore have had an indirect influence on the amount of damages for domestic paternal support. In this case the usual award of K1,500.00 was made for the loss of expectation of life.⁴¹

Woods J gave support to the principle developed by Amet J in the *Seni Eli* case. The plaintiff was the widow of a person killed in a motor vehicle accident. At the time of the death the couple had a child aged five. The deceased was a village person. He cultivated traditional crops and some coffee and was the sole supporter of the plaintiff and the child. The yearly income from the coffee was estimated to be K350.00 and that from vegetables was K50.00. Amet J, noting that this was a co-operative effort, made an allowance for the reduction of coffee and income brought about through the death of the deceased. He also made an allowance for the other work which the deceased did for the family and which could not be given an exact cash figure, namely, the construction of gardens and fences and the construction and maintenance of the family home. In converting all of this into a cash figure, Woods J allowed K5.50 per week for the plaintiff until she reached the age of 55 and K5.50 per week for the daughter until she reached the age of 18.⁴²

The principle of domestic paternal support is an innovative development in the principles governing the award of damages and is a principle which accords well with the support given by a husband and father in a traditional village situation.

Bredmeyer J addressed the issue of domestic *maternal* support in relation to an urban situation in the *Koko* case. In this case he provided a clear framework which would allow sufficient latitude for the Court to award damages for the loss of domestic maternal support in an appropriate case. In

⁴¹ In common law jurisdictions it is usual for Courts to set a fixed amount for the loss of expectation of life. Up until 1994, the amount that was established and followed was K1,500. However, in 1994, the Supreme Court in the case of *Wallbank v Papua New Guinea* [1994] PNGLR 88 increased the amount to K3,000.00.

⁴² *Seni Eli v The Independent State of Papua New Guinea* [1988-89] PNGLR 653.

the *Koko* case, two children lost their mother in a motor vehicle accident. Bredmeyer J, after a careful survey of relevant cases, decided that it was possible to award damages for the cost of replacing the services of a mother by a housekeeper, the extra services provided by a mother (such as essential matters to do with upbringing and help with homework), and the increased risk of orphanhood. This approach acknowledged the special vulnerability of a child when losing his or her mother. This was because there was the risk that the father might not be able to perform fully the parenting duties. This might occur because of the premature death of the father or the lack of money due to illness or unemployment.⁴³

Woods J, in the *Nolnga* case, applied the principles established in the *Koko* case to a village lifestyle situation. A mother from the Jimi valley in the Western Highlands was killed in an accident. Surviving her was the husband and three children aged 10, 9 and 4 years of age. While at the time of the Court decision the oldest child was 19, she was only 14 at the time of the accident and therefore a dependent. The younger children since the accident were being looked after by the plaintiff's mother (their grandmother) in the village. She was fulfilling the housekeeping-type work as well as trying to be a mother to them. Following the precedent established in the *Koko* case, Woods J allowed for a payment to each child of K3.50 per week, to be calculated from the time of the accident causing the mother's death until they reached the age of 18. As the two older children were 19 and 16 respectively at the time of the judgment, Woods J saw no justification for making any further award to them under the head of the increased risk of orphanhood. However for the youngest child who was only four at the time of the accident he held that an award under this head was proper. He therefore proceeded to award K1,000 to the youngest child, which was the same amount that was awarded to the oldest child in the *Koko* case. The *Nolnga* case was a start but the principle could be developed further so that the category of damages can properly be called domestic maternal support. This would include the total support given by a wife and mother to the whole family in a traditional village situation.⁴⁴

The co-operative work of the partners has been discussed. The loss of one partner creates a gap. Amet J, in the *Dambe* case, made the point that, while by custom the deceased relatives should help the surviving widow, they are reluctant as they have their own families and gardens to nurture.⁴⁵ People are quick to criticise this lack of help. In reality, immediately after the death

⁴³ Supra note 36, at 168.

⁴⁴ *Nolnga v Motor Vehicles Insurance (PNG) Trust* (1991) PNGLR ?.

⁴⁵ Supra note 39, at 12.

of the deceased, the relatives or extended family are very supportive. However, as time passes, there are new events, situations and obligations which arise requiring immediate attention and diverting the focus away from the needs of the widow. There may be tribal fights or tensions, compensation demands, bride price and moka exchanges to contribute to, unexpected floods, droughts or raids by the police destroying large parts of people's livelihood. In a village situation people have many conflicting demands for their time and resources. The most immediate demands tend to take precedence. The widow with three children does not receive priority attention. However because of the reasons outlined it is unfair to be critical of relatives.

2. Dependency Claims on Death of Child

Three cases illustrate claims for damages arising out of the death of a child in traditional village situations. In each case a claim was brought by a parent of a child who was killed through a civil wrong and who had provided support to the parents or, had the child not been killed, would have provided significant economic support. In the *Mina Uokare* case, a claim was made by the parents of an 18-year-old son who was killed in a motor vehicle accident. The parents maintained that they relied on their son for support. The son was living a traditional village lifestyle and at the same time of his death was giving significant support to the plaintiffs. While there were other children, the deceased was the main support-giver. The parents were 45 at the time of the death. The Judge acknowledged that the loss of support was significant and that the parents would have increasingly relied on the son's support as they grew older. He made a K2.00 per week allowance for the loss of support for the next 20 years which he took to be their life expectancy.⁴⁶ A similar claim was made in the *Helen* case. In this case the deceased was shot dead by the Station Commander of the Wabag police station without any apparent reason. The plaintiff, who was the step-mother of the deceased claimed damages for loss of support. Again the Court acknowledged this loss and that the need for support would increase as the plaintiff and her husband grew older.⁴⁷ In this case the Judge awarded damages for the loss of support to the value of K5.00 per week for twenty years which the court took to be their life expectancy.⁴⁸ In the *Simin Dingi* case, the Court went so far as to take into account under the head of loss of earning capacity the loss of potential bride-price to the parents of a teenage

⁴⁶ *Mina Uokare v The Independent State of Papua New Guinea* [1988-89] PNGLR 655, 656.

⁴⁷ *Ibid*, 394.

⁴⁸ *Helen v Jack Marius Karani and The State* [1992] PNGLR 391.

daughter who was killed in a road accident in the Chimbu. But for the death resulting from an accident which was brought about by a negligent act, the plaintiff could have expected the bride-price payment for his daughter. Woods J therefore saw that it was proper to take the bride-price into account for the award of damages. He was guided in his assessment of damages by the average bride-price paid in the Gumine area of Chimbu.⁴⁹

The willingness of the Court to award damages for the loss of support of a child acknowledges the importance given to family obligations in Melanesian Society. As parents grow older they rely upon their child more for support. The death of a child brought about through a civil wrong means that the parents are unable to rely upon that support. It is only fair and just that the defendant should have to compensate for this loss of support for which he or she is responsible.

3. Claims for Reasonable Funeral Costs

Under the Wrongs (Miscellaneous Provisions) Act, the Court is able to award costs in favour of the plaintiff for reasonable funeral costs in cases where the death of a person has been the result of a civil wrong.⁵⁰ In Papua New Guinea, when a death occurs there are many traditional obligations which must be fulfilled in accordance with the custom of a particular area. In the *Inabari* case, the issue of awarding funeral costs was considered as well as whether or not this could include traditional obligations. Salika J noted that in Papua New Guinea generally the event of a death is regarded as a major occasion. The length of the period of mourning and the number of mourners often depends upon the status of the person who has died. It is the task of the deceased's immediate relatives to provide for the mourners for as long as the mourning period extends. This in practical terms can be an expensive exercise. The costs also include ceremonies and other gatherings which occur after the funeral. In this particular case the deceased was a child from Dagua in the East Sepik. There the mourning period usually extends for two weeks. The deceased's parents had to provide food for the mourners for this period of time. The issue that the Judge had to consider was whether reasonable funeral costs could include traditional obligations associated directly with the death, and costs which were incurred after the burial but still related to the mourning. The Judge decided that they could and was prepared to include as reasonable funeral expenses the cost of the food for feeding the mourners for two weeks, telephone calls to inform people about

⁴⁹ *Simin Dingi v Motor Vehicles Insurance Trust* [1994] PNGLR 385.

⁵⁰ Wrongs (Miscellaneous Provisions) Act, chapter 297, s 28 (2).

the death, and the cost of a vehicle to take the deceased body to the village.⁵¹

IV. PERIODIC PAYMENT AWARDS

Under the present common law principles regarding the awarding of damages, once the amount of damages has been assessed and determined, they are awarded to the plaintiff in a lump sum and (barring appeal) this is the end of the matter so far as the court is concerned. The Court is not concerned with how the damage money is spent and there is no safeguard to ensure that it will be spent on rehabilitating the plaintiff and supporting his family.⁵² In a way this undermines the central purpose of damages which is to place the plaintiff in the same position that he or she would have been in but for the injury or but for the death of the spouse. There are other difficulties that may arise. After the judgment it may be realised that there was a mistake in the assessment of damages and the medical costs were greater than anticipated. Similarly, while damages might be awarded on the basis (following medical opinion and evidence) that the plaintiff would live another three years, he might live another ten years and this extra seven years is not provided for in the damages. However, the original award of damages stands.

In the *Kupil* case, the difficulties surrounding the award of damages were considered in some detail by Bredmeyer J.⁵³ He quoted a report written by a Commission in Australia on this very matter. Amongst other points, it suggested that damage awards for future economic loss and medical needs should be awarded on a periodic basis. It was this suggestion that clearly influenced Bredmeyer J to decide to initiate an innovative idea for the award of damages. The award of damages for pain and suffering, loss of expectation of life, past economic loss and the associated interest were by way of the traditional lump-sum. However, for the awards of damages relating to future economic loss and medical needs, Bredmeyer J chose to order these to be paid at a set amount each fortnight. His authority to make such an order came from section 155 (4) of the Constitution. This section reads:

⁵¹ *Inabari v Sapat and the Independent State of Papua New Guinea* [1991] PNGLR 427.

⁵² Bredmeyer J made this point strongly in the *Kupil* case, supra note 13.

⁵³ *Ibid*, 383.

Both the Supreme Court and National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice to a particular case.⁵⁴

According to Bredmeyer J, the purpose of this section was to enable the Courts to tailor their remedies to meet the circumstances of the particular case and so ensure that justice was done. Bredmeyer J felt that in this particular case it was in the interests of justice to order damages for future economic loss and medical expenses to be paid on a fortnightly basis. The reason for this was that both of the plaintiffs had been seriously paralysed. Their life expectancy was estimated to be only five years.⁵⁵ However it was possible that they might live longer. Should the Court award damages for future economic loss in a lump sum assessed on a life expectancy of five years, and then the plaintiffs lived for ten years, there would be no provision for that extra five years. The fortnightly order would, however, ensure that the plaintiffs received a regular payment for the duration of their remaining life.

Woods J adopted the approach of Bredmeyer J in the *John Taka* case. Again the plaintiff was a village person who had been permanently paralysed and so required the continual assistance of others for all of his needs. Woods J was of the opinion that the Court had a responsibility to consider the future needs of the plaintiff and to make an appropriate order to ensure that he was guaranteed a regular payment to cover his difficulties and need for continual care. It was noted that for most people in Papua New Guinea (including the plaintiff) there was no effective system in place to manage large sums of money in a way that fully protected their future interests. Because of this, Woods J followed the precedent set by Bredmeyer J and used the authority given to him under section 155 (4) of the Constitution. He ordered that the plaintiff's damages for future economic loss and need for future care should be awarded in a fortnightly amount which was assessed at K70.00 per week and was to be paid for the duration of the plaintiff's natural life.⁵⁶

This method of awarding damages for future economic loss and medical needs is appropriate for the Papua New Guinea village situation, for two

⁵⁴ Constitution of Papua New Guinea, s 155(4).

⁵⁵ Supra note 13, at 384-385.

⁵⁶ *John Taka v Leo Kipi and The State* [1995] PNGLR 254, 257. Neither Woods J nor Bredmeyer J saw any difficulty in giving effect to the order. Woods J was of the opinion that the fortnightly payments could be incorporated through the Department of the Attorney-General onto the Government pay-roll system and paid through a bank account in the name of the plaintiff. It would then be up to the Solicitor-General to track the life of the plaintiff and be advised of his eventual demise in the future.

reasons. First, the criticisms made regarding the awards paid in lump sums are acknowledged. Secondly, in a Papua New Guinea village situation, when a person receives in one payment a large amount of money there is pressure from a person's relatives to distribute that money to acknowledge the different assistance given or to acknowledge certain relationships. In reality the plaintiff may receive very little of the amount that was awarded to him or her. However, relatives seeing the ongoing needs of the plaintiff would more readily be able to appreciate that the payment of the modest but regular sum of money is for the purpose of tending to the plaintiff's ongoing needs. The use of the periodic payment for future economic loss and medical needs is another development made by the Courts to ensure that the award of damages to a person living a traditional lifestyle is effective and appropriate. The damages for pain and suffering and the negative impact of the injury on the plaintiff's lifestyle would still be awarded in a lump sum. This would still enable the plaintiff to use this lump sum as working capital to rehabilitate coffee gardens and regain respect in the community.

It is unfortunate that the principle of periodic payments has not been developed further by other members of the judiciary. Given the continual traditional demands on people who receive large amounts of money by their relatives, it is necessary to provide some protection to the injured party or surviving family members of the deceased by using the power given to the courts under section 155(4) of the Constitution. The use of this section could be extended even further to create a trust whereby trustees would be responsible for administering the money for the best interests of the beneficiary. Respected members of the community, such as a priest, a pastor and an educated community leader, could be appointed as trustees. They would have the responsibility of dealing with the demands from relatives and, while acknowledging these, would also ensure that the money was used to support the plaintiff in the way that it was intended. It would be necessary to gain the approval of the plaintiff, for such a proposal to be given effect. He or she might not be interested in the proposal. It is however a possible further development in ensuring that damages are awarded appropriately.

V. RELATIONSHIP BETWEEN COMMON LAW DAMAGES AND CUSTOMARY COMPENSATION

Occasionally the Courts are required to consider what should be done in a situation where, prior to the award of damages, the plaintiff also received some compensation from the clan of the person responsible for the civil wrong. This happened in the *Kupil* case. The vehicle in which the accident occurred was owned by the State. The driver was an employee of the State. However, the driver was also a member of a clan having a close relationship

with both plaintiffs and the accident occurred in that area. The result of this was that the clan of the driver made a compensation payment to the clan of the plaintiffs. To each of the two plaintiffs a separate compensation payment was made of K2,400.00, forty pigs and two muruks. Each plaintiff then distributed a considerable amount of this compensation to their clan members in accordance with local custom. They kept for themselves and their families the cash of K2,400.00.⁵⁷

Bredmeyer J had to determine what effect the compensation payment should have on the damages. To assist him in this, expert witnesses were called to explain the purpose of compensation in the Wahgi area. He was also guided by schedule 2.1 of the Constitution and sections 3 and 5 of the Customs Recognition Act (chapter 19). Schedule 2.1 of the Constitution provides for the recognition of custom unless it is inconsistent with a constitutional law or statute or repugnant to the principles of humanity. Under section 3 of the Customs Recognition Act, a custom is recognised provided that its practice would not result in some injustice or would not be in the public interest. Under section 5 of the same Act, the Courts are permitted to take custom into account where justice requires it or where the failure to take it into account would create an injustice. Thus, Bredmeyer J was able to acknowledge the custom of compensation provided that its practice was in the public interest, was not repugnant to the principles of humanity and was in the general interests of justice.

The evidence given concerning custom in the Wahgi area revealed that it had two purposes. First, it aimed at easing the tensions created by the injury to the plaintiffs and to restore peace, harmony and good relationships between the two clans. The second purpose was to avoid retribution or “payback” from the victim’s clan. Bredmeyer J was of the view that the aim of restoring harmony and good relationships between the two clans was in accordance with the general principles of humanity. The purpose of avoiding payback was not. He was prepared to emphasise the purpose of restoring good relationships and therefore recognise the custom of compensation. The next step was to determine how the Court should decide the damages to be awarded less the compensation paid directly to them. In other words the Court only took account of the compensation that the plaintiffs held themselves and not that which was distributed to the wider clan. The purpose of this was to discourage customary payments in situations where common law damages could be obtained.⁵⁸

⁵⁷ *Supra* note 17, at 355.

⁵⁸ *Supra* note 17, at 362-363.

While *Bredmeyer J* was trying to avoid unjust enrichment his reasoning evokes two responses and observations. First, compensation is central to Highlands custom and it is one of the most important methods of avoiding tribal fights when tensions emerge between clans. A custom fulfilling that role should not be discouraged. Secondly, it could be argued that common law damages and customary compensation perform two different yet complementary roles. Traditional compensation focuses on inter-tribal dynamics and tensions which arise as the result of an injury or death. The purpose is to restore harmony and good relationships. The focus is therefore on the group and not the individual. The focus of common law damages is however on the individual plaintiff and aims at providing him or her with the means of being in the same living situation that he or she would have been in had the injury or death of a spouse not occurred. The focus on group dynamics on the one hand and the needs of the individual on the other, if applied properly, can combine and address the tensions, sufferings and disabilities created by the civil wrong. Why not allow the awards of compensation and damages to do this and complement each other without reducing the common law damages by the amount of compensation paid directly to the plaintiff? Since the largest amount of compensation is distributed to the wider clan members, this could hardly be said to amount to unjust enrichment.

VI. CONCLUSION

Considering the approach of the Courts as a whole it is safe to say that the courts have achieved two things. First, they have moulded the award of damages to meet the local circumstances and lifestyles of the plaintiffs directly affected. Secondly, the Courts have broken new ground in the manner in which damages ought to be awarded. While this approach needs to be developed further, it can be said that the Papua New Guinea Courts have made a significant contribution to the award of damages in Papua New Guinea. Some of the unique sections of the Constitution of Papua New Guinea has helped the Courts to do this.

In conclusion, five matters are raised to which the Courts need to give greater attention. First, more attention needs to be given to the additional severity that an injury can have upon a person who is dependent upon the use of his hands or legs to obtain a subsistence living, and this needs to be recognised in the award of damages. Secondly, the Courts need to reconsider the life expectancy of village people. At the moment they have set it at 55. Given the increased life expectancy in the country generally, it is suggested that this should be increased to 60 years of age. Thirdly, if an award of solatium can be made to parents for the loss of a child, a similar

award could be made to a child under a certain age for the loss of a parent. Fourthly, the Courts need to consider the extension of the use of section 155 (4) of the Constitution when determining the appropriate method of the payment of damages. One of the possible extensions of this section would be to order the ongoing supervision of a village person who is fully paralysed as the result of an accident to ensure that the orders of the court are achieving what they are supposed to achieve. Finally, the Courts need to consider the establishment of a trust in certain circumstances to ensure that money provided as damages is protected from excessive and unreasonable demands of relatives.

It is only through making such orders that Woods J's claim, that Courts have a responsibility to consider the future needs and interests of the plaintiff and ensure that he or she is properly cared for, can be fully realised. The goal of appropriate awards of damages to people living a part-subsistence village lifestyle in Papua New Guinea will continue to rely upon the shared contribution of counsel and the judiciary in Papua New Guinea.

BATTERED DEFENDANTS AND THE CRIMINAL DEFENCES TO MURDER – LESSONS FROM OVERSEAS

BY JULIA TOLMIE*

I. INTRODUCTION

It has become trite to point out that the defences to murder do not equitably accommodate the circumstances in which battered woman tend to kill their violent mates.¹ Thus, women who fall within the substance of the defences of self-defence, and to a lesser extent provocation, have had difficulties historically in fitting their fact situations within the technical parameters of those defences.

To date New Zealand practitioners and judges have had a mixed response to this situation.² On the one hand there have been cases like *R v Wang*³ and *R v Oakes*⁴ in which battered woman have had traditional self-defence doctrine applied to their cases with little apparent sensitivity to their unique circumstances. On the other hand there have been cases like *The Queen v Zhou*⁵, *R v Stephens*⁶ and *R v Manual*⁷ which have used the evidentiary

* Senior Lecturer in Law, University of Auckland. The research for this article was funded by a Canadian Studies, Faculty Research Program Award.

¹ See eg McDonald, "Defending Abused Women: Beginning a Critique of New Zealand Criminal Law" (1997) 27 VUWLR 673; Robertson, "Battered Woman Syndrome: Expert Evidence in Action" 9:2 (1998) Otago Law Review 277; Sheehy, Stubbs and Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Criminal Law Journal 369; Seuffert, "Battered Women and Self Defence" (1997) 17 New Zealand Universities Law Review 292; and Schneider, "Resistance to Equality" (1996) 57 University of Pittsburgh Law Review 477.

² See McDonald, "Battered Woman Syndrome" [1997] NZLJ 436; Seuffert, *ibid*; and Finn, "Case and Comment: Oakes" (1995) 19 Crim LJ 291, 293.

³ [1990] 2 NZLR 529; (1989) 4 CRNZ 674.

⁴ [1995] 2 NZLR 673.

⁵ Unreported, High Court, Auckland, 4 October 1993. See Tolmie, "Pacific-Asian Immigrant and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" [1997] 19:4 Sydney Law Review 472; and Seuffert, *supra* note 1.

⁶ Unreported, High Court, Whangarei, 23 April 2002. See "Jury: Killer Acted in Self-Defence," April 24 2002, *The New Zealand Herald* 1; and "He didn't deserve to die insists abusers mother," 25 April 2002, *The New Zealand Herald* 2.

⁷ Unreported, High Court, Rotorua, T7/97, 19 September 1997, Robertson J. See Robertson, *supra* note 1.

device known as the “battered woman syndrome” to achieve positive results for the women concerned.

The purpose of this article is to assess the recent recommendations of the New Zealand Law Commission⁸ on battered defendants who kill their violent mates in the light of experiences and developments in the area in Canada and Australia.⁹ Accordingly, it is proposed to highlight three strengths and three limitations in the Law Commission’s report on battered defendants.

First, it will be suggested that the three key recommendations of the Law Commission are the abolition of the imminence requirement in respect of the law on self-defence; a movement away from understanding the issues raised in such cases in terms of the “battered woman syndrome”; and the abolition of minimum mandatory sentences for murder. It will be argued that the first two reforms should be given immediate effect by key players in the criminal justice system, as they represent potential developments in the common law that are consistent with up-to-date international understandings. Since the release of the Law Commission’s report, the third recommendation has been superseded by the enactment of the Sentencing Act 2002 which came into effect on 1 July 2002, and which has replaced the previous mandatory life sentence for murder with a rebuttable presumption of life.

Secondly, it will be suggested that the report could have gone further in three ways. There could have been a more sophisticated treatment of the need to introduce cultural information as a context for the application of self-defence doctrine; a prescriptive list of factors to be considered when judging the reasonableness of the accused’s beliefs for the purpose of self-defence; and a systemic review of those cases in which women have already been convicted of homicide in respect of their violent mates.

⁸ NZLC, *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper*, Preliminary Paper 41 (August 2000); and *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (May 2001).

⁹ These jurisdictions are chosen because their legal systems have similar starting points and a number of parallels to New Zealand. They (particularly Canada) have also pioneered efforts to develop the criminal defences to accommodate battered women. As to the Australian Model Criminal Code, see Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility*: Final Report (December 1992) 66-67.

II. KEY RECOMMENDATIONS OF THE LAW COMMISSION

The Law Commission made a number of recommendations for reform in respect of battered defendants who have killed their violent mates and seek to raise one of the criminal defences. In this section I shall highlight the three that international developments would suggest are the most important.¹⁰ These are the abolition of the requirement of an imminent attack for self-defence, a movement away from the battered woman syndrome in favour of the introduction of broader social context evidence, and the abolition of minimum mandatory sentences for murder.

1. Self-defence and imminence

The test for self-defence is contained in section 48 of the Crimes Act 1961, which reads:

Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

This definition of self-defence does not require that an attack be “imminent” before self-defence can be successfully claimed. However the New Zealand judiciary uses the concept of imminence as an evidentiary tool – a guide to help the trier of fact apply the law as it is set out in section 48 to any factual scenario. Arguably the inflexible way in which the concept has been used has had the practical effect of elevating it into a rule of law.¹¹ Certainly the New Zealand case-law has prompted Simester and Brookbanks to comment that a pre-emptive strike will not be allowable as a lawful act of self-defence without “a crystallised, immediate danger that needed to be averted by instant action”.¹² In other words, there has to be an imminent threat.

It is well established that requiring that an attack be “imminent” before an accused can lawfully use lethal self-help in response to it has several

¹⁰ See Stubbs and Tolmie, “Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome” (1995) 23:3 *Melbourne University Law Review* 709; and Ratushny J, *Self Defence Review: Final Report*, submitted to the Minister of Justice Canada and to the Solicitor General of Canada (11 July 1997). There were a number of other important recommendations. For example, the Law Commission also recommended the abolition of the partial defence of provocation and the non-introduction of the partial defences of excessive self-defence and diminished responsibility.

¹¹ *R v Terewi* (1985) 1 CRNZ 623; Wang, *supra* note 3.

¹² Simester, A and Brookbanks, W *Principles of Criminal Law* (2 ed, 2002) 490.

unfortunate consequences in cases involving women who kill their attackers in the course of defending themselves.¹³ First, it has the effect of automatically excluding self-defence as a defence in most of these cases, regardless of the merits of the defence on the substance of the particular case. This is because, as the Law Commission points out, many, if not most, women either kill during a lull in the violence or when the perpetrator is off guard, or they arm themselves in advance of being attacked.¹⁴ There are obvious reasons for this. No woman is going to take a violent man on in hand-to-hand combat if she values her life. Requiring an imminent attack effectively denies self-defence to women who take advantage of the element of surprise to defend themselves.¹⁵

Secondly, the requirement of imminence contributes to a misunderstanding about the nature of the threat that the accused is responding to in many of these types of cases. This point is made by the Law Commission which comments that:

A search for “imminent danger” inclines the court to look for a one-off attack and to measure the defendant’s use of force in relation to that attack. Such an approach is based on a view of domestic violence as a series of discrete acts of physical violence between which the women is not being abused and is free to leave. However, violence within a battering relationship is often just part of a general strategy to maintain power and control over the intimate partner. Successfully negotiating a particular incident of physical violence by calling the police, leaving the room or leaving the relationship at a particular point in time may not be the end of the matter. A woman may have done all of these things many times in respect of particular incidents of violence without ultimate relief from the constant threat of violence in her life. In fact, these actions may be instrumental in escalating the terror she lives with.¹⁶

¹³ Nourse, “The ‘Normal’ Successes and Failures of Feminism and the Criminal Law” 75 (2000) *Chicago Kent Law Review* 951, 973-974; Seuffert, *supra* note 1, at 309-313; Bradfield, “Is Near Enough Good Enough? Why Isn’t Self-Defence Appropriate for the Battered Woman?” (1998) 5 *Psychiatry, Psychology and the Law* 71; and Sheehy, Stubbs and Tolmie, *supra* note 1.

¹⁴ NZLC, *Battered Defendants*, *supra* note 8, at 13.

¹⁵ This point is made in *R v Lavallee* (1990) 55 CCC (3d) 97, 120.

¹⁶ NZLC, *Some Criminal Defences*, *supra* note 8, at 10-11; Tarrant, “Something is pushing them to the side of their own lives: A Feminist Critique of Law and Laws” 20 [1990] *Western Australian Law Review* 573, 599; Minnesota Program Development, Inc, Domestic Abuse Intervention Project, discussed in Seuffert, “Lawyering and Domestic Violence: A Feminist Integration of Experiences, Theories and Practices” in Stubbs, J (ed) *Women, Male Violence and the Law* (1994); Leibrich, J, Paulin, J and

In consequence, the Law Commission has recommended that section 48 “be amended to make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but inevitable”.¹⁷ The intention of this change is to shift the focus of self-defence from the narrow question of what particular threat of specific violence the accused was facing just before her lethal act of self-help, to the more general nature of the threat that she faced. In addition, the concept of inevitability will necessitate a realistic inquiry into the alternatives that the accused had available to her to deal peacefully with this violence. It is worth noting that the recommendation of the Law Commission bears some resemblance to a submission made by the Canadian Association of Elizabeth Fry Societies to the Canadian Department of Justice.¹⁸ The submission was that self-defence ought to be available when the anticipated danger is unavoidable in the sense that the accused cannot by other means guarantee safety.

It is hoped that legislative reform giving effect to the Law Commission’s recommendations will be swift. However, practitioners and Judges should not wait for such reform in order to recognise and respond to the concerns raised by the Law Commission. The New Zealand requirement that the attack being defended be “imminent” for the purposes of self-defence is not only indefensible in principle but it is out of line with the common law in comparable jurisdictions.

At least four Australian cases have explicitly allowed battered women to raise self-defence successfully in circumstances where there was no imminent attack, and where immediate retreat could therefore have been argued as a possibility on the facts. In these cases it was still essential for the accused to demonstrate that her defensive action was necessary in the circumstances that she faced.¹⁹ In half of these cases the threat that was being faced was not necessarily understood as being represented by any

Ransom, R *Hitting Home: Men Speak About Abuse of Women Partners* (1995); Mahoney, “Legal Images of Battered Women: Redefining the Issue of Separation” (1991) 90 *Michigan Law Review* 1; Mahoney, “Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings” (1992) 65 *Southern California Law Review* 1293; and Wallace, *A Homicide: The Social Reality* (1996) 99.

¹⁷ NZLC, *Some Criminal Defences*, supra note 8, at 12.

¹⁸ Response to the Department of Justice re: *Reforming Criminal Code Defences: Self-Defence and Defence of Property*, Canadian Department of Justice (1998).

¹⁹ The concept of necessity should produce the same result on any set of facts as the concept of inevitability. Both arguably require an examination of the nature of the threat that is faced by the accused as well as the realistic alternative means of dealing with it, without introducing a narrow presumption that only certain types of threat (ie those that are imminent) justify a defensive response.

particular incident of violence. Instead, it was understood as being the general ongoing danger with which the woman was living in the relationship.

Three of these cases involved sleeping aggressors. *Kontinnen* was a South Australian case in which the accused successfully raised self-defence using battered woman syndrome evidence in spite of the fact that the deceased was sleeping when he was shot. In this case the accused had been threatened with violence that was to take place when the deceased woke up.²⁰ The other two cases were decided under the Northern Territory Criminal Code.²¹ The Northern Territory Code differs from the common law in the manner in which the issue of immediacy arises. Under the Code a person cannot argue self-defence unless there is a serious "assault being defended". An assault can be a "threatened" application of force provided that the person threatening assault has "an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words".²² It is arguable that this requirement is even tougher to satisfy than the requirement of imminence in respect of sleeping aggressors. Nonetheless, in *Tassone* the jury acquitted a woman who was charged with attempted unlawful killing on the basis of self-defence. She shot her violent husband (who survived) whilst he was sleeping and after he had assaulted and raped her. Although her husband had not verbally threatened her before he fell asleep, the general and ongoing threat that he presented to her, which was demonstrated by his past behaviour, was obviously satisfactory to the jury in terms of the Code.²³ In *Secretary* the Northern Territory Court of Criminal Appeal re-examined the issue. In this case the accused had shot and killed her sleeping aggressor who had fallen asleep after he had terrorised her, assaulted her, and told her that further violence would commence when he woke up.²⁴ In the Supreme Court the trial judge held that self-defence was unavailable to the accused on the basis that a sleeping aggressor did not have a "present and apparent ability to effect his purpose". The Court of Criminal Appeal overturned this decision²⁵ and on retrial the accused was acquitted.²⁶ Unlike *Tassone* all of the Judges in *Secretary* dealt

²⁰ Unreported, Supreme Court, South Australia, 30 March 1992.

²¹ The relevant provisions are sections 28 and 187 of the Code.

²² Section 187(b).

²³ Unreported, Supreme Court, Northern Territory, 20 April 1994.

²⁴ [1996] 5 NTLR 96.

²⁵ At 96. Mildren J said that the "reference in the section to 'present ability' means in this context an ability, based on the known facts as present at the time of making the threat, to effect a purpose at the time the purpose is to be put into effect".

with the matter as though the assault against which the accused was defending herself comprised the words uttered by the deceased before he went to sleep, rather than the general threat he represented in relationship with her.

In *The Queen v Stjernqvist*, a Queensland jury accepted self-defence after only 15 minutes deliberation in respect of an accused who had shot her violent husband in the back as he walked away from her. In this case the assault from which the accused was defending herself was to be found, according to the trial Judge's instructions to the jury, in the general nature of the relationship, and particularly threats that the deceased had made to the accused over a period of years, rather than any specific action that he had taken on the day in question.²⁷

In addition to these four cases Kirby J, in the Australian High Court in *Osland*, has provided *obiter dicta* support for the proposition that the law does not insist that an accused be facing an imminent attack before she can legally use force to defend herself. In his opinion the determining factor is not the imminence of the attack but the necessity of the defensive force used.²⁸

Similar authorities exist in Canada. In *R v Lavallee*, the relevance of self-defence was upheld in circumstances that did not involve an imminent attack. In this case the perpetrator threatened the accused with violence that would occur later and he was leaving the room when she shot him in the back of the head.²⁹ This aspect of *Lavallee* has been approved in subsequent decisions.³⁰

Obviously the concept of inevitability, proposed by the Law Commission as an alternative to imminence, will need to be applied with a great deal of sensitivity. On the one hand this concept cannot be construed too narrowly. It needs to be used in a way that realistically accommodates the kinds of limitations and pressures that women who are trapped in violent

²⁶ Ross, "Battered Wife Syndrome and the Role of Lawyers" (1998) *Law Institute Journal* 39.

²⁷ Unreported, Circuit Court, Northern Territory, 18 June 1996, 153, 165, 174.

²⁸ (1998) 159 ALR 170. He said: "The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defenders belief that "he or she had no alternative but to take the attacker's life" (at 221).

²⁹ *Supra* note 15, at 120.

³⁰ See eg *R v Petel* [1994] 1 SCR 3.

relationships face. This point underlines the importance of introducing expert evidence on the social context and the nature of domestic violence (discussed below). On the other hand the concept cannot be construed too broadly. The Courts need to be careful that it is not used to justify unacceptable extensions of self-defence doctrine.³¹ It is worth noting that in Canada attempts to relax the imminence requirement in respect of cases that do not involve battered defendants have not met with a great deal of success. For example, in *R v Charlebois*, the Court refused to allow self-defence to a man who shot another in the back of the head while he was sleeping. His defence was based on an overwhelming fear of the victim that he developed over the course of their long and difficult relationship. The court held that the relationship here was quite different from that in *Lavallee* and remarked:

While we have relaxed the requirement of imminency of the threat in the self-defence analysis particular to battered women, on the basis of expert evidence outlining the unique conditions they face, there is no justification for extending its scope further on the evidence presented in this case.³²

2. Expert Evidence and the Battered Woman Syndrome

Introducing expert evidence about the battered woman syndrome was a defence strategy designed to counteract some of the problems battered women were experiencing in accessing self-defence.³³ The idea was that evidence about the accused's syndrome counteracted the assumption that leaving the relationship or calling the police was the most reasonable way for the accused to protect herself and her children from the domestic violence that she faced, and was more reasonable than the lethal self-help that she ended up employing. Unfortunately, the syndrome did not counter this assumption by either explaining the objective realities of women's lives

³¹ Note the concerns raised by Hubble, "Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence" (1997) 9:2 *Current Issues in Criminal Justice* 113.

³² [2000] 2 SCR 674.

³³ Walker, L E *The Battered Woman Syndrome* (1984); Schneider, "Describing and Changing: Women's Self Defense Work and the Problem of Expert Testimony on Battering" (1986) 9 *Women's Rights Reporter* 195; Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 *New York University Law Review* 520; Leader-Elliot, "Battered But Not Beaten: Women Who Kill in Self-Defence" (1993) 15:4 *Sydney Law Review* 403; McDonald, *supra* note 2; Dawkins, "Criminal Law and Procedure" [1994] *NZ Recent Law Review* 61-70; and Seuffert, *supra* note 1.

and domestic violence,³⁴ or questioning why women were required to avoid violent situations in advance in order to argue self-defence successfully when no-one else was subjected to this requirement.³⁵ What the syndrome did instead was suggest that it is normal for victims of domestic violence to become so brow-beaten by the ongoing violence that they are unable to contemplate how they can leave the perpetrator or otherwise avoid it, thus developing the belief that they are backed into a corner.³⁶

It is now recognised that the nature of battered woman syndrome evidence is such that it is unlikely ever to be completely successful in adapting self-defence doctrine to accommodate realistically the life experiences of battered women who kill their violent mates. There are many reasons for this.³⁷ One comes from the fact that the syndrome is directed at explaining the accused's psychology, as opposed to explaining her circumstances, which has sometimes led the Courts in Canada to interpret the syndrome as being relevant to the subjective as opposed to the objective component of

³⁴ Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals" (1991) 140 *University of Pennsylvania Law Review* 379; and Maguigan, "A Defense Perspective on Battered Women Charged With Homicide: The Expert's Role During Preparation for and Conduct of Trials" (paper prepared for the National Association of Women Judges).

³⁵ Nourse, *supra* note 13, at 973: "The man who walks into the dangerous bar for the fiftieth time or walks into the dangerous neighbourhood for the eightieth does not lose his self-defense claim because he should have 'left' before the knife was above his head. If the law is imposing such a rule on battered women in confrontational situations then it is imposing a special disadvantage on these women, not a special advantage. Under this view the syndrome becomes a kind of 'normal' corrective to a law whose normative references risk imbalance".

³⁶ Note also that the Courts in Canada have indicated that they would be willing to allow battered woman syndrome evidence in relation to a background of abuse from someone *other* than the deceased (see *R v Eyapaise* [1993] AJ No 1080).

³⁷ For an overview of the problems that the battered woman syndrome evidence presents as a defence strategy see Sheehy, Stubbs and Tolmie, *supra* note 1; McDonald, *supra* note 2; McDonald, *supra* note 1; and White-Mair, "Experts and Ordinary Men: Locating *R v Lavallee*, Battered Woman Syndrome, and the 'New' Psychiatric Expertise on Women within Canadian Legal History" 12 (2000) *Canadian Journal of Women and the Law* 406.

self-defence.³⁸ This is in spite of the fact that both *R v Lavallee*³⁹ and *R v Malott*⁴⁰ made it clear that the evidence is intended to explain the reasonableness of the accused's perceptions and defensive actions. There are similar authorities in Australia⁴¹ and in New Zealand.⁴² As a consequence of the limitations presented by the battered woman syndrome as a defence strategy, there is evidence in Canada that whilst individual women have managed to achieve positive results in using the defence, it "has not meant that women charged with killing their batterers are securing acquittals in greater numbers".⁴³

In addition to concerns about the battered woman syndrome as a defence strategy, there does not seem to be strong case for it as a scientific concept, at least not as it was originally conceived and presented by Dr Walker,⁴⁴ and certainly not as a concept to be universally applied to all victims of battering.⁴⁵ However, there does seem to be over-powering evidence that

³⁸ Sheehy, "Battered Women and Mandatory Minimum Sentences" [2001] 39 Osgoode Hall Law Journal 529-554; Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*" (1997) 47 University of Toronto Law Journal 1; and *Reforming Criminal Code Defences*, supra note 18.

³⁹ Supra note 15.

⁴⁰ [1998] 1 SCR 123; 155 DLR (4th) 513.

⁴¹ See the approach of Gaudron and Gummow JJ in *Osland*, supra note 28; and Stubbs and Tolmie, supra note 10, at 725.

⁴² See *R v Oakes*, supra note 4, at 676, 679; McDonald, supra note 1, at 681; Wright, "The Circumstances as she Believed them to be: A Reappraisal of Section 48 of the Crimes Act 1961" (1998) 7 Waikato Law Review 109; and Seuffert, supra note 1, at 294-295.

⁴³ Shaffer, supra note 38. It is hard to know how most of these cases are being resolved in Australia and New Zealand, as the absence of reporting makes it very difficult to assess what is happening. See Stubbs and Tolmie, supra note 10, at 721. Bradfield argues that in New South Wales a "de facto defence of domestic violence" has emerged in the form of a defence of lack of intent (Bradfield, "Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide" (2001) 13:2 Current Issues in Criminal Justice 143, 148).

⁴⁴ For a compelling and scathing review of the evidence see Leader-Elliot, supra note 33. See also Faigman and Wright, "The Battered Woman Syndrome in the Age of Science" (1997) 39:1 Arizona Law Review 67; Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438" [1998] NZLJ 39; and McDonald, "Battered Woman's Syndrome" [1998] NZLJ 79.

⁴⁵ Ironically the battered woman syndrome can be erroneously used in a prescriptive sense by the Crown, which has been known to argue that an accused who has been proactive and has taken active steps to deal with violence cannot be a battered woman

extensive exposure to the trauma of domestic violence can have a psychological effect on the targets. It is also evident that domestic violence can be accompanied by, or take place in the context of, other economic and social phenomena which have direct relevance in terms of a woman's ability to cope with and address the trauma that she faces. There are also strong indications of the need to present this evidence in Court if juries and Judges are to approach the facts in such cases in a sensitive and nuanced fashion when applying the defences to murder.⁴⁶

Mindful of these concerns, the Law Commission has recommended that the "term 'battered woman syndrome' or any use of the term 'syndrome' in this context be dropped and that reference be made instead to the nature and dynamics of battering relationships and the effects of battering".⁴⁷ The Law Commission has been careful to spell out in detail what expert evidence on the dynamics of domestic violence and its social context might look like,⁴⁸ and, consistent with this conclusion and with trends elsewhere, to contemplate that experts other than psychiatrists and psychologists might give testimony in such cases.⁴⁹

These recommendations are not accompanied by suggestions for legislative reform and are thus clearly intended to provide immediate guidance to those involved in shaping the trial process and the common law. They were foreshadowed by Thomas J in *Ruka v Department of Social Welfare*, where he remarked that:

While the syndrome represents an acute form of the battering relationship ... it is probably preferable ... to speak simply of the battering relationship. There is a

because she fails to exhibit the learned helplessness that is a feature of the battered woman syndrome. See eg *Zhou*, supra note 5; and Tolmie, supra note 5.

⁴⁶ See eg Schuller and Hastings, "Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Testimony" (1996) 20 *Law and Human Behaviour* 167.

⁴⁷ NZLC, *Some Criminal Defences*, supra note 8, at 6. This would consist of "expert evidence on the social context, nature and dynamics of domestic violence" (at 15). For a sensitive discussion of the evidentiary issues involved in introducing such evidence see Robertson, supra note 1.

⁴⁸ Final Report, *ibid*, 15-18. It is important that the Law Commission went to the effort to spell this out because it appears that, whilst key players in the criminal justice system have generally grasped the relevance of psychological evidence about the effects of violence in cases involving battered defendants, many would benefit from education about what social context evidence might look like and how it might work. See Stubbs and Tolmie, supra note 10, at 727-730.

⁴⁹ NZLC, *Some Criminal Defences*, supra note 8, at 10.

danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts. Moreover, few aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships.⁵⁰

There is overwhelming international support for the stance taken by the Law Commission. In the United States, a major review of battered woman syndrome evidence and its use in criminal trials, undertaken at the direction of Congress under the federal Violence Against Women Act, recommended that the term “evidence or expert testimony on battering and its effects” should be used instead of battered woman syndrome to reflect better the current state of knowledge and practice.⁵¹ The review legitimated the use of a broader range of information, ‘social framework evidence’, in these kinds of cases.⁵²

In Canada, Ratushny J reviewed the law on self-defence and commented that:

The significance of *Lavallee* for the law of self defence, in my view, is not in the recognition of the phenomenon referred to as the “battered woman syndrome”, although it is this aspect of the case that has probably received the most attention. Rather, its real significance lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of the law of self-defence. In particular, it recognised that the experiences, background and circumstances of the accused should be taken into account in determining whether she actually believed she was at risk of serious bodily harm or death and had to use force to preserve herself, and the reasonableness of her beliefs.⁵³

⁵⁰ [1997] 1 NZLR 154, 173. See Hughes, “Battered Woman’s Syndrome and ‘Interdependence’ as Factors in Establishing Conjugal Status in Social Security Law” (1999) 7 Waikato Law Review 104.

⁵¹ US Department of Justice and US Department of Health and Human Services, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act NIJ Report* (1996) vii.

⁵² Stubbs and Tolmie, *supra* note 10.

⁵³ *Self Defence Review: First Interim Report – Women in Custody*, submitted to the Minister of Justice of Canada and to the Solicitor General of Canada (February 6, 1997) 78. Similar remarks were made in the *Self Defence Review: Final Report*, submitted to the Minister of Justice Canada and to the Solicitor General of Canada (July 11, 1997) 50-51. Ratushny J (at 55) approved remarks made by Sheehy, “What Would a Women’s Law of Self Defence Look Like?” (1995) to the effect that: “the judicial understanding of BWS in *Lavallee* was not in fact focussed on the question of

In Australia, there is case-law utilising social-framework evidence in respect of battered defendants who have used lethal self-help against their perpetrators. For example, in *R v Gilbert*, an Aboriginal elder from the community to which the accused belonged, and an Aboriginal Liaison Officer from the local police force, were introduced into Court to explain the lack of resources available to the accused when she was trying to deal with the deceased's violence. This evidence was used to demonstrate that there had been a break-down of both non-Aboriginal and Aboriginal systems of legal protection for her.⁵⁴

3. Mandatory Minimum Sentencing

It is now recognised in Canada that the primary effect of *Lavallee* has been to facilitate plea-bargaining by battered women, and not, as was hoped when it was first decided, to produce more acquittals through the successful application of self-defence.⁵⁵ There is evidence that battered women are pleading guilty to manslaughter in exchange for murder charges being dropped even when they have credible cases of self-defence and are therefore legally innocent.⁵⁶ One can find indications of a similar phenomenon in the Australian case-law.⁵⁷

There are strong pressures on such women to plea bargain.⁵⁸ These pressures include the problematic nature of syndrome evidence which can

whether a woman displays the 'syndrome', but rather on the need for information and context regarding the violence of the situation confronting an accused and a realistic assessment of her options".

⁵⁴ Unreported, Supreme Court, Western Australia, 4 November 1993.

⁵⁵ *Self Defence Review: Final Report*, supra note 53, at 193. Shaffer, supra note 38, found that, of 16 homicides involving battered women as accused persons, 9 pleaded guilty to manslaughter.

⁵⁶ Thus, when the self-defence review was conducted in Canada, Ratushny J reviewed files where there were legitimate issues of self-defence that were not tried because of the systemic hurdles that the accused needed to cross to get to trial (*Self Defence Review: Final Report*, supra note 53, at 163).

⁵⁷ Stubbs and Tolmie, "Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?" in Stubbs, supra note 16, at 192. This evidence is impressionistic as the nature of plea-bargaining is such that it occurs in secret and is not adjudicated. It is therefore impossible to confirm with any degree of accuracy the extent to which this is occurring.

⁵⁸ *Self Defence Review: Final Report*, supra note 53, at 160-162; and Sheehy, supra note 38.

potentially end up sabotaging a self-defence case,⁵⁹ the uncertainty of the law on self-defence as it is applied to these types of situations, and the lack of strong appellate decisions giving guidance in this respect. Other pressures include the trauma involved for the accused in testifying about the abuse publicly and in front of the deceased's family and any children, and the potential trauma to her children if they are needed to testify. Another pressure is remorse about what has occurred and the fact that there are typically no independent witnesses to verify the accused's claim that she was responding to abusive conduct on the part of the victim, which means that the success of her defence will rest heavily on her own credibility. The Canadian Association of Elizabeth Fry Societies has added that:

Women who allege that they killed violent mates face widespread disbelief and misogynist denial, an enormous lack of legal, social, and economic support for their defence, and the prospect of loss of their children for decades. Added to this is the loss of self-worth, confidence, and clarity engendered by male control and violence.⁶⁰

The stakes may be even higher for women who deviate from the ideal notion of the deserving battered woman:

The more a woman may have displayed anger or aggressive tendencies, have experienced problems with alcohol or drug abuse, have been involved in criminal activities, or have demonstrated autonomous behaviour in other spheres of her life, the more risky a defence based on battered woman syndrome may become.⁶¹

The fact that first-degree murder in Canada carries a mandatory life sentence operates in this context to place what is sometimes an unbearable pressure on the accused to plead guilty to manslaughter. Such a plea has the advantage of guaranteeing access to a range of more lenient sentences, as opposed to running the risk of missing out on self-defence altogether and ending up with an automatic life sentence. One thing that has therefore emerged very strongly from the Canadian experience is the urgent need to abolish mandatory sentences for murder so that battered women have a fair opportunity to get their legitimate claims to self-defence adjudicated.⁶²

New Zealand presents battered-women defendants with a similar range of pressures. At the time of the Law Commission's report, these also included a

⁵⁹ Stubbs and Tolmie, *supra* note 57; and *R v Oakes*, *supra* note 4.

⁶⁰ *Supra* note 18.

⁶¹ Shaffer, *supra* note 38, at 25.

⁶² Sheehy, *supra* note 38.

mandatory life sentence for a murder conviction, and it was thus extremely important that the New Zealand Law Commission recommended the introduction of a sentencing discretion in respect of murder.⁶³ As a fortunate coincidence, the Sentencing Act 2002 was enacted not long after the release of the Law Commission's report. Under section 102 of this Act the mandatory life sentence for murder in New Zealand has been replaced with a presumption in favour of a sentence of life. This presumption can be displaced if, "given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".

At the time of enacting the Sentencing Act 2002, it was envisioned that battered women who had been convicted for murdering their perpetrators would be exactly the types of defendants who might successfully utilise section 102 to displace the sentencing presumption and trigger a full sentencing discretion in the sentencing Judge. Nonetheless, how far this provision will go to alleviate the pressures that such defendants experience in these types of cases to plead guilty to manslaughter is still going to depend on how strongly the presumption of a life sentence for murder is to be applied on the facts of these cases and what kind of onus such defendants will come to bear in terms of displacing that presumption. Certainly, if the presumption is not displaced, battered defendants may be in a worse position than they were in prior to the enactment of the legislation, because it now provides for a minimum period of imprisonment of 10 years if a life sentence is imposed, with options for the Court to raise that period if aggravating circumstances exist on the facts.⁶⁴

It is, of course, possible to side-step some of the pressures on battered defendants to plea bargain through the use of the Crown's prosecutorial discretion. This point is illustrated by the recommendation made in the Canadian Self-Defence Review to the effect that:

⁶³ *Some Criminal Defences*, supra note 8, at 52. Note, however, that the sentencing discretion recommended by the Law Commission was limited along the same lines as that introduced in the Sentencing Act 2002. Thus the Law Commission proposed a presumption in favour of murder carrying a life sentence.

⁶⁴ If the offender is sentenced to life for murder, then under section 103 there is automatically a minimum period of imprisonment of 10 years. However, the Court is given the option of imposing a longer minimum period of imprisonment if "the circumstances of the case are sufficiently serious to justify doing so". Under section 104, the Court must impose a minimum period of imprisonment of 17 years in the event of a number of aggravating circumstances (eg, if the murder was calculated or was committed with a high level of brutality, cruelty, depravity or callousness).

prosecutors only proceed to trial with manslaughter rather than murder charges where the Crown would be prepared to accept a guilty plea to manslaughter and where the plea is “equivocal” due to a possible defence of self-defence.⁶⁵

Ratushny J explained the rationale behind this recommendation as follows:

An accused charged with manslaughter would be far more likely to go to trial and present the evidence relevant to self defence than would a person accused of murder. One could be sure that if the result was a conviction on manslaughter it would represent the failure of that defence evidence to create reasonable doubt rather than the “duress” of current sentencing laws. I also note that the “downside” for the prosecution in proceeding this way is minimal. If it should turn out that the defence fails and the accused is convicted of manslaughter in any case, the prosecutor may seek a sentence at the high end of the scale for manslaughter.⁶⁶

It is perhaps a little unfortunate that this issue was not explored by the New Zealand Law Commission. Of course, even if the Commission had made a similar recommendation to Ratushny J, whether or not it would be taken up in practice would depend on how sensitive and informed the Crown in New Zealand is around the issues facing battered women on trial for the killing of their violent mates. There have been problems with this in Canada. For example, there is evidence that Ratushny J’s recommendation has been misconstrued by Crown prosecutors to mean that they should not accept manslaughter pleas from battered women charged with murder, in order to avoid being put in the position of charging only at the level of manslaughter.⁶⁷

III. LIMITATIONS OF THE LAW COMMISSION’S REPORT

In this half of the article I will explore three limitations of the New Zealand Law Commission’s report on battered defendants.⁶⁸ These are the superficial nature of its treatment of the issue of culture, the lack of guidelines for the application of the notion of “reasonableness” to facts

⁶⁵ Ratushny J in *Self Defence Review: Final Report*, supra note 53. See Bradfield, supra note 13.

⁶⁶ *Self Defence Review: Final Report*, supra note 53, at 180.

⁶⁷ Sheehy, supra note 38. The Canadian Association of Elizabeth Fry Societies comment that there is “evidence that indicates a Crown preference for first degree murder charges against women who kill their mates, when either no charges or a manslaughter charge would be warranted on all the evidence” (supra note 18).

⁶⁸ Another limitation which could be explored is the lack of a developed gender equity jurisprudence under sections 19 and 27 of the New Zealand Bill of Rights Act 1990 which could be utilised in this context.

involving battered women, and the lack of tangible results for already convicted women.

1. The Problematisation of Culture

The interface between the criminal law and culture is complex and fraught. On the one hand human experience is often presented within the criminal law as acultural and universal. On the other hand the law is impregnated with understandings borrowed from mainstream culture as well as having its own unique rituals, logic, language, hierarchies and values. In addition, there are instances where information about non-mainstream culture is self-consciously introduced into the criminal justice process, reacted to and, in this process, created.⁶⁹

For battered woman with a non-Pakeha cultural identity who kill their violent mates the relationship between law and culture is problematic. On the one hand the “universalising of experience ignores the different situated contexts of abused women’s lives”.⁷⁰ Thus the defences are being applied in fact situations that are improperly and incompletely understood. On the other hand such women are often implicitly constructed in racist terms or measured against cultural norms that are inappropriate to them.⁷¹ For example, in the New Zealand context, Beri has argued that:

BWS evidence interacts with cultural, gender stereotypes with the result that women who kill abusers now have to fit within an “abused woman” straightjacket. This corresponds to a stereotype of a white, middle-class woman and stresses passivity, docility and helplessness. It excludes the experiences of Maori women... whose experience of abuse is also shaped by racism.⁷²

Conversely, when culture is deliberately introduced into the criminal law, it is often constructed, as has been noted by Canadian commentators, in such a

⁶⁹ Lawrence, “Cultural (in)sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom” 13 (2001) *Canadian Journal of Women and the Law* 107.

⁷⁰ Minaker, “Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of Women’s Needs” (2001) 13 *Canadian Journal of Women and the Law* 74, 103.

⁷¹ See Stubbs and Tolmie, “Race, Gender and the Battered Woman Syndrome: An Australian Case Study” (1995) 8 *Canadian Journal of Women and the Law* 122; Tolmie, *supra* note 5; and Stubbs and Tolmie, *supra* note 10.

⁷² Beri, “Justice for Women who Kill: A New Way?” (1997) 8 *Aust Fem LJ* 113, 123.

manner as to attempt to justify acts of violence *against* women or children.⁷³ There is evidence of a similar phenomenon occurring in New Zealand.⁷⁴

In view of this discussion it is significant that the New Zealand Law Commission has acknowledged the need for the actions of battered women who kill their perpetrators to be assessed in light of the particular cultural and factual context in which they are located. The Law Commission comments that:

Expert evidence about the cultural group to which the defendant belongs may be relevant in throwing light on particular difficulties the defendant may have faced in gaining access to legal protection. For example, language difficulties, lack of knowledge of the New Zealand legal system, lack of knowledge about their rights, and mistrust of the police by refugees who have experienced state persecution.⁷⁵

Whilst this acknowledgment is important, and in line with developments in Canada and Australia,⁷⁶ it does not go far enough in addressing some of the difficult issues involved in introducing “cultural context” information.⁷⁷ The examples provided by the Law Commission in the extracted quote are, of course, less problematic than true cultural information because they are more in the nature of information about the context in which women located within immigrant and refugee communities might find themselves.

Information about culture and related issues of context need to be introduced into the trial process and responded to in an extremely sensitive and nuanced fashion.⁷⁸ Leti Volpp identifies a number of issues that need to be considered when introducing such evidence.⁷⁹ First, it is important to be aware of the fact that presenting evidence about “culture” in Court necessarily oversimplifies and renders static (essentialises) what is a complex and constantly evolving thing. Secondly, even within a fairly

⁷³ Lawrence, *supra* note 69, at 113, 123; and *R v Brown (Alta CA)* [1992] AJ No 432; 73 CCC (3d) 242.

⁷⁴ *R v Tai* [1976] 1 NZLR 102; and *R v Lafaele* 2 CRNZ 677.

⁷⁵ *Supra* note 8, at 18.

⁷⁶ See L’Heureux-Dube J in *R v Malott*, *supra* note 40; and Kirby J in *Osland*, *supra* note 28, at 213-214.

⁷⁷ The author must take partial responsibility for this lack as she was a peer reviewer in respect of the discussion paper and the final report, and is quoted by the Law Commission in this acknowledgment of the need to introduce cultural context.

⁷⁸ Lawrence, *supra* note 69, at 129.

⁷⁹ Volpp, (Mis)identifying Culture: Asian Women and the ‘Cultural Defence’ (1994) 17 *Harvard Women’s Law Journal* 57.

homogenous culture, there are many different perspectives on the set of values by which it is appropriate to live. Thirdly, anthropologists from outside tend to put their own cultural interpretations and values into the process of observing other cultures. Fourthly, culture is often presented in Court as though it is determining whereas in fact people have a complicated and negotiated relationship with their culture. And finally, some cultural values will inevitably be oppressive of certain groups within the culture.⁸⁰

In spite of identifying these issues, Volpp still advocates introducing cultural information in the spirit of what she calls “strategic essentialism,” and according to a series of guidelines designed to counteract some of the problems with such evidence. The first guideline is to focus on the testimony of the actual accused, rather than starting with generalisations about group behaviour and then attempting to fit the accused’s behaviour within that. The second is to use transcultural psychology, that is, the experiences of people who migrate rather than the culture as observed in the country of origin. The third is to use experts who have the same cultural (and one could add gender) positioning as the accused. The fourth is to avoid suggesting that the dominant norms are neutral or culture-free.⁸¹ The final guideline is to factor the value of anti-subordination into the decision to use such information. Thus, the information should not be introduced in a way that sub-ordinates certain groups within the culture, such as women.

It is thus vital that practitioners and judges not only heed the suggestions of the Law Commission but are also strategic, educated, and ethical in their decisions to introduce and respond to such information.

2. Definitions of Reasonableness

It is well accepted that a key concept in the determination of self-defence, that of “reasonableness”, has been historically applied in a profoundly gendered fashion.⁸² In other words, imbedded in the application of the standard to any given set of facts are male norms which govern how the

⁸⁰ Lawrence points out that it is important to recognise the existence of intra-cultural disputes and power struggles and the effect that these may have on the information that is selected for intercultural educational purposes (Lawrence, *supra* note 69, at 119).

⁸¹ Lawrence, *supra* note 69, argues that in the process of self-consciously introducing evidence about non-mainstream cultures the criminal law often constructs mainstream culture as idealised and oppositely placed.

⁸² Seuffert, *supra* note 1; Ratushny J, *Self Defence Review: Final Report*, *supra* note 53; and Forell, C and Matthews, D *A Law of Her Own: The Reasonable Woman as a Measure of Man* (2001).

world should be interpreted and responded to. One way of dealing with this problem in the context of battered defendants is that adopted by Ratushny J in the Canadian Self Defence Review. She recommended giving Judges and juries greater guidance in the application of standards of reasonableness in the context of self-defence.

First, Ratushny J recommended that the law on self-defence should clearly state that:

The defender's actual beliefs and the degree of force used are reasonable if they do not constitute a marked departure from what an ordinary sober person would have believed or used, as the case may be, if placed in the circumstances as the defender believed them to be.⁸³

What this means is that, in order to disqualify for self-defence, the accused's belief that she was under serious threat and could only defend herself with lethal self-help needs to be more than mildly unreasonable. It needs to be grossly unreasonable. This standard gives effect to two criminal law principles.⁸⁴ The first is the idea that the reasonableness of the accused's beliefs for the purposes of self-defence are not to be judged with undue nicety given the circumstances of panic in which she finds herself.⁸⁵ The second is that the criminal standard of negligence is higher than the civil standard and should consist of gross, culpable or wicked negligence.⁸⁶

Ratushny J's second, and more important, recommendation is that the law on self-defence should provide that:

The circumstances that shall be considered in determining reasonableness are those that may have influenced the beliefs and the degree of force used by the defender and may include:

- (a) the defenders background, including any past abuse they suffered;
- (b) the nature, duration and history of relationship between the defender and the other person, including prior acts of violence or threats, whether directed to the defender or to others;
- (c) the age, race, sex and physical characteristics of the defender and the other person;
- (d) the nature and imminence of the assault; and

⁸³ Ibid, 154.

⁸⁴ Sheehy, *supra* note 38.

⁸⁵ *Palmer v The Queen* [1971] AC 814, per Lord Morris; and *Zecevic v DPP* (1987) 162 CLR 645, per Wilson, Dawson and Toohey JJ.

⁸⁶ *R v Burney* [1958] NZLR 745; and the Crimes Act 1961, s 150A(1).

(e) the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force.⁸⁷

Whilst these factors must be considered in relation to all defendants who might seek to argue self-defence it is clear that the point of introducing such a list is to focus the jurors' minds on the kinds of contextual considerations that will enable them to assess realistically the self-defence claims of battered women.⁸⁸

It could be argued that these reforms are not necessary because the kinds of contextual factors set out for consideration should *already* be considered by practitioners and Judges who are attempting to apply self-defence in a realistic fashion to the facts involved in these types of cases. And furthermore, even if the reforms are a good idea, it could be argued that the New Zealand Law Commission has, in any case, covered the same ground by suggesting that expert evidence drawing attention to these kinds of factors should be introduced into the trial process.

A compelling response to these arguments is that, as noted above, the New Zealand common law evidences a patchy treatment of the kinds of issues involved in these types of cases. Introducing a prescriptive list of factors to be considered in the application of reasonableness in the context of self-defence will ensure a better and more consistent standard of lawyering and of jury instruction. And whilst the suggestions made by the New Zealand Law Commission may be taken on board by those practitioners that are rigorous enough to research the subject and read the report, they will not affect those who do not. Furthermore, they will not ensure that juries consider these kinds of factors even in those instances where they do not happen to be supported by expert evidence.

Accepting the need for a list of prescriptive factors to be considered when applying the concept of reasonableness in the context of the law on self-defence, there are still, arguably, several deficiencies in the actual list that Ratushny J has compiled. Of central significance for evaluating the self-defence claims of battered women who kill their perpetrators are the second and fifth factors listed and these could be extended. For example,

⁸⁷ Ratushny J, *Self Defence Review: Final Report*, supra note 53, at 154-155.

⁸⁸ The Canadian Association of Elizabeth Fry Societies, supra note 18, proposes a vastly expanded version of Ratushny J's list of factors to be considered in the application of reasonableness in the context of self-defence. These include not only a consideration of the particular features of the accused's experience but also the systemic issues faced by abused women as a class.

Ratushny's list does not specifically mention the accused's fear of retaliation from the perpetrator should she leave him, and any threats that the perpetrator has made, including past experiences, of separation assault. A list which gives a greater emphasis to the specific issues which might affect a battered woman's self-defence claim is as follows:

- (1) Were there realistic alternative means which the accused could have used to protect herself or other persons?
- (2) (if relevant) With respect to (1), had the accused attempted alternatives in the past?
- (3) Was she afraid of retaliation if she attempted any alternative?
- (4) What was the accused's economic and psychological state?
- (5) How did the accused and the person she killed or assaulted compare in size and strength?
- (6) Was the accused's action reasonable, given her socialisation?⁸⁹

A final criticism of the specific list that Ratushny J has compiled is that it both contemplates a specific assault that is being defended and mentions the concept of imminence as an important consideration. Given the need to shift the focus in this context from the requirement of a specific imminent attack, as discussed above, it is not clear how productive this is.

3. *Reviewing Individual Convictions*

The third limitation in the New Zealand Law Commission's report is more in the nature of a limitation in its terms of reference. It is disappointing that the Commission was not given the mandate to conduct the kind of individual review of women's cases that occurred in the Canadian Self Defence Review.

The Self Defence Review was set up in 1995 to review the cases of women under sentence for homicide "in circumstances in which the killing allegedly took place to prevent the deceased from inflicting serious bodily harm or death".⁹⁰ It was set up in recognition of the fact that there were likely to be women serving sentences for homicide who may not have received the benefit of the defence of self-defence that should have been available to

⁸⁹ Boyle, Bertrand, Lacerte-Lamontagne, and Shamai, *A Feminist Review of Criminal Law* (1985) 39-42.

⁹⁰ Ratushny J, *Self Defence Review: Final Report*, supra note 53, at 11. In addition to making recommendations concerning individual women's cases, the review was also "to make recommendations as considered appropriate with respect to possible law reform initiatives stemming from the review".

them in light of the understandings developed in *Lavallee*.⁹¹ There is every reason to suspect that similar New Zealand cases might have benefited from such a process of review.⁹²

Having said this, it must be acknowledged that the execution of the Canadian review was disappointing. Ratushny J, who conducted the review, considered the cases of 98 women but made recommendations in respect of only 7.⁹³ Furthermore, it took so long to implement her recommendations that no women were actually released from prison. There were a number of reasons for these disappointing results.⁹⁴ One reason was that the standards of review that Ratushny J set were very strict and meant that women with strong cases of self-defence who had plea bargained, as opposed to going to trial, were unable to receive a remedy.⁹⁵ Given the amount of women who, as discussed above, are likely to have plea bargained, this is a major deficiency. Obviously it would be hoped that if a similar exercise took place in New Zealand the pitfalls in the Canadian process could be avoided.

⁹¹ Although the review considered both pre- and post-*Lavallee* convictions it used different and tougher standards of review in respect of the latter in recognition of the fact that the accused should have had the benefit of understandings developed in *Lavallee* at the time of her trial.

⁹² See eg the analysis of *Wang*, supra note 3, in Seuffert, supra note 1.

⁹³ Ratushny J found that three should have succeeded on self-defence and recommended a free pardon. In respect of a further three she found that the evidence relevant to a defence of self-defence failed her standards of review for self-defence but was consistent with the defence of provocation and she recommended remissions of sentence in respect of these defendants. In respect of the final applicant she concluded that the evidence relevant to self-defence, whilst failing her standards of review in respect of that defence, was relevant to the "planned and deliberate" elements of first-degree murder and recommended the allowing of a new appeal.

⁹⁴ In addition to the high standards of review that Ratushny J set, Sheehy pointed to a number of other shortcomings in the process. These were that the applicants did not get independent counsel, there was no education or brainstorming for the counsel that were appointed, there was no bibliography or discussion of materials that informed Ratushny J's decisions, an expert (a psychologist or socio-linguist) was not employed to interpret the women's files, and a narrower interpretation of self-defence in some circumstances was used than was necessary (Sheehy, "Review of the Self-Defence Review" (2000) 12 *Canadian Journal of Women and the Law* 197).

⁹⁵ Ratushny J, *Self Defence Review: Final Report*, supra note 53, at 164.

IV. CONCLUSION

There are jurisdictions which have been grappling with the issues presented by battered defendants in the context of the defences to murder for longer and more frequently than New Zealand has. It is therefore gratifying to note that the New Zealand Law Commission in its recent report on the subject has made the three recommendations that academic commentary and legal developments elsewhere would suggest are the most significant.⁹⁶ Accordingly it is hoped that key players in the criminal justice system will give immediate effect to the suggestions made in the report.

Although embracing the most necessary reforms, the Law Commission has also failed, or was not given the mandate, to take on board others which developments in Canada and elsewhere would suggest are important. It is hoped that future reform efforts in New Zealand will take the subject further.

⁹⁶ *Some Criminal Defences*, supra note 8.

BOOK REVIEWS

PRINCIPLES OF CIVIL PROCEDURE (second edition), by Andrew Beck, Wellington, Brookers Ltd, 2001, 323 pp. New Zealand price \$84.00 plus gst.

Since the inception of the High Court Rules 15 years ago there have been 29 sets of amendments. Major changes in terms of case management, the updating of the District Court rules to bring them in line with the High Court Rules and an entirely new approach to costs have necessitated the update of Andrews Beck's 1992 first edition of *Principles of Civil Procedure*. Beck has once again taken on the difficult task of describing over 800 High Court rules, 600 District Court rules, numerous statutory provisions and many cases, as well as incorporating the major changes to civil procedure in New Zealand in only 300 pages. While the book takes on essentially the same format as the 1992 first edition, there has been substantial rewriting of chapters, and revising and updating of material. In particular, the incorporation of discussion on case management and a new chapter on costs are timely additions to the book. Like his first book, one of the most pleasing aspects is the readability of the book, which has summarised, in easy-to-read fashion, complex and technical rules.

Beck intended that this book, like his first edition, as "an overall introduction to the area of civil procedure" (p viii). With the ever-changing civil procedure rules and numerous cases, Beck has been able to produce a concise book which will enable any law student or practitioner to gain a basic understanding, at least, of the workings and aspects of civil procedure and in particular the High Court rules. The reader will not find detailed analysis of civil procedure rules or cases. Beck rightly recognises that, for a more detailed discussion of technical points and cases, the reader should refer to *McGechan on Procedure*, which is an extensive loose-leaf book regularly updated. Therefore, for students and practitioners, this book is a valuable aid as a first port of call when seeking clarification, information and understanding of civil procedure. This book must be seen as an aid to *McGechan on Procedure* and not as the authoritative resource required to assist in civil proceedings.

This book, like the first edition, is set out in a logical manner. It follows, as closely as possible, "the path that has to be followed to have a civil dispute resolved in the High Court" (p 1). Starting with "Preliminary matters" in Chapter 1, Beck finds scope to discuss some of the principles and themes that underlie the area of civil procedure in New Zealand. Of note is the emphasis that is now placed on dealing with the merits of a case rather than becoming ensnared by technicalities. The result is that undue technicality is

avoided where possible. This is a trend in the development of procedural rules, with a common objective, as Beck explains, “to achieve practical justice between persons” (p 5).

The important issue of jurisdiction is discussed in Chapter 2. Beck displays his support for the use of inherent jurisdiction to assist in the administration of the law. Beck recognises that the Courts have been criticised for using their inherent jurisdiction to legislate. Beck notes that, in some situations where the Courts have been criticised as legislating, “more often than not the legislature has acted to confirm what the courts have done” (p 27).

Chapter 3 examines matters relating to who can bring a claim and who should be involved in a claim. Beck examines the extensive development in this area. Initially, the Courts required a person to be able to point to a right vesting in that person in order to be allowed to bring proceedings. Difficulties of standing arose for plaintiffs who sought to compel a defendant to comply with some duty imposed on that defendant that was of a public nature. Thankfully, the position today, put simply by Beck, is that “if the matter to be decided is important enough, standing will be irrelevant” (p 53).

The High Court rules set out to bring uniformity to the way in which proceedings are initiated. To a certain degree this has been achieved. Most proceedings commence with the filing of a statement of claim and a notice of proceedings. However, there still remain several different types of proceedings with their own special requirements for commencement. The different types of proceedings are considered in Chapter 4.

The documents required in proceedings are discussed in Chapter 5. As noted above, the High Court rules are ever-changing. In terms of pleadings, Beck observes how the High Court rules have not changed in order to keep up with technology or common practice. Beck notes that technically it is not possible to file a document by fax, yet this is common practice today. Given the rapidly changing technological world of computers and a recent Court report entitled *The Use of the Internet by Courts and the Judiciary*, one would suspect that it will not be long before electronic filing of documents, electronic exchanging of briefs of evidence and service of documents through email all become common practice. Regular updating of the rules will be required to keep pace with technology. These regular updates will no doubt become part of *McGechan on Procedure*. An obvious advantage of the loose-leaf *McGechan on Procedure* over any book is that *McGechan on Procedure* is regularly updated while the revision of books is irregular.

The general rules pertaining to service are described in Chapter 6 and issues for a defendant to consider in defending a claim are considered in Chapter 7. Chapter 8 will be helpful to practitioners as well as students as it sets out "case management" in a brief summarised form. One comment here is that the section on case management is probably too brief and required further description and analysis. Beck acknowledges that the rise of case management is "[w]ithout a doubt, the most significant development" (p viii) since his first book. Given this acknowledgment, case management could therefore have been given more attention and analysis than it has been given. It would have been good to have had further discussion of the objectives of case management, description of the different tracks, and the timelines associated with those tracks. Additional discussion of the different conferences and the purposes of these conferences would be helpful for students and new practitioners embarking on civil litigation. However, where Beck has made comment regarding case management he has provided useful practical advice.

Chapter 9 has been revised to update the law regarding injunctions, preservation orders, Anton Piller orders, charging orders, Mareva Injunctions, arrest of defendants about to leave, security for costs, payments into court, want of prosecution and interim payments. Similarly, Chapters 10, 11 and 12 have been updated to incorporate the latest cases and new or amended rules.

On 1 January 2000 the High Court rules were amended to include a new costs regime. The new costs regime is discussed by Beck in Chapter 13. I would recommend this chapter to anybody wanting to gain an understanding of the costs regime. As is evident throughout the book, Beck's description of the applicable rules and cases is easy to understand and comprehend.

An obvious fact of civil litigation that Beck identifies is that most cases do not go to trial but settle (p 2). Right throughout the civil procedure rules is the strong emphasis on settlement (p 4). It is therefore surprising that Beck has not devoted a chapter to the issues surrounding mediation, negotiation, arbitration and settlement conferences, which are now all a major part of any civil proceeding. While there are a number of books on alternative dispute resolution processes, a chapter on how to negotiate a settlement of a civil proceeding, when to consider settlement and what civil procedure tools are helpful in achieving settlement would be useful to students and practitioners.

Throughout the book, Beck's academic background and practice as a practitioner are indicated in his theoretical application of rules and his

practical observations of the rules' application. Beck's experiences, both academic and as a practitioner, are invaluable in his writing of this book.

Overall, this book is a valuable resource for all law students of civil procedure and practitioners practising civil litigation. For extensive detailed commentary of rules and comprehensive case analysis, *McGechan on Procedure* is still to be considered the essential resource for people working in civil litigation. Nevertheless, Beck's book, as he intended, provides a readily accessible introduction to civil procedure.

CRAIG COXHEAD*

INTELLECTUAL PROPERTY LAW; COMMENTARY AND MATERIALS (third Edition), edited by Jill McKeough, Cathy Bowery and Philip Griffith, Sydney, Law Book Company, 2002, 603 pp. Price A\$114.35 incl gst.

Professor McKeough's previous edition of this commentaries and materials text came out in 1992. This edition introduces two new authors, Kathy Bowrey and Philip Griffith. The book is intended as the resource for an undergraduate, semester-length course at an Australian law school. The text covers both intellectual property law and industrial property law, and claims that it could be used as an adjunct to media or information technology law studies. Lecturers using the text are intended to have access to reading guides. (These were not seen by the reviewer).

The book has four parts. These are entitled "Introduction", "Copyright", "Patents" and "Other intellectual property areas, designs, confidential information, protection of business reputation and trade marks". Parts 1, 2 and 3 each opens with a very useful historical overview. Most chapters open with some commentary and explanation. The book overall is light on commentary, perhaps hoping that the extremely well chosen materials will speak for themselves.

The materials link the Commonwealth statutes that now constitute the Intellectual Property Rights ("IPR") regime in Australia to binding and persuasive decisions and policy documents from across the common law world, thereby allowing useful comparisons of other regimes. The book outlines the historical evolution of attempts, since the eighteenth century, to harmonise national IPR regimes into a single, uniform international regime.

* Lecturer in Law, University of Waikato.

This outline provides a useful perspective on the now dominant TRIPs (Trade Related Intellectual Property Rights) Agreement 1994, promulgated by the WTO (World Trade Organisation), as amended in Doha in 2001.

What this reviewer looked for and mostly found, albeit delivered in an eclectic fashion, was commentary and material addressing the fundamental challenges which intellectual and industrial property laws are facing in the third millennium. The major economic, cultural and political revolutions, such as the biotechnology revolution, the information communication revolution and economic globalisation, are each evident in IPR jurisprudence presented in the text. The polarising of North and South, rich and poor, settler and indigenous populations deserve more explicit attention. This is especially so given the text's refreshingly explicit critique of the value of IPR in protecting authors or stimulating innovation for the public good.

The copyright ownership section opens the way to a very timely discussion about the compatibility of existing IPR concepts with indigenous community-ownership entitlements. *John Bulun Bulun v R & Textiles* (1998) 41 IPR 513, decided in the Federal Court of Australia, is included in the materials. More commentary along the lines of McKeogh and Stewart's "Intellectual property in the Dreaming", in Johnston, Hinton and Ringey's *Indigenous Australia and the Law* (1997), would be useful. This would allow students to try to conceptualise Traditional Resource Rights and other ideas that offer alternatives to IPR.

Some more commentary and description of the institutional apparatus that manage the IPR regimes are needed. This would give students a sense of the governance schemes that attempt to enforce the norms, for example, national Patents Offices and registers. This sort of understanding is also needed on the international level. For instance, the opportunity to contrast the WTO's work with that of the World Intellectual Property Organisation and the United Nations Environment Programme's Convention on Biological Diversity 1993 would be instructive. This topic would illustrate how elaborate and costly IPR regimes are to set up and run, and hence problematic for poor developing nations. Likewise, the operation of the WTO's dispute-resolution process in relation to pharmaceutical patents for HIV drugs and poor countries' needs, and the ICANN (Internet Committee on Assigned Names and Numbers) and WIPO processes in relation to domain name conflicts between the powerful and powerless, merit attention. The degree to which IPR regimes perpetuate the digital and North/South divide could be explored more deeply and explicitly. There could also be further discussion of the conservatism of domestic courts which is well

illustrated by the topical copyright infringement case in the materials: *Commonwealth v John Fairfax & Sons Ltd.* (1980) 55 ALJR 45. Here, fair dealing for criticism and review in the public interest was not a sufficient defence to stop an injunction to restrain publication. In this case the publication would have revealed the Australian Government's knowledge of and complicity in the East Timor crisis arising from Indonesia's invasion in the 1960s.

The biotechnology revolution poses a challenge to the claim that patents are the mechanism to stimulate inventions presumably for the public good. The materials effectively address attempts to define discoveries about life forms and human genome as patentable, to exploit such discoveries for private gain, and to inhibit research to preserve a monopoly of knowledge about the discovery to exploit it commercially. Patent challenges posed by the ICT (information communication technology) revolution are equally well illustrated in the materials.

Overall, the text provides a superb resource for the advanced New Zealand scholar. Because the focus of the text is on Australia and is meant for an Australian undergraduate course, the book would not be ideal as a text in New Zealand. The book's more generic appeal could be broadened if a more thematic and conceptual approach were adopted in the commentary sections. The text could then explicitly highlight scores of themes that tend to lie implicit in its otherwise most insightful assembly of materials. IPRs, as presented in this text, offer a perfect vantage point from which to evaluate the elasticity and rigidity of common law and statute in regulating the revolutions of our times.

PAUL HAVEMANN*

A GUIDE TO E-COMMERCE LAW IN NEW ZEALAND by Simpson Grierson's x-tech group, Wellington, Brookers Ltd, 2002, 382 pp. New Zealand price \$94.50 plus gst.

This book is the first substantial single-bound text to address e-commerce law from a New Zealand perspective and is therefore a first step to filling an obvious need in the legal text landscape. The book lists 14 lawyers from Simpson Grierson's x-tech group as contributors to the book (p ix). The x-tech group specialises in e-business and information technology (see <http://www.x-tech.co.nz>).

* Professor of Law, University of Waikato.

As is stated in the introduction, there is no discrete body of e-commerce law. Instead, there is said to be “a mixture of existing and (in some cases) new legislation and various rules of common law and private international law” (p 6). Indeed, the text covers all of these sources of law and also includes codes of practice and industry standards. The text targets “businesses engaging in or intending to engage in e-commerce” (p 7). The book is very accessible, even for someone new to the area or with little or no legal training. As such, the text would be suitable as a text for business or commercial school papers in the area. While not providing the detailed legal analysis needed for advanced undergraduate and postgraduate papers, the text would be useful to bring students to a level of understanding where in-depth critical analysis could begin.

The text covers a wide range of topics but maintains a practical focus. This is evidenced in the industry-based rather than legal approach of the chapters on “Electronic Payments” and “Contracts with Service Providers”. The text also provides introductory sections giving brief descriptions of general areas of law, in order to allow a wide audience to gain access to the contextualised applications which follow.

Not surprisingly, intellectual property features prominently in the text. The Chapter on intellectual property identifies the major issues within this area in e-commerce, and the footnote references provide useful links to case-law and secondary sources which would allow further analysis. The sections on piracy and rights in databases are not always present in intellectual property overviews of e-commerce. These sections add another dimension by applying several of the intellectual property concepts, which results in giving the reader a deeper understanding.

The Chapter on “Computer Misuse” usefully describes the relevant sections of the Crimes Amendment (No 6) Bill, in terms of the existing Crimes Act 1961. This blending of the Bill and Act, along with accompanying analysis, provides an extremely accessible presentation of the computer misuse clauses. I took particular interest in the analysis of section 253. This relates to accessing a computer system without authorisation (or “hacking”). The section draws comparisons with the Computer Misuse Act 1990 (UK) and uses English, Australian and United States case-law to illustrate possible application. It would have been helpful if this level of analysis had been applied to all sections.

Rather surprisingly, given the book’s targeted audience, there is a comparatively extensive discussion of electronic material as evidence, and of jurisdictional issues. Both of these chapters deal with complex areas

which are presented in a clear, coherent format, and case-law and hypothetical scenarios illustrate these two chapters

Chapter 10 on tortious liability stands out as a gem in this text. This section describes five specific torts and then applies these to the e-commerce situation. The section includes a high-level analysis of relevant international and national case-law. The application of traditional torts to new situations is described with a precision that allows the reader to grasp quickly the developments that e-commerce may bring to the law of torts. This chapter ends with a topical discussion of internet-service provider liability under several heads, which links to other parts of the book.

Finally, Chapter 12 covers specialist areas, which cover such diverse areas as online offering of securities, electronic banking, online games of chance, and provision of health-related services. This chapter briefly covers six discrete areas and refers to the relevant legislation and/or codes of practice.

The book includes a glossary which defines some of the ever-increasing technical language associated with computer and internet technology. I was pleased that the book also includes an index and tables of cases and legislation. Although the tables may not be heavily used by business users, they increase the book's usefulness as a student text.

As a guide to the law of e-commerce, this book gives the reader a good start, and for all but a legal scholar or practitioner the book may be sufficient. This text covers a vast area of law in 382 pages, and so must necessarily deal with many areas briefly. One criticism of the text, notwithstanding its limitations and audience, is its rather light coverage of consumer protection and privacy issues, which could have been developed. On the whole, this book is a good introduction to e-commerce law, ideally suited for the libraries of businesses engaged in e-commerce, and to students of business studies. I will be recommending this text for my e-commerce students in the Waikato Management School.

The danger with a text in a volatile area of the law is that parts of the text will become dated rather quickly, as legislation is enacted and further cases in the area are decided. Notwithstanding this, the text represents a step forward in clarifying the law of e-commerce and I commend the x-tech group on their publication.

WAYNE RUMBLES*

* Lecturer in Law, University of Waikato.

AUSTRALIAN REAL PROPERTY LAW (third Edition) by Bradbrook, MacCallum and Moore, Sydney, Lawbook Co, 2002, 800 pp. Price A\$115.00 incl gst.

This new edition of *Australian Real Property Law* was interesting to read and a pleasure to review. As a teacher of property law of many years' standing, I am aware that students regard this subject with some trepidation if not actual loathing, so I continue to look for texts that students will find stimulating as well as informative. This book is one such text.

From the first chapter, which deals with the nature and development of real property law, it is clear that this book is out of the ordinary. The authors intend this book to be specifically about Australian property law, which cannot be properly understood "unless it is recognised that its fundamental concepts are different from those of the English feudal system" (para 1.02). Although material relating the doctrines of tenure and estates is included (in Chapter 2), the significance of these concepts is said to be theoretical rather practical in terms of Australian property law. It is this approach that singles this book out from others in the field, which tend to take a chronological approach, explaining the English origins of property law and treating the law in Australia as merely an adaptation of those origins.

Taking the Torrens System as the "essence" (para 1.03) of Australian real property law, it is seen not only as a system for the transfer of interests in land, but also as defining the range of interests that it is possible to create in the land. For me, as one who has studied and worked within both the English and the Torrens systems, this approach to property law is provocative and extremely engaging. The historical introduction in chapter one is very much an Australian history. The approach to modern problems arising out of property rights' issues pertains to modern Australia, for example, the statutory provision of proprietary rights to those who reside in retirement villages. The effective intervention of equity in property relationships is dealt with from the outset of the text, using modern examples as well as dealing effectively with the historical perspective of the use and the development of the trust.

This is a book about Australian property law, so the question arises as to its usefulness to students in New Zealand. The answer lies in the theoretical approach taken to the issues arising. The authors approach questions about property law on a general level, applicable to all Australian jurisdictions, before citing specific legislation applicable to individual states. So I would say that this is a book that will be useful to all students of the Torrens system so far as the general principles coincide between Australian and New

Zealand jurisdictions. Care needs to be taken to identify areas where New Zealand law has developed along significantly different lines. Certainly, where the text becomes specific with regard to legislation pertaining to different states, the book becomes less useful to students in New Zealand. However, this should not be a bar to New Zealand academics and students from making full use of this text for its theoretical content.

At first I was surprised at the insertion of the chapter on priorities so early in the text. However, upon reflection, this appears to assist in the logical progression from a discussion about tenure, possession, estates and trusts in Chapter 2 to the Chapter 4, which is a detailed analysis of the Torrens system. The chapter on priorities is one of the most interesting aspects of the book. This chapter contains a detailed description of the relationship between legal and equitable interests and an introduction to the impact that further development of the constructive trust may have on Australian real property law. The constructive trust is further analysed in Chapter 5.

This book is wide-ranging in its approach to property law. The book includes sections on topics that would traditionally be thought of as belonging in an equity text alongside those parts that deal with the creation and transfer of legal interests conferred by statute. The correlation between equity and property law, especially the development of the concept of the constructive trust, cannot be too strongly emphasised. For me, this holistic approach to property law makes this book even more attractive.

A modern approach to the restrictions on the use and development of land permeates the text, reflecting the political and sociological developments of Australia in the areas of conservation and the rights of indigenous peoples. A wide range of cases from different jurisdictions are carefully related and considered criticism is offered where appropriate.

I found the language of the text to be eminently readable, with good explanations of the principles, without losing any of the terms specific to property law. This is not a book that deals in simplification of difficult topics. Instead, the authors have produced a text that explains the intricacies of property law in the context of modern Australian society. I would recommend the book to students of property law and to academics looking for a refreshing approach to property law.

SUE TAPPENDEN*

* Lecturer in Law, University of Waikato.

THE McCAW LEWIS CHAPMAN ADVOCACY CONTEST

R v JOHNSON

BY JANE WALKER*

I. INTRODUCTION

Ian Douglas Johnson was convicted of murder and sentenced to life imprisonment by the High Court. He appealed against the conviction and applied for legal aid. Johnson was refused legal aid under the provisions of the Legal Services Act 1991 and his appeal was turned down without being given an oral hearing.¹ Mr Johnson is appealing to the Court of Appeal on the grounds that the procedure followed in dismissing his appeal was not lawful. The legislation that governs the granting of appeals is found in the New Zealand Bill of Rights Act 1990 ("BORA"), the Crimes Act 1961, and the Legal Services Act 1991. The issue before the Court is whether the procedure used in considering appeals is lawful in light of the relevant sections of those Acts.

The submission for the Crown in support of the procedure that was undertaken by the Court of Appeal is that the procedure is lawful under the relevant legislation and is in keeping with the international obligations contained in the International Covenant on Civil and Political Rights.

II. BORA AND INTERNATIONAL COVENANT

There are two relevant sections of the BORA. Section 24(f) deals with a right to legal aid "if the interests of justice so require". It is submitted that the words "in the interests of justice" rule out an absolute right to legal aid whatever the merits of the case. Section 25(h) gives a right of appeal "according to law" to a higher court. The words "according to law" indicate that it is the intention of the statute to grant an appeal when the law requires it and not purely as of right.

* BSc/LLB honours student, winner of the 2001 McCaw Lewis Chapman Advocacy Contest. The competitors in the Contest were required to stand in the shoes of either counsel for the Crown or counsel for the accused, and present an argument as at the date of the hearing in the Court of Appeal.

¹ See *Taito v The Queen and Others*, unreported, PC 50 & 59/2001, 19 March 2002, Appendix to judgment paragraph 6.

If the BORA was to be construed more widely, this would not of itself be the final say in relation to appeals. The BORA does not have an overriding status within New Zealand law and, while section 6 states that where possible a statute should be interpreted in a way that is consistent with the BORA, this is not an absolute statutory requirement.

Section 25(h) of the BORA is directly reflected in Article 14, section 5 of the International Covenant on Civil and Political Rights. This section states that everyone who is convicted of a crime has a right to an appeal "according to law". It is submitted that New Zealand's obligations under the International Covenant are being met.

III. CRIMES ACT

The right of appeal against conviction is granted under section 383 of the Crime Act. The other sections which deal with the procedures to be followed in dealing with appeals are laid out in Part XIII of the Act. An analysis of these sections shows that the Court dealt with the appeal in a lawful manner.

Section 392(2) states that, if the ground of appeal involves a question of law alone and appears to be without substance, the Registrar can refer the appeal to the Court of Appeal which may dismiss it without calling a hearing. This is undertaken when the Court considers that the appeal is frivolous or vexatious. It is submitted that this is in keeping with section 25 (h) of the BORA in that an appeal will be granted "according to law". It is also suggested that this is further evidence that a right to an appeal as of right has never been the intention of the legislature.

Section 388 states that, in appealing, a convicted person may choose to present his or her case in writing rather than orally. While it may be desirable in some instances to have the opportunity to present a case orally, the way in which the section is worded does not state that this is an absolute right. There is an obvious presumption that an oral argument is allowable or, in some cases, possibly even preferable, but it is not in itself a statutory requirement.

Section 395(1) states that, if the appellant is in custody, "he shall not be entitled to be present, except where rules of the Court provide that he shall have the right to be present, or where the Court of Appeal gives him leave to be present". It appears that Parliament intended that there would be occasions where an appellant would not have a right to give oral evidence. The cost and time associated with running appeals that have no possibility of

success is a factor to be considered when taking into account “the interests of justice”. While it is accepted that cost alone should not be the sole factor in making decisions concerning appeals, it is submitted that if the appeal is found to be completely lacking in substance then it would be contrary to the “interests of justice” to pursue the appeal.

The Crimes Act provisions must be read in the light of the Court of Appeal (Criminal) Rules 1997, which plainly do not envisage that all hearings will be conducted orally. Rule 13 states that the Registrar must give notice of the time and place fixed for a hearing or an application for leave to appeal to certain parties. Subsection (c) deals with who receives notice if the appellant is in custody and the Court has granted the appellant leave to be present at the hearing. There is not the assumption that the Court will always grant leave to the appellant. The wording “if the Court has granted the appellant leave” makes it quite plain that the Court has discretion in this matter. Rule 15 also indicates that, in some instances, it is not expected that all appellants would be present at a hearing for an appeal. The Rule covers what process the Registrar must undertake in notifying an appellant who is in custody. This plainly allows for an *ex parte* decision dismissing the appeal which is what occurred in Mr Johnson’s case.

IV. LEGAL SERVICES ACT

While the focus of this Act is predominantly concerned with granting legal aid, in its procedural functioning it has a substantial bearing on appeals. In response to a question regarding dealing with worthless appeals, Cooke P stated that “(t)o some extent it is possible to control the problem through the legal aid mechanism in that in the criminal field most appeals are legally aided”.²

Given that the issues of legal aid and appeals are closely related, it is important to examine the relevant sections of the Legal Services Act. It is the submission of Counsel for the Crown that the dismissal of Mr Johnson’s appeal was in keeping with the procedure required by this Act.

Under section 7, the Registrar of the relevant Court may grant criminal legal aid to a person if, after considering the application in accordance with the correct procedure, “it is desirable in the interests of justice”. This is commonly understood to cover a wide ambit in terms of the considerations that make up what the “interests of justice” might be. These interests include the gravity of the offence and the grounds of the appeal. The Registrar is

² Interview with Cooke P [1986] NZLJ 170, 174.

also required to have regard to the consequences for the appellant if legal aid is not granted. In considering this last aspect, the Registrar takes into consideration the complexity of the argument in relation to the grounds of appeal and makes a decision based on the ability of the defendants to represent themselves.

In this particular case, because the appeal is to the Court of Appeal, the Registrar must consult with a Judge of that Court under section 15 before making a decision. It has become common practice for the Registrar to seek the opinion of three Judges of the Court of Appeal and, while this is not expressly stated in the section, neither is it expressly stated that only one Judge may be consulted. This procedure has evolved through the desire to make absolutely certain that justice is done in relation to granting legal aid and therefore in granting appeals. If one of the Judges is of the opinion that legal aid should be granted, then this is the recommendation that the Registrar acts on regardless of the views of the other two Judges.

It is apparent from the wording of the statute that Parliament has allowed for an area of discretion on the part of the Courts in relation to the granting of appeals. If, for example, Parliament had intended that all convictions for an offence of a very "serious" nature would automatically qualify for an appeal, then the statute would say so. What the statute does do is make it incumbent upon the Registrar to follow a procedure when dealing with appeals that gives careful attention to the case under consideration.

V. CONCLUSION

In concluding for the Crown, it is submitted that the procedure followed by the Court of Appeal in relation to the disposal of the appeal by Mr Johnson was lawful. The requirements of the BORA and the International Covenant on Civil and Political Rights were followed in that the appeal was declined "according to law".

The procedures set out under the Legal Services Act and the Crimes Act were also adhered to as required by law. There was consultation entered into and the procedural matters that followed that consultative process were also lawful. As there is no definitive requirement in either statutes for the appellant to be granted an oral hearing, it was lawful for Mr Johnson's appeal to be declined *ex parte*.