

WAIKATO LAW REVIEW

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EDITOR'S INTRODUCTION

I am pleased to present the seventh edition of the *Waikato Law Review*. I thank the referees to whom articles were sent and the members of the editorial committee for their assistance.

The *Review* is proud to publish the Harkness Henry Lecture of the Solicitor-General, John McGrath QC. His lecture on the Crown, the Parliament and the Government provides (in an election year) an appropriately-timed exploration of recent experiences in government in New Zealand.

The *Review* is also honoured to publish an article on the law of civil remedies by the Rt Hon Justice Thomas. Justice Thomas is well known for his role in the Court of Appeal in challenging traditional approaches to the law and promoting responses which are more in tune with modern demands. His article on civil remedies is in the same vein.

The *Review* is also pleased to publish the presentation by Antonia Di Maio, the winner of the annual student advocacy contest kindly sponsored by the Hamilton firm McCaw Lewis Chapman. Her argument highlights the dilemmas of legal practice in an era acutely conscious of issues of professional responsibility.

The other publications in the *Review* cover a wide field. Two of the articles, on the law of succession to the Crown in New Zealand and artificial selection in colonial New Zealand, have a strong historical dimension. The other three present important insights into current New Zealand law of domestic violence, homicide and breach of confidence.

Most of the articles in this year's *Review* have been contributed by authors outside of the Waikato Law School. This fact signifies the growing recognition of the *Review* in New Zealand academic circles as a vehicle for critical thought on legal developments relating to New Zealand.

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THE HARKNESS HENRY LECTURE

THE CROWN, THE PARLIAMENT AND THE GOVERNMENT

BY JOHN MCGRATH QC¹

E ngā mana, e ngā waka, e ngā iwi o te motu - tēna koutou.

E ngā rangatira o Te Whare Wānanga nei - tēna koutou.

Tēna koutou ngā tini aituā, haere, haere, haere ki te po.

Ko Taupiri te māunga ko Waikato te awa me ngā taniwha rau o roto - tēnei te mihi atu.

Na reira, tēna koutou, tēna koutou, tēna koutou katoa.

I. INTRODUCTION

Canadian judges have summarised the principles of a constitution in an equation: constitutional convention plus constitutional law equals the total constitution of a country.² Generally the components of this equation remain unchanged for long periods, but that has not been the case in New Zealand over the past decade. In that time we have been in the midst of a constitutional drama. Tonight, I wish to look at some of the experiences in government New Zealand has recently faced and the different perspectives that we are starting to perceive in this new constitutional era. I believe those experiences provide important insights into the nature of the arrangements that form our constitution. Discussion of them is useful also in appreciating our constitution's underlying values of democracy and effective government. In the course of a discussion of contemporary events, I hope to throw light on what Sir Ivor Jennings has described as the "understandings and habits of mind" by which the constitution functions.³

I start by referring to the principal actors in our drama. First, there is the Governor-General who is the Sovereign's representative in New Zealand but whose office is now well and truly patriated and to be regarded as a New

¹ Solicitor-General of New Zealand. Sir Kenneth Keith, Sir John Jeffries, Marie Shroff, John Martin, Ellen France, Grant Liddell, Claudia Geiringer and Rebecca Kitteridge were all good enough to read drafts and offer suggestions. The author also acknowledges the research assistance of Tania Warburton. However, the views expressed are those of the author.

² *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, 883-884 (SCC majority judgment).

³ Jennings, Sir Ivor *The Law and the Constitution* (5th ed, 1959) 16.

Zealand institution.⁴ The Governor-General has legal power to appoint and dismiss Ministers and appoint other high officers who serve the Crown, such as judges. By convention, the Governor-General acts on the advice of the second set of actors, the Prime Minister and Ministers who appear to have the support of the House of Representatives. They govern the country, but whenever the continuation of their support in the House falls into question the Governor-General may become involved. So may the third set of actors, who are leaders of parties and factions in the Parliament other than those supporting the Prime Minister. The role they play will depend on the reliability at any time of the support for the Ministers who hold office. Meanwhile, they are understudies.

Then there are those with lesser parts. The Cabinet Secretary and Solicitor-General are advisers on constitutional matters with the duty to act independently. They are available to the Governor-General and to Ministers who are, of course, free to seek other advice.⁵ Ultimately at the crucial times they are responsible for and deliver their own lines. The wider public service is in the wings facilitating continuity. There is audience participation on these occasions, in particular by those with constitutional expertise who usefully express their opinions. Their role is fostered by an alert and aware media. Finally, there is the producer in the form of the whole electorate, which gives directions from time to time, albeit not always with clarity.

II. MIX OF LAW AND CONVENTION

The context, of course, is New Zealand's largely unwritten constitution. By that I mean that New Zealand, unusually among modern polities, lacks a supreme document constituting the institutions of the state and specifying their functions and powers. As the equation indicates, our constitution comprises, first, rules of constitutional law expressed in statutes, being the law made by Parliament, and in the common law, being the law articulated by the courts. Secondly, it comprises what Dicey called "conventions, understandings, habits or practices".⁶ These rules of constitutional morality he termed "conventions of the constitution". The distinction between them and the rules of constitutional law was that conventional rules were not

⁴ The Office is constituted by Letters Patent (SR1983/225). As to patriation, see Joseph, P A *Constitutional and Administrative Law in New Zealand* (1993) 154-158; Wood, "New Zealand" in Butler, D and Low, D A (eds) *Sovereigns and Surrogates* (1991) 108-143.

⁵ Scott, K J *New Zealand Constitution* (1962) 82, refers to the Governor-General's ability to seek advice from others.

⁶ Dicey, A V *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 23-24.

enforced by the courts. This basic distinction that Dicey identified remains a feature of our constitution today.

Important elements of our constitution expressed in statute were modernised by the Constitution Act 1986.⁷ In this Act the institutional legal framework of the constitution is set out. For example, the Governor-General's power to assent to Bills passed by the House of Representatives is expressed in a provision that a Bill passed by the House becomes law when that assent is given.⁸ The purpose of conventions is to apply the cladding of constitutional values to the basic legal framework. In particular, they ensure that legal powers are exercised consistently with democratic principles. Conventions do so by stipulating how such powers should be exercised. Thus, the legal power to assent is subject to a conventional duty to do so. The Royal assent thereby gives legal force to the will of the democratically elected House of Representatives. Unlike the law of the constitution, the conventions are largely unwritten. Most are simply "binding usages built up over time".⁹ This allows ample scope for argument over questions of both existence and content of the rules that have the status of conventions and whether they have been breached, varied or even abandoned.

One important difference between rules of constitutional convention and those of constitutional law is the manner of determining their existence. Laws come into being in recognised ways. The very manner of creation signals that a rule is one of law. But there is no authoritative signal that a convention has come into existence. Nor is there any definite method of recognising a change to a convention or whether a convention has been abandoned.¹⁰

Marshall says conventions may be established in three ways.¹¹ First, a series of precedents may have become recognised as giving rise to a binding rule of behaviour.¹² The convention that the Governor-General assents to Bills passed by the House of Representatives is perhaps the classic instance. Secondly, an agreement may be reached by parties concerned that those with a particular legal power will use it in a certain way. In this instance there is no custom and the convention may spring up quickly. The Balfour

⁷ As to the genesis of this Act, see the reports of the Officials Committee *Constitutional Reform* (Department of Justice, February 1986).

⁸ Constitution Act 1986, s 16.

⁹ Joseph, *supra* note 4, at 243.

¹⁰ Munro "Law and Conventions Distinguished" (1975) 91 LQR 218.

¹¹ Marshall, G *Constitutional Conventions* (1986) 8-9.

¹² Joseph, *supra* note 4, at 243-244, discusses these views.

Declaration of 1926 recorded an agreement that the United Kingdom should not legislate for Commonwealth countries without their consent. The Statute of Westminster (UK) gave substantial legal expression to that convention in 1931, but it is to be regarded as having conventional status prior to the engagement.¹³ Thirdly, Marshall speaks of a convention being formed simply on the basis of an acknowledged principle of government that justifies it. While less determinate, this means of creation highlights the importance of constitutional values and, in particular, democratic principle in conventions. Commentators generally agree that this is a crucial element. Conventions ensure that the exercise of the legal powers is for constitutional ends. The stronger the apparent relevance of democratic principle in the context, the more ready observers will be to see instances of application which demonstrate that those exercising constitutional legal powers have regarded themselves as bound by convention.

In the New Zealand context, these elements can be seen in the development in 1993 of the already existing convention of caretaker government as a guiding principle for Ministers in periods following general elections. The 1993 election was the last conducted under the First Past the Post (the FPP) system.¹⁴ It was uncertain which political interests would comprise the government. In New Zealand, the election night count of votes is informal and a period will elapse before an official count clarifies the state of the parties in the new House. Under the FPP system, the outcome was usually apparent on election night. In this context, a convention was recognised that a Ministry defeated at an election would remain in office until formal results were declared and a new Ministry was ready to take office. In the interval, only routine government administration would be conducted.¹⁵ One advantage seen in this unhurried transfer of power is that the party leader or the party can choose a Cabinet without undue haste.¹⁶

The general election of 1993 produced a situation in which it was uncertain on election night whether the National Party Government would have a majority in the new House. On the election night count on 6 November 1993 it appeared that the election might produce a Parliament without a single party majority. This was premature! Seat distribution according to the 1993

¹³ Statute of Westminster 1931 (UK), s 4.

¹⁴ The term "First Past the Post" is not to be understood literally; it refers to a relative majority system. See Wade, Sir William *Constitutional Fundamentals* (Hamlyn Lectures, 1989) 10.

¹⁵ The convention is described in these terms in Scott, *supra* note 5, at 106.

¹⁶ *Constitutional Reform*, *supra* note 7, at 18.

election night count was: National 49 seats, Labour 46 seats, Alliance 2 seats, New Zealand First 2 seats (total 99 seats).

However, in 1993, as under the current legislation, the electoral night count was and is provisional. Under the 1956 Act, a period was allowed following an election during which special votes (exercised out of the electorate or overseas) were forwarded to the Returning Officer. A final recount was undertaken with the Returning Officers required to announce the result by a set date. Within three days a judicial recount could be requested which generally commenced immediately. In 1993, the system was entirely electorate based. The result only became clear on 17 November 1993 when the final seat distribution was: National 50 seats, Labour 45 seats, Alliance 2 seats, NZ First 2 seats (total 99 seats).

The advice given to the Prime Minister on the day following the election was that, pending clarification of the result, his government should function in a caretaker capacity. The advice did not reflect any legal obligation but was an application of an established New Zealand convention to new facts. What guided the advice to the Prime Minister was democratic principle.¹⁷ The mandate which the government had enjoyed since the 1990 election was, of course, spent. The will of the electorate had been freshly expressed but, as yet, its meaning was not clear. Only when clarity emerged, as it did after two weeks, could the government legitimately, as opposed to lawfully, resume the exercise of government power. The Prime Minister and the Cabinet accepted that advice and acted on it, thereby demonstrating their intention to be bound. On one view they simply adapted the convention, applying it to situations of uncertain electoral results. However, in my view, they varied the convention in a manner that has proved important under the new electoral system.

When the Cabinet Office Manual was revised in 1996, a new section on conduct of government during periods of caretaker government was included. This was based on the 1993 experience and decisions. The Manual expressly recognises that, during periods of caretaker government, some decisions going beyond routine administration may have to be made. Accordingly, when the identity of the incoming government has not emerged, the Manual suggests consultation with other Parliamentary

¹⁷ Advice was given by the Cabinet Secretary and Solicitor-General. The Prime Minister no doubt also conferred with others and had regard to public discussion.

interests as a means of ensuring that such decisions comply with democratic principle.¹⁸

When in 1996 formation of the government took place some eight-and-a-half weeks after the election, New Zealand endured its longest period of caretaker government. It has been unkindly suggested that the hiatus during negotiations over a coalition provides a period in which the bureaucracy, personified by Sir Humphrey Appleby, governs.¹⁹ The reality is that there is a period of governmental languor during which decision-making is minimal but when stress, in particular between Ministers and public servants, is high. Caretaker government is a necessary condition in the post election period but only for as long as it takes to clarify who is to have the mandate of the House to govern. In my opinion, the convention starts to apply only once the previous mandate has expired, a point usually marked by election day. Governments may exercise some discretion in making decisions in the pre-election period.²⁰ They do so, however, as a matter of choice. Until the electorate votes again, according to democratic principle, the government retains the electorate's mandate.

Finally, on the caretaker convention, it is to be borne in mind that the restraint is one of convention not law. If Ministers take decisions outside the scope of the convention, they will not, I believe, on that account be restrained by the courts. They will, however, need to satisfy the electorate that the circumstances warranted the exercise of their powers or suffer the political consequences.

III. MMP: CATALYST FOR CHANGE

At this point, I provide a summary of the changes in electoral representation which have been the catalyst for wider constitutional change. Until 1993 New Zealand general elections were conducted on the FPP electoral system. In 1993, in conjunction with the general election of that year, a proposal was carried at a national referendum for the introduction of the Mixed Member Proportional (MMP) system of voting in place of the existing FPP relative majority system. In direct consequence, provisions for the MMP electoral system, set out in the Electoral Act 1993, came into force.²¹ Under the MMP

¹⁸ *Cabinet Office Manual* (Cabinet Office, Wellington, 1996) [hereafter referred to as "COM"] paras 2.49 to 2.51. Guidance about the caretaker convention is given in Cabinet Office Circular CO 99/5.

¹⁹ Brazier, R *Constitutional Practice* (2nd ed, 1995) 39.

²⁰ See *COM*, supra note 18, at para 2.42, and CO 99/5.

²¹ Under s 2(2) of the Electoral Act 1993.

system, each elector may separately vote for both a local constituency member and a party. Half of the 120 seats in the House of Representatives are allocated to the successful candidates in constituencies who are still elected on an FPP basis. Of the remaining 60 seats, five were in Māori roll constituencies. The remaining 55 were allocated among candidates on party lists, the seats being distributed according to a system reflecting the proportionate vote received by those parties qualifying for list seats. The broad purpose of the 1993 Act is to achieve the distribution of seats in the new House of Representatives according to the proportionate vote received by each party across the whole electorate.

On 16 December 1996 the first administration in New Zealand to take office with the mandate of a Parliament elected under the MMP electoral system was sworn into office by the Governor-General. In political terms, that mandate had been expressed by the announced agreement of the Parliamentary representatives of the New Zealand National Party and the New Zealand First Party. Those representatives respectively occupied 44 seats and 17 seats in the 120 member Parliament. The two Parliamentary parties had signed a written Coalition Agreement expressing the terms of their political accommodation.

MMP has not altered the basic principles of our constitution. The key principles remain that, first, the Governor-General acts on advice of Ministers who enjoy the confidence of the legislature, to which, secondly, Ministers are collectively and individually responsible. Both those principles have had to be considered in the course of events of the last three years.

I will discuss particular experiences in our institutions of government over the last three years, principally focusing on the constitutional impact on the Crown, the Parliament and the government under the new electoral system. I do so from the perspective of a public servant who is a law officer of the Crown and who has been an adviser on questions of constitutional law and practice to each of the principal constitutional actors.²²

1. Mrs Kopu's "Resignation"

On 16 July 1997 an Alliance list Member of Parliament, Mrs Alamein Kopu MP, resigned from the Alliance Party. That day she wrote to the Speaker advising that she intended "to serve the Māori people as an independent Māori Member of Parliament". As a list member Mrs Kopu owed her place

²² I have discussed the role of the Solicitor-General of New Zealand in "Principles for Sharing Law Officer Power" (1998) 18 NZULR 197.

in Parliament to her position on the Alliance party list at the previous election. She had not personally won a constituency seat. Herein lay the controversy over her decision to become an independent Member of Parliament.

This interesting political incident resulted in the Privileges Committee of the House being required to rule on whether Mrs Kopu remained a Member of Parliament or whether the effect of her political action was to resign her seat allowing the Alliance to draw a new Member being the next candidate on the Party List on which it had gone to the polls in 1996. The Privileges Committee resolved this issue in favour of Mrs Kopu's continuing membership. The matter did not raise a question of direct importance to the position of the Coalition Government at the time but it did raise an issue of principle that surfaced again when tensions developed in the Coalition the following year.

It is convenient now to examine the constitutional issues raised by Mrs Kopu's departure from the Alliance Party. Here, I had the privilege of a ringside seat. I had been invited to appear as counsel before the Privileges Committee of the House to advise it on legal and constitutional issues arising.²³ In legal terms, the key provision was s 55(1)(f) of the Electoral Act 1993, which relevantly provided:

The seat of any Member of Parliament shall become vacant - ...

(f) If he or she resigns his or her seat by writing under his or her hand addressed and delivered to the Speaker of the House, or to the Governor-General if there is no Speaker or the Speaker is absent from New Zealand, or if the resigning Member is the Speaker.

Mrs Kopu had not in express terms resigned her seat. She had rather, in writing, resigned from the Alliance Party and notified the Speaker accordingly. Evidence was, however, given that she had in 1995, prior to selection as an Alliance list candidate, given a pledge that she would resign her seat should she vote against or obstruct Alliance policies or leave the party after her election. The Alliance argued before the Privileges Committee that the statutory provision as to when a vacancy was created by resignation was to be interpreted in light of the principle of proportionality, in terms of which, counsel said, it was the purpose of the Electoral Act that the numbers of each political party in the House should be proportional to the votes cast in favour of that party at the general election. On that basis, it was argued that Mrs Kopu's letter of resignation from the Alliance, read in the context of

²³ I appeared with Claudia Geiringer, Crown Counsel.

the earlier written commitment she had given to resign from Parliament should she leave the Alliance, constituted her resignation “by writing”. It was further argued that, when these documents were delivered to the Speaker by the Alliance Party Leader, Mrs Kopu’s resignation had been delivered within the terms of the statutory provision. As an alternative argument, the Alliance said that it had relied on a contractual commitment from Mrs Kopu who was either directly bound in contract to resign, or at least estopped from subsequently asserting before the Committee her right to remain an MP.

Following its taking of evidence, the Privileges Committee called on me to advise my view of the Alliance’s contentions. There were, I concluded, two obstacles to the Alliance’s standpoint. First, there was force in the argument that Mrs Kopu’s pledge to resign her Parliamentary seat, given prior to her selection as a candidate but later reaffirmed, was a clear commitment to vacate should she oppose Alliance policy or leave the party once in the House of Representatives. To classify the commitment as a resignation to be effective on occurrence of a future event might perhaps be arguable. But it was not possible to say that the various actions or documents amounted to a resignation in the form required by s 55(1)(f). In particular, the only document addressed by Mrs Kopu to the Speaker specifically expressed her intention to continue in Parliament. Moreover, the Act had said what was to be a resignation and required a definite rather than a contingent action.

As to the principles of statutory interpretation, a core purpose of the Act was certainly to introduce a proportional representation system to the legislature. However, the Act’s principle of proportionality was subject to exceptions, in specified circumstances, for example, to set thresholds for representation and in order to accommodate the need for constituency representation.²⁴ I suggested that there was also a countervailing principle of the independence of an elected Member of Parliament which had not been displaced by the 1993 Act. The Act was to be interpreted as accommodating both principles on the basis that, while proportionality dominated the process of appointment, the statutory scheme thereafter strongly reflected the value of independence.

The argument that Mrs Kopu had resigned raised the question of the status of a Member of the House, specifically, an issue concerning a Member’s qualification to sit and vote in the House. As such, there was precedent for

²⁴ Disproportionate representation can arise in circumstances where a party wins more constituency seats than its proportion of the Party vote. Similarly, if the seat of a constituency MP is vacant, a by-election result may change the proportions of representation in the House.

the view that the question was one of privilege, to be decided exclusively by the House. In *Bradlaugh v Gossett*,²⁵ it was held that the House of Commons was not subject to that part of the statute law which concerns its own internal proceedings. There was legal as well as Parliamentary precedent, therefore, for ruling that the question was one of privilege which ought to be considered by the Privileges Committee of the House. The Speaker so ruled.²⁶ The Privileges Committee was asked to investigate and did so.

Nevertheless 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. The interpretation of statutes and their application to particular facts is pre-eminently the function of the courts in our constitutional structure. Whether an elected legislator remains qualified to sit in a legislative house is also inherently a question which calls for an independent decision according to law. It should not be thought that *Bradlaugh v Gossett* will forever be the final word on the boundary between Parliamentary privilege as a jurisdiction exclusively administered by the House of Representatives and the jurisdiction claimed by the courts, when an issue concerning a member's qualification to sit arises. Courts in other jurisdictions, albeit in the context of a written constitution, regularly decide questions concerning the status of legislators.²⁷ I suggest that there is scope for movement in New Zealand in this area of constitutional common law. The principle of *Bradlaugh v Gossett* is most important in the context of internal deliberative workings of the House, including the maintenance of its internal discipline. In cases of significant legal difficulty which address the right to membership, the House is in any event likely to wish to follow the precedent of 1897 when it enlisted the assistance of the court, passing special legislation to do so.²⁸

²⁵ (1884) 12 QBD 271.

²⁶ *Report of the Privileges Committee on the question of privilege referred on 22 July 1997 relating to the status of Manu Alamein Kopu as a Member of Parliament* (1997) AJHR 1.15B, Appendix A, 8.

²⁷ See *Egan v Willis and anor* (1998) 158 ALR 527; (1998) 73 ALJR 75, a decision of the High Court of Australia; and *Kalauni v Jackson & Ors*, a decision of the Court of Appeal of Niue (reported in Angelo, *A H Niue Laws 1996-1997* 156). The judgment in *Kalauni* refers to *Powell v McCormack* (1969) 395 US 486, a decision of the United States Supreme Court which reinstated a United States Congressman after the House of Representatives had voted to exclude him.

²⁸ The resulting Court of Appeal decision is *Re "The Awarua Seat Inquiry Act, 1897"* (1898) 16 NZLR 353.

Indeed, in Mrs Kopu's case, the Privileges Committee itself accepted that the alternative argument which asserted that there was a contractual obligation on Mrs Kopu to resign was outside the scope of Parliamentary privilege and should be left to the courts. This argument raised the legal principle which had been articulated recently in the decision of the High Court in *Peters v Collinge*.²⁹ In that case, Fisher J had considered the effect of what was said to be a contract which purported to preclude a person seeking selection as a candidate from exercising electoral rights if not finally selected as a candidate for the National Party. The judge concluded that for the Court to enforce an agreement not to exercise the right to stand for Parliament would be contrary to public policy. It followed, I suggested, that it would be contrary to public policy for the courts to recognise the enforceability of a contract which included a contingent obligation to resign membership of the House.

There was also support for application of this approach in the judgment of the Court of Appeal in the Māori fish settlement case *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*.³⁰ In that case, the Court discussed the nature of a "Deed of Settlement" of fishing claims which was entered into between the government and Māori negotiators which it was contemplated would be the subject of legislation. The Court held that the deed did not have legal effect, being "a compact of a political kind, ... its subject matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights". The terms of the deed could not interfere with the introduction of a Bill in the House of Representatives. The scope of that principle, as I saw it, extended to attempts to use the law to enforce compacts of a political kind that would impact on the right of a Member of Parliament to continue to hold office. In summary, I did not consider that the Committee should decide the matter, but did indicate my view that the argument of the Alliance would be unsuccessful if the same issue were taken to court.

The Privileges Committee in its Report to the House expressed its agreement with my advice on the interpretation question and, of course, Mrs Kopu remains a Member of Parliament to this day. But the events demonstrate the tension between the longstanding Burkean principle of the independence of Members of Parliament, which supports Mrs Kopu's right to leave her political grouping, and the principle of proportionality under the MMP electoral system, whereby parties earn the right to representation in the House to the full proportionate extent of their list vote at the election.

²⁹ [1993] 2 NZLR 554.

³⁰ [1993] 2 NZLR 301.

MMP has altered the relationships between Members of Parliament, political parties and the electorate in a manner not previously apparent. Under the traditional Westminster FPP model, all members were in a direct relationship with the electorate. The parties played no formal institutional role. Indeed, the constituency model pre-dated the emergence of political parties which in theory remained irrelevant to the electoral process.³¹ It was in this context that the Burkean ideal of an independent Member accountable to his or her conscience originally developed. During the twentieth century, the advent of strong political parties threatened, but did not destroy, Burke's legacy.³² Not until 1993 was the growing de facto power of parties recognised by New Zealand's electoral law. On introduction of the MMP system, a tri-partite relationship was constituted between the electorate, party list candidates, and the political parties themselves.

The view I reached in advising the Privileges Committee was that, despite such statutory recognition of political parties, specific legislation was required to displace the constitutional independence of a Member of Parliament, including the Member's right to resign from her party but remain in the House. Here, presently, there are no conventions nor realistically is there any prospect of them arising. Other jurisdictions have fashioned and implemented new approaches to this constitutional issue.³³ It remains to be seen whether New Zealand's legislature will do so.

2. Appointment of Governments: Role of the Governor-General

One area where it is well recognised that constitutional convention provides only limited guidance to the correct exercise of legal powers concerns the Governor-General's power to appoint the Prime Minister following a general election. Where it is unclear where the support of the new House of Representatives will lie, the Governor-General retains a discretion as to whom to appoint. Inherently, general elections under the MMP system are more likely to produce uncertainty, immediately following the election, as to which party or parties will be able to form the government.

³¹ *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (Government Print, Wellington, 1986) para 2.4.

³² *Amalgamated Society of Railway Servants v Osborne* [1909] 1 Ch 163, 186-187, per Fletcher Moulton LJ (CA) and [1910] AC 87, 114-115, per Lord Shaw (HL).

³³ In South Africa the constitution's anti-defection clause obliges legislators to vacate their seats if they cease to be members of the parties that nominate them. The clause was upheld by the Constitutional Court of South Africa when challenged in *re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744, 829-831.

In this area, we now have the considerable benefit of a series of public contributions by His Excellency, the Rt Hon Sir Michael Hardie Boys, the present Governor-General of New Zealand. These include his valuable 1997 Harkness Henry lecture.³⁴ I propose simply to summarise what I perceive to be the main themes of His Excellency's approach and to point to differences that seem to be emerging between New Zealand practice and that of other countries in this traditionally sensitive area.

Sir Michael emphasises that it is the task of elected politicians to reach the political accommodations that enable governments to be formed. How they do so is for them but the outcome of their processes should, as soon as it is clear, be made known to the electorate. The Governor-General in some instances may need to take steps to communicate directly with the political leaders to clarify where support lies but, in general, that will not be necessary. Ideally, only when the politicians have discharged their duty and made clear to the public the alignment of the forces in Parliament should the Governor-General act and appoint or reappoint the government as necessary.

Two things are notable about this approach. First, the emphasis is on facilitation of a political contest as the means of determining whom the Governor-General should appoint as Prime Minister. The process is open to the extent that the Governor-General seeks to act on the parties' public statements of their position. It is democratic in that the Governor-General acts as a proxy for the Parliament. Because he or she acts on public statements of the political position, the responsibility for miscalculations will generally be seen to be that of the relevant parliamentary leaders. The second factor is that the playing field for the contest is level. There is no suggestion that the Governor-General accords preference to a particular faction at the outset of the contest by inviting its leader to see if she or he can form a government. Under our electoral system, being the head of the largest party in the new House of itself warrants no preferred treatment until it is demonstrated that the leader is able to secure the support of a majority.³⁵ The position of a Prime Minister, holding office in a caretaker capacity following a general election, and who is not immediately able to demonstrate majority support in the new House, is the same.

This is not to say that the New Zealand approach will not encounter difficulty. The risks in any Vice Regal assessment of public statements about future political intentions are vividly illustrated by the action of Governor-

³⁴ "Continuity and Change: The 1996 General Election and the Role of the Governor-General" (1997) 5 *Waikato Law Review* 1.

³⁵ *Ibid.*, 9.

General Byng of Canada who refused a request for dissolution from the Liberal Prime Minister, Mr Mackenzie King, accepted Mr King's resignation and, appointed the Conservative Leader, Mr Meighan, in his place. Mr Meighan was defeated after only three days in office and, on his advice, Parliament was dissolved.³⁶ After the resulting election, Mr King again became Prime Minister. The Governor-General was recalled. But there are also risks in being cautious.³⁷ The new approach signals a willingness by His Excellency as far as possible to adhere to democratic principle and correlatively to diminish the scope of broad gubernatorial discretion. This valid goal may lead to giving less weight to the views of Ministers in office as caretakers following an election.

3. Coalition Break-up: A Political or Constitutional Event?

In August 1998 the Coalition Government broke up over the issue of the sale of the government's shares in the Wellington International Airport Company. On 12 August, New Zealand First members walked out of a pivotal Cabinet meeting called to decide the issue. National members of the Cabinet remained and agreed in principle to proceed with the sale. To decide the matter in their partner's absence was said by the leader of New Zealand First to be contrary to the terms of the Coalition Agreement. In any event, the Coalition did not survive the split. The leader of New Zealand First, who was the Deputy Prime Minister, was dismissed on 14 August by the Governor-General acting on the advice of the Prime Minister. By 19 August, New Zealand First as a Parliamentary party itself had split into factions. National was able to obtain sufficient support from some former New Zealand First Members and others to enable a National-led coalition to remain in office. Some of that support (most notably that of the ACT New Zealand Party) was from members remaining outside the government. The continuing coalition was therefore a minority government.

I now look at the events that led to the break up of the coalition government that had taken office in 1996. In their agreement, the two parties addressed

³⁶ Forsey, "The Royal Power of Dissolution of Parliament in the British Commonwealth" in *Evatt and Forsey on the Reserve Powers* (1990) chs 5 and 6; Quentin Baxter "The Governor-General's Constitutional Discretions: An Essay Towards a Re-Definition" (1980) 10 VUWLR 293.

³⁷ I have in mind the Tasmanian situation following the 1989 election when the Governor permitted a Premier to stay in office for over a month even though there were public statements indicating that a minority Labour Government, supported by independent members, would have a majority. See Castles, "Tasmania's Constitutional Crisis 1989" (1990) 12 Adel LR 292.

the coalition's relationship with the key institutions of government. They said that constitutional requirements, in particular the Constitution Act 1986, would "require the retention of existing Executive structures subject to amendment as set out in this agreement".³⁸ The Ministry would comprise 20 Ministers inside as well as six outside the Cabinet, and the sharing between the parties of those positions was specified.³⁹ Ministers were to comply with the Cabinet Office Manual provisions and "accept the conventions of Cabinet responsibility".⁴⁰ General provisions for Cabinet procedures included a provision that the "quorum of Cabinet to be at least one half of each Coalition partner's appointees to inside Cabinet Ministerial positions".⁴¹ By that, the parties presumably meant that the Cabinet would not transact business in the absence of the specified form of combined presence.

Provision was also made in relation to the resolution of what were called fundamental disputes.⁴² The stipulated purpose of the coalition was the political one of "provid(ing) sound and stable government for New Zealand for a three year term".⁴³

The coalition agreement provisions in respect of a quorum for meetings of the Cabinet differed from those expressed in the Cabinet Office Manual. This provided, then as now, for a quorum of half the full membership of the Cabinet plus one.⁴⁴ The nature and relative constitutional status between these documents accordingly comes into question. When the Cabinet had proceeded to take its decision to sell part of its shareholding in the Wellington Airport Company it had a quorum in terms of the Cabinet Office Manual's provisions but not in terms of what the Coalition Agreement had provided. That was on account of the walk-out by New Zealand First Ministers. What were the implications of this in terms of government? Was it a constitutional or merely a political question that arose? The answer requires consideration of the legal and constitutional effect of the events.

If we start with the relevant statutory provisions we do not get far in answering this question. The Constitution Act specifies who may hold office

³⁸ *The Coalition Agreement* (1996) cl 7.1.

³⁹ *Ibid*, cl 7.3(a).

⁴⁰ *Ibid*, cl 7.3(d).

⁴¹ *Ibid*, cl 7.3(d)(x).

⁴² *Ibid*, cl 13.

⁴³ *Ibid*, cl 2.1.

⁴⁴ *COM*, *supra* note 18, para 3.25 (which also empowers the chair to vary the requirement "if necessary").

as Ministers and as members of the Executive Council.⁴⁵ It also provides that any member of the Executive Council may exercise the functions, duties or powers of any Minister.⁴⁶ The Act does not, however, lay down any procedural requirements for governmental decision-making. Indeed, the Constitution Act does not mention the term “Cabinet” at all, although the term has been mentioned in our legislation since at least the passing of the first Ombudsmen Act in 1962. Nevertheless it remains true to say that the Cabinet is “a body existing by constitutional convention rather than law”.⁴⁷ No principle of constitutional law was accordingly breached by the fact that the decision was taken by the Ministers who remained in the Cabinet room when New Zealand First Ministers walked out.

What about constitutional convention? Clearly the decision to sell the Crown’s shares in the Wellington Airport Company raised issues about compliance with the Coalition Agreement. Did this political event disturb the conventions upon which Cabinet government rests? Wheare has said that “[a] convention is a binding rule ... of behaviour, accepted as obligatory by those concerned in the working of the constitution”.⁴⁸ Conventional obligations are of moral and not legal force. Recognising this does not diminish their importance which is that, in the working of the constitution, they often provide definitive guidance for the proper and principled exercise of legal power. In law, Cabinet may be no more than a group of members of the Executive Council but, by convention, it is the central decision-making body of the government. Cabinet is also the body finally determining the government’s policy, including what matters it will submit to the House of Representatives.

The conventions that support Cabinet government are, first, that Ministers collectively are responsible to Parliament and, secondly, that the Governor-General acts on the advice of Ministers who enjoy the confidence of Parliament.⁴⁹ In deciding, albeit conditionally, to sell the government’s shares after their colleagues left the Cabinet room, the National Ministers exercised rights of the Crown as the owner of the shares. The only criticism that could be advanced in terms of convention would be if it could be said that the Ministers had lost the support of the House at the time they acted. But there was no indication that this was the case. Any rejection of the administration would be a subsequent matter for the House, which as it

⁴⁵ Constitution Act 1986, s 6.

⁴⁶ Constitution Act 1986, s 7.

⁴⁷ *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 177 (per Cooke J).

⁴⁸ Sir Kenneth Wheare, cited in Marshall, *supra* note 11, at 7.

⁴⁹ *Letters Patent Constituting the Office of Governor-General of New Zealand* (1983) cl 7.

happened, was sitting at the time. Incidents of robust difference within government may lead to but do not in themselves demonstrate a loss of parliamentary support.

But what of the provisions in relation to quorum in the Coalition Agreement? In my view, a pact such as the Coalition Agreement, however it is expressed, must be regarded as a political arrangement, so that any failure to observe its terms is a matter of *political* rather than *constitutional* consequence. From a legal perspective, I consider that the courts would, if an issue between parties to such an agreement came before them, regard the agreement as unenforceable, whether the case was argued in terms of the law of contract or otherwise. That seems to have been the expressed intention of the parties to the Coalition Agreement.⁵⁰ However, even if it were not, surely the courts would have refused to enforce the collection of mutual political promises as to how the government would be conducted during the term of Parliament? To do otherwise would take the courts outside their proper role. Such questions are entirely political and not legal.

Would the position have been different had the text of the Cabinet Office Manual been amended by the Cabinet to reflect the Coalition Agreement provisions? While the Coalition Agreement is clearly a political pact, it is not so easy to categorise the Cabinet Office Manual. The Manual is, its preface states, “an authoritative guide to central government decision-making ... (and) a primary source of information for those outside government on constitutional and procedural matters”.⁵¹ It includes an introductory essay on the foundation of the current form of government.⁵² It describes the functions of the Governor-General, in particular, in relation to the Executive Council, and of the Prime Minister and Ministers of the Crown. Powers and procedures of Cabinet and Cabinet Committees including preparation of proposals for legislation and regulation are discussed. It stipulates standards of government administration to the extent of outlining relevant conventions and practices seen as in accordance with them. The Manual’s authority derives from the Cabinet’s decision, taken at the outset of each new administration, to adopt the Manual’s procedures.

In brief, the Manual describes the underlying structures, principles and values of government. Much of its guidance concerns administrative

⁵⁰ *The Coalition Agreement* cl 14 provided that: “The parties agree that this agreement shall not be justiciable in the Courts of New Zealand”.

⁵¹ *COM*, supra note 18, at xiii.

⁵² Keith, Rt Hon Sir Kenneth “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in *COM*, supra note 18, 3-8.

practices to be followed by Ministers and public servants in the government's decision-making process.

The description of principles includes the discussion of constitutional conventions of government. However, the Cabinet Office Manual does not itself purport to be a final articulation of conventions which form part of our unwritten constitution. It is descriptive rather than prescriptive. Some constitutional writers distinguish usages from conventions.⁵³ A usage is not a rule but merely a governmental practice that is ordinarily followed, although it cannot be regarded as obligatory in the sense of a convention. Much of the content of the Manual would be regarded as reflecting usages in relation to government practices - matters of administration rather than constitutional substance.

Some observers see the breakdown of the coalition in terms of the superior constitutional status of the Manual over the Coalition Agreement. I regard that view as flawed. It was certainly the case that, when the Cabinet took its decision to sell the shares, the numbers met the quorum requirements of the Manual and not those of the Coalition Agreement. But, in my opinion, no breach of the constitution would have taken place had the Manual's provision for a quorum matched that of the Coalition Agreement. A provision in the Manual for a quorum no doubt expresses a sound principle, but to assert that it has constitutional significance is to label as constitutional a matter of administrative significance. That it is the Cabinet Office Manual that expressed the administrative requirement does not alter the position.

The Cabinet is an informal body which regulates its own procedure. It is free to vary its existing procedures and may do so to implement terms of a coalition agreement. The Prime Minister also can vary the Cabinet's procedures. All must do so within the limits of constitutional law and convention or risk the respective legal or political sanctions for breach. And the Manual is an important tool in maintaining order and continuity in government process. That role would not be facilitated by constant tinkering with its provisions.

Had the Coalition Agreement stipulated amendments to the Cabinet Office Manual in relation to matters of constitutional convention, such, on their adoption by the Cabinet, would have taken effect as Ministerial administrative directives. But, for reasons already given, caution would be required before it could be said that new conventions were being initiated by such a process. A usage may develop into a convention, but constitutional

⁵³ For example, Hogg, P W *Constitutional Law of Canada* (4th ed, 1997) 23.

writers would generally regard that status as reached only after there has been usage for a period of time. The furtherance of democratic or other constitutional principle is also required. As the Cabinet Office Manual is merely descriptive of constitutional conventions, amendment of its terms does not necessarily alter existing conventions in any way.

IV. ENFORCING CONVENTIONS

Conventions ensure that the legal powers of our constitution are exercised in accordance with democratic principles. But, not being obligations of a legal kind, the orthodox view is that they are not enforceable other than at the hands of the constitutional actors themselves. This may appear extraordinary given the constitutional importance of both the Governor-General's and the executive government's compliance with conventional rules. Moreover, there is strong public acceptance of the constitutional principle that executive government should be accountable to the courts for acting within its legal powers. Nevertheless, the courts do not equate rules of constitutional convention with those of law and do not enforce conventions.⁵⁴

The principal reason for this attitude is theoretical. Conventions are the product of neither statute nor judge-made rules. To speak of constitutional precedents is to use that term in a different sense than that used by lawyers with reference to the common law. Constitutional precedents are no more than series of events from which insights into the working of the constitution may be derived. The issues arising appear to offer little scope for adjudication against legal standards.

Arguments that a convention may crystallise into law through evolutionary development were rejected by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*.⁵⁵ The reason given was that the legal system did not contemplate sanctions for breach of conventional rules which were often in conflict with legal rules which it was the court's duty to enforce.⁵⁶

⁵⁴ See *Madzimbamuto v Lardner-Burke & Anor* [1969] 1 AC 645, where the Privy Council rejected the argument that the United Kingdom legislature could not legislate within the area of competence of Southern Rhodesia in the face of a convention that required the Southern Rhodesian legislature's consent.

⁵⁵ [1981] 1 SCR 753. The case concerned a proposed resolution of both legislative Houses in Canada inviting the United Kingdom Parliament to patriate the British North American Act. It was argued that convention required that the Provinces consent before the resolution was transmitted to the Westminster Parliament.

⁵⁶ *Supra* note 55, at 880-881.

It does seem apparent that there are effective sanctions available for errant constitutional behaviour in most instances. If a government clung to the office, despite the obtaining by opposition forces of a majority, the remedy would be dismissal of the Ministry by the Governor-General. If a Governor-General declined to assent to legislation, removal from office would generally be an available remedy. In other words, sanctions are available at the hands of the principal actors.

That a breach of convention can carry a significant political sanction is well illustrated by events in New Zealand immediately following the 1984 election. The National government had been defeated. At the time, New Zealand was experiencing a foreign exchange crisis. The incoming government was pressing for a devaluation of the New Zealand dollar, a proposal resisted for some days by the defeated Prime Minister (who was also Minister of Finance). That resistance was widely criticised as being in breach of the caretaker government convention. The outgoing Attorney-General publicly acknowledged that the criticism was justified.⁵⁷ The political embarrassment to the caretaker Cabinet was obvious. It seems plain that the incident contributed to the subsequent early change in the position of leader of the National Party.

The 1984 breach of convention had a further consequence. The events threw doubt on whether it would have been possible for the Governor-General to appoint the leader of the successful Labour Party immediately to office to deal with the crisis had it continued. This issue concerned whether the incoming Prime Minister's status as a Member of Parliament continued during the period between dissolution of the old Parliament and confirmation of the final results of election of its successor.⁵⁸ The matter was put beyond doubt by section 6 of the Constitution Act 1986 which permits candidates at a general election to be appointed Ministers, vacating that office if they do not become a Member of Parliament within 40 days.

This legal outcome may be regarded as an indication that the political consequences of breach of a convention will, at times, include legislation clarifying and thus reinforcing the power of the principal actors to apply constitutional values. Such consequences are not uncommon.⁵⁹

⁵⁷ Attorney-General J K McLay's press statement, 17 July 1984: reproduced in Palmer, Sir G and Palmer, M *Bridled Power* (1997) 34.

⁵⁸ See the discussion in *Constitutional Reform*, supra note 7, at 13-20.

⁵⁹ See, for example, Munro, supra note 10, at 220, citing the Parliament Act 1911 (UK).

Professor Hogg argues that the effect of a court-granted remedy for a breach of convention would be the judicial transformation of a conventional rule into a legal one.⁶⁰ Nevertheless the courts in ways other than direct enforcement can and do give recognition and impact to constitutional conventions. In *Attorney-General v Jonathan Cape Ltd*,⁶¹ a conventional duty of Cabinet secrecy was drawn on by the Court as one source which helped to identify a legal duty of confidence which duty was enforceable. Similarly, the statutory recognition of certain constitutional conventions in the Official Information Act 1982 indicates the likelihood at some time that a court will be called on to discuss their content and, perhaps, their importance in the particular context.⁶²

In the *Canadian Reference* case,⁶³ a majority of the Supreme Court was prepared to recognise and indicate the existence of a constitutional convention even although it could not be enforced. The Court had separately addressed the legal question of whether a convention could crystallise into law and held that it could not. To go on to address whether a convention existed was, in the Court's view, an appropriate exercise of the judicial function, given that fundamental issues of legitimacy and constitutionality arose. The Court recognised that a convention did exist, requiring that there be Provincial consent to the federal Parliament's initiatives for promotion of amendment by the United Kingdom legislature of Canadian constitutional legislation. The Court also held that sufficient consent was not at the time available. The Court emphasised that it could not enforce the convention. The decision nevertheless strongly influenced the subsequent constitutional debate in favour of the Provinces' political position, and has been heavily criticised. Hogg argues:

In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations.⁶⁴

The Canadian judgment may, however, indicate that in appropriate circumstances the court will regard issues arising in the context of a constitutional convention as justiciable.⁶⁵ It may be that this will be unlikely

⁶⁰ Hogg, *supra* note 53, at 26.

⁶¹ [1976] 1 QB 752. The *Crossman Diaries* case.

⁶² See s 9(2)(f).

⁶³ *Supra* note 55.

⁶⁴ Hogg, *supra* note 53, at 22-23.

⁶⁵ But see *Te Waka iti Ika o Te Arawa v Graham & Ors* CA 277/96, 27 November 1996.

where the factors governing a decision or position involve a high degree of political judgment. But that matters have a high degree of political significance does not necessarily mean that the issues to be decided are not justiciable in terms of accepted standards.⁶⁶ The Canadian case reminds us that the courts ultimately will judge for themselves whether such standards are available, deferring to gubernatorial and political judgments when they are not, but asserting their constitutional role to the extent that they are.⁶⁷

V. CONCLUSION

Until 1993, people went to the polls knowing that they were choosing which of two major parties would form the government. In law, there was a series of individual constituency contests, but the party process made the reality a general election rather than a series of constituency elections. Since 1993, the reality of a general election is also the legal truth. But now the election is but a first step in the drama of government formation. The people speak and the politicians then translate their message into allocation of governing power.

The role of the Governor-General as guardian of the constitution who ultimately finds the true successor by ascertaining the will of Parliament continues in New Zealand with innovations marked by adherence to democratic principle. But it cannot be said that the political and conventional nature of the process will not in future give rise to legal questions. The courts can be expected to refrain from intervention where they would usurp the role of democratic institutions or where public opinion is the best referee. But there may be occasions in the area of convention, as well as law, in which issues arise that put in doubt the adequacy of the constitutional framework within which democracy operates. If this transpires, New Zealand can expect to see the judiciary become a significant actor in our constitutional drama.

⁶⁶ For example, a Court will not decline to make a declaration as to the meaning of a statute simply because the issue is politically sensitive and controversial. See *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA).

⁶⁷ See Keith, "The Courts and the Conventions of the Constitution" (1967) 16 ICLQ 549.

AN ENDORSEMENT OF A MORE FLEXIBLE LAW OF CIVIL REMEDIES

BY RT HON JUSTICE THOMAS*

I. "A BASKET OF REMEDIES"

In this article I pursue the thesis that, having found the defendant in breach of a common law or equitable obligation, the judge should be able to select the most appropriate remedy to redress that breach. The judge should be free to do this irrespective of the historical chains which have hobbled the development of a realistic and responsive law of remedies. I will argue that, while inevitably enlarging judicial discretion, the concept can be advanced in a principled manner. The flexibility and pragmatism which are its integral features can abide principle without succumbing to the inhibitions inherent in undue conceptualisation.

The thesis is not novel. It is frequently referred to as the "basket of remedies" approach. Having held the defendant liable, the judge has at hand a basket containing all the remedies which the common law and equity have yet devised. From that basket he or she selects the remedy which will best meet the circumstances of the particular case. The picture conjured up is, perhaps, unfortunate. With liability out of the way, the judge is envisaged, partly obscured by the bench, humped over a large hamper-like basket busily fossicking around for a likely remedy. To some, the procedure seems to lack even the structure of a supermarket shopping list.

But it would be immature to be deterred by such imaginings. To avoid any pejorative connotation, however, I will adopt the clumsier phrase "appropriateness of remedy principle".¹ Properly formulated, the principle will ensure that the administration of justice is promoted. The ancient maxim (without reference to which no text on the law of remedies would seem complete), "where there is a right there is a remedy",² becomes "for every wrong there is an appropriate remedy". The aim of a developed legal system,

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¹ See Goddard, D and Rickett, C *NZLS Seminar – Developments in the Law of Obligations – Tort Equitable Duties and the Effect of Contractual Relationships* (1996) 33.

² Tilbury, M J *Civil Remedies* (1990) chap 1, 3.

as well the dictates of justice, must surely be to ensure that, where there is a wrong, there is not only a remedy but also a remedy which is the most appropriate remedy to redress the particular wrong. A law which permits a wrong to be met with a less than appropriate remedy is necessarily imperfect and certainly inferior to a law which requires a wrong to be met with the most suitable remedy.

Existing common law and equitable conceptual categories tend to be historical rather than functional. They remain remnants of a time when each legal remedy was administered under a separate writ and, still later, a time when law and equity were administered in separate courts. But while the courts have generally sought to manipulate the rules derived from these historical categories to achieve just and functional results, the vocabulary and the conceptual categories remain. They have become dysfunctional.³ As Professor Maxton has succinctly said: "There is nothing in the nature of wrongs *per se* which demands that remedies for them should bear any relation to their jurisdictional origin".⁴ What is recommended in this article is a more functional approach in which the choice of remedy proceeds on the basis of a variety of criteria directed at ascertaining the most appropriate remedy in the particular circumstances of the case. The question of remedy would become a substantive issue in itself.

The recommended approach borrows heavily from Canadian jurisprudence where it has been developed largely in the context of cases involving unjust enrichment.⁵ Once a cause of action in unjust enrichment has been accepted in that jurisdiction, it does not follow that a remedy is awarded *pro forma*. The question of the most appropriate remedy is dealt with as a substantive issue.⁶ Thus, Canadian Courts will consider whether a proprietary or a personal remedy is the more appropriate. But there is no reason why other matters should not be addressed, such as whether a gain-based or loss-based remedy is the most suitable form of relief.⁷ Essentially, with the divide between law and equity diffused, the question whether a remedy is legal or equitable need never arise.

³ Laycock, "The Death of the Irreparable Injury Rule" (1990) 103 Harv. LR 688, 693.

⁴ Maxton, "Equity and the Law of Civil Wrongs" in Rishworth, P (ed) *Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon*, (1977) 101.

⁵ *Supra* note 1, at 33.

⁶ See *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

⁷ See also the decisions of the High Court of Australia: *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 100, 111; and *Baltic Shipping Co v Dillon* ("The Mikhail Lermontov") (1993) 176 CLR 344, 376.

By far the most forceful exponent of the appropriateness of remedy approach is Hammond J, and it is appropriate to pay a tribute to his extensive research, scholarship and writings on the subject.⁸ Advocating that what is required in principle is that the courts have at their disposal a suitable range of declaratory, preventive, coercive, compensatory and restitutionary remedies, Hammond J contends that the apparent breadth of choice available at present is not, by the time the law gets to work on the problem, a full choice at all. As with other commentators, he affirms that the reason is historical. Judicial remedies in both private and public law did not develop systematically, they “just grew”. He follows Corbin, who half a century ago suggested that “[the remedial] decree of the court should be moulded to suit the facts of each case as justice may require”.⁹ So it is that Hammond J asks: “If we were drawing up a remedies scheme *de novo*, would we not include a ‘basket’ of all the potential modes of relief, and leave it to a court to select that which is most appropriate in a given case?”¹⁰

II. OF RIGHTS AND REMEDIES

For the purpose of this article, other than to clarify one point, I do not need to enter upon the elaborate debate as to the nature of “rights” and “remedies” and the relationship between them.¹¹

One school of thought holds to what is sometimes called the “monastic” view.¹² Rights and remedies are perceived to be entirely congruent. Remedies merely serve to implement substantive rights so that the right must dictate the remedy. In essence, the remedy is not separate and apart from the right. Thus, for example, there is no such thing as a “right to reputation” in the abstract, but rather a right to a particular remedy in the event that a person’s reputation is unjustifiably besmirched.¹³

⁸ See the articles and cases listed below. See also *Crump v Wala* [1994] 2 NZLR 331, 343 and *Tabley Estates Ltd v Hamilton City Council* [1996] 1 NZLR 159, 162-163.

⁹ Corbin, *A L Contracts* (1950) sec 613, 458.

¹⁰ Hammond, “Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies” in Berryman, J (ed), *Remedies: Issues and Perspectives* (1991) 92-93.

¹¹ See the full discussion in Hammond, “The Place of Damages in the Scheme of Remedies” in Finn, P D (ed) *Essays on Damages* (1992) 197, 199; and Ken Cooper-Stephenson, “Principle and Pragmatism in the Law of Remedies” in *Remedies: Issues and Perspectives* (1991) 1.

¹² Hammond, *supra* note 11, at 197.

¹³ Hammond, *supra* note 10, at 90-91.

The second school of thought is labelled “dualistic”. Rights and remedies are perceived as being wholly different and discrete. A distinction is drawn between an independent and antecedent right and the remedy which the court may then order for a breach of that right. Rights occupy “the world of the ideal” while remedies provide “relief in the world of the practical”.¹⁴ The function of the remedy is to realise a legal norm and make it a “living truth”.¹⁵ In the result, the court is seen to be engaged in very distinct exercises when it adjudicates a right and when it fashions a remedy.¹⁶

The third view adopts a middle ground rejecting the complete bifurcation of rights and remedies. They are seen as being integrated. Rights are not sharply separable from remedies. Gewirtz, in advancing this view, has suggested that there is a permeable wall between rights and remedies. The prospect of “actualising” rights through a remedy makes it inevitable that thoughts of remedy will affect thoughts of right, and “that judges’ minds will shuttle back and forth between right and remedy”.¹⁷

The point I wish to clarify is that the appropriateness of remedies approach necessarily requires acceptance of the dualistic analysis. A remedial regime which enables the court to select any one or more of the full range of remedies known to the law presupposes that the question whether there is a breach of a right, that is, the commission of a wrong, may be resolved antecedently and independently of the question of the appropriate relief. The middle way, as alluring as it is in its self-defined moderation, is simply to be seen as a descriptive perception of what presently happens in practice. Judges’ minds do at times “shuttle back and forth between right and remedy”, the right prescribing the remedy and the remedy shaping the right. But this phenomenon is not intrinsic to the law or the practice of the law. It reflects, in large part, the fact that the law of remedies is still in a state of disorder, bearing the imprint of the nineteenth century procedural writs and the historical division between the common law and equity. Hampered by the final vestiges of these ancient forms of action and this jurisdictional divide, and striving, as they will, to do justice in the individual case, judges are necessarily prone to shape the right - or cause of action to which it gives rise - having regard to the remedy which is available. The more flexible remedies available in equity, for example, have resulted in equitable rights or

¹⁴ Fiss, “The Forms of Justice” (1979) 93 Harv L Rev 58, quoted in Gewirtz, “Remedies and Resistance” (1983) 92 Yale LJ 587.

¹⁵ Gewirtz, *supra* note 14, at 587. And see Cooper-Stephenson, *supra* note 11, at 2.

¹⁶ *Ibid.*, 6.

¹⁷ Gewirtz, *supra* n 14, at 678-679. And see Cooper-Stephenson, *ibid.*

causes of action being utilised to fill in the gaps or deficiencies in the common law.¹⁸

By far the most striking example of this phenomenon is the development of the fiduciary concept beyond what many jurists and commentators see as its proper boundaries in order to ensure that the remedy of a constructive trust is available to do justice in the particular case.¹⁹ The exercise is innately artificial. Separating remedies from rights, and making available a full range of remedies to enforce any obligation or rectify any wrong, frees the law of the covert mental gymnastics required in shifting back and forth between right and remedy and, in particular, allowing the availability or non-availability of a remedy to infect the definition of a right - or cause of action. In other words, the definition of the right - or cause of action - need not be distorted by furtive regard to the remedy which is perceived to be desirable and just in the particular circumstances of the case.

Accepting the bifurcation of rights and remedies for the purpose of adopting the appropriateness of remedies approach does not pose an obstacle for me simply because the arguments in favour of that division seem unanswerable. In a persuasive article, Hammond J has proffered a number of reasons, and makes an overwhelmingly strong case, for preferring the dualistic view.²⁰ I do not propose to repeat the arguments he marshals in support of that view. Suffice to say, the persistent objections to the distinction between rights and remedies seem antiquarian today. Both the language and practice of the law involve the invocation of antecedent rights possessing an independent meaning extending beyond the law - and litigation - and divorced from the question of enforcement. In my view, there can be no plausible challenge to the development of a more flexible law of remedies based on the bifurcation of rights and remedies.

III. THE FACTORS CONTRIBUTING TO A MORE FLEXIBLE APPROACH

A number of factors make progress towards a more flexible law of remedies seemingly inexorable. The first and foremost factor is the merging or intermingling of law and equity. This coalition renders separate remedial regimes illogical. Other trends point in the same direction. In New Zealand the courts have been prominent in adopting a substantive interest-based approach in which the substance of duties or obligations is given preference over their conceptual origins. The same substantive approach is evident in

¹⁸ Thomas, "An Affirmation of the Fiduciary Principle" (1996) NZLJ 405.

¹⁹ *Ibid*, 407.

²⁰ Hammond, *supra* note 11, at 197-198.

the proposal to disregard historical and jurisdictional doctrines and select the most appropriate remedy in the circumstances of the case to redress the particular wrong. The noticeable break-down of the traditional hierarchy of remedies under which compensatory relief enjoyed primacy facilitates the appropriateness of remedy approach. No particular remedy or kind of remedy has an intrinsic weighting in its favour. Finally, the gradual progression of the civil law of wrongs towards an integrated law of obligations requires mention. Such a move must necessarily be accompanied by an integrated set of legal remedies for a breach of any such obligation. I shall deal with each of these factors in turn.

1. The intermingling of law and equity

The Judicature Acts made possible the merging or intermingling of law and equity. With jurisdictional and procedural requirements assimilated, the two discrete bodies of law were prone to become a single coherent body of law. Maitland confidently predicted that the historical links would diminish with the passing of the years.²¹ But, as Professor Maxton has observed, the historical bond has proved to be remarkably durable.²² Lord Simon suggested in *United Scientific Holdings Ltd v Burnley Borough Council*²³ that the central reason for this durability was “that lawyers, trained in systems which look to precedent and thus foster conservatism, tended to minimise the change which had been made”. I suspect that the learned Law Lord was right. Practising lawyers seem to have a deep and abiding respect for Ashburner’s famous – or infamous – fluvial metaphor; “The two streams of jurisdiction [law and equity], though they run in the same channel, run side by side and do not mingle their waters”.²⁴

Yet, judicial indications to the contrary have been evident for many years. In 1977 Lord Diplock made so bold as to say; “the waters of the confluent streams of law and equity have surely mingled now”.²⁵ The same attitude is to be found in the decision of the New Zealand Court of Appeal in *Coleman*

²¹ Maitland, *F W Equity* (Revised, J W Brunyate, 1936) 20.

²² *Supra* note 4, at 92. For a full exposition of the effects of the intermingling of common law and equity, see Maxton, “Some Effects of the Intermingling of Common Law and Equity” (1993) 5 *Cant LR* 299-302. The New Zealand approach did not find universal favour in Australia; see *G R Mailman and Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 *NSWLR* 80, 99, per Meagher J.

²³ (1977) 2 *All ER* 62, 84.

²⁴ Ashburner, *N Principles of Equity* (1902) 23, quoted in Maxton, *supra* note 4, at 93.

²⁵ *Supra* note 23, at 68. And see Lord Simon’s observation at 84.

*v Myers*²⁶ of that year. The appellants pleaded negligence, breach of fiduciary duty, and fraud against the respondent. Restitution was the primary objective, but damages were sought in the alternative. On the cause of action for negligence only damages could be awarded. Rescission, and with it restitution, was available for breach of fiduciary duty and fraud. Although the respondents resisted rescission and sought to minimise damages, they did not argue that monetary compensation or damages could not be awarded for breach of fiduciary duty. Cooke J (as he then was) observed that, since the fusion of common law and equity, any argument to the contrary would be an unattractive technicality.²⁷ But, as no such argument was advanced by counsel, the point did not need to be taken further. Inevitably, of course, the point was taken further. In *Hayward v Giordani*²⁸ the same judge opined that the law of unjust enrichment, as well as the principles of equity, had not ceased developing and that the function of the courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, and not to frustrate them.

The theme gathered force in *Van Camp Chocolates Ltd v Aulesbrooks Ltd*.²⁹ In that case it was alleged that the defendants improperly used commercial information. Reverting to its perceived historical genesis, counsel argued that the Court did not have jurisdiction to award damages for past breaches of the obligation of confidence. In rejecting the argument, Cooke J responded that it should not matter whether the award is described as damages for tort or equitable compensation for breach of duty.

Cooke P took the opportunity to advance the cause in *Day v Mead*.³⁰ Both negligence and breach of fiduciary duty were alleged against a solicitor. The trial judge had found that there had been a breach of fiduciary duty and this finding raised the question whether contributory negligence applied to such a breach. Cooke P held that the courts were not restricted to the remedies of injunction or account, neither of which would meet the circumstances of the case. In the style of Lord Denning, Cooke P cited his earlier dicta in *Coleman v Myers* and *Van Camp Chocolates Ltd v Aulesbrooks Ltd*, and stated that the Court had accepted that, independently of Lord Cairns' Act, damages or equitable compensation can be awarded for past breaches of a duty deriving historically from equity.³¹

²⁶ [1977] 2 NZLR 225, 298.

²⁷ At 359.

²⁸ [1983] NZLR 140, 148.

²⁹ [1984] 1 NZLR 354.

³⁰ [1987] 2 NZLR 443.

³¹ At 450.

The New Zealand position was further crystallised with the decision of the Court of Appeal in *Aquaculture Corporation v New Zealand Green Mussel Co.*³² That case again involved a claim for breach of confidence. The notion that it was open to the court to apply the most appropriate remedy made its overt entrance. The plaintiff claimed that the improper disclosure of confidential information had damaged its commercial prospects. Cooke P was not prepared to let the uncertain historical and jurisdictional origins of the action for breach of confidence prevent the Court from providing a suitable remedy. He said:

For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the partners the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.³³

Finally, reference may be made to the forthright comments of Tipping J in *New Zealand Land Development Co Ltd v Porter*.³⁴ Tipping J argued that there is no longer any value, except for historical purposes, in seeking to distinguish or keep conceptually separate common law damages and damages in equity, whether under Lord Cairns' Act or otherwise. The court, he said, should now award such damages as are a proper and fair reflection of what the plaintiff has lost by reason of the failure of the defendant to perform the contract. It no longer matters whether the damages are called common law or equitable damages. Any residual distinction has now gone and perhaps serves more to confuse than to assist. Let us, the learned judge enjoined, carry the fusion of law and equity into the area of damages.³⁵

These cases, beginning with no more than a hint of things to come and developing into explicit recognition of the view that a full range of remedies should be available for a wrong, irrespective of whether the wrong lay in common law, equity or statute,³⁶ provided the foundation for the remarkable

³² [1990] 3 NZLR 299.

³³ At 301.

³⁴ [1992] 2 NZLR 462, 468.

³⁵ Further judicial approval of the principle was forthcoming from Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68, 96.

³⁶ The focus of this article has been on common law and equitable wrongs, not statutory-based wrongs. Consistently, however, the same principle should apply whenever the statute vests the courts with a latitude in the choice of a remedy. Thus, the judgments of the minority (Richardson P and Tipping J) are to be preferred to the judgment of the majority (Gault, Henry and Blanchard JJ) in *Cox & Coxon Ltd v Leipst & Anor*

projection of that view pursued by Hammond J to which I have already alluded. With the objective of bringing about a sea-change in remedial law he has arrayed an armada of arguments, the most judicially comprehensive of which is to be found in *Butler v Countrywide Finance Ltd.*³⁷ No judge has appreciated more avidly and expressed more articulately than him that the choice of remedies for civil wrongs has become historical and dysfunctional.

However, to focus solely on developments in New Zealand, and ignore the progress made in Canada, would be incomplete. Canadian Courts have displayed meagre respect for the niceties of legal history. As already intimated, the need for remedial flexibility has been particularly evident in the development of the cause of action in unjust enrichment. Dickson J said in *Pettkus v Becker*³⁸ that it would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. The great advantage of ancient principles of equity is their flexibility. The judiciary, he said, is able to shape these malleable principles so as to accommodate the changing needs and mores of society in order to achieve justice.

McLachlin J pursued this theme in an extra-judicial article. She observed that judges are no longer content to apply the rules and, Pontius Pilate-like, wash their hands of the result. Judges, she said, rather want to do justice. She quoted Lord Denning in *Re Vandervell's Trusts (No. 2)*,³⁹ to the effect that every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law. Increasingly, therefore, McLachlin J concluded, the Canadian Courts are realising that it is not enough to focus merely on equitable principles;

24 November 1998, CA 59/98. The majority held that damages for loss of bargain or future profits for a breach of s 9 of the Fair Trading Act 1986 were totally precluded on the basis that such losses flowed, not from the conduct which was wrongful under the Act, but from failure to implement a promise. Damages were calculated by analogy to tort. The minority opted for a flexible approach to remedies for a breach of the Act, rejecting the importation of notions of contract or tort for the purpose of assessing compensation. Preferring a new approach untrammelled by historical causes of action, the minority considered that damages for loss of profits should be available if on the facts of the particular case such damages represented the real loss of the innocent party. In the particular case the real loss of the appellant justified such a basis of assessment because of the promissory nature of the misrepresentation in issue.

³⁷ [1993] 3 NZLR 623.

³⁸ (1980) 117 DLR (3d) 257, at 273; see also *Powell v Thompson* [1991] 1 NZLR 597.

³⁹ (1974) Ch 269, 322.

they “must also work toward reconciling equity with the common law to create a single, coherent doctrine of civil remedies”.⁴⁰ The logic of this reconciliation is plain to see if only because the divide between law and equity was always inherently irrational.

The divide is all the more irrational to the extent that it provides duplicating or closely parallel remedies. Professor Burrows paused in the course of his admirable text to point out that, while it is essentially true that only equitable remedies are available for equitable wrongs, it is also true that the same or similar functions are performed by remedies in tort and contract.⁴¹ In respect of proprietary estoppel, for example, the primary remedies are orders to convey land and declarations of right over another’s land, and these correspond to the contractual remedies of specific performance and declaration respectively. In other cases, monetary awards corresponding to compensatory damages have been secured for a plaintiff by way of, for example, an equitable lien or a conditional possession order. Burrows goes so far as to say that, if proprietary estoppel were to be treated as a breach of contract giving rise to solely contractual remedies, the range of remedial functions would barely differ. For breach of fiduciary duty, of which the prime example is breach of trust, the main remedies are accounting for loss (otherwise referred to as equitable compensation), the prohibitory injunction and an account of profits. The first of these corresponds, he suggests, directly to compensatory damages, while the last two are also remedies for torts, albeit that an account of profits and other restitutionary remedies are yet only available in relation to certain torts. Again, Burrows asserts, no wide gulf exists between judicial remedies awarded for torts and those for breach of fiduciary duty, so that to treat breach of fiduciary duty as a tort giving rise to purely tortious remedies would produce little change in the range of remedial functions.

While I incline to think that Professor Burrows may have overstated his point, closely parallel remedies of this kind are self-evidently confusing and an impediment to the development of a single, coherent doctrine of civil remedies. Equitable obligations will necessarily overlap with other heads of liability. Indeed, in practice it is frequently difficult to determine whether a fact situation should be governed by the law of contract, the law of tort, or the law of trusts.⁴² The intermingling of law and equity virtually guarantees

⁴⁰ McLachlin, “Fairness and the Common Law: Using Equity to Achieve Justice” in Saunders, Cheryl (ed) *Courts of Final Jurisdiction: the Mason Court in Australia* (1996) 137.

⁴¹ Burrows, Andrew *Remedies for Torts and Breach of Contract* (2nd ed, 1994) 9-10.

⁴² Thomas, *supra* note 18, at 405.

overlapping liability and is a situation which equity has long accepted. Moreover, concurrent liability is now accepted in contract and tort.⁴³ With such overlapping and concurrent liability, the need for a single rational system of remedies to avoid remedial discrepancies and anomalies is readily apparent.

2. The substantive interest-based approach

As befits a jurisdiction which has been to the forefront in endorsing and giving substance to the fusion of law and equity, the New Zealand Courts have also been prominent in emphasising the substance of the plaintiffs' claimed interest in preference to a formalistic and historical analysis. This has been called the substantive interest-based approach.⁴⁴ The substance of the duties or obligations is given preference over their conceptual origins.

The substantive interest-based approach is nowhere more clearly articulated than in the judgments of Cooke P and Tipping J in *Lockwood Buildings Ltd v Trustbank Canterbury Ltd*.⁴⁵ The learned judges indicate that the substance of the right claimed by a plaintiff is where the cause of action is to be found and then accurately articulated, rather than in the historical formulation of the cause of action which often brings with it unhelpful baggage.⁴⁶ Cooke P commented that, at the present day, the historical derivation of the cause of action is less important than an identification of the substance of the right. Tipping J added that the assimilation of trespass and case, which he favoured in that case, accorded with the modern practice which is to look more at substance than at form. The learned Judge revisited the issue in *Bank of New Zealand v New Zealand Guardian Trust Company*:

Historically the law has tended to place emphasis on the classification of the relationship giving rise to the obligation. But more recently, for certain purposes at least, there has been a shift of emphasis from the classification to the nature of the obligation, or duty, as it is usually called. Thus the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the particular classification or historical source of that duty. What matters is not so much the historical source, be it equity or the common law,

⁴³ *Henderson v Merrett Syndicates Ltd* (1995) 2 AC 145; and see *Rowlands v Collow* [1992] 1 NZLR 178, 190-193; and *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 74.

⁴⁴ Goddard and Rickett, *supra* n 1, at 33.

⁴⁵ [1995] 1 NZLR 22, at p 26 and p 34 respectively.

⁴⁶ See also Maxton, "Intermingling of Common Law and Equity" in Cope, M (ed) *Equity: Issues and Trends* (1995) at 25.

fiduciary duty or tort, but rather the nature and content of the obligation which has not been fulfilled. For example, duties of care are owed both in equity and at common law. But as a matter of policy it will not usually be appropriate, if the nature and content of the duty are the same, to have different approaches to causation and remoteness, according to its historical source.⁴⁷

The same approach is evident in England in the insightful contributions of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd*,⁴⁸ *White v Jones*⁴⁹ and *Target Holdings Ltd v Redferns*.⁵⁰ In the first two cases Lord Browne-Wilkinson drew attention to the close connection between tortious obligations and equitable obligations. In the last case he identified the remedial similarities between these two heads of liability.⁵¹ The learned Law Lord's observations are perhaps evocative indications that the point has been reached where, certainly in respect of obligations of care which cover the same or very similar conduct, and although developed separately at common law and equity, the substance of those obligations matters more than their particular historical origin.⁵² Under such a regime the focus will be on the real nature of the pre-existing relationship between the parties, the assumption of responsibility by the defendant, the reliance of the plaintiff on the defendant's undertaking, and the detriment suffered by the plaintiff.⁵³

Again, the progress made in Canada cannot be disregarded. The developing approach is well indicated in the judgment of La Forest J in *Hodgkinson v Simms*.⁵⁴ It reveals a desire to:

strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. The courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.⁵⁵

3. *The breakdown of the traditional hierarchy of remedies*

A further factor favouring the acceleration of the appropriateness of remedy approach is the gradual but inexorable break-down of the traditional

⁴⁷ [1999] 1 NZLR 664.

⁴⁸ Supra note 43.

⁴⁹ (1995) 1 All ER 691.

⁵⁰ (1995) 3 All ER 785.

⁵¹ See Thomas, supra note 18, at 408.

⁵² And see *Downsview Nominees Ltd v First City Corporation Ltd* (1993) 2 WLR 86.

⁵³ See *Rowlands v Collow*, supra note 43, at 183.

⁵⁴ [1994] 3 SCR 377. See also *Canson Enterprises Ltd v Broughton* (1991) 85 DLR (4th) 129.

⁵⁵ *Hodgkinson v Simms*, ibid, at 444.

hierarchy of remedies. Historically, the range of remedies available has been distinctly ordered. Compensatory relief has enjoyed primacy. Specific relief is theoretically available only if damages to compensate for the wrong are inadequate. Declaratory relief tends to follow where other forms of relief are, for one reason or another, not available.

This hierarchy of remedies has meant that, at least *prima facie*, legal remedies have been regarded as primary and equitable remedies as secondary. Equity advanced to remedy the gaps and deficiencies in the common law and equitable relief was predicated on the inadequacy of legal remedies.⁵⁶ Admittedly, the inflexibility of this hierarchical order has been mitigated by the readiness of the courts to hold that the legal remedy is inadequate.⁵⁷ But this hierarchical approach is logically unsound. There is no good reason why the availability of one remedy should depend on the inadequacy of another remedy. Irrespective of the apparent adequacy of another remedy, the preferred remedy should be that remedy which in all the circumstances is the most appropriate. Indeed, however fully compensatory damages may be, damages remain a substitution for more specific or performance-based relief. Damages are only fully adequate if the injured party can use them to replace the specific thing that he or she has lost.⁵⁸ Moreover, as a rule it is more likely that the injured party will, if at all possible, prefer the implementation of his or her rights to obtaining a replacement for that implementation. If anything, the hierarchy should be inverted and specific relief should be treated as being the primary form of relief.⁵⁹ The essential point, however, is that there is no sound reason or justification for retaining the hierarchical approach to remedies.⁶⁰

In his usual vigorous style, Professor Birks has described this primacy as the “false monopoly of compensation”.⁶¹ In large part he attributes the subterranean persistence of the dogma that all non-compensatory awards for civil wrong somehow offend the nature of private law to the views of the House of Lords in *Rookes v Barnard*,⁶² affirmed in *Cassell & Co v*

⁵⁶ Thomas, *supra* note 18, at 407-408. See also Cane, “Retribution, Proportionality, and Moral Luck in Tort Law” in Cane, P and Stapleton, J (eds) *The Law of Obligations* (1998) 161.

⁵⁷ Laycock, *supra* note 3, at 693.

⁵⁸ *Ibid*, 703.

⁵⁹ Tilbury, *supra* note 2, at 13.

⁶⁰ *Ibid*, 13-14.

⁶¹ Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 WALR 52-54.

⁶² (1964) AC 1129.

Broome.⁶³ Although concerned with punitive damages, the underlying notion which emerged from these decisions was that in the law of civil wrongs the plaintiff's loss is the proper measure of damages and that anything outside that measure is somehow anomalous. Although immune to some of the criticisms of punitive damages, gain-based awards fall foul of this notion. As Birks comments, this interpretation deprives the law of its normativity and abdicates to the criminal law all the business of deterrence and retribution.⁶⁴

Birks rightly concludes that it cannot be right to portray a restriction to compensation for loss as other than a choice which some systems happen to prefer. He endorses the thrust of Lord Wilberforce's dissenting judgment in *Cassell & Co v Broome* to the effect that legal systems do with the law of civil wrongs and remedies whatever seems to them to be useful and wise. Birks takes heart from the report of the Law Commission (Eng) Report, *Aggravated, Exemplary, and Restitutionary Damages*,⁶⁵ which supports the practice of gain-based awards, that is, restitutionary damages.⁶⁶ In all, there should be no reluctance to abandon the notion that the law of remedies is anomalous whenever it permits a remedy which is not compensation for loss. Compensatory relief must necessarily lose its "false monopoly".

4. *The emerging law of obligations*

It would be a serious oversight to ignore the evolution, glacial in speed though it may be, which is taking place in the law towards an integrated law of obligations in which we will speak of the essential obligation rather than a duty in tort, contract, or equity. The evolution is evident in the court's acceptance of the intermingling of law and equity for it cannot but lead to an appreciation, as suggested by the doyen of trust lawyers, Professor Donovan Waters, that there is little or no value to be gained in duplicating obligations.⁶⁷ No firm lines of demarcation between the tortious, contractual,

⁶³ (1972) AC 1027.

⁶⁴ *Supra* note 61, at 52. Note, however, that notwithstanding that *Rookes v Barnard* never obtained acceptance in New Zealand, the contraction of the function or role of punitive damages is implicit in the decision of the majority in *Daniels v Thompson* [1998] 3 NZLR 22. But the multi-functional role of civil remedies is too soundly based in legal theory to be irreparably harmed.

⁶⁵ Report No. 247 (London: HMSO, 1997).

⁶⁶ See Jaffey, "The Law Commission Report on Aggravated, Exemplary, and Restitutionary Damages" (1998) 61 MLR 860.

⁶⁷ Waters, "The Nature of the Remedial Constructive Trust" in Birks, P B H (ed) *Frontiers of Liability* (1994) vol 1, 175.

fiduciary or equitable obligations are required. The court's willingness to extend equitable concepts to foreclose perceived inadequacies in the law, to do justice in the instant case and meet the reasonable expectations of the community, is indicative of this underlying progression towards a broadly based law of obligations.⁶⁸ It is also evident in the substantive interest-based approach touched upon above in that the recognition of the substance of the interest allegedly injured must necessarily lead to the substantive expression of the obligation.

The slow progression towards an integrated law of obligations has a symbiotic relationship with the appropriateness of remedy principle. As obligations meld and lose their historical classification, and with it their doctrinal character, it becomes pointless to retain those same historical classifications and doctrinal concepts for the purpose of the law of remedies. As causes of action in tort, contract and equity increasingly overlap and become concurrent, the substantive obligation must emerge and, having emerged, will logically wish to command an open choice of remedies. The futility of developing an integrated obligation hitherto involving, say, causes of action in tort and equity, only to restrict the remedies to those available in, say, tort, is patent.

The symbiotic nature of the development arises from the fact that, once it is accepted that the courts will have at hand a full range of remedies to redress an established wrong, it would be pointless, unless there is some particular reason, to persist with the historical demarcation between the duties in contract, tort and equity. Establishing, for example, that the defendant is only liable in tort or contract will avail the defendant nothing if the court can then impose a traditional equitable remedy as the most appropriate remedy for the injury suffered by the plaintiff.

IV. PROBLEMS LOOM

It would be foolhardy to suggest that the appropriateness of remedy principle will not give rise to problems. Indeed, I consider that, although generally endorsing this approach, commentators on the subject may not have fully confronted the difficult legal issues which will need to be resolved. For myself, I am not daunted by these difficulties. I do not doubt that they are capable of being resolved on a case by case basis with the application of the conventional incremental approach to the development of the law. But they need to be confronted.

⁶⁸ Thomas, *supra* n 18, at 412.

It is not possible, however, to carry out a full review of all the potential difficulties. The objective in an article of this kind must be more modest. I shall therefore essay to do no more than outline the nature and scope of the difficulties which will arise following a more overt adoption of the appropriateness of remedy principle.

The two broad but far-reaching consequences of adopting this principle have already emerged in this article. First, any jurisdictional nexus between the right, or cause of action, and the remedy must be severed. Once the remedial exercise to be undertaken by the court is to ascertain and apply the most suitable remedy, the cause of action can no longer dictate the remedy. The right embraced in the cause of action becomes *sui generis*. Secondly, disparities between the requirements for determining relief at common law and those in equity, in overlapping or collateral causes of action, must be eliminated or reconciled. Requirements embedded in either legal or equitable remedies will not easily yield one to the other and it will not always be clear which should in fact yield to the other. It is, of course, not only the different requirements of the common law and equity which must be reconciled, but also the differing remedial elements of tort and contract.

A number of the particular difficulties which arise under one or other of these broad headings may be highlighted. The first difficulty which springs to mind arises from the fact that legal remedies are available as of right whereas equitable remedies are discretionary. Once liability in common law has been established the legal remedy must be granted, but even though liability has been established in equity the court may decline to grant relief. Consequently, damages of some kind must be awarded for the commission of a tort or for breach of contract where the claim is for damages or the award of an agreed sum. Specific performance or an injunction, on the other hand, can be refused in the court's discretion. Clearly a coherent scheme of remedies for civil wrongs cannot brook this lack of uniformity. Remedies which presently follow a finding on liability as a matter of law will not necessarily be the most appropriate remedy. The approach will not work if, for example, the court is obliged to award damages where there is a commission of a tort or a breach of contract, when that form of relief is not the most suitable form of relief. It is in the nature of the approach that, while some form of relief may be required, the choice of the most appropriate remedy will involve the exercise of a discretion on the part of the judge.

A second area of difficulty which will need to be resolved lies in the form of relief. Relief at common law is generally compensatory while relief in equity tends to be gain-based aimed at stripping the defendant of his or her profits, such as when an account of profits is taken or a constructive trust is imposed.

If the two regimes are to be assimilated for the purpose of selecting the most appropriate remedy, the courts will require a discretion as to whether to grant compensation or decree a gain-based award. For example, as an account of profits would be available for breach of any cause of action, including a breach in tort, there would be no need to treat intellectual property and breach of confidence as discrete areas of the law for which that remedy is available. Wrongdoers who deliberately commit a tortious or any other wrong could be liable to be denuded of their profits. Similarly, in contract, a cynical and manipulative breach of contract might invite a remedy which would strip the contract-breaker of any material gain arising from his or her breach.⁶⁹

It should not be thought that this approach will mean that damage or loss will not need to be proved where proof of damage or loss is an element of liability, as for causes of action in negligence and breach of contract. Rather, it means that, once damage or loss is established, the court can then determine whether compensatory or gain-based relief is the more appropriate and, if the latter, which of the various forms of remedy is the most suitable.

A third area of conflict requiring reconciliation relates to the fact that equitable remedies issue without the requirements of foresight and remoteness which are essential prerequisites for an award of damages at common law. In equity the usual inquiry after a breach is directed to ascertaining whether the loss would have occurred had there been no breach.⁷⁰ In common law, on the other hand, the doctrines of causation and remoteness rule – or rule out – the possibility of relief.⁷¹ A standard or uniform approach would seem imperative where the causes of action overlap or are collateral. In such cases, either the requirements of foresight and remoteness stipulated by the common law or the approach adopted to causation by equity will need to prevail. It would seem that the latter more flexible inquiry would be more appropriate to the flexibility inherent in an appropriateness of remedy regime.

Each of the above areas of difficulty imports a discretionary element in the reconciliation of the difficulty. But I do not consider that the introduction of this discretionary element will result in remedial chaos. As Professor Maxton has observed, in most cases the established remedies for wrongs will continue to be the most appropriate remedy in terms of justice and policy, and there are reasons to be confident that the evolving law of remedies will

⁶⁹ See McLachlin, *supra* note 40, at 125.

⁷⁰ *Brickenden v London Loan & Springs Co* [1934] DLR 465.

⁷¹ Maxton, *supra* note 4, at 102-103; and *supra* note 22, at 307-308.

prove workable.⁷² It will prove workable, in my view, because it will develop and be applied in accordance with principles which will evolve from particular cases. I will return to these principles in due course.

The extent to which the appropriateness of remedy principle would make the different remedial requirements in contract, tort and equity redundant in practice is probably only dimly perceived at present. Under the law of contract, for example, damages are generally compensatory, measuring the plaintiff's loss on the basis of expectancy. Damages are calculated on a restorative basis in tort. Indeed, restitutionary remedies are at times available. Then, requirements of compensatory damages such as remoteness, contributory negligence, and some kinds of loss such as damages for mental distress and loss of reputation, are treated differently in contract and tort. Exemplary damages can be awarded for certain torts but not for contract.⁷³ Differences then exist between remedies in tort and contract and in equity. In equity the duty arising under a trust has been considered so sacred and the difficulty of detecting a breach so difficult that equity has been generous in the remedies offered. Rules relating to reasonable expectation of profit, foreseeability and duty to mitigate loss generally do not apply.⁷⁴

The appropriateness of remedy principle will render many of these distinctions otiose when, liability having been established, the judge can select the most appropriate remedy available in contract, tort or equity, irrespective of the basis of liability. But the changes which will be required to the substantive law need not generate a daunting fear. Such changes will occur incrementally on a case by case basis. Nor, when regard is had to underlying principle, will the changes be able to be categorised as fundamental. Lord Browne-Wilkinson captured this point in his speech in *Target Holdings Ltd v Redferns*.⁷⁵ Having referred to the two principles which he saw as fundamental to an award of compensatory damages at common law, that is, that the defendant's wrongful act must cause the damage claimed and that the plaintiff is to be placed in the same position as he would have been if he had not sustained the wrong, his Lordship continued:

⁷² Ibid, supra note 4, at 101.

⁷³ Burrows, supra note 41, at 6. But see *Tak & Co v AEL Corporation* (1995) 5 NZBLC, 103,887, and *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ Conv C 192,398.

⁷⁴ McLachlin, supra note 40, at 125.

⁷⁵ Supra note 50.

Although, ... in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.⁷⁶

An incidental, but certain, casualty of the application of the appropriateness of remedy principle will be the notion of the so-called "efficient breach". Loosely stated, the proponents of an economic analysis of law suggest that a contracting party is entitled to breach his or her contractual promise and so become liable for damages if it is in his or her economic interest to do so. The notion emanates from a commitment to the view that resources should be directed to their most efficient use, and that the calculated utilisation of the "efficient breach" promotes this objective. Necessarily embedded in the idea is a clear preference for protecting expectancy loss for it is only that basis which makes it at all possible, if indeed it is possible, for the cynical contract-breaker to assess the economic advantage which would result from a breach. Not knowing what remedy will eventuate or, more particularly, not knowing whether the measure of relief will be the expectancy loss or the defendant's enrichment resulting from the deliberate breach where damages are selected as the appropriate remedy, must prove an effective impediment to the operation of this essentially mercenary concept.

I am unable to bring myself to regret the demise of the notion of the "efficient breach". It is not a concept that has obtained judicial backing or significant academic support. Indeed, it has been roundly criticised on a number of different grounds. These grounds need not be traversed at length in this article. But it is readily apparent that the notion of an efficient breach undermines the principle of the sanctity of contract and subverts the very certainty in commercial relations which that principle is expected to provide. As Professor Gareth Jones has observed, it would frustrate the natural and reasonable commercial expectations of contracting parties.⁷⁷ Jones correctly observes that the notion of the efficient breach assumes that the innocent party can always discharge the burden of proving his or her precise loss

⁷⁶ At 792.

⁷⁷ Jones, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 LQR 454.

when every student of the law knows that this is not invariably the case. It also ignores the transaction costs imposed on the innocent party as a result of the breach, such as the costs incurred in attempting to resolve the contractual dispute or mitigate the loss.⁷⁸

For my part, Buckland's famous aphorism, "one does not buy a right to damages, one buys a horse", sums it up.⁷⁹ The efficient breach argument discounts the fact that the promisor has failed to do what he or she promised to do, that the promisee paid for that promise and, to add insult to injury, that the promisor then profited from his or her breach.⁸⁰ I therefore unashamedly ally myself with those who believe that promises are made to be kept. It is inconsistent with the fundamental nature of the contractual bargain not to recognise that it was open to the promisee to have made a different bargain for a different consideration if the promisor had not made the promise in issue. Logic, apart from considerations of morality, demands that the promisor not be permitted to renege on that promise for his or her own economic advantage. In short, the likely demise of this basically *ersatz* concept should not deter the courts from advancing a more flexible law of remedies.

V. UNCERTAINTY, CONCEPTUALISM AND PRINCIPLES

The notion that the law can proceed on the basis of the complete identification of the wrong, leaving the remedial response in the discretion of the courts, will be inimical to many lawyers and judges. Academics, in particular, will resent and resist the apparent expansion of judicial discretion.⁸¹ Lack of coherence and certainty will be the feared consequences of such a flexible regime.

The validity of these incipient fears must be questioned. How sensible is it to speak of lack of coherence when it is the very lack of coherence in the law of remedies at the present time which inspires the proposed reform? And how much more uncertainty will be introduced than exists at present? In doubting that the benefits of the perceived consistency in the law of remedies are overwhelmingly strong, Hammond J has pointedly asked, "In the end, can remedies law ever be anything but discretionary?"⁸² The critical point which

⁷⁸ Ibid. See also Hammond, *supra* note 9, at 104.

⁷⁹ Buckland, "The Nature of Contractual Obligations" (1944) 8 CLJ 247.

⁸⁰ Jones, *supra* note 77.

⁸¹ See Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 WALR 39.

⁸² Hammond, *supra* note 11, at 228.

I would add is that much of the uncertainty which presently besets liability would be removed. As indicated above, the substantive interest-based approach would be facilitated. For example, counsels' doubts as to whether the trial judge can be restricted to finding that there was no breach of contract or, having made that finding, will go further and find a breach of a fiduciary duty, will become superfluous as the courts focus on the substance of the interest in determining liability.

The leading opponent of the appropriateness of remedy regime is undoubtedly Professor Birks.⁸³ His enmity is evidenced in his response to Professor Davies' discussion of the *Lac Minerals* case.⁸⁴ Professor Davies considered that there is much to be said for the majority view in that case that, if a ground of liability is established, the remedy which then follows should be the one which is most appropriate on the facts of the case rather than one derived from history or over-categorisation. He said that, while considerable certainty is undeniably to be required in establishing an initial liability, "predictability of remedy need not be accorded so high a priority".⁸⁵ To Professor Birks this view seems a "dangerous doctrine".⁸⁶ Bearing in mind that on different facts the different responses may have wildly different values, it is not clear on what principles a court could possibly choose between them. Choice, if there is to be one, he insists, should be regulated, not by the court in its discretion, but according to settled rules.⁸⁷ If the matter is to be left open, the choice would be better left with the plaintiff than with the judge. He holds that the law is not intellectually respectable if, even at the level of remedies, it takes refuge in an inscrutable case to case empiricism.⁸⁸

Professor Davies' thinking is the more acceptable. Greater certainty is undoubtedly required in establishing liability; and the predictability of remedy, presently more illusory than real in any event, can take second place to achieving that greater certainty in establishing liability. Case by case empiricism can proceed in accordance, not with settled rules as Birks would have it, but with principles which the courts will undoubtedly develop.

⁸³ Birks, "The Remedies for Abuse of Confidential Information" (1990) 4 LMCLQ 463-465.

⁸⁴ Davies, "Duties of Confidence and Loyalty" (1990) 4 LMCLQ 5.

⁸⁵ Ibid.

⁸⁶ Birks, *supra* note 81, 39.

⁸⁷ Ibid.

⁸⁸ Birks, *supra* note 83, at 465.

Nonetheless, fear of disarray in the law of remedies will continue to inspire a number of commentators to urge that the appropriateness of remedies principle should advance within a more structured conceptual framework. For the most part, conceptualism in the law is not to be frowned upon, but it must be appreciated that in this area the precipitate or excessive introduction of conceptualism will frustrate the objective or essence of the proposed regime. The flexibility which is required will at once become cramped. As Davies has said: “There is no need to pass the facts through further conceptual hoops before a particular remedy is selected”.⁸⁹ What is required is not so much conceptualism as the development of a set of principles which will guide the courts in the exercise of determining the appropriate remedy.

No one jurist has done more to articulate the principles which could guide the court’s choice in selecting the remedy than Hammond J. He has collated and discussed these principles in two articles.⁹⁰ Admirably, having moved from academia to the bench, he took the opportunity to incorporate the principles in a judgment, *Butler v Countrywide Finance Ltd*.⁹¹

It would be inappropriate in this paper to embark upon a critical examination of the principles or considerations which would be relevant to the courts’ choice. It is better, in my view, that the principles or considerations be left to evolve on a case by case basis. The hard facts of particular cases, and counsel’s industry in identifying the factors which favour his or her client’s interests, will ensure a better progression towards a comprehensive set of valid principles than a deliberate attempt to construct those considerations *in vacuo* and in advance. But a brief reference to the factors identified by Hammond J in his judgment will serve to illustrate how the task of selecting the most appropriate remedy in the circumstances of a particular case can proceed in a principled manner.⁹² At the same time the process will serve the objective of encouraging judges to articulate the real reasons for the remedial choices which they make.⁹³

The first principle which Hammond J identifies is described as “plaintiff autonomy”, that is, that generally speaking a plaintiff should have the “first

⁸⁹ Davies, *supra* note 84, at 5.

⁹⁰ *Supra* note 8.

⁹¹ *Supra* note 8, at 632-633.

⁹² The relevant considerations are ably summarised from Hammond’s article by Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd*, *supra* note 35, at 96.

⁹³ Hon Mr Justice E W Thomas, *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (1993) VUWLR, Monograph 5, 59.

choice” of remedy.⁹⁴ As he or she is the injured party, the plaintiff should be able to select the remedy. This election, however, while it can be expected to receive due judicial deference, must be subject to the ultimate control of the court. Clearly, a plaintiff cannot, by claiming a right to elect the remedy, be permitted to select that form of relief which would result in him or her being over-compensated. But some weighting must be given to the remedy sought by the wronged party.

Secondly, the relative efficiency in economic terms of common law damages as against equity-based performance remedies is a relevant factor. Hammond J refers to the long-running debate on this subject and observes that it is far from conclusive. Nevertheless, the comparable efficiency of the competing remedies, especially damages as against performance-based remedies, is a necessary consideration.⁹⁵

Thirdly, Hammond J refers to the relative severity of the remedy on the parties. Here the learned judge is advertent to the principle of proportionality. It would, for example, be disproportionate to close down a large enterprise when the damage to the plaintiff is limited.⁹⁶ A solution which seeks to avoid disproportionate burdens to either party is to be preferred.

The fourth principle adverted to is the nature of the right being supported by the remedy. Not every “right” has the same strength. Thus, a stronger remedy may be required where the court has a stronger perception of the relevant right. Free speech is cited by Hammond J as an example of a right generally heralded in common law jurisdictions as being a near absolute right. It commands strong responses.⁹⁷

⁹⁴ *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623, 632.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* See *Boomer v Atlantic Cement Company* 26 NY 2d 219 (1970).

⁹⁷ See, eg, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, in which the High Court of Australia held that legislation which amounts to a ban on paid political advertising is invalid being contrary to the right of free expression on matters of political and public affairs implied in the system of representative government provided for in the Constitution. The implication of the implied term is acceptable, but the application of it to the legislation in issue must be highly questionable. See also *Lange v Atkinson & Ors* [1998] 3 NZLR 424 in which the Court of Appeal extended the defence of qualified privilege to statements published about members and would-be members of Parliament, but declined to impose a requirement of reasonable care along the lines adopted by the High Court of Australia in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, and *Lange v*

The fifth principle is a related and possibly duplicating factor, described by Hammond J as the “moral view” to be attached to the interests at stake. Accepting that this is an overtly value-laden question, Hammond J finds the need to have regard to this factor on the need for candour on the part of judges. Again, free speech is proffered as an example, the higher value placed on that interest routinely over-riding the plaintiff’s interest in prior restraint.⁹⁸

Hammond J then lists the effect of a given remedy on a third party or the public as the sixth principle. Reference to this factor acknowledges the general public interest in the determination of a remedy in a private law suit. Proprietary remedies in particular may have repercussions for third parties. But the courts have always been acutely sensitive to the impact of their decisions on persons other than the parties before the court.⁹⁹ Either under this heading, or under a separate heading altogether, I would include policy considerations bearing on the nature of the remedy. In *Daniels v Thompson*,¹⁰⁰ for example, the reasoning in both the majority and minority judgment was based on questions of policy.

Seventhly, difficulties in the calculation of damages on the facts of the particular case may be relevant. While Hammond J acknowledges that the difficulty in calculating the loss *per se* is no bar to compensatory relief and that the court will do the best it can to assess the loss, the level of difficulty may point to a performance-based remedy being preferable. Intractable problems of calculation may thereby be avoided.¹⁰¹

The practicality of enforcement is the eighth principle. Hammond J points out that it is the parties who must live with a performance-based decree. For that reason, and because the courts should avoid being brought into disrepute by attempting to enforce the impossible and, possibly, the very difficult, this point will always be relevant.¹⁰² But it has been pointed out elsewhere that the difficulties perceived by the courts under this heading are generally overstated.¹⁰³ Indeed, the historic tendency of courts to wish to disassociate themselves from supervision or, indeed, any kind of ongoing involvement in

Australian Broadcasting Corporation (1997) 145 ALR 96. The omission of this defence is surely wrong.

⁹⁸ *Supra* note 94, at 633. *TV3 Network Services Ltd v Fahey* (1 December 1998, CA 276).

⁹⁹ *Supra* note 94, at 633.

¹⁰⁰ *Supra* note 64.

¹⁰¹ *Supra* note 94, at 633.

¹⁰² *Ibid.*

¹⁰³ *Tilbury*, *supra* note 2, at 13.

a case, has been a source of irritation to scholars for a long time. As early as 1923, Roscoe Pound referred to the “almost pedantic squeamishness of courts about absolute certainty in all details as a requirement of specific performance of a contract” and to “the *ex post facto* attempts to put reason behind a historical prejudice in case of specific performance of contracts for construction or for continuous performance”.¹⁰⁴ In one of his articles, Hammond J expresses the view that, while it is entirely understandable and practical that they should wish to close a file at the end of a case and hear no more of it, the judges’ attitude begs the question, “when *should* the case end?”¹⁰⁵ I agree that sometimes the best remedy may be an ongoing remedy, but I also agree that it is unlikely the courts will be overly ambitious in the imposition of a remedy which requires a significant element of supervision.

Finally, reference is made to the conduct of the parties. Hammond J observes that the parties’ conduct has always been one of the great cornerstones of equitable relief and that, in a system in which common law and equity now inform each other, the conduct of the parties becomes relevant to a wide range of causes of action and the selection of a remedy.¹⁰⁶

I would not suggest, any more than Hammond J would, that these principles are exhaustive. Rather, they are the kind of considerations which, reinforced by the judges’ intuitive sense of justice, will arise out of the facts of a particular case. Counsel will press the points seen to be to their client’s advantage. Inevitably, by the process so firmly established in the methodology and discipline of the law, factors of this kind will emerge and will be defined and redefined so as eventually to provide a core of principles to which the courts will have regard in exercising their choice. Such principles will enhance rather than inhibit the flexibility which the appropriateness of remedy concept requires.

VI. CONCLUSION

I began by indicating that the appropriateness of remedy principle is not novel. It has been judicially endorsed in this country and in other jurisdictions. The great majority of academic commentators support the concept. In this article I have not sought to side-step the difficulties the implementation of the principle must confront. But they are not insurmountable, and will surely succumb to the dynamic of the law.

¹⁰⁴ Pound, “The Theory of Judicial Decision”, (1923) 36 Harv. LR 649, and see Hammond, *supra* note 11, at 195 and *supra* note 9, at 94.

¹⁰⁵ Hammond, *supra* note 11, at 195-6.

¹⁰⁶ *Supra* note 8, at 633.

The profession, I believe, has a vital role to play. Judges may adjudicate, but it is counsel who initiate the cases which come before the courts and who have the opportunity to identify the issues which require resolution. Generally speaking, counsels' focus at trial is on the question of liability; sadly the question of relief tends to be neglected. Yet, do not counsel have a duty to do the best by their client, and does not that "best" include obtaining the most appropriate remedy to meet the wrong which their client has allegedly suffered? With the groundwork that has been laid, both judicially and academically, I believe that it is incumbent on counsel conscious and alert to their duty to their client, and irrespective of their personal views on the subject, to pursue that remedy which will most appropriately redress the injury which their client has suffered. The impetus for the further development of a more flexible law of remedies will ultimately, I suggest, be founded in lawyers' uncompromising dedication to serve the best interests of their client.

A much more flexible and logical law of remedies will result. Notwithstanding the darkest fears of Professor Birks and others, intellectual respectability will not be lost to a law which will provide a much more coherent set of legal remedies for civil wrongs than is presently the case.

THE LAW OF SUCCESSION TO THE CROWN IN NEW ZEALAND

BY NOEL COX*

I. INTRODUCTION

In recent years there has been some speculation regarding the possibility of changes to the laws governing succession to the Crown.¹ The local news media has tended to regard this as a matter for the British authorities, or as one which can somehow be resolved by non-legal means.² But it is a debate which does raise important issues for New Zealand. The succession laws are not merely rules invented to amuse constitutional lawyers. They are rules which are in certain respects central to the constitution, and are important aspects of New Zealand independence.³

This article will explore three issues. First, it will examine the existing New Zealand succession law. Secondly, it will discuss the ways and means by which this law can be changed. Thirdly, it will discuss in what circumstances the succession ought to be changed.

II. THE NEW ZEALAND SUCCESSION LAW

The Constitution Act 1986 is the only piece of legislation enacted by the New Zealand Parliament which makes any direct reference to the succession law.⁴ Section 5 of the Constitution Act 1986 deals with the demise of the Crown.⁵ Section 5(1) states that:

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- 1 Either to make Prince William the heir to Queen Elizabeth II, rather than his father Charles Prince of Wales, or to repeal the Act of Settlement 1700 (12 & 13 Will III c 2), which excludes Catholics from the Crown. Suggestions have also been made that the eldest child of the Sovereign, irrespective of sex, should succeed.
 - 2 Though this is more a reflection of the absence of in-depth reporting which does not rely on overseas agencies for news stories.
 - 3 Both jurisdictionally and politically.
 - 4 Occasional references to the Sovereign and their successors are, at best, indirect references which give no guidance as to the actual law.
 - 5 The demise of the Crown means the transmission of the Crown from one individual to another, usually, though not implicitly, by death.

[t]he death of the Sovereign shall have the effect of transferring all the powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the Act of Settlement 1700 and any other law which relates to the succession to the Throne, but shall otherwise have no effect in law for any purpose.⁶

Section 5 (2) adds that every reference in any document or instrument to the Sovereign shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign's heirs and successors.⁷

The Imperial Laws Application Act 1988 preserves the Act of Settlement 1700 (Eng)⁸ as part of the laws of New Zealand. But what is the "other law which relates to the succession to the Throne"?⁹ There are two possible sources of law, statute and common law.¹⁰

1. Statute law

Although the common law governing the succession to the Crown would appear to have remained common throughout the Queen's realms,¹¹ the statute law may not have remained so. A germane example of this may be seen in the modern legislation governing regencies.¹²

⁶ The one paragraph uses the terms "Sovereign", "Throne" and "Crown". Although not synonyms, they are commonly used as equivalents.

⁷ The effect of the Demise of the Crown Act 1908 was similar. It was designed to maintain imperial consistency. It excluded the operation of the rule in relation to property held by the Sovereign in a private capacity. Its provisions however were unnecessarily elaborate for a general principle. But the Constitution Act 1986 goes further. If death has no effect in law then the Sovereign in a private as well as a public capacity is immortal in New Zealand.

⁸ 12 & 13 Will III c 2.

⁹ Constitution Act 1986, s 5 (1).

¹⁰ The laws of succession are unlikely to be based on the royal prerogative, or convention, since they are clearly more than mere rules of conduct, however binding, and most probably justiciable. They are also not merely ancillary or residual rights. The royal prerogative is of course a branch of the common law, because it is the decisions of the courts which determine its existence and extent (*Case of proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB)).

¹¹ Although there has been no litigation on this question, it is submitted that there are no circumstances which might create a divergence in the common law of succession. This is particularly so given the importance of the law of succession.

¹² Pre-1840 regencies were generally governed by ad hoc arrangements, although for much of the early eighteenth century Lords Justices were required from time to time because of the Sovereign's absence in Hanover.

Since 1937 the absence, illness or incapacity of the Sovereign has been dealt with in the United Kingdom by the Regency Acts 1937 and 1943 (UK).¹³ As a matter of construction of the law of England, United Kingdom Acts have not extended to New Zealand as part of New Zealand law after 1931, without an express declaration that New Zealand has requested and consented to the enactment.¹⁴

It is highly doubtful if the Regency Acts 1937 and 1943 originally extended to New Zealand despite their subject matter and the failure of New Zealand to adopt the Statute of Westminster 1931 until 1947.¹⁵ But to make the matter clearer, the Royal Powers Act 1983 section 5 negates the application (if any) in New Zealand of the Regency Acts. However, by the Constitution Act 1986 it is provided that:

[W]here, under the law for the time being in force in the United Kingdom, the royal functions are being performed in the name and on behalf of the Sovereign by a Regent, the powers of the Sovereign in right of New Zealand shall be exercised in the name and on behalf of the Sovereign by that Regent.¹⁶

If British statutes enacted after 1931 are ineffective to regulate mere regencies, the effectiveness of any British Act of Parliament to alter the succession to the Crown of New Zealand itself must be doubted.

Be that as it may, if the British regency Acts did not extend to New Zealand, what precisely is meant by the Sovereign's successor as determined "in accordance with the Act of Settlement 1700 and any other law which relates to the succession to the Throne"?¹⁷ Can this include a Sovereign whose title

¹³ 1 Edw VIII & 1 Geo VI c 16, and 6 & 7 Geo VI c 42.

¹⁴ Or in the absence of clear words or necessary implication (*Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd* (1958) 100 CLR 597). A better view is that the Statute of 1931 (22 & 23 Geo V c 4) imposes only a procedural bar, at least as far as the law of England is concerned.

¹⁵ Department of Justice, *Constitutional Reform - Reports of an Officials Committee* (1986) 28.

¹⁶ Constitution Act 1986, s 4 (1).

¹⁷ The consequences of the Act extend beyond the Crown. The prohibition on those "born out of the kingdoms of England, Scotland or Ireland or the dominions thereunto belonging shall be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military" was the subject of some consideration in the *Report of the Justice and Law Reform Committee on the Imperial Laws Application Bill* (1988) Explanatory Material, 58. The authors of the Report believed that membership of the Privy Council was best left uncertain, and

depends solely upon a new, post-1931 (or 1947) Act of Parliament of the United Kingdom? What, if any, have been the consequences for the law of succession to the Crown which have occurred as a consequence of the development of the notion of a divisible Crown, and the evolution of dominion status?

Although the modern notion of a separate sovereignty would see the Crown as potentially divisible in actuality as well as in law, there has not been a division of the sovereignty of the Crown of England since Saxon times, although a separation could arguably have occurred in 1936.¹⁸ Implementing suggested changes to the law in the United Kingdom would produce just such a division, were New Zealand- and every one of the other countries which recognise Elizabeth II as Sovereign, not to follow suit.

2. Common law

It is commonly said that the title to the Crown was governed at common law¹⁹ by the feudal rules of hereditary descent formerly applicable to land.²⁰ They were however subject to the distinctions that the ancient doctrines relating to the exclusion of the half-blood from the inheritance had no application, and that, in the case of females, the title devolved upon the eldest daughter alone and her issue.²¹

that the other matters were not relevant. Yet the practice has been for subjects of Her Majesty overseas to be appointed to British offices as if this were proper. The only solution is that the expression "the dominions thereto belonging" must be interpreted in light of the Statute of Westminster 1931 (22 & 23 Geo V c 4) and be assumed to have been impliedly amended accordingly.

¹⁸ Due to the effect of His Majesty King Edward VIII's Declaration of Abdication Act 1937 (SA).

¹⁹ Lawson, F H and Davies, H J *Halsbury's Laws of England* (4th ed, 1974) vol 8 para 845.

²⁰ This is the substance of the rule as deduced by Sir William Blackstone (see *Commentaries on the Laws of England* (ed E Christian, 1978) 192, 193). The principal authority for the existence of the rule is to be found in the course of descent in the past, and in the fact that, where the rule has been broken, or where any doubt as to the validity of the title has existed, it has usually been found necessary to fortify the title by statute. See 7 Hen IV c 2 (Succession to the Crown) (1405-6); 1 Mar sess 2 c 1 (Legitimacy of the Queen) (1553); 1 Eliz I c 3 (Recognition of the Queen's Title to the Crown) (1558-9); 1 Jac I c 1 (Recognition of the King's Title to the Crown) (1603-4) (all repealed); and the Succession to the Crown Act 1707 (6 Ann c 41).

²¹ Unlike real property inheritance, for example, it is generally accepted that, in the case of female heiresses, the title devolved upon the elder daughter of the king alone, and

In the legal history of those Western societies which have passed through the era known as feudalism, succession to property and succession to thrones are intimately connected. The analogy with land descent is, however, not strictly correct, it is submitted, since the only feature which the title to the Crown had in common with this was primogeniture, and this had been the developing rule in the pre-feudal Saxon dynasty.²² And in the sixteenth century it was established that the Salic law,²³ which excluded female rulers and was long thought fundamental to Western laws of succession, only applied to private law. This caused some dismay in France, though not in England, where the rule had never prevailed.²⁴

The analogy with land presupposed that this developed before the title to the Crown had been settled. In fact the laws developed side by side in the two centuries after the Conquest. As society become more settled in the century after the Conquest, primogeniture came to be the usual form of inheritance. But the Crown did not pass without formal election until Edward II. For practical reasons primogeniture was the most convenient means of conveying the Crown.

By the accession of Richard II, however, influenced by this misleading analogy, the then developed rule of representative primogeniture was applied

her issue, and was not subject to coparcenary. This is stated by Blackstone to be of necessity (he gave no other authority). In the case of land, the title devolved upon all the daughters equally as coparceners (Coke, Sir Edward, *Coke upon Littleton* ("First Institutes") (1979) 135a; Blackstone, *supra* note 20, at 194). See O'Farra, "The Law of the Accession" (1953) 16 Mod LR 140. Queen Elizabeth II succeeded in accordance with Blackstone's rule. Henry VIII provided for the succession of his daughters by statute, but it was therein said that the Crown should pass to females "according to their ages, as the Crown of England has been accustomed, and ought to go in cases where there be heirs female to the same" (25 Hen VIII c 22).

²² See Truax, Jean Ann "The making of the King 1135: Gender, family and custom in the Anglo-Norman succession crisis" (1995) unpublished University of Houston PhD thesis; Le Patourel, "The Norman Succession 996-1135" (1971) 86 *English Historical Review* 225-250; Leyser, "The Anglo-Saxon Succession 1120-1125" (1990) 13 *Proceedings of the Battle Conference on Anglo-Norman Studies* 225-241.

²³ Salic or Salique Law, an ancient law of Pharamond, King of the Franks.

²⁴ In the East, there was an elaborate succession law, but little or nothing on the Crown. This was most irreconcilable, or perhaps most explicable, in Muslim countries, because of the minute fractional division of estates. Natural selection, the triumph of the strong over the weak, prevailed as a means of settling the succession within the ruling family (Maine, Sir Henry Sumner, *Early Law and Custom* (1890) 125-144).

to the Crown.²⁵ But the true political nature of the Crown, and the continuing right of the magnates to regulate the succession to it, was re-asserted, not twenty years later, by the deposition of the king.

It is submitted that, although the law of succession at common law is based on that applicable to real property, it is distinct from it, and has only adopted those principles of descent appropriate to the Crown.²⁶ The succession law was never consciously adopted; it developed, adopting the developing real property law gradually, but always restrained by the political nature of the office.

The principal authority for the existence of the rules is to be found in the course of descent in the past. It is also seen in the fact that, where the rules have been broken, or where any doubt as to the validity of the title has existed, it has usually been found necessary to fortify the title by statute.²⁷

In the absence of statutory limitations, therefore, the Crown would descend lineally to the issue of the reigning Sovereign, males being preferred to females, and subject to the right of primogeniture amongst both males and females of equal degree, whilst children would represent their ancestors *per stirpes ad infinitum*.²⁸ Upon failure of lineal descendants, the Crown would pass under the rule to the nearest collateral relation descended from the blood royal.²⁹

²⁵ Taswell-Langmead, Thomas, *English Constitutional History* (9th ed AL Poole, 1929) 169.

²⁶ Henry Constable stated, incorrectly, that the succession was by the "ordinary course of inheritance in fee simple by lineal descent in blood" (*Discovery of A Counterfected Conference* (1600) 44). Logically, the Crown was an estate in fee, because at common law only an estate in fee was heritable. But inherited land was freely alienable; the Crown never was, though the attempt by Edward VI to devise the Crown may be taken to have implied this.

²⁷ *Halsbury's Laws of England*, supra note 19, vol 1.

²⁸ Blackstone, supra note 20, at 194.

²⁹ There can be no doubt that the ancient doctrine with regard to land, relating to the exclusion of the half-blood from the inheritance, never had any application to the descent of the Crown, and that collaterals were always admitted provided that they could trace their descent from the first monarch purchaser (Blackstone, supra note 20, at 202; *Willion v Berkeley* (1561) 1 Plowd 223, 245; 75 ER 339). It is said also that the maxim *possessio fratris haeredem facit sororem* (possession of an estate by a brother such as would entitle his sister [of the whole blood] to succeed him as heir [to the exclusion of a half-brother]) does not apply to the descent of the Crown, and that,

Today, descent is by primogeniture, the heir succeeding immediately.³⁰ The principle of primogeniture has been abolished with respect to real property,³¹ and remains only in respect of the Crown and dignities.³²

III. POWER TO CHANGE DESCENT OF THE CROWN

The first formulation of the doctrine of the demise of the Crown dates from some time between 25 and 29 September 1399. This doctrine was held to invalidate the parliamentary writs that had been issued by the authority of the former king. The last Parliament of Edward II had become the first of Edward III, and a new Parliament was afterwards called on the demise of the Crown without the issue of writs until 1867.³³ Thereafter there was to be no interregnum on the death of one king, and the succession of the next.

Succession was now direct and automatic. It followed that there was no room for parliamentary intervention. But the common law right of inheritance was always liable to be defeated by parliamentary grant, or by the election of the *Witan* or *Commune Concilium*.³⁴ This parliamentary intervention normally took place when the king's ability to rule (or in some cases his right to rule) was challenged.

The Crown now descends according to the statutory limitations, but retains its hereditary and descendible qualities as at common law, subject to the

therefore, in the absence of lineal issue, the brother of the half-blood may succeed to the sister of the whole blood (see Coke, *supra* note 21, at 15b).

³⁰ As is reflected in the wording of the Accession Council, the lineal descendant of the Anglo-Saxon *Witan* (see the Appendix, Accession Proclamation 1952).

³¹ Administration of Estates Act 1925 (15 & 16 Geo V c 25) (UK); Administration Amendment Act 1944 (NZ).

³² A peerage is an incorporeal and impartible hereditament, inalienable and descendable according to the words of limitation in the grant, if any (*Nevil's Case* (1604) 7 Co Rep 33a; 77 ER 460; *R v Purbeck (Viscount)* (1678) Show Parl Cas 1, 5; 1 ER 1; *Norfolk Earldom Case* [1907] AC 10; *Rhonda's (Viscountess) Claim* [1922] 2 AC 339). If the peerage is a barony by writ, there will, of course, be no words of limitation. In English law, letters patent purporting to create a peerage without including words of limitation will be held to be bad. A peerage is descendable as an estate in fee tail (*Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 ER 942).

³³ Lapsley, "The Parliamentary Title of Henry IV" in Barraclough, Geoffrey and Cam, Helen (eds) *Crown Community and Parliament in the Later Middle Ages* (1951) 273-336, reprinted from (1934) 94 *English Historical Review* 423-49, 336.

³⁴ *Halsbury's Laws of England*, *supra* note 19, at vol 8 para 846.

statutory provisions.³⁵ Title by descent, and title by choice of Parliament, expressed two different views of kingship. This came to the fore under James II, and the solution settled the supremacy of the statutory title. The question as to whether the king could vacate the Throne by his misconduct, as James was held to have done, is not one which can be examined here. So far as the succession was concerned, the immediate solution was a return to the ancient device of election by the magnates, or, as it now was, by Parliament, *ex post facto*.

From this point forth we have two competing views of the title to the Crown: by inheritance, and by grant of Parliament. A king relying in fact on one would invoke the other to reinforce his title. For several centuries more there remained conflict between title by parliamentary choice and title by inheritance. The old form of election gave way to parliamentary title, but several kings claimed hereditary title despite statutory bars, James I among them.³⁶

Dunham and Wood have argued that two centuries of depositions led to the formulation of a new theory of parliamentary monarchy, based on the principle that any aberrant settlement of the succession had to be justified by the consent of the estates of the realm. They concluded that, by 1485, it had “established and then reiterated principles that were, in the end, to form a constitutional doctrine legitimating a right to depose and a right to rule”.³⁷ But the Crown was not yet at the disposal of Parliament.

The Tudor dynasty could appeal neither to the theory of hereditary right which had been the basis of the Yorkist claim nor the statute law on which a

³⁵ These are contained in the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng), and His Majesty’s Declaration of Abdication Act 1936 (1 Edw VIII & 1 Geo VI c 3 (UK); now repealed in New Zealand by the Imperial Laws Application Act 1988. The Legitimacy Act 1959 (7 & 8 Eliz II c 73) (UK) does not affect the succession to the Throne (s 6 (4)). While the Status of Children Act 1969 does not expressly exclude the Crown, since it is not expressed as binding the Crown, this interpretation may freely be arrived at.

³⁶ Indeed, the succession of James in such circumstances appeared to suggest that hereditary right was indeed indefeasible. He was also an alien, and thereby debarred by common law from possessing land in the kingdom (Nenner, Howard, *The Right to be King- The Succession to the Crown of England, 1603-1714* (1995) 3).

³⁷ Dunham and Wood, “Right to Rule in England: Deposition and the Kingdom’s Authority, 1327-1485” (1976) 81 *American Historical Review* 738-761.

Lancastrian claim might have been maintained.³⁸ But Henry VII was at least de facto king.³⁹ There is no assertion of hereditary right in the Act for the Recognition of the title of Henry VII 1485.⁴⁰ It merely recognises a fact, it does not elect or create the king.⁴¹ That the Parliament which passed the statute was summoned by a usurper did not matter since he was de facto king at least. Henry relied on possession.

As the son of Elizabeth of York, Henry VIII had the best hereditary claim of anyone. The new king obtained from Parliament a power to dispose of the Crown by will, and devised it, failing issue of Edward, Mary or Elizabeth, to the grandchildren of his younger sister. The reigns of Henry's three children all rely on statutory right. This is of necessity the case since the statute of 1536,⁴² making Mary and Elizabeth illegitimate, was not repealed.⁴³ The

³⁸ It was not clear by what right Henry VII was king, but there could be no denying that he was king. Heredity, election, nomination, conquest and prescription could each have been pleaded, but reliance on too many grounds showed the weakness of the title.

³⁹ Under an Act to regulate the Succession 1405-6 (7 Hen IV c 2) (Eng), Henry VII's line were legitimate, but excluded from the succession. However, it is unclear whether this conditional legitimation was effective. Though there are a number of instances which suggest that illegitimacy was not a bar to succession to the Saxon Throne, since the Conquest all monarchs had been legitimate. Henry VII did not claim the Throne by inheritance, neither did Elizabeth (though hers was a legitimate birth subsequently invalidated).

⁴⁰ Act for the Recognition of the title of Henry VII 1485 (1 Hen VII c 1) (Eng), printed at the beginning of the Statutes of Henry VII in *Statutes of the Realm* (1816) II, 499. [extract only]: "for comfort of realm, and to avoid all ambiguities and questions... ordained, established and enacted that by the authority of this present parliament, that the inheritances of England and France, with all the permanence and royal dignity to the same pertaining... rest, remain and abide in the most royal person of our now sovereign lord King Henry VII and in the heirs of his body lawfully coming, perpetually with the grace of God so to endure in none other." This does not rely on hereditary title- it recognises a political fact or fait accompli.

⁴¹ Keir, Sir David Lindsay *The Constitutional History of Modern Britain since 1485* (8th ed, 1966) 8.

⁴² 28 Hen VIII c 7 (Eng).

⁴³ Mary was legitimated by statute (1 Mar St 2 c 1) (Eng), and also relied on a statute to confirm her title to the Throne (1 Mar St 3 c 1) (Eng). Elizabeth remained illegitimate in canon law, and therefore in the eyes of her Catholic subjects, as well as under 28 Hen VIII c 7 (Eng) (although her title to the Throne was also confirmed, by 1 Eliz c 3 (Eng)). Henry may have wanted to protect the rights to succession of any future female children born after Mary and Elizabeth. He did however allow them the right to succeed under the statutory entail of 35 Hen VIII c 1 (Eng).

first Act of Succession of Henry VIII 1534⁴⁴ made the king's marriage to Katherine of Spain void and annulled, and affirmed that to Anne Boleyn.⁴⁵

An Act fixing the succession 1544 refers to the statute of 1536, and makes Jane's heirs the king's heirs, and enacted:

that the King should and might give, will, limit, assign, appoint or dispose the said imperial Crown and the other premises... by letters patent or last will in writing.⁴⁶

This is the title on which Mary and Elizabeth relied. The king bequeathed the Throne to the Suffolk line, descendants of his younger sister Mary, by Will in 1546.

The succession of Mary was unprecedented.⁴⁷ To a sixteenth century mind this was a guarantee of a disputed succession, a civil war or at least domination by a foreign power by marriage. Henry VIII may indeed have briefly considered in 1525 recognising as his heir his six-year-old son by Mary Blount. The boy, who died in 1536 at the age of seventeen, was made Duke of Richmond, and Lord High Admiral.⁴⁸

⁴⁴ 25 Hen VIII c 22 (Eng).

⁴⁵ The First Act of Succession of Henry VIII 1534 (25 Hen VIII c 22) (Eng) [extracts only]: "VI.. issue of Anne shall be your lawful children, and be inheritable, and inherit, according to the course of inheritance and laws of this realm, the imperial Crown of the same, with all dignities, honours, pre-eminences, prerogatives, authorities, and jurisdictions to the same annexed or belonging, in as large and ample manner as your highness at this present time has the same as King of this realm; the inheritance thereof to be and remain to your said children and right heirs in manner and form as hereafter shall be declared, that is to say... heirs of Anne's son, then subsequent wives' sons... then the issue female by Anne... then to the second issue female ... according to their ages, as the Crown of England has been accustomed, and ought to go, in cases where there be heirs female to the same; and for default of such issue, then the said imperial Crown, and all the other premises, shall be in the right heirs of your highness for ever."

⁴⁶ 35 Hen VIII c 1 (Succession to the Crown Act 1543-4) (Eng).

⁴⁷ The disastrous reign of Matilda, the only earlier instance of a female Sovereign, tended to reinforce the idea that, while a man could inherit the Throne through a woman, a woman was not fit to reign herself. Whilst men looked back at the reign of Elizabeth with some satisfaction, they were by no means conducive to the idea of a female Sovereign as a regular occurrence. Because of Eve's perfidy in seducing Adam with the forbidden fruit, women were forever to be subject to the dominion of men (Knox, John, *First Blast of the Trumpet* in Laing, David (ed), *The Works of John Knox* (Edinburgh, 1846-64) vol IV, 377-8).

⁴⁸ Patent Roll, 17 Hen VIII pt 1 m 42.

In 1533 Mary was declared illegitimate by Act of Parliament,⁴⁹ but was reinstated in 1544, after Prince Edward.⁵⁰ Philip, son of Charles V, claimed the style king in 1553, but this was granted with strict limitations and was not to last beyond the duration of his marriage to Queen Mary.⁵¹ In the conditions of the day, it was impossible that a husband, foreign or English, would not attempt to exercise real authority.⁵²

Elizabeth claimed the Crown under the third Act of succession of Henry VIII.⁵³ The question of the succession dominated much of Elizabeth's reign, colouring, if not dictating, her attitude towards marriage, foreign relations and the religious settlement.⁵⁴

When Elizabeth died, she was succeeded by James I, the descendant of the elder daughter of Henry VII, and not by a representative of the younger daughter as the statute of 1544 required. Until Elizabeth's death it was unclear who should succeed her, and by what right.⁵⁵ There was, in fact, general agreement only that the rule of primogeniture applied to the Crown.⁵⁶ The Treasons Act 1571⁵⁷ asserted that Parliament possessed the right to settle the Crown,⁵⁸ and rendered it treason to deny this right.⁵⁹ The

⁴⁹ Succession to the Crown Act 1533 (2 Hen VIII c 22) (Eng), repealed by the Succession to the Crown: Marriage Act 1536 (28 Hen VIII c 7) (Eng) s 1 and the Legitimacy of the Queen Act 1553 (1 Mar sess 2 c 1) (Eng) s 2 [repealed by Statute Law Reform Act 1948].

⁵⁰ Succession to the Crown Act 1543 (35 Hen VIII c 1) (Eng).

⁵¹ The Queen Regents Prerogative Act 1554 (1 Mar sess 3 c 1) (Eng), repealed by the Statute Law (Repeals) Act 1969, and Queen Mary's Marriage Act 1554 (1 Mar sess 3 c 2) (Eng), repealed by the Statute Law Reform Act 1863.

⁵² Cannon, John, and Griffiths, Ralph *The Oxford Illustrated History of the British Monarchy* (1988) 341.

⁵³ Succession to the Crown Act 1543-4 (35 Hen VIII c 1) (Eng).

⁵⁴ Cannon and Griffiths, *supra* note 52, at 334-335.

⁵⁵ Burghley actually proposed a legislated interregnum upon the death of Elizabeth I, and for Parliament to decide who had the best right to succeed (Collinson, "Monarchical Republic of Queen Elizabeth I" (1987) 69 *Bulletin of the John Rylands University Library of Manchester* 394-424).

⁵⁶ Craig, Sir Thomas, *The Right of Succession to the Kingdom of England* (1703, first published 1602) 11; Doleman, R (pseudonym for Fr Robert Parsons), *Conference About the Next Succession* (1594) 129; Harington, Sir John, *A Tract on the Succession to the Crown (AD 1602)* ed Clements R Markham (1880).

⁵⁷ 13 Eliz I c 1 (Eng).

⁵⁸ "[T]o limit and bind the Crown of this realm and the descent, limitation, inheritance, and government thereof". An assertion to this effect was made, perhaps prematurely, by

Act was designed to forestall claims by Mary Queen of Scots to the Crown.⁶⁰

James also had to step warily lest he himself contravene the Act of Association 1584.⁶¹ This provided that anyone involved in attempts on the Queen's life would be disbarred from succeeding. James relied solely on inheritance,⁶² as had Lady Jane Grey when she was forced to claim the Crown on the death of Edward VI.⁶³ Edward's attempt to devise the Crown by letters patent had no legal effect; he had purported to exclude all females and Catholics, and devise the Crown to the heirs male of Jane.⁶⁴

Sir Thomas Smith (*De Republica Anglorum; A Discourse on the Commonwealth of England* ed L Alston (1970, first published 1583) 49). Even earlier, in 1535, Thomas More had told Richard Rich that an Act of Parliament was competent to make Rich, or any other man, king (Nenner, *supra* note 36, at 251).

- ⁵⁹ Earlier legislation had provided for the settlement of an uncertain title, as 7 Henry IV c 2 (Eng), and 35 Hen VIII c 1 (Eng) allowed the king to dispose of the Crown, but the Treason Act 1571 (13 Eliz I c 1 (Eng)) was a much more general statement of legislative authority.
- ⁶⁰ Levine, Mortimer, *Tudor Dynastic Problems, 1460-1571* (1973) 119-20; Hurstfield, "The Succession Struggle in Late Elizabethan England" in Bindoff, S J et al (eds), *Elizabethan Government and Society* (1961) 107.
- ⁶¹ Act for the Safety of the Queen etc (27 Eliz I c 1) (Eng), repealed by the Statute Law Revision Act 1863 (26 & 27 Vict c 125) (UK).
- ⁶² He was regarded as the next heir since the death of his mother, Mary Queen of Scots. The claimant under Henry VIII's Will (authorised by 35 Hen VIII c 1 (Eng)), Catherine, representative of this line, had died in 1568, and her sons were of questionable legitimacy. The descendants of Eleanor, cadet branch of the Suffolk line, remained however (Levine, Mortimer, *Early Elizabethan Succession Question, 1558-1568* (1966) 1, 10-11). If the prohibition of the Scottish line was upheld, then the heir was Lady Catherine Grey, younger sister of Lady Jane Grey and granddaughter of Mary, younger sister of Henry VIII. If the claims of the Scottish line were allowed, the next heir was Mary Queen of Scots.
- ⁶³ Since Mary and Elizabeth were illegitimate, by inheritance alone Jane did have a prior claim. The Pope might, in any case, grant a dispensation from the canon law which would allow inheritance in accordance with Church law. This would of course present a problem if Church and national laws were to conflict.
- ⁶⁴ Efforts were made to ensure her succession under an interlineation. The actual attempt to convey the Crown by act of nomination was thought to be even less satisfactory than a claim by conquest. Only God could make an heir, and nearness of blood was a matter not of choice but of divine intervention. It was only with the Statute of Wills 1540 (32 Hen VIII c 1) (Eng) that the right freely to dispose of property was accorded ordinary people; it is hardly surprising that there should be even stronger opposition to giving a

Although James I was not seriously opposed as successor,⁶⁵ it was necessary to reinforce his title by statute, since it contravened an earlier Act.⁶⁶ The Act of Recognition of the King's title 1603-4⁶⁷ was an attempt to explain the contravention of the Succession to the Crown Act 1543-4,⁶⁸ an assertion of the hereditary title as stronger than the statutory one.⁶⁹

In two of the three Parliaments in 1679-81, bills intended to exclude James Duke of York from the succession were introduced and debated in the House of Commons.⁷⁰ The bill of May 1679 was worded so as to include Scotland and Ireland, in case their respective Parliaments neglected to enact similar measures. In 1680 a similar measure was introduced, received three readings in the Commons, but was defeated in the House of Lords.⁷¹

The Exclusion Crisis lasted from November 1679 till March 1682.⁷² Ironically, a doctrine condemned as papist in the sixteenth century was now

similar freedom to kings. Conquest might have been acceptable to give a foreign prince a good title to the Crown, but a subject would be a usurper (Walpole, "Historic Doubts on the Life and Reign of Richard III" in Kendall, Paul (ed), *Richard III: The Great Debate* (1965) 198).

⁶⁵ James was proclaimed king "by law, lineal succession, and undoubted right" (Larkin, James and Hughes, Paul (eds) *Stuart Royal Proclamations* (1973) vol I, iv, 2-3).

⁶⁶ A point not lost on his contemporaries (Harbin, *Hereditary Right to the Crown of England Asserted* (1713) 208-9).

⁶⁷ Act of Recognition of the King's title 1603-4 (1 Jac I c 1) (Eng) [extract only]: "We do recognise and acknowledge that immediately upon the dissolution and decease of Elizabeth, late Queen of England, the imperial Crown of the realm of England... did, by inheritance birthright and lawful and undoubted succession, descend and come to your most excellent majesty, as being lineally, justly and lawfully next and sole heir of the blood royal of this realm as is aforesaid."

⁶⁸ 35 Hen VIII c 1 (Eng).

⁶⁹ Sir Thomas Craig, a Scots legal scholar, exhaustively laid the ground for James's hereditary claim in *The Right of Succession to the Kingdom of England* (1703, first published 1602). He was, in any case, practically the only reasonable choice.

⁷⁰ Nenner, *supra* note 36, at 10.

⁷¹ Cannon and Griffiths, *supra* note 52, at 414.

⁷² Locke himself was involved, see Ashcraft, "The Two Treatises and the Exclusion Crisis" in Pocock, JGA and Ashcraft, R (eds) *John Locke* (1980). Sir Algernon Sidney was involved in the Rye House Plot in 1683 to assassinate both royal brothers. It is not clear however to what extent this indicated a desire on his part to revive the Commonwealth. He was however executed for his trouble.

adopted by Protestants.⁷³ It was supposed that a Catholic monarch would not respect the law, and so could not be effectively bound to preserve the Protestant Church of England. Attempts were made to exclude the Duke of York and “all other popish successors”, and it was proposed “that no King shall marry a popish Queen”.⁷⁴

Anti-Exclusionists argued for an heritable Crown, but saw in it features of a life tenancy that made it impossible for the king to affect the disposition of the estate after his death.⁷⁵ The Exclusionists argued that there was no law of succession (or at best there was an hereditary expectation to succeed), and that the king and Parliament were empowered to make one (or that the hereditary expectation to succeed was rebuttable by Parliament for cause). While denying that there was a fundamental law of succession, they maintained that there was a fundamental right of self-defence against a king who was opposed to the liberty of the Protestant Church.⁷⁶ They would have acknowledged their debt to Hobbes but that he stood for secular absolutism. A elective monarchy would have led to an arbitrary and uncertain succession.⁷⁷ Sir Algernon Sidney was less concerned about who should succeed as who should decide.⁷⁸

The Jesuit Robert Parsons stated in 1594 that :

⁷³ And critics were not slow to identify Exclusion with the teachings of the sixteenth century Jesuit Robert Parsons.

⁷⁴ Cobbett, William (ed) *The Parliamentary History of England* (1806-20) vol IV, 1132, 1196, 1250, 1332.

⁷⁵ The traditional view of the Crown as a property of the king to be transmitted to his posterity by right of descent was being eroded, but was still the majority view.

⁷⁶ “W G”, *Case of Succession to the Crown of England Stated* (1679) 14. Sovereignty became an issue because, in countering the assertions of a fundamental law of succession, the Exclusionists were pressed to contend for the even more basic right of self-protection.

⁷⁷ Comber, Revd Thomas *Religion and Loyalty Supporting each other* (1681) 11, 34.

⁷⁸ Scott, Jonathon *Algernon Sidney and the Restoration Crisis, 1677-1683* (1991) 53. Sidney argued in *Discourses concerning Government* that, unless the succession could be grounded in the consent of Parliament, there was no hope of political stability. By this standard any other rule of succession, hereditary right included, would be effectively futile. Sidney maintained that there could be no stability in a political system dependent on the random abilities of an hereditary prince (West, Thomas (ed) *Discourses concerning Government* (1990) chap 2 sect 11, 136-7).

no man is King or Prince by instrument of nature, but every King and kings sonne hath his dignity and preheminece above other men, by authority only of the common wealth.⁷⁹

What was a heresy in late Tudor times came to be orthodoxy in the next century. In the 1590s Peter Wentworth proposed that Parliament, as the High Court of Parliament, be charged to sort through the potential complex of hereditary claims, to choose whoever had the best right, but not to elect the heir.⁸⁰ The opportunity to formulate a rule for future successions was lost.

The right of Parliament to vary and limit the descent of the Crown, in cases of misgovernment amounting to a breach of the original contract between the Crown and the people, cannot be said to be admitted as a definite constitutional principle.⁸¹ But due weight must be attributed to the fact that the tenure of the Crown since 1688 has depended upon the action taken by the Lords and Commons convened in an irregular manner.⁸²

On the flight of James II in 1688, all those who had served as members of the Parliaments of Charles II, together with the Court of Aldermen and members of the Common Council of the City assembled on 26 December 1688, at the desire of the Prince of Orange. They requested the Prince to take over the civil and military administration and the disposal of the public revenue, and likewise to summon a Convention Parliament.

⁷⁹ Specifically, he argued that the presumption of the hereditary right of the next in blood could be rebutted in some circumstances. Title is determined by Parliament. Parliament is, in the first instance, guided by common law rules of hereditary succession, as modified by historical experience. Upon consideration of the personal qualities and circumstances of those in the line of succession, it may qualify the succession further. According to his reading of the precedents, there was in fact a form of election each time a Sovereign succeeded. This, in fact, amounted to an interregnum (Doleman, R (pseudonym for Fr Robert Parsons) *Conference About the Next Succession* (1594) 142, 198-199).

⁸⁰ Wentworth, Peter *A Pithie Exhortation to Her Majestie for Establishing Her Successor to the Crowne. Whereunto is Added a Discourse Containing the Authors Opinion of the True and Lawfull Successor to her Majestie* (1598) 5, 48, 51.

⁸¹ The title to the Crown was originally elective, and the notion of the hereditary right grew gradually. What survives of the elective principle is still to be seen in the terms of the coronation ceremony. The true nature of the title of William and Mary was elective, but this was cloaked in the legitimacy of heredity. James II was deemed to have abdicated by having withdrawn himself from the country (*Some Considerations Touching Succession And Allegiance* (1689) 7).

⁸² Maitland, Frederic, *The Constitutional History of England - a course of lectures* (1931) 283-285.

A Convention Parliament was accordingly summoned by the Prince of Orange by letters directed to the Lords Spiritual and Temporal, being Protestants, and to the coroners, clerks of the peace, and others. This Convention Parliament met on 22 January 1688 (old style). On 28 January the Commons so convened recorded that:

King James II having endeavoured to subvert the constitution of the kingdom by breaking the original contract between the King and people and by the advice of Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the Throne is thereby vacant.⁸³

On 12 February a declaration was drawn up and agreed by the Lords and Commons affirming the rights and liberties of the people, and settling the Crown and regal government of England, France and Ireland upon William and Mary of Orange, during their joint lives and the life of the survivor. The further limitations were: (1) to the heirs of the body of Mary; (2) to the Princess Anne of Denmark and the heirs of her body; (3) to the heirs of the body of William, Prince of Orange.

This declaration was offered on the following day to William and Mary, who accepted its terms, and the declaration was then published to the nation in the form of a proclamation.⁸⁴ The declaration was subsequently enacted with certain additions in the form of the Bill of Rights 1688 (Eng),⁸⁵ and the Acts of the Convention Parliament were subsequently ratified and confirmed by the Crown and Parliament Recognition Act 1689 (Eng),⁸⁶ which also acknowledged the king and queen.

Since William and Mary were monarchs *de facto* at the time Parliament was summoned, it was validly summoned (whereas the Convention Parliament was not), and the confirmatory Act was legally effective to do what it purported to do, validate the royal title and the Acts of the Convention Parliament.⁸⁷

⁸³ Commons Journals dated 28 January 1688.

⁸⁴ Commons Journals dated 12 February 1688 and 13 February 1688.

⁸⁵ 1 Will III & Mary sess 2 c 2.

⁸⁶ 2 Will & Mary c 1.

⁸⁷ So far as the royal title was concerned, the Act merely “recognised and acknowledged” title, whereas enacting rather than declaratory language was used in confirming the Acts of the Convention Parliament. See Brookfield, FM “Some aspects of the Necessity Principle in Constitutional Law” (1972, unpublished University of Oxford DPhil thesis,

The Bill of Rights, being thus confirmed by a Parliament summoned in the constitutional manner, acquired the force of a legal statute, and appears upon the statute books as such.

The present succession is affected largely by the Revolutionary Settlement still.⁸⁸ As from the dates of the Unions of England with Scotland and Ireland, the succession of the imperial Crown of the United Kingdom of Great Britain, and of Great Britain and Northern Ireland respectively, is to be as it then stood limited and settled under the Act of Settlement.⁸⁹ This succession is vested in the heirs of the body of the Princess Sophia,⁹⁰ who are Protestants.⁹¹

The settling of the succession on the heirs of the Electress Sophia was an extension of this elective approach, but the succession thereafter proceeded by inheritance. The Succession to the Crown Act 1707⁹² itself expressly

Parliaments of the de facto king, 278). They could have claimed the Crown by conquest, but William and Mary disavowed any intention to do so.

⁸⁸ *Halsbury's Laws of England*, supra note 19, at para 847.

⁸⁹ Union with Scotland Act 1706 (6 Anne c 11) (Eng), art II; Union with Ireland Act 1800 (39 & 40 Geo III c 67) (Eng) art 2; Ireland Act 1949 (12 & 13 Geo VI c 41) (UK) s 1 (1). In Scotland a convention offered the Throne jointly to William and Mary, though conditional upon the abolition of episcopacy and the institution of a Presbyterian church order.

⁹⁰ The Princess Sophia having predeceased Anne, the Crown descended, under this provision, to George I, son of Sophia. It then descended lineally to George IV, from George IV to his brother William IV, from whom it descended to Queen Victoria, niece of William IV, then lineally to Edward VIII, who on 10 December 1936, executed an Instrument of Abdication, and, on 11 December 1936, gave his assent to His Majesty's Declaration of Abdication Act 1936 (1 Edw VIII & 1 Geo VI c 3) (UK). Thereupon His Majesty ceased to be king, and the Crown passed to George VI (s 1 (1)), from whom it descended lineally to Her present Majesty Queen Elizabeth II. The Duke of Windsor (the former King Edward VIII) and any issue he might have were excluded from the succession: s 1 (2).

⁹¹ As to the effect of the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) and the subsequent statute, 4 Anne c 4 (Princess Sophia, naturalisation) (1705) (otherwise 4 & 5 Anne c 16) (Eng) (repealed) on the lineal descendants of Princess Sophia, see *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, [1957] 1 All ER 49, HL (lineal descendants are British subjects). Indeed, Blackstone maintained that this Act actually re-asserted the rule of hereditary succession. But it really provided for the Crown to continue in the hereditary line, but by right of Parliament. Blackstone, Sir William, *Commentaries on the Laws of England* (ed Christian, 1978).

⁹² 6 Anne c 41.

affirmed the power of Crown and Parliament to limit and bind the succession.

After the triumph of hereditary title over election, the possibility of intervention by the successors of the *Witan* remained. The modern position is that the statutory provisions settle the Crown in the present line of succession, and provides certain statutory conditions on tenure.⁹³ The descent of the Crown in the present Protestant line is secured by the Act which regulates the succession, the Act of Settlement 1700.⁹⁴

William Henry Duke of Gloucester, son of Anne, died in 1700 at the age of eleven. The Act of Settlement⁹⁵ was introduced to meet the situation, although other restrictions were tacked on also.⁹⁶ Consent was required for the king to engage in war or to leave the country. Privy counsellors were to sign any advice which they gave. No foreigners were allowed to hold office under the Crown, or occupy a seat in Parliament.⁹⁷ No person holding office of profit or a pension were to be a Member of Parliament. To limit the Crown's freedom to appoint ministers of their choice, no pardons were to be available on impeachment.⁹⁸

Anyone who adheres to the Roman Catholic Church, or who marries such a person, cannot inherit the Crown, nor can they remain Sovereign if they are

⁹³ *Halsbury's Laws of England*, supra note 19, at para 850.

⁹⁴ Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) s 1: the lords spiritual and temporal and commons shall and will, in the name of all the people of the realm, most humbly and faithfully submit themselves, their heirs and posterities, and faithfully promise [in the event of the decease of King William III and of Queen Anne and the failure of the heirs of their respective bodies] to stand to, maintain and defend the heirs of the body of the Princess Sophia, being Protestants, according to the limitation and succession of the Crown in the Act specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

⁹⁵ 12 & 13 Will III c 2 (Eng).

⁹⁶ Without the Act, on the death of Queen Anne the Elector of Hanover would still have succeeded, but only if none of the intervening Catholics had renounced his or her religion.

⁹⁷ This prohibition is the subject of some consideration in the *Report of the Justice and Law Reform Committee*, supra note 17, at 58; Section 3 would appear to prevent New Zealanders (and others of Her Majesty overseas subjects) from being appointed members of the Privy Council.

⁹⁸ Cannon and Griffiths, supra note 52, at 440.

disqualified after succeeding to the Crown.⁹⁹ In such a case the people are absolved of their allegiance, and the Crown is to descend to such person or persons, being Protestants, as would have inherited it in case the person so reconciled were dead.¹⁰⁰ As a consequence of the wording used in the Act of Settlement 1700,¹⁰¹ there is no requirement that someone whose spouse joins the Roman Catholic Church after marriage loses their right to the Crown.¹⁰² It would appear that the operation of the Act is irreversible, although to be effective the marriage must be a legal one.¹⁰³

⁹⁹ The actual wording used says that any person “who shall be reconciled to, or hold communion with, the see or Church of Rome, or profess the popish religion, or marry a papist”, is excluded from “inheriting, possessing or enjoying the Crown”.

¹⁰⁰ This is the joint effect of the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) s 2, as amended by the Accession Declaration Act 1910 (10 Edw VII & 1 Geo V c 29) (UK), and the Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) (Eng) s 1, as amended by the Juries Act 1825 (6 Geo IV c 50) (UK) s 62.

¹⁰¹ 12 & 13 Will III c 2 (Eng).

¹⁰² Thus, Prince Edward Duke of Kent retains his position (21st in 1999) in the line of succession despite his wife Katharine having been received into the Roman Catholic Church on 11 January 1994. However, their son George Earl of St Andrews lost his right to the Throne when he married the Roman Catholic Sylvana Palma Tomaselli on 9 January 1988. Similarly, Prince Michael of Kent lost his own right to the Throne when he married Baroness Marie-Christine von Reibnitz in 1978. Anyone who is disqualified loses his or her title to the Crown by operation of law, and without the need for any procedures to be followed. Children of such parents retain their right to succeed so long as not otherwise disqualified.

¹⁰³ Thus the marriage of George Prince of Wales to Mrs Maria Fitzherbert, a devout Catholic and twice a widow, did not disqualify him from succeeding as king in 1820, as the marriage was contrary to the Royal Marriages Act 1772 (12 Geo III c 11) (GB), and legally null and void. The Imperial Laws Application Act 1988 preserves for the purposes of New Zealand law sections 1 and 2 of the Royal Marriages Act 1772 (12 Geo III c 11) (GB). They are also preserved in the United Kingdom, New South Wales, Victoria and the Australian Capital Territory (*Report of the Justice and Law Reform Committee*, supra note 17, at 61). The Act itself is archaic and badly drafted. It has been argued that the Act does not apply to any of Queen Victoria’s descendants (O’Farran, supra note 21, at 140). The Royal Marriages Act 1772 applies to all the descendants of George II, other than the issue of princesses who have married into foreign families. Their marriages are void unless the consent of the Queen has been formally signified. Such a person may, however, marry without consent if they are over twenty-one, provided that they give twelve months’ notice to the Privy Council and that the two Houses of Parliament do not register objection during that period.

Since the time of the Act of Settlement there has been but one statutory alteration of the succession law. King George VI was a case of succession upon abdication, although he was the heir apparent.¹⁰⁴ His Majesty's Declaration of Abdication Act 1936¹⁰⁵ was passed in accordance with the procedures of the Statute of Westminster 1931,¹⁰⁶ and so was applicable in New Zealand. Since then, however, there have been no statutory alterations to the law of succession in either New Zealand or the United Kingdom. The procedure in the Statute of Westminster 1931 and the Statute of Westminster Adoption Act 1947 (NZ) is not likely to be used again, even solely for the purpose of altering the law of succession.

However, the development of a distinct New Zealand Crown means that the succession law in New Zealand must be seen to be separate from that in the United Kingdom, though they presently have identical provisions. Whether they remain identical is a matter yet to be decided.

¹⁰⁴ There was however some consideration given to the Duke of Kent succeeding, as he had a son and heir. See also the Accession Proclamation of His Majesty King George VI 12 December 1936: WHEREAS BY an instrument of abdication dated the tenth day of December, his former Majesty King Edward the Eighth did declare his irrevocable determination to renounce the Throne for himself and his descendants, and the said instrument of abdication has now taken effect whereby the Imperial Crown of Great Britain, Ireland, and all other of his former Majesty's Dominions is now solely and rightfully come to the high and mighty Prince Albert Frederick Arthur George. We, therefore, the Lords Spiritual and Temporal of this Realm, being here assisted with these of His former Majesty's Privy Council, with numbers of other Principal Gentlemen of Quality, with the Lord Mayor, Aldermen and Commonalty of do now hereby with one voice and Consent of Tongue and Heart publish and proclaim: That the High and Mighty Prince Albert Frederick Arthur George is now become our only lawful and Rightful Liege Lord George the Sixth, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, to whom we do acknowledge all Faith and constant Obedience with all hearty and humble Affection; beseeching God, by whom Kings and Queens do reign, to bless the Royal Prince George the Sixth with long and happy Years to reign over us. Given at St James's Palace, this twelfth day of December in the year of our Lord one thousand nine hundred and thirty six."

¹⁰⁵ 1 Edw VIII & 1 Geo VI c 3; now repealed in New Zealand by the Imperial Laws Application Act 1988.

¹⁰⁶ 22 & 23 Geo V c 4 (UK).

IV. CIRCUMSTANCES IN WHICH THE SUCCESSION OUGHT TO BE CHANGED

At common law the accession of the Sovereign may be automatic, so that there is no interregnum, though the accession does involve a number of legal procedures.¹⁰⁷ On the death of the reigning Sovereign the Crown vests immediately in the person who is entitled to succeed, it being a maxim of the common law that the king never dies.¹⁰⁸ The new Sovereign is therefore entitled to exercise full prerogative rights without further ceremony.¹⁰⁹

The fact of the new Sovereign's accession is published by a proclamation which is issued as soon as conveniently may be after the death of the former Sovereign. It is made in the name of the lords spiritual and temporal, members of the late Sovereign's Privy Council and the principal gentlemen of quality, with the Lord Mayor, aldermen and citizens of London.¹¹⁰

Any alteration in the succession laws has therefore to take place during the reign of a Sovereign whose own title will not be affected. It is clear that, since the advent of separate Crowns, the right to alter and amend the laws of succession of the New Zealand Crown belongs to the Parliament of New Zealand. But, it is also clear that any such alteration would have to take into account the trans-national nature of the Crown.

There are two possible scenarios for such a change. The first is changing attitudes to succession in general, the other is the position of the Prince of

¹⁰⁷ *Halsbury's Laws of England*, supra note 19, at vol 8 para 851.

¹⁰⁸ *Calvin's Case* (1608) 7 Co Rep 1a, 10b; and 3 Co Inst 7; 4 Co Inst 156, 201, 352. The acceptance of this doctrine appears to have been gradual, the importance of the ceremonies of the oath of recognition and coronation being originally far greater than it is now. Edward I commenced to reign in 1272, although his coronation did not take place until 1274. Edward II dated his reign from the day after his father's death. See Stubbs, *The Constitutional History of England in its origin and development* (4th ed 1906) 102.

¹⁰⁹ According to Coke, the Crown descends to the rightful heir before coronation, for by the law of England there is no interregnum, and the coronation is but an ornament or solemnity of honour; and so it was resolved by all the judges (*Calvin's Case* (1608) 7 Co Rep 1a). Coronation is a solemn recognition on the part of the nation that the regal authority is vested in the person of the Sovereign, and on the part of the Sovereign a solemn recognition of the fundamental rights of the people. Coke based his conclusion, not in itself unreasonable, on the grounds of *causa necessitatis*.

¹¹⁰ This is the established practice, for which there appears to be no direct legal authority other than usage. For the form of proclamation used on the accession of Her Majesty Queen Elizabeth II, see the *London Gazette*, 8 February 1952, 787.

Wales. In respect of the first, primogeniture has been abolished with respect to private property.¹¹¹ The presumption that a son should succeed in preference to daughter is at odds with modern attitudes, and in conflict with the Human Rights Act 1993.¹¹² Were a succession law to be drawn up today, it is likely that it would provide for the succession of the eldest child of the Sovereign, irrespective of sex.¹¹³ Although some of the statutes of Henry VIII approached this, there has never been a statement of a generally applicable law of succession, except in the limitations of the Revolutionary Settlement. Whether the time has come for such a restatement, perhaps accompanied by significant change, is by no means proven.

One possible ground for alteration in the law of succession relates to the Prince of Wales. The present position is that whoever he marries would become Queen when he succeeded to the throne. Were he to marry Camilla Parker-Bowles, there would doubtless be calls for him to renounce his right to succeed in favour of his eldest son. Such a renunciation would not, of course, be effective unless accompanied by legislation in each of the countries acknowledging the Queen as Sovereign.

Changing the succession law in such a way would be likely to follow the example of 1936, with Parliament(s) implementing a decision already taken by the royal family. This is in accordance with the tradition of Parliament reinforcing doubtful claims. Excepting 1688-89, Parliament itself has never taken the initiative. To do so now might be to raise questions about the proper balance of the constitution, questions which Parliament might prefer unasked.¹¹⁴

¹¹¹ Administration of Estates Act 1925 (15 & 16 Geo V c 25) (UK); Administration Amendment Act 1944 (NZ).

¹¹² Discrimination on the grounds of sex being unlawful; see also the Human Rights Commission Act 1977.

¹¹³ Norway and the Netherlands have in recent decades instituted these changes. Given modern life spans, borough-English, in which land descended to the younger son to the exclusion of all other children, would actually make more sense. See Cheshire, GC *Modern Law of Real Property* (13th ed, 1982) 25; Coke, *supra* note 21, at ss 165, 211; Blackstone, *supra* note 20, at vol ii, 83. A similar rule applied in Swaziland.

¹¹⁴ This is particularly significant in the United Kingdom, at a time when the House of Lords is undergoing reform, and significant powers are being devolved to a Scottish Parliament and a Welsh Assembly, though not an English Parliament. See Mirfield, "Can the House of Lords Lawfully be abolished?" (1979) 95 LQR 37; Winterton, "Is the House of Lords Immortal?" (1979) 95 LQR 386.

On 27 February 1998, in London, Lord Wilson of Mostyn, QC, Parliamentary Under Secretary of State for the Home Office, announced that the British Government supported changing the law of succession to the Crown, in favour of the succession of the eldest child irrespective of sex. This came in a debate on a private members' Bill sponsored by Jeffrey Lord Archer, intended to provide for the succession of the eldest child of the Sovereign regardless of sex.¹¹⁵

While he acknowledged that any change would have to receive the support of all countries of which The Queen is Sovereign, it is inappropriate that Lord Wilson, who had special responsibility for revision of the British Constitution, should propose such a fundamental change for purely party political reasons. While his colleagues in the Scottish and Welsh Offices were busy dismembering the United Kingdom, in the name of devolution, doubtless he felt that he had to make his own mark on the constitution.

The British Government should not let its own desire for change be the reason for such a fundamental move. The Crown has evolved gradually, and there has been enough disruption already in the last decade. Any proposal for change is risky, and there is no evidence of a need or desire for any change in the succession law.

The present rules are a compromise, the result of centuries of evolution. It is half-way between the extremes of the strict rule of primogeniture of the so-called Salic law, and the modernist eldest child rule, as adopted recently in Norway and the Netherlands.

Any move to change the law would be seen as defensive, an attempt to counter criticism. Yet criticism has never focused upon the fundamental nature of the Crown. Any change would be controversial. No good grounds for change have been advanced, aside from claims of sexual inequality.

Any change in the law of succession would have to be enacted in each of Her Majesty's realms, requiring detailed consultation to avoid the possibility of error. Such a proposal should be discussed in private first, not announced by the British Government almost as a *fait accompli*. The succession law in

¹¹⁵ Bills which affect the royal prerogative, hereditary revenues, personal property or interests of the Crown, or the Duchy of Lancaster, require the Queen's consent, or the Prince of Wales's consent for Bills affecting the Duchy of Cornwall. These consents are customarily given, and do not imply actual approval of the proposed measure (Erskine May, *Parliamentary Practice* (1989) 237, 561).

New Zealand is that of the United Kingdom prior to 1931, subject to potential statutory alteration by the New Zealand Parliament.

In the past, Parliament has legislated for the succession for reasons of expediency. With the exception of settlement and exclusion provisions of the Act of Settlement, the succession remains strictly hereditary. Although the continued exclusion of Catholics, as the basis of the three-hundred-year-old Revolutionary Settlement, may be unjustified in the New Zealand environment, any change in this country would be dependent upon events in the United Kingdom. So long as the king or Queen of the United Kingdom remains Head of the Established Church of England, no change is likely. Were New Zealand to amend unilaterally the Act of Settlement, it is unlikely that any division of the Crown would occur, but it would emphasise the separateness of the Crown.

The problem with altering the Act of Settlement is that the Act was a deliberate and conscious rebalancing of the constitution, one which also brought us the sovereignty of Parliament. Tampering with one aspect might encourage calls for the other to be reconsidered also. Indeed, in light of claims that the Treaty of Waitangi or the 1835 Declaration of Independence guaranteed Māori sovereignty, or rangatiratanga, such calls could not be ignored.

ARTIFICIAL SELECTION IN COLONIAL NEW ZEALAND

BY RICHARD M DAWSON*

The number of aborigines is rapidly decreasing ... This decrease, no doubt, must be partly owing to the introduction of spirits, to European diseases ..., and to the gradual extinction of wild animals. ... Wherever the European has trod, death seems to pursue the aboriginal. We may look to the wide extent of the Americas, Polynesia, the Cape of Good Hope, and Australia, and we shall find the same result. ... It was melancholy at New Zealand to hear the fine energetic natives saying, they knew the land was doomed to pass from their children.¹

Darwin had two kinds of “selection” among the variabilities: Natural Selection and Artificial Selection. Ours is a theory of artificial selection.²

The purpose of this article is to present John R Commons’s concept of artificial selection as a tool with which to consider and explore facets of legal-economic evolution in New Zealand.³ The period of New Zealand history examined here is from the late 1830s, when so-called Systematic Colonization began, to the 1880s, when the British Crown for all intents and purposes left the internal affairs of New Zealand to the Colonial Parliament. Whilst this article is intended to be of general interest to historians of political economy and colonisation, the main purpose of this study is to help illuminate certain basic issues that continue to be a source of Māori-European conflict in New Zealand. The first section below introduces Commons and his work. The second section outlines the concept of artificial selection. The third section turns to New Zealand. The final section summarises significant themes.

I. JOHN R COMMONS

John Rogers Commons was born in 1862 in Hollandsburg, Ohio, United States of America. Several of Commons’s early writings on labour issues gained him national recognition. Among other appointments, he was chosen

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¹ Darwin, Charles *Journal of the Voyage of the Beagle* (1836; reprinted in Barrett, Paul H and Freeman, R B *The Works of Charles Darwin* (1986) volume 3) 407.

² Commons, John R *Institutional Economics* (1934; reprinted 1961) 657.

³ This article draws heavily from the present author’s PhD thesis: Dawson, Richard M *The Treaty of Waitangi and the Fish: An Interpretation from Institutional Law & Economics* (unpublished PhD Thesis, forthcoming, Department of Economics, University of Auckland, New Zealand).

by President Woodrow Wilson in 1913 to serve on a national commission investigating the causes of labour unrest. Commons is widely recognized to have been perhaps the principal figure in formulating the intellectual vision underlying the New Deal. He authored or co-authored 17 books and more than 60 articles on a broad range of subjects.⁴ His major theoretical works include *Legal Foundations of Capitalism*⁵ and *Institutional Economics*.⁶ Commons provided an informative story of his life and work in his autobiography *Myself*.⁷ He died in 1945 in North Carolina.

Something of an embryo of Commons's major works is "A Sociological View of Sovereignty", published as a series of articles in the *American Journal of Sociology* in 1899 and 1900.⁸ Here Commons urged the conceptualisation of sovereignty as a *process* rather than an entity, personified as The State. He perceived the state as a process of negotiation over the control of the sanction of physical force. In this process, legal rights are created, manifest only in the behaviour and actions of officials in directing force. Commons's views in this regard were in accord with and later shaped by Oliver Wendell Holmes Jr. In Holmes's words:

For legal purposes a right is only the hypostasis of a prophecy - the imagination of a substance *supporting* the fact that the public force will be brought to bear upon those who do things said to contravene it.⁹

Commons thus rejected the pretence that rights have an abstract antecedent existence that the state is obligated to protect. The reality is that rights which are protected are rights only because they are protected. In Commons's words: "It is the sanctions of sovereignty that make property what it is for the time being ... by keeping people off".¹⁰ Thus, the issue for society

⁴ A bibliography of Commons's writings resides in Commons, John R *The Economics of Collective Action* (1950, posthumous).

⁵ Commons, John R *Legal Foundations of Capitalism* (1924).

⁶ Commons, *supra* note 2.

⁷ Commons, John R *Myself* (1934).

⁸ Commons, John R *A Sociological View of Sovereignty* (1899-1900, reprinted 1965).

⁹ Cited in Cohen, Felix S *The Legal Conscience* (1960) 53.

¹⁰ Commons, *supra* note 4, at 41 and 81. In *Legal Foundations of Capitalism*, *supra* note 5, at 367, Commons wrote on the same point: "The state is [not] an entity having a separate existence and providing preeminently the service of security. But the state, in reality, is the officials in action; their action is the organization of violence according to due process of law. ... Security is not something abstract and separate, a kind of outside force ready to come in when property or liberty is violated. ... Property, liberty and voluntary organizations exist only to the extent that they are secure, and they are secure

confronted with conflict is the determination of *who is to be kept off what*. The issue is not whether to employ the sovereign sanction of force, but rather the direction in which the sanction is to be wielded. The fundamental question to be worked out is: *who is to direct the sanction of force?* This involves, Commons emphasised, a struggle to get control of the hierarchy of legislative, executive, and judicial officials.¹¹

Much of Commons's theoretical work may be understood as an attempt at bridge-building. For example, he sought to account for the "contradictions of abstract individualism and abstract socialism and the other historic dualisms of individual and society".¹² And he also sought to correlate law, economics, politics, and ethics. In these respects there is a deep resonance between his work and the Legal Realism of Felix Cohen¹³ and Karl Llewellyn,¹⁴ and the Sociological Jurisprudence of Roscoe Pound.¹⁵ Commons's major theoretical works form the base of a school of thought known as Institutional Economics. Current members strongly influenced by Commons include such scholars as Daniel Bromley,¹⁶ Steven Medema,¹⁷ Nicholas Mercurio,¹⁸ Warren Samuels,¹⁹ and Allan Schmid.²⁰

only to the extent and in the direction that officials give indication that they will choose to make them secure".

¹¹ Commons, *supra* note 2, at 751.

¹² Commons, *supra* note 5, at 140.

¹³ *Supra* note 9.

¹⁴ Llewellyn, "The Effect of Legal Institutions Upon Economics" (1925) *American Economic Review* 665-683; Llewellyn, "A Realistic Jurisprudence: The Next Step" 30 (1930) *Columbia Law Review* 431-465.

¹⁵ Pound, "Liberty of Contract" (1909) 18 *Yale Law Review* 454-487; Pound, "The Scope and Purpose of Sociological Jurisprudence" (1911) 24 *Harvard Law Review* 591-619, and (1912) 25 *Harvard Law Review* 140-168.

¹⁶ Bromley, Daniel W *Economic Interests and Institutions* (1989); Bromley, Daniel W *Environment and Economy: Property Rights and Public Policy* (1991); Bromley, "Entitlements and Public Policy in Environmental Risks" in Bromley, Daniel W (ed) *The Social Response to Environmental Risk* (1992) 1-21.

¹⁷ Medema, "Another Look at the Problem of Rent Seeking" (1991) 25 *Journal of Economic Issues* 1049-1065; Medema, "Making Choices and Making Law: An Institutional Perspective on the Takings Issue" in Mercurio, Nicholas (ed) *Taking Property and Just Compensation* (1992) 46-7.

¹⁸ Mercurio, Nicholas and Medema, Steven G *Economics and the Law: From Posner to Post-Modernism* (1997).

¹⁹ Samuels, "Welfare Economics, Power, and Property" reprinted in Samuels, Warren J and Schmid, A Allan *Law and Economics: An Institutional Perspective* (1981) 9-75;

Commons's institutional economics may be conceived as a "rounding out" of orthodox economic theory into an inquiry into the culture of the period under investigation.²¹ It constitutes an inquiry into the causes and nature of conflict and a search for ways to resolve conflict through new institutional structures and new procedures - thereby transforming that culture. A thread uniting Commons's diverse writings was the development of institutions, especially within capitalism. He developed theories of the evolution of capitalism and of institutional change as a modifying force alleviating the major defects of capitalism.

II. ARTIFICIAL SELECTION

As an entry point to Commons's "artificial selection" theory of institutional evolution, I shall briefly examine his understanding of the nature and significance of institutions. Commons wrote in "A Sociological View" that "[i]nstitutions are ... definite modes according to which persons deal with one another".²² He noted that "[a]n institution has ... a body of accepted beliefs, which color and shape the individual's desires from infancy ...".²³ Elaborating on this, he said:

The beliefs which hover about an institution are the social atmosphere, the "social mind", related thereto. They are the traditional estimates and valuations, expressed and transmitted in some form of language. ... The child is born and begins to grow as a plastic, homogenous group of desires and activities urging him in all directions. He comes in contact with parents at home, policemen in the street, teachers in school and church, workers in shop and factory, and his homogenous desires are drawn out and distinguished from each other by each several group of fellow-men. He learns the language of each institution. His innate but incoherent aptitudes and likings are thus given shape and particular expression. His mind fits into these social beliefs, and he

Samuels, "The Legal-Economic Nexus" (1989) 57 *George Washington Law Review* 1556-78.

20 Schmid, "Nonmarket Values and Efficiency of Public Investments in Water Resources" (1967) *American Economic Review* 158-68; Schmid, "The Economics of Property Rights: A Review Article" in Samuels, Warren J (ed) *The Chicago School of Political Economy* (1976) 469-478; Schmid, A Allan *Property, Power and Public Choice* (1987); Schmid, "Institutional Law & Economics" (1994) 1 *European Journal of Law & Economics* 33-51.

21 Gruchy, Alan *Modern Economic Thought* (1947) 237.

22 *Supra* note 8, at 4.

23 *Ibid.*

learns to believe and act more or less spontaneously and appropriately in each institution.²⁴

One oft-quoted definition of “institution” given by Commons in *Institutional Economics* is “collective action in control of individual action”.²⁵ He elaborated on the first part of the definition as follows:

Collective action ranges all the way from unorganized Custom to the many organized Going Concerns, such as the family, the corporation, ... the trade union, the Federal Reserve System, ... the state Collective action is even more universal in the unorganized form of Custom than it is in the organized form of Concerns. Yet even a going concern is also a custom.²⁶

By “individual action” in the next part of the definition, Commons refers to “participation in ... transactions ...”.²⁷ And the “control” by custom or concerns “consists of working rules which govern more or less what the individual can, must, or may do or not do”.²⁸

Working rules are enforced through the use of collective sanctions. These are “collective inducements applied to individuals by the concern which controls, liberates, and expands their individual actions ...”.²⁹ Commons identifies three types of sanctions according to the kind of concern which exercises control:

These sanctions are distinguishable as moral, economic, and legal sanctions. The legal sanction is violence, or threatened violence, and the concern is the State. The other sanctions are “extra-legal”. The moral or ethical sanction is mere opinion, enforced by such concern as churches, social clubs, and ethical associations like the many “trade associations” of business men who formulate a “code of ethics” whose enforcement rests only on the collective *opinion* of the members, if *not* supported by economic or legal penalties or rewards. The economic sanctions are enforced by such organizations as trade unions, business corporations, cartels, through the sanctions of profit or loss, employment or unemployment, or other economic gain or deprivation, but without violence.³⁰

24 Ibid.

25 Commons, *supra* note 2, at 69.

26 Ibid, 69-70 and 72.

27 Commons, “Institutional Economics” (1931) *American Economic Review* 648.

28 Ibid.

29 Commons, *supra* note 2, at 77.

30 Ibid, 77-79.

At a point in time when an individual joins a going concern, there is in place a more or less elaborate set of interrelated working rules to which adherence is required if sanctions are to be avoided. As individuals carry out their activities within the many overlapping going concerns of which they are "citizens," they gradually become habituated to the patterns dictated by the underlying set of rules. Eventually the patterns are internalized as unconscious "habitual assumptions" - assumptions that shape one's response to stimuli.

Familiarisation with the working rules of going concerns permits one to be able to function at a sub-conscious level, allowing the active dimension of the mind to deal with various contingencies that arise in every-day life, thereby facilitating successful participation in the concern. Commons described the process as follows:

When a new worker goes into a factory ... everything may be novel and unexpected because not previously met in his experience. Gradually he learns the ways of doing things that are expected of him. They become familiar. He forgets that they were novel when he began. He is unable to explain them to outsiders. They have become routine, taken for granted. His mind is no longer called upon to think about them. ... Their physical and mental framework has become automatic, and their minds run off happily to a world of memory, imagination, day-dreaming, or what not. We speak of such minds as institutionalized. But all minds are institutionalized by whatever habitual assumptions they have acquired and they take for granted, so that they pay no attention to them ...³¹

For many institutionalised minds, the working rules, especially those customs that have existed for some time and been inculcated in the process of education, "appear to be natural unchangeable, inalienable", even though they are in fact "artificial, collective, transitory, forfeitable".³² Commons was critical of, among others, political theorists such as Robert Filmer and John Locke for picturing the customs with which "they were familiar and felt secure, as an eternal timeless, presupposed, and unchangeable law of Nature, God, and Reason".³³ He continued:

The customs with which both Filmer and Locke were familiar were the repeated practices and transactions of landlords, tenants, kings, known as the feudal system; and the practices and transactions of merchants, master workmen, farmers, in the then period of capitalistic expansion through commerce and revolution.

³¹ Ibid, 697.

³² Ibid, 703.

³³ Ibid, 45.

The customs, however, which seemed divine and natural to Locke, were very recent history, though they were older than Locke himself. ... The subjection of women to their husbands, as then practiced in England, was founded on God's punishment of Eve, and on "the laws of mankind and customs of nations", so that there is a "foundation in nature for it". Her subjection was a divine and natural duty correlative to the husband's right, because familiar and beneficial in Locke's opinion. ...

Most important was the custom of private property ... as practiced in the common law of 1689. Yet property, according to Locke, exists before the organization of society, and "the great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. ... [But] property is, in "real fact", only an expected repetition of ... transactions, as variable as changing conditions and changing meanings; not a divine unchanging command issued in conformity to what present beneficiaries now think ought to be made unchangeable.³⁴

The contingent nature of customs, Commons pointed out, often becomes apparent when they come into conflict with other customs following a change in circumstances, such as an increase in population, a technological innovation, or an environmental degradation. It is at this point when *deliberate decision-making is required over whose custom will count and whose will not*:

Customs are, indeed, the raw material out of which justice is constructed. But customs differ, customs change, customs are good and bad, and customs conflict. They are uncertain, complex, contradictory and confusing. A choice must be made. Somebody must choose which customs to authorize and which to condemn or let alone Somebody must choose between customs. Whoever chooses is the lawgiver.³⁵

The above passage brings us directly to Commons's artificial selection theory of institutional evolution:

Customs originated in the past. But they also changed in the past, and they are changing in the present. ... It is these variabilities that makes possible the evolutionary changes of custom. The common law itself is only the decisions of disputes according to the prevailing customs, each decision operating as a precedent. Between the multitude of competing precedents there is opportunity for judges to select, so that the common law changes and "grows" by "artificial selection" looking towards future consequences.³⁶

³⁴ Ibid, 45-47, 51.

³⁵ Commons, supra note 5, at 299-300.

³⁶ Ibid, 239-40.

Artificial selection is central to Commons's 1924 book *Legal Foundations of Capitalism*. Commons outlined the complex process by which the customs relating to property and liberty which prevailed under feudalism were converted into the very different customs which prevail under capitalism. The role of the state in this process was pivotal. Of present note, Commons gave some considerable attention to the fact that the state, the sovereign concern, is an object of control and capture in regard to channeling the direction of artificial selection, that is, the determination of whose customs are to count and whose are to perish.³⁷ Commons stated:

[T]he common-law courts accomplished, in the case of the guilds, what they had accomplished in the case of the barons. They abolished the private jurisdictions with their private courts, and the way was thenceforth open for them to build up, for the Kingdom, a common law of the price-bargain, just as they had built up a common law of the rent-bargain. The business man now, like the Yeoman and copy-holders, could have his customs inquired into by the King's justices, and his rights and privileges asserted against private jurisdiction of both guilds and barons. Capitalism entered upon its offensive stage, intent on controlling government whose aid it had petitioned during its defensive period. Eventually its petitions became its rights. The next hundred years, until the Act of Settlement in 1700, was substantially the struggle of farmers and business men to become members of the Commonwealth, whereby they might have courts of law willing and able to convert their customary bargains into a common law of property and liberty. The King's courts themselves had been impotent after Chief Justice Coke, the great champion of the common law had been removed from office by King James in 1616, and consequently the farmers and business men turned towards collective control through parliament, towards raising an army, and even, for a period of ten years, abolishing the King and House of Lords and converting the Kingdom literally into a commonwealth. Although the Kingdom was restored ... the common law of business was incorporated into the common law of agriculture.³⁸

Commons, we have seen, understood sovereignty to be a process of negotiation over the use of the sanction of force. The principal tools of negotiation are words. Contests to control and use sovereignty for the

³⁷ On the subject of the "distribution of sacrifice", see Arnoux, Dawson, and O'Connor, "Logics of Death and Sacrifice in the Resource Management Law Reforms of Aotearoa/New Zealand" (1993) 27 *Journal of Economic Issues* 1059-1096. On the subject of sovereignty as an object of capture and control, see Dawson, "Sovereignty and Withholding in John Commons's Political Economy" in Samuels, Warren J (ed) *The Founding of Institutional Economics: The Leisure Class and Sovereignty* (1998) 47-75.

³⁸ Commons, *supra* note 5, at 228-9.

purpose of channeling artificial selection, Commons emphasised, ultimately involve attempts to control and manipulate language. Commons gave enormous attention to the dynamics of language. In *Legal Foundations of Capitalism*, Commons gave an advanced and refined observance to considerations of language and how words, as cultural artifacts, encapsulate changing interpretations of experiences and of values.³⁹ Words, Commons perceived, are as fluid as a pattern of working rules. Commons wrote in the first chapter of *Legal Foundations*:

Words, prices and numbers are nominal and not real. They are signs and symbols needed for the operation of the working rules. Yet each is the only effective means by which human beings can deal with each other securely and accurately with regard to the things that are real. But each may be secure and inaccurate.⁴⁰

In the process of writing *Legal Foundations*, Commons learned that changes in the meanings of words were correlated with cultural change. In particular, he discerned that capitalism became what it is, and took the form that it has, in part because of certain definitions of, among other words, “property” and “liberty” that were given privileged status in law. Commons sought to illuminate the language-culture reciprocity in *Legal Foundations*. His analysis of liberty began in England in the Middle Ages, then a central object of dispute. Commons clarified the nature of the conflict:

As early as the year 1300, it is asserted, an unlearned local court imposed a fine on several candle-makers who “made a covenant among themselves that none should sell a pound of candles cheaper than another”. Thus liberty of trade among business men became the common-law rule of the landlords until modified, in the 17th century, by the business-law rule of “fair trade”.

It was these common-law concepts of personal rights, of property and liberty that came into conflict, in the reigns of Elizabeth and the Stuart Kings, with the prerogative of the monarch. The way was prepared for a double meaning of the word liberty. It might mean the “liberates” of Magna Carta” which were the privileges of the landlords granted by the monarch, or it might mean the liberty to buy and sell, to be free from violence, theft and trespass, derived from approved customs which constituted the common law. The two were inconsistent. One was a contradiction of the other. Freedom, or liberty, in the sense of a grant out of the royal prerogative, stood for a relation of superior to inferior; freedom or liberty in the sense of the common law stood for a relation of equality between members of the same class. The first is more properly to be distinguished as “freedom,” the second as “liberty”. Freedom was a grant of power to participate in the privileges of those who were

³⁹ Samuels, Warren J *The Historicism of John R Commons* (manuscript version, 1996).

⁴⁰ Commons, *supra* note 5, at 9.

specially favored by a superior. Liberty was the common-law right to equality of treatment among individuals who belonged to the same class whether privileged or unprivileged. Equal liberty was inconsistent with unequal freedom.

It was this contradiction and double meaning of liberty that characterized the long struggle of the 17th century.⁴¹

An early part of the struggle was between Sir Edward Coke and King James I. Coke began an assault on monopolies, and justified this by (incorrectly) applying the common law definition of liberty to the “liberates” of Magna Carta. The process of “socialization” - Commons’s term for the positive response by officials of the state to pressure from a coercively disadvantaged group to extract power from those in a position of privilege - orchestrated by Coke was terminated with his dismissal. The English Revolution, however, resuscitated Coke’s language. Commons wrote of the linguistic significance of the “democratization” - his term for the process whereby a group, through force, get its representatives to become officials of the state, thereby causing the form of the state to evolve, and procure laws to protect their interests:

The political uprising ..., which ended in the Commonwealth, is well-known. On the legal side it was reflected in new definitions of monopoly and liberty, based on errors in interpreting the original meanings.⁴²

With the transformation from feudalism to capitalism, words had to change their meaning - for, as Commons perceived, the languages we speak reflect and make possible the cultural practices in which we participate.

Commons’s analysis of the legal foundations of capitalism underpinned his rejection of those theories in political economy, both physical and evolutionary, which have “attempted to get rid of the human will and to explain economic phenomena as the working out of natural forces, either foreordained or blind”.⁴³ Commons outlined his own conception of political economy:

Economic phenomena, as we know them, are the result of artificial selection and not of natural selection. ... The subject-matter is the habits, customs and ways of thinking of producers, consumers, buyers, sellers, borrowers, lenders and all who engage in what we call economic transactions. The method has been the adoption of common rules applying to the similar transactions of all who come within the same concern. If

⁴¹ Ibid, 49-50 (the quote in the passage is from Pollock’s *The Genius of the Common Law* (1913)).

⁴² Ibid, 50.

⁴³ Ibid, 376.

you watch the development of the credit system out of the customs of business men in buying and selling, borrowing and lending, and out of the customs of courts in deciding disputes, according to the changing common rules, you will see how political economy evolved. The desirable customs were selected gradually by the courts, the undesirable customs were progressively eliminated as bad practices, and out of the whole came the existing economic process, a going concern, symbolized by a flux of prices, and operating to build up an artificial mechanism of rules of conduct, creating incorporeal property and intangible property quite different from the unguided processes of nature. ...

[T]he phenomena of political economy ... are the present outcome of rights of property and powers of government which have been fashioned and refashioned in the past by courts, legislatures and executives through control of human behavior by means of working rules, directed towards purposes deemed useful or just by the law-givers and law interpreters.⁴⁴

What Commons called the “art of political economy”⁴⁵ is concerned, not with fine tuning Adam Smith’s invisible hand, but with deliberately creating the institutional structure upon which the hand operates, and in doing so determining whose interests the hand will serve. Commons wrote:

The oversight ... of Adam Smith and the classical economists ... is explicable in the fact that what they mistook for the order of nature or divine providence was merely the common law silently growing up around them in the decisions of judges who were quietly selecting and standardizing the good customs of the neighborhood and rejecting the bad practices that did not conform to the accepted rules of reason. Legislatures and monarchs are dramatic, arbitrary and artificial, courts are commonplace and natural.⁴⁶

The Smithian hand, Commons discerned, is not the hand of God, but the “visible hand”⁴⁷ of the law-giver.

This section concluded with a passage from Charles Darwin which was then connected with Commons’s theory of economic evolution. In a book published in 1875 entitled *The Variation of Animals and Plants Under Domestication*,⁴⁸ Darwin essentially characterised artificial selection as follows:

44 Ibid, 376-8.

45 Ibid, 379.

46 Ibid, 241-242.

47 Ibid, 204.

48 Reprinted 1972.

Although man does not cause variability and cannot even prevent it, he can select, preserve, and accumulate the variations given to him by the hand of nature almost in any way which he chooses; and thus he can certainly produce a great result. ... Man may select and preserve each successive variation, with the distinct intention of improving and altering a breed in accordance with a preconceived idea; and by thus adding up variations, often so slight as to be imperceptible to the uneducated eye, he has effected wonderful changes and improvements. ... As the will of man thus comes into play, we can understand how it is that domesticated breeds show adaptation to his wants and pleasures. We can further understand how it is that domestic races of animals and cultivated races of plants often exhibit an abnormal character, as compared with natural species; for they have modified not for their own benefit, but for that of man.⁴⁹

The above passage, it should be clear without explanation, captures the general thrust of Commons's artificial selection. That Commons's view was in accord with Darwin can be discerned from the following passage from the former:

Natural selection, which is natural survival of the "fit", produces wolves, snakes, poisons, destructive microbes; but artificial selection converts wolves into dogs, nature's poisons into medicines, eliminates wicked microbes, and multiplies the good microbes. A holstein cow could not survive if left to natural selection -- she is a monstrosity created by artificial selection for the sake of what she can do for man in the future.⁵⁰

For Commons, the direction of nominally economic evolution was shaped by the purposes of the Darwinian 'breeder', that is, the officials of the sovereign concern, the state. The state is a human artifact and it is an instrument of physical force which individuals and groups endeavour to control, to ensure, among other things, the survival of what they deem to be good customs.

III. NEW ZEALAND

In the early 1800s, there existed some 50 iwi (tribes/nations) in the area of land commonly known by Europeans as New Zealand. Rangatira and Tōhunga largely managed the sovereign sanction of force. The administration of property was carried out through a complex interaction of

⁴⁹ Cited in Ramstad, "On the Nature of Economic Evolution: John R Commons and The Metaphor of Artificial Selection" in Magnusson, Lars (ed) *Evolutionary and Neo-Schumpeterian Approaches to Economics* (1994) 67.

⁵⁰ Commons, *supra* note 2, at 636.

the three multi-faceted concepts of mana, utu, and tapū.⁵¹ The Tōhunga, for example, could place a tapū (or rāhui) on certain areas, such as a forest or fishery, constituting an order for the citizens to keep off.⁵² Intruders, or those committing a hara, would have their maūri attacked by evil spirits otherwise kept at bay by benevolent protection of the gods, and become sick. If the offence was serious, kouka, or the abyss of death, yawned before them.⁵³ If the sorcery did not kill the intruder, the Rangatira would at the first chance. For less serious offences a milder utu would take place in the form of muru. Here, some or all of the offender's property, including that of his or her whānau or hapū, was confiscated or plundered. Iwi histories contain numerous cases where a whānau or hapū had to accept muru for a member's wrong-doing.⁵⁴

Rangatira were responsible for managing a large part of the politico-economic affairs of the hapū and iwi. The greatest efforts were made to secure production of goods in order to meet all obligations, including, among other things, hospitality (involving the reciprocal giving of hākari, or feasts), and the returning of gifts from other hapū and iwi.⁵⁵ Gifting served various purposes, including the acquisition of goods that were unable to be produced, the maintenance of harmonious relations, and the retention of mana.⁵⁶

Early European explorers in New Zealand readily discerned a cultural abyss between themselves and the indigenous peoples. In the 1838 inquiry by the House of Lords Committee, the question was posed:

51 For introductory as well as comprehensive discussions, see, eg, Bowden, "Tapu and Mana: ritual authority and political power in traditional Māori Society" (1979) *Journal of Pacific History* 50-61; Firth, Raymond *Economics of the New Zealand Māori* (1929, reprinted 1959); Te Rangi Hiroa (Buck, P H), *The Coming of the Māori* (1950); Penniman, T (ed) Makereti (Maggi Papakura), *Old Time Māori* (1938); Pere, Rangimarie Rose *Ako: Concepts and Learning in the Māori Tradition* (Working Paper No 17, Department of Sociology, University of Waikato, Hamilton, 1982); Winiata, "Leadership in Pre-European Māori Society" *Journal of the Polynesian Society* 214-220.

52 Firth, *supra* note 48, at 258-262; Makereti, *supra* note 48, at 218-222; Best, "Notes on the Custom of Rāhui" (1904) 13 *Journal of the Polynesian Society* 83-88.

53 Marsden M and Henare, T A *Kaitiakitanga* (manuscript, November 1992) 21-22.

54 Jackson, Moana *The Māori and the Criminal Justice System; A New Perspective: He Whaipanga Hou* (Part Two, 1988) 40-41.

55 Firth, *supra* note 51, at chapter 9.

56 *Ibid*, chapter 12.

Supposing the Chief of one of the Tribes disposed of ... his Rights of Sovereignty over his land, his Rights of Sovereignty would pass to the Person to whom he disposed of them?

Robert FitzRoy, Captain during Darwin's *Beagle* voyage, answered:

I apprehend they would at first, but whether that would be held good Twenty or Thirty Years hence would be a different Question; for those Natives do not understand parting with their Rights in Perpetuity ...⁵⁷

And, to the question, "Have the New Zealanders any Notion that the Compact is not final ...?", FitzRoy answered:

I do not think they do, because they consider that when a European purchases their Land, he is taken from that Moment under the Protection of their Tribe. All the Purchases have been with the Understanding that the Settlers are to be protected by the Chief from whom they purchased the Land, which appears to me very much like their considering that they still have a Sovereignty over the Land, though they allow those People to make use of it.⁵⁸

During the 1830s there were various groups urging officials of the British Crown to use force to protect their respective interests in New Zealand, including several iwi (who were fearful of the French), the Church Missionary Society, and the New Zealand Company.⁵⁹ The last-named was largely the brainchild of Edward Gibbon Wakefield, who, several years earlier, developed a theory of Systematic Colonization.⁶⁰ In 1837 Wakefield described elements of a joint colonization-civilization plan in an ethnocentric-laden letter to the Reverend Charles Torlesse:

I have set on foot a new measure of colonisation on principles which have worked so well for South Australia. The country is New Zealand - one of the finest countries in the world, if not the finest, for British settlement. A New Zealand Association is now in course of formation: it will comprise a more influential body than that which founded South Australia. The colony - that is, the body of capitalists who will first emigrate - is already considerable and comprises persons qualified for every occupation but *one*. We have no clergyman. The New Zealanders are not savages properly speaking, but a people capable of civilisation. A main object will be to do all

⁵⁷ Irish University Press Series, *British Parliamentary Papers* (Colonies: New Zealand 1, 1840) 171.

⁵⁸ Ibid.

⁵⁹ Supra note 3, book 2, chapter 2.

⁶⁰ As per Wakefield, E G *England and America* (1833, reprinted in Pritchard, M F Lloyd (ed) *The Collected Works of Edward Gibbon Wakefield* (1969)).

that can be done for inducing them to embrace the language, customs, religion and social ties of the superior race. The missionaries have already done something towards this object.⁶¹

Wakefield had begun to do his best to induce the Crown to undertake the task of carrying the plan into execution.

However, officials of the Church Missionary Society became disturbed by the plans of Wakefield and the New Zealand Company. The Secretary, Dandeson Coates, giving evidence before the 1838 Select Committee of the House of Lords on the status of New Zealand, argued that the Company would:

interrupt, if not defeat, those Measures for the Religious Improvement and Civilization of the Natives of New Zealand, which are now in favourable Progress through the Labours of the Missionaries ... [S]uch Colonization of Countries inhabited by uncivilized Tribes having been found by universal Experience to lead to the Infliction upon the Aborigines of the greatest Wrongs and most severe Injuries.⁶²

Coates's objections to the Association were held by many if not most missionaries in New Zealand. In 1838 the Reverend Henry Williams, who also had a clear agenda for the use of British force, wrote to the Church Missionary Society:

I ... do not hesitate to say that unless some protection be given by the British Government, the county will be bought up, and the people pass into a kind of slavery, or be utterly extirpated. The European settlers are making rapid advances and are beginning to hold out threats. Should any encouragement be given to the association, thousands would immediately come and overrun the country, and the natives must give way. The only protection that I can propose is that the English Government should take charge of the country, as the Guardians of New Zealand; and the chiefs should be incorporated into a General Assembly, under the guidance of certain officers, with a military force. This would be the only means of giving weight to any laws which might be established.⁶³

⁶¹ Cited in Harrop, "The Companies and British Sovereignty" in *The Cambridge History of the British Empire: Volume VII, New Zealand* (1933) 67.

⁶² Cited in McIntyre David and Gardner, W (eds) *Speeches and Documents on New Zealand History* (1971) 5.

⁶³ Henry Williams, in Carelton, Hugh *The Life of Henry Williams* (1874, reprinted and revised 1948) 286.

On 13 June 1839, the Crown, in the person of Lord Normanby, instructed Captain William Hobson to treat with the “natives” of New Zealand for, among other things, “the cessation of sovereignty”. The instructions given to Hobson covered numerous issues. The first issue of present significance related to consent:

The Queen ... disclaims for herself and her subjects every pretension to seize of the Islands of New Zealand, or to govern them as part of the Dominions of Great Britain unless the free intelligent consent of the natives, expressed according to their established usages, shall first be obtained.⁶⁴

Normanby’s instructions touched on numerous matters, including that of educating (as broadly defined) the “natives”:

For their religious instruction liberal provision has already been made by the zeal of the missionaries ... and it will be at once the most important and the most grateful of your duties to this ignorant race of men to afford the utmost encouragement, protection and support to their Christian teachers. I acknowledge also the obligation of rendering to the Missions such pecuniary aid as the local Government may be able to afford. ... The establishment of schools for the education of the aborigines in the elements of literature will be another object of your solicitude, and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as they are compatible with the universal maxims of humanity and morals. But the savage practices of human sacrifice and cannibalism must be promptly and decisively interdicted.⁶⁵

It can be inferred from the above passage that Normanby would have agreed with Adam Smith that “[t]he great secret of education is to direct vanity to proper objects”.⁶⁶ Normanby’s manifest ethnocentrism certainly gave rise to a position on what objects were proper. It remained to be seen whether or not Hobson would or could explain these matters to the “natives”. In the language of Commons, the Crown would be controlling the process of artificial selection; that is, the selection of what are deemed to be good customs and the elimination of what are deemed to be bad customs. That is to say, the Crown would want to monopolize the position of the Darwinian breeder.

⁶⁴ Cited in Buick, T Lindsay *The Treaty of Waitangi* (1936) 72.

⁶⁵ *Ibid.*, 75-76.

⁶⁶ Smith, Adam *Essays Philosophical and Literary* (1880) 230.

Hobson was, it seems, much of Normanby's mind as to what were proper objects. Of immediate significance, on several occasions in 1840, hoping to give effect to the instructions, Hobson pushed the Secretary of State for the Colonies to send a military force in order to help "the natives" come "within the pale". (Hobson's official physical power on arrival in New Zealand consisted of five troopers of the New South Wales Mounted Police). On one occasion, Hobson wrote:

In my former letters I took the liberty to urge your Lordship the necessity for augmenting the military force in New Zealand. Further experience convinces me of the expediency of this measure. I stated in my letter of 17 February [1840], that four companies of a regiment would be sufficient to support the authority of the Government, and to afford protection to the settlers; I still adhere to that opinion, and I again respectfully recommend it to your Lordship's favourable consideration. ... [T]he habits ... of the native population ... are so inveterately opposed to those of civilized life, and their practices so repugnant to the customs of Englishmen, that we can scarcely hope to preserve ... harmony when the settlers become more numerous.⁶⁷

It can be inferred from this passage that Hobson would have doubted the applicability of the conventional interpretation of Adam Smith's theory of the invisible hand. To carry out his instructions, Hobson saw the necessity for the visible hand of the military in determining a fundamental question of policy: order on whose terms? Hobson's express ethnocentrism suggested that he would prefer order on British terms.

The texts of the Treaty of Waitangi provided, according to William Swainson, "that the chiefs should still continue to exercise their 'chieftainship', with all its incidents".⁶⁸ Swainson, appointed Attorney-General of New Zealand in 1841, gave considerable thought in the early 1840s as to how this related to the provision that Rangatira ceded to the British Crown "what we, on our part, understood and intended to be understood, by the language made use of ... the Sovereignty over the country".⁶⁹ Swainson, like his fellow Crown officials, understood the Crown's acquisition of sovereignty to mean the monopolisation of force. The potential antinomy, if Rangatira used force (in the name of exercising their "chieftainship", or "Rangatiratanga") against Europeans or Māori of other iwi to defend what they deem to be their rights, contrary to what the Crown

⁶⁷ Hobson to the Secretary of State for the Colonies, 15 October 1840; *supra* note 57, New Zealand 3, 311, 113.

⁶⁸ Swainson, William *New Zealand and its Colonization* (1859) 157.

⁶⁹ *Ibid.*

deemed to be its rights, would soon become an issue of contention, one that remains to the present day.⁷⁰ This issue would centre on the political process of determining definitions of terms.

The potential antinomy does not appear to have been the subject of discussion at any of the Treaty negotiations. What views Crown officials held on the matter at the time is unknown. But the following remarks by the first Chief Justice, William Martin, are instructive:

The work of collecting signatures to the Treaty of Waitangi was hasty and incomplete in the extreme. It was especially imperfect in the central districts of this island [North Island]. ... Subjects to the Crown were to be gathered in from year to year, not by mere signatures, but by acts of practical assent, gradually growing into the habit of willing obedience to a power recognised as beneficial. Discussion was avoided. To let the authority of the Crown quietly grow in the land was the great object.⁷¹

So much for Hobson's duty of obtaining the "free intelligent consent" of Rangatira.

During the 1840s, however, the real officials of sovereignty in New Zealand were Rangatira. This was indeed admitted to by Robert FitzRoy, Governor of New Zealand 1843-45. FitzRoy informed us in his 1846 book, *Remarks in New Zealand*, that Rangatira became an integral part of Government House:

For instance, on one day more than two hundred chiefs were assembled. ... [On that day] above a thousand of their followers were in the town, and not less than two thousand in the neighbourhood, within an hour's journey.⁷²

With FitzRoy at the time able to call on a detachment of only 80 rank and file, it is of no surprise to read in his *Remarks* that he considered the settlement of Auckland to be "entirely in their [the local iwi] power"⁷³ FitzRoy went on to infer that what he considered to be the "public interest" would really have to be what was in the interests of Rangatira:

After a few months' observation and reflection the governor became more and more convinced of the absolute necessity of acting so as to make the large majority of the natives really friendly towards the government, and disposed, of their own free will,

⁷⁰ Supra note 3.

⁷¹ William Martin to William Fox, 31 December 1863, supra note 57, *New Zealand* 13, 1863-64, sec 326, at 7.

⁷² FitzRoy, Robert *Remarks on New Zealand* (1846) 22.

⁷³ Ibid.

to support his authority. By the small [European] physical force in the colony, it was plain he could then do nothing against such numerous opponents as any hostilities would raise.⁷⁴

Rangatira were at this time largely in control of the process of artificial selection. Many Rangatira in fact quickly learned the European game of capitalism and became good at playing it. For several years after the New Zealand Company had commenced operations, it was still without a Crown grant for a single acre of land, and its 8,000 settlers in 1846 were technically no better than squatters. The institution of leasing emerged. By 1848 it was estimated, for example, that Rangatira of Ngati Kahungunu were receiving £600 for 100,000 acres. Leasing proved to be a profitable practice for them, and at the same time they retained control over the land.

Māori received early support from some Europeans, particularly missionaries, for their policy of leasing. But officials of the New Zealand Company and the Crown were not so supportive. The following passage from Crown agent Donald McLean gave a clue to attitudes that were, arguably, shared by many Europeans from the beginning of leasing:

It is quite certain that while such squatting exists, the Natives, even as far North as Auckland will oppose the sale of land in the expectation. ... that they may realize high rents for it. ... [T]he greatest recipients ... [of] these rents are frequently, if not always, the most idle and dissolute characters of their tribe, whose reckless conduct, and increasing cupidity, render the position of the settlers holding and under them not only disagreeable and precarious, but in every way repugnant to the independent feelings of an Englishman.⁷⁵

McLean expressed here a simple dislike of the situation in which certain Māori occupied a coercively advantageous position in their relations with Europeans - a pattern of inequality that was, of course, instituted through the land guarantee in the Treaty. The colonists, McLean would have it, had not come to New Zealand to be tenants for the “natives”.

In the 1850s the arrival of numerous colonists took the European population above that of Māori. At this time some major changes began to occur in

⁷⁴ Ibid.

⁷⁵ Donald McLean to Colonial Secretary, 9 July, 1851; cited in “Report and Recommendation on Petition No. 240 of 1852, of Hori Tupaea and four others, Praying for Relief in Connection with Whanganui-o-Rotu (or Napier Inner Harbour) and Their Right of Property Therein” (*Appendices to the Journal of the House of Representatives* (1948) G-6A, 21).

inter-racial relations. The Reverend Richard Taylor commented in his 1855 book *Te Ika a Maui*:

As our countrymen increased and occupied the country, the necessity of keeping on terms of friendship with the natives became less felt, and by the fresh comers not at all. Many, too, often viewed the original owners of the soil as intruders, and when they approached their doors have not infrequently let loose their dogs at them. There can be little doubt that the same cause which rendered our countrymen objects of native dislike in India also repeated here; the Māori is constantly being called a nigger and black fellow to his face, and viewed as an inferior being. ... The only individuals who have been well treated have been those who have had lands to sell, and they only whilst the negotiation went on; immediately the sale was completed they were ... disregarded and unnoticed.⁷⁶

The differences between the iwi and colonists in terms of political-economic power indeed were becoming the subject of possible confrontation. A correspondent of the *Taranaki Herald* in 1855 made the following prophesy:

The feeling generated in the mind of the actual settler, who is compelled to go miles back into the forest to obtain land, is one extremely unfavourable to continued peaceable relations with the Natives; and with the growth of the European population, and the increased pressure for land, this feeling will become more bitter.⁷⁷

The pressure from settlers on iwi to sell was a stimulus for antagonism within and between iwi. This, in the view of Crown agent George Cooper, was to the benefit of the settlers:

So long as they abstain from absolute fighting these differences among themselves are so much to our advantage as they are the only means by which we can hope to induce them to give up the land.⁷⁸

This was the customary colonial policy of “divide and rule”.

At a meeting in Taranaki on 8 March 1859, at which the Crown sought to buy land, Te Teira Manuka of Wiremu Kingi’s iwi, Te Ati Awa, came forward with an offer to sell Governor Thomas Browne a 600 acres of land at the mouth of the Waitara River. Kingi, however, refused to permit the sale. Browne chose to ignore Kingi’s claim of a power of veto. On the

⁷⁶ Taylor, Reverend Richard *Past and Present New Zealand* (1868) 111-112.

⁷⁷ Cited in Sinclair, Keith *The Origins of the Māori Wars* (1961) 118.

⁷⁸ Cooper to Sinclair, 31 May 1852; cited *ibid*, 125.

critical issue of mana, Browne subscribed to the view of his Native Minister, William Richmond, who stated:

After all, what is mana, where, as in Taranaki, it is not a silent admitted influence? What is it, I say, but the right of the strong over the weak - the old Māori right of the strong arm? Such a right is, of course, perpetually changing as to its territorial limits; and we have seen how the mana of William King - that sacred right! - now reaches to Waitara. On this question *it is bootless to refer to the old customs of the country. Mana, as now set up, is a veto on sales. Where sale was never thought of, what could the people know of mana?* But this is not worth further discussing - it cannot affect our conclusion about Wi Kingi. All right of chieftainship, veto, seignior, mana, or whatever you may choose to call it, is, in reason and equity, barred in the present case.⁷⁹

Here Richmond asserted the power of the Crown to monopolise the control of artificial selection - which ultimately centred on the meanings of words (such as “mana” and “rangatira”) to count at law. (A better illustration of the language-culture mutuality would be hard to find). Browne authorized the use of force to eject Kingi and his people. The Taranaki War soon followed.

Several years earlier, Browne had predicted pressure from his Native Minister concerning the appropriation of “native” land. Browne had arrived in New Zealand in 1855 with the responsibility of implementing Representative Government for the Europeans (Māori had been deliberately prevented from participating on grounds tied to asserted cultural superiority).⁸⁰ Browne, however, would retain control of Native Affairs, as he was responsible for the peace and security of the colony. Browne was frank about the reason for his control of Native Affairs in a private letter to the Permanent Under-Secretary for Colonies:

⁷⁹ *New Zealand Parliamentary Debates*, 3 August 1860 (emphasis added).

⁸⁰ Colonial Secretary, Hugh Carleton, sent the following resolution to the Crown Law Office: “For a Native constituency implies, Native representatives; and what greater debasement to the House can be conceived, than the occupation of seats in it by men raised, as yet, but one step above barbarism - who would not only be able to comprehend the reasons adduced concerning the measure upon which they were about to vote, but even to understand the language in which those reasons would be given. What could be more debasing to the House than the inevitable endeavours of rival parties to catch the votes of the Native members - not by force of argument, but by any means available” (*Appendices to the Journal of the House of Representatives* (1860) E7, 5).

Judging by what I now see, the difficulty will be not to turn men out of office but to keep them in it: my adviser will be subject to pressure from an opposition agitated by violent party feelings and restrained by no fear of the consequences. If my view is correct *they will not find it easy to control those who cast longing eyes on native lands*, nor will the fear of war have that effect, *for many would profit by it largely in the way of trade and to the unscrupulous it holds out hope of acquiring the lands they want*. If therefore the Governor is obliged to consult with his executive council in questions affecting the natives, he will be liable to their throwing up office and being supported in so doing by the assembly whenever they take or are forced to take a one sided view of native affairs.⁸¹

It can be seen from the above passage that Browne recognized the state to be an object of control for economic gain. And it is clear that he did not subscribe to the conventional interpretation of Adam Smith's invisible hand - for, in Browne's view, self-interest would be likely to lead, not to harmony, but to war. Evidently, by 1859, Browne came to the view that war would be a good thing for the Europeans. Victory eventually came several years later.

An early preoccupation of the Colonial Parliament in 1862 was the Native Lands Act. The cause of the Taranaki War, in the view of Crown officials, had been ill-defined Māori titles (this view was not, of course, shared by Rangatira such as Kingi). "Remedy" was sought in the establishment of a tribunal to enable ownership to be determined judicially before acquisitions were attempted. The Native Land Act 1862 made provision for (what became known in 1865 as) the Native Land Court to decide on the ownership of Māori lands. After reciting Hobson's Text and the cessation of the right of pre-emption, the Act stated:

And whereas it would greatly promote the peaceful settlement of the colony, and the advancement and civilization of the Natives, if their rights to land were ascertained, defined and declared, and if the ownership of such lands ... were assimilated as nearly as possible to the ownership of land according to British law; and whereas with a view to the foregoing objects Her Majesty may be pleased to waive *in favor of the Natives* so much of the said Treaty of Waitangi and reserves to Her Majesty the right of preemption of their lands, and to establish Courts, and make provision for ascertaining and defining the rights of the Natives to their lands, and for otherwise giving effect to the provisions of this Act.⁸²

Whilst this ethnocentric-laden Preamble suggested that the Act was to be "in favor of the natives", it remained to be seen who would be given the titles.

⁸¹ Browne to Herman Merivale, 29 April 1856; cited in McIntyre, W David (ed) *The Journal of Henry Sewell 1853-7* (1980) 103 (emphasis added).

⁸² Native Land Act 1862, Preamble (emphasis added).

The Colonial Legislature had taken it upon itself to answer the fundamental issue of *who decides*: the Court was to be under the presidency of a European Magistrate.⁸³

Certificates of title were to be issued to individuals (specifically, no more than 10 persons). The result was that those named on the certificate were enabled to dispose of what were thereby formerly iwi lands.⁸⁴ For all intents and purposes iwi were destroyed. A later observation of the Court by Chapman J in *Willoughby v Panapa Waihopi* is as follows:

A body of custom has been recognized and created in that Court which *represents the sense of justice of its Judges* in dealing with a people in the course of a transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. *Many of the customs of that Court must have been founded with but slight regard for the ideas which prevailed* in savage times. Thus it is well known that, like other races in the same condition as to the ideas of property, the Māoris recognized no individual property in land beyond that derived from occupation by cultivation. The tribal lands have, however, to be partitioned and otherwise dealt with, and that is done by allotting blocks of land to persons found by the Court by a process of its own to be entitled to them.⁸⁵

The colonial judiciary thus had a significant degree of control with respect to artificial selection - a power that Hobson had ultimately sought in 1840 through the Trojan Horse of the Treaty of Waitangi.

Historian Alan Ward has provided a brief general outline of the consequences of the Court as follows:

The Māori people were consequently exposed to a thirty-year period during which a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land agents and money-lenders made advances to rival groups of Māori claimants to land, pressed the claim of their faction in the Courts and recouped the costs in land. Rightful Māori owners could not avoid litigation and expensive surveys if false claims were put forward. ...

⁸³ As per Smith, Norman *Native Custom and Law* (1942) 7.

⁸⁴ The workings of the Native Land Act 1865 (and amendments) and its consequences have been the subject of repeated analyses. See, eg, Sorrenson, "Land Purchase Methods and Their Effect on Māori Population, 1865-1901" (1956) 65 *Journal of the Polynesian Society* 183-199.

⁸⁵ (1910) 29 NZLR 1123, 1149 (emphasis added).

The ... Native Land Court ... ushered in an era of bitter contesting, of lying and false evidence. The legalistic nature of the Court also instituted a costly and tedious paraphernalia of lawyers, agents, legal rules and precedents - a morass in which the Māori floundered for decades, frittering away their estates in ruinous expenses.⁸⁶

Another facet of what can readily be understood as cultural genocide concerned education - a subject, it will be recalled, that held significance in Normanby's instructions to Hobson. In 1862, Henry Taylor, Auckland Inspector of Native Schools, in a report to the Colonial Parliament, noted "some impediments to progress" in "carrying out the work of civilization among the aboriginal Native race, through the medium of schools". He insisted:

The Native language itself is also another obstacle in the way of civilization. So long as it exists there is a barrier to the free and unrestrained intercourse which ought to exist between the two races. It shuts out the less civilized portion of the population from the benefits which intercourse with the more enlightened would confer. The School-room alone has the power to break down this wall of partition between the two races. Too much attention cannot be devoted to this branch of Māori education.⁸⁷

The Native Schools would become a pivotal instrument of cultural assimilation. The "father" of the Native School system, James Pope, believed that "the Māori could be rapidly and painlessly Europeanised and that virtual identity between the two peoples would be achieved and the Māori absorbed at no distant date".⁸⁸ Pope's ethnocentrism is manifest in his statement of the overriding objective of the system:

to bring to an untutored but intelligent and high-spirited people into line with our civilisation and by placing in Māori settlements European school buildings and European families to serve as teachers, especially as exemplars of a new and more desirable mode of life.⁸⁹

A multi-layered form of artificial selection took place with the development of "acclimatisation" societies. With a view to introducing, among other things, their fishing customs from "home", colonists residing in Canterbury held a public meeting in 1864. The Canterbury Horticultural and Acclimatisation Society was formally constituted that year, with Frederick Weld its first President. Soon the Society began jockeying for protective

⁸⁶ Ward, Alan *A Show of Justice* (1973) 185-186.

⁸⁷ *Appendices to the Journals of the House of Representatives* (1862) B4, 35-36.

⁸⁸ Quoted in Ballara, Angela *Proud to be White?* (1986) 92.

⁸⁹ Quoted in Simon, Judith (ed) *Nga Kura Māori* (1998) 14.

legislation. (Fortunately for the Society, Weld was to become Premier later in the year). Vice-President Julius Haast thought that “our [sic] Alpine rivers are well calculated for the propagation of the salmon and trout”.⁹⁰ In 1866 William Murison, Member of the House of Representatives for Waikouaiti, introduced the Salmon and Trout Bill to permit and protect these fish introduced into rivers and streams by the societies. The Governor would be given power to make regulations as to closed seasons, the definition of mouths of rivers and streams, and methods and prevention of poaching.⁹¹ The Bill was passed in 1867.

The salmon and trout, however, had a considerable adverse impact on indigenous fish such as koaro, pipiki, tikiheimi and inangi. Also, there were numerous eel drives designed to protect young trout. Tonnes of eels were slashed with iron and allowed to decay on the banks.⁹² Māori were precluded from catching the imported fish unless they purchased a license. These events, needless to say, led to antagonism. In 1881, Alexander Mackay, Native Commissioner, reported on conflict in Ngai Tahu. His description of events (which also concerned matters relating to the drainage of lakes) illuminated clearly a process of cumulative-causation wherein the iwi had been pushed into “a state of privation”:

I have recently visited the majority of settlements in Canterbury and Otago. ... At many of the settlements poverty is steadily on the increase among the residents, and without some change ... effected, the people will ultimately drift into a state of semi-starvation. The increase of civilization around them, besides curtailing the liberties they formerly enjoyed for fishing and catching birds, has also compelled the adoption of a different and more expensive mode of life, which they find very difficult to support; this gets them into debt with tradesmen, and the puzzle is how they manage to exist at all, as regular employment is not to be obtained, and the scanty crops that are raised are insufficient for their own use ...

A matter that has inflicted serious injury on the Natives of late years ... is the action of the Acclimatization Societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using the nets for catching the whitebait in season, [n]or can they catch eels or other native fish in these streams for fear of transgressing the law. ... In olden times the Natives had control of these matters, but the advent of the Europeans changed this state of affairs and destroyed the protection that formerly existed, consequently their mahinga kai (food-producing places) are rendered more

⁹⁰ Ibid, 94.

⁹¹ As per Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (1992, Wai 27) 135.

⁹² See, eg, the claim made by Hoani Korehe Kahu to the Mackay Commission, *Appendices to the Journals of the House of Representatives* (1891) G-7, 49.

worthless every year, and in addition to this ... they are frequently ordered off by the settlers if they happen to have no reserve in the locality. This state of affairs, combined with the injury done to the fisheries by the drainage of the country, inflicts a heavy loss on them annually and plunges then further into debt, and keeps them in a state of privation. All this is very harassing to a people who not long since owned the whole of the territory now occupied by another race, and it is not surprising that discontent prevails, or that ... prosperity is impossible.⁹³

Ngai Tahu's means of subsistence, according to Mackay, was literally taken away by the laws of the Colonial Legislature and given to Europeans. If Ngai Tahu wanted fish to eat they now had to pay Europeans for it. In short, the colonists had forced the "game" of capitalism on the iwi and made the rules favourable to themselves. That is to say, it was capitalism for the colonists via their control of the state. Virtually without rights, the status of iwi as "economic" actors was bordering on an empty set.

At the time of the passing in the Colonial Parliament of the Māori Representation Act 1867, officials of iwi lost virtually all influence in directing the sovereign sanction of force in New Zealand. This Act provided for the election of four members to represent the Māori race, one each for the electorates of Northern, Eastern, Western and Southern Māori. The following passage taken from the debates on the Māori Representation Bill is instructive as to one of its purposes:

The well-known line, "Satan finds some mischief still for idle hands to do", might very well be applied to them, and if they got something useful to do, something to occupy and amuse them, their energies might no longer go in a questionable direction. The Bill would give them this, and would act as a kind of safety-valve to let off some dangerous steam, and they would have something to talk about and think about, instead of devoting their whole attention to war.⁹⁴

Members for Māori soon became well aware of their "absolute impotency when a policy measure is going through that is inimical to them".⁹⁵

In a last-ditch effort to save a dying culture, Tawhiao, the second Māori King, led a deputation to England with a petition to Queen Victoria in 1884. The petition proposed a separate Māori Parliament, the appointment of a special commissioner as intermediary between the Māori and Colonial Parliaments, and an independent commission of inquiry into land

⁹³ *Appendices to the Journals of the House of Representatives* (1881) G-8, 16.

⁹⁴ The Hon. Buchanan, (1867) *New Zealand Parliamentary Debates* 814-5.

⁹⁵ Te Rangi Hiroa, (1913) 167 *New Zealand Parliamentary Debates* 825.

confiscations. The following passage from the petition directed attention to the destruction of the Māori governments:

The rights of the chiefs over their own lands were disallowed by the Government, and the positions of the chiefs, in accordance with their Māori customs, was swept away; for the chiefs had the power to secure the land for themselves and their tribes ... and their rights were reduced to an equality with ordinary persons, and their words were allowed no weight in retaining their land or in directing affairs of their own tribes.⁹⁶

The Native Land Court featured in the petition. It was clear that the Crown's control of the selection of the judicial personalities was objected to. For it was requested:

that European Judges in the Native Land Court be superseded, and that your Māori race be then permitted to direct their own affairs in that Court; that they may be empowered to appoint their own Judges over their own lands, lest they be lost by all the present doings of the Court; that they may be able to deal with these lands in accordance with their own customs.⁹⁷

At a meeting with Lord Derby, the Secretary of State for the Colonies, Tawhiao acknowledged Queen Victoria's supremacy, and defined his own kingship as uniting the Māori as one people; not for purposes of separation but to claim the Queen's protection. However, Lord Derby stated that the petition had first to be referred to the Colonial Government. The Prime Minister, Robert Stout, eventually responded to the Colonial Office by declining to discuss events preceding 1865, when the Imperial Government was "responsible", and denying that there had been any infraction of the Treaty since then. Tawhiao's specific proposals were dismissed or ignored.⁹⁸ Derby wrote to Tawhiao:

The questions to which the memorial relates have ... been discussed in the House of Commons with many expressions of sympathy for the Māori race ... The feeling, at the same time, appeared to be general that ... the Government of the Queen in this country has no longer its former power and responsibility in regard to the internal affairs of New Zealand. ... [U]nder the present Constitution of New Zealand the government of all Her Majesty's subjects in the islands is controlled by Ministers

⁹⁶ Cited in Buick, *supra* note 64, at 314.

⁹⁷ *Ibid*, 316-317.

⁹⁸ The foregoing paragraph draws from Mahuta, "Tawhiao" in *The Turbluent Years: 1870-1900* (the Māori Biographies from *The Dictionary of New Zealand Biography*, vol 2, 1994).

responsible to the General Assembly, in which the Natives are efficiently represented by persons of their own race, and it is no longer possible to advise the Queen to interfere actively in the administration of native affairs. I observe, however, with satisfaction that it is in contemplation to increase the number of the Native representatives.⁹⁹

The number of “safety valve” seats was, however, increased to five only in the 1990s. The Colonial Parliament retained full control of the process of artificial selection.

IV. CONCLUDING REMARKS

Supported with imperial troops, officials of the British Crown acceded to requests from colonists in New Zealanders to pursue war in order to get full control of the sovereign sanction of force in New Zealand. Victory had the reward of becoming the Darwinian cultural breeder, determining, in situations of conflicting customs, whose customs were to be perpetuated and whose were to perish. “Sovereignty” was *not* obtained through treaty negotiations with iwi but through force and conquest. Some remarks concerning treaty negotiations made in 1860 by Paora Tuhaere, of Ngati Whatua, are suggestive:

[B]lankets were brought by Mr. Williams. Those I call the bait and the hook was within; the fish did not know there was a hook within; he took the bait and was caught. Mr. Williams’s bait was the blanket; the hook was the Queen’s sovereignty. When he came to the chief he presented his hook and forthwith drew out a subject for the Queen.¹⁰⁰

Colonial politicians would make their actions pertaining to the Treaty immune from judicial review by appointing judges with a similar cosmology. In 1877, in the (in)famous case *Wi Parata v Bishop of Wellington*, the ethnocentric Chief Justice, James Prendergast, deemed the Treaty to be a “legal nullity”.¹⁰¹ After *Wi Parata*, it was generally held that iwi property “rights” could not be legally recognised unless established by statute. Such rights could exist only if created by the Crown. This was the mortar in the legal foundations of the subjection of iwi.

Two years after *Wi Parata*, in 1879, the Reverend H Tucker reflected on events in New Zealand since 1840 in his biography of Bishop Selwyn. Tucker was of the view that, in light of the experience that, wherever the

⁹⁹ Cited in Buick, *supra* note 64, at 320.

¹⁰⁰ As per “The Māori Messenger” (1860) 7 *Te Karere Māori* 43.

¹⁰¹ (1877) 3 *New Zealand Jurist* (New Series) 72, 76.

European had trod, death seemed to pursue the aboriginal, the subjugation of Māori was somewhat predictable. In a passage from his chapter “The Māori War”, Tucker wrote:

The colonizing instinct of the Anglo-Saxon race, on which we are wont to boast ourselves, is too often but an euphemistic synonym for the “greed of the land” which in so many instances has led to the ultimate destruction of the rightful owners, until we have accepted as a philosophical axiom the vague assertion, so grateful to our pride and ambition, that “the inferior race is doomed to disappear in the presence of the superior”.

How sad had been the story, how discreditable the policy of our earlier colonization in the plantations of America, in New South Wales, and in Tasmania, was only too notorious, when the Government, in a fit of apparent compunction, determined that New Zealand should be a bright exception to the blunder of our former experiments.¹⁰²

Here we see Tucker refusing to accept some bastardised version of Darwin’s theory of natural selection as a tool for avoiding responsibility for what amounted to cultural genocide by the majority of his fellow colonists.

Commons’s concept of artificial selection, it is submitted, is a powerful tool with which to contemplate fundamental legal-economic processes, including the many roles of institutions in society. Institutions, as Commons emphasised, are not neutral, physically complete, independent, unchangeable substances. Rather, “they are human beings organized in permanent but slowly evolving relations”.¹⁰³ Institutions develop and evolve through efforts to resolve conflict, and often become sources of conflict; they typically depend upon and also serve to re-create hierarchical structures inter-generationally; and they represent constellations of values and shape individual and collective identity. Commons sought to illuminate the ongoing valuational process concerning choices about institutions through his concept of artificial selection.

In pursuing questions related to the concept of artificial selection, Commons and his followers adopted a demythicising role. Some scholars from other schools perceive the demythicising role as dangerous and undesirable. In a 1932 article in the *Journal of Political Economy*, Frank Knight, the premier leader of many members of the Chicago School, articulated the importance

¹⁰² Tucker, H W *Memoir of the Life and Episcopate of George Augustus Selwyn*, DD vol 2 (1879) 156.

¹⁰³ Commons, “The Value of the Study of Political Economy to the Christian Minister” *The Methodist Review*, cited in Commons, *supra* note 8, at ix.

of a belief system for both individuals and society and the service of economics in providing such a system. Knight wrote:

Education ... has this interesting feature, that there are many things about it which are obviously "true", and it may be entirely proper to mention them in friendly conversation ... yet to "say" them publicly and officially would simply sink the ship. At least everybody assumes that it would, and the consequence is the same - it must not be and is not done. If this should turn out to be the one general and important principle of methodology in the entire social science field, the fact would undoubtedly be embarrassing to the profession, unless some way were found to keep it in the dark. ...

To inquire into the ultimates behind accepted group values is obscene and sacrilegious; objective inquiry is an attempt to uncover the nakedness of man, his soul as well as his body, his deeds, his culture, and his very gods. The point is that the "principles" by which a society lives in a tolerable harmony are essentially religious. The essential nature of a religious principle is that not merely is it immoral to oppose it, but to ask what it is, is morally identical with ... attack. ...

Like-mindedness in beliefs and ideas regarding itself is the really important thing in society, and to produce and maintain it is the really important function of education in the social field. That the unanimity has to do with symbols, and that a part of the task is to keep people from asking what they symbolize in any concrete sense, is a mere corollary; for nothing is more obvious than that any such questioning would turn like-mindedness into universal enmity and conflict. The teaching of social science on any considerable scale must be of this sort, and inevitably will be, and there is simply no problem.¹⁰⁴

Knight's disciple James Buchanan also considered that difficult questions should be kept safely among the cognoscenti. Buchanan candidly admitted to Warren Samuels a preference for perpetuating myths of the free society:

It is essential for any ... genuinely individualistic ... social order ... that men act as if and think as if the process works in a certain way even if, from another vision, the facts may seem so different. ... The basic and necessary myths of the free society. These are my main concern, and, admittedly, I have been concerned about my own role in dispelling some of these. Once majority rule is shown to be the tattered relic that analysis must reveal it to be, what are we to think??? And of vital importance for our time men must not see the judiciary as overtly legislating, even though as scholars, we must recognize that judges do legislate and always have.¹⁰⁵

¹⁰⁴ Knight, "The Newer Economics and the Control of Economic Activity" (1932) 40 *Journal of Political Economy* 441, 448-9, 454.

¹⁰⁵ Buchanan and Samuels, "On Some Fundamental Issues in Political Economy: an exchange of correspondence" (1975) 9 *Journal of Economic Issues* 19.

However, the propagation of the hegemonic Western “free society” myths and values has been, and still is, at the expense of the vitality of myths and values from other cultures. Many Māori have experienced and expressed concern about the obnoxious aspects of majority rule (tyranny à la Alexis de Tocqueville and John Stuart Mill),¹⁰⁶ and many are also cognisant that judges are indeed making law notwithstanding their refuge-seeking in doctrines such as the “public interest”.

With regard to Knight’s concern about “raising problems”, in New Zealand it is not a matter of raising them. The *on-going* questions include: whose group values, whose myths, whose gods, whose religion, whose language, whose order, and, perhaps most importantly, *who decides?* The concept of artificial selection invites us to think about the questions.

¹⁰⁶ Tocqueville, Alexis de *Democracy in America* (1835, reprinted 1966) vol 1, 309-313; Mill, John Stuart *Representative Government* in Wollheim, Richard (ed) *John Stuart Mill: Three Essays* (1975) 247-271.

BATTERED WOMAN'S SYNDROME AND "INTERDEPENDENCE" AS FACTORS IN ESTABLISHING CONJUGAL STATUS IN SOCIAL SECURITY LAW

BY JOHN HUGHES*

In *Ruka v Department of Social Welfare*,¹ the Court of Appeal radically redefined the concept of "de facto" marriage for social security purposes, relying in significant respects on the analysis of Canadian courts when emphasising the importance of financial interdependence,² and assessing the relevance of battered woman's syndrome.³ This article examines the analysis in *Ruka*, in the light of its background and its remarkable legislative aftermath: a bill proposing to allow the Department of Social Welfare (now the Department of Work and Income) to ignore domestic violence when establishing a "marriage-type" relationship and to remove social security support for battered women after a six month period as an incentive to leave the relationship.

I. INTRODUCTION

The "conjugal status" principle allows social security administrators to treat two people who are not legally married as if they were married, where those people are deemed to share a relationship which approximates a legal marriage. The application of the principle has a number of significant consequences for the people concerned. Whilst these consequences will vary depending on the structure of the relevant social security scheme, deciding to regard a couple who are not legally married as living in a relationship in the nature of marriage means that, at the very least:

- * in relation to an income-tested benefit, the financial circumstances of both parties will be taken into account;
- * the rate of benefit payable will be that available to a married couple, rather than the greater sum represented by two individual benefits;
- * as the person concerned will be regarded as married, there will be no entitlement to benefit as, say, a lone parent;
- * failure to disclose the existence of such a relationship may amount to fraud.

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1 [1997] 1 NZLR 154.

2 *Re Proc and Minister of Community Services* (1974) 6 OR (2d) 624; 53 DLR (3d) 512.

3 *R v Lavallee* [1990] 1 SCR 852; (1990) 76 CR (3d) 329.

The principal justification advanced for the rule is the argument that it would be wrong in principle to treat a person who is said to be living in a relationship which approximates to a legal marriage better than if that person was legally married.⁴ Few issues in social security law have aroused such controversy, however. The rationale for the rule, its nature, and the methods used by governmental agencies in implementing it, have each given rise to extended academic debate and case law across jurisdictions.⁵ The criticisms of the rule have been elaborated elsewhere. Essentially, it has been argued that the rule:

- * implicitly reinforces the ideology of women's dependence on men, in making an assumption of support where a woman lives with a man;⁶
- * is applied disproportionately to women, and particularly to working class women and women belonging to ethnic minorities;⁷
- * fails to recognise cultural differences in living arrangements;⁸
- * penalises one form of non-marital living arrangement (heterosexual "cohabitation") over others;⁹
- * is associated with inappropriate moral judgments, and is used as a tool of social control;¹⁰

⁴ In New Zealand see, eg, Royal Commission on Social Policy (NZ), *Working Papers on Income Maintenance and Taxation* (1986) para 7.1. In *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, Tipping J emphasised that the aim of the rule was "to ensure that those who choose to enter into what effectively amounts to a married state, but without getting legally married, are not to be treated more favourably for benefit purposes, either as to entitlement or as to quantum, than those who are married not only in fact (de facto) but in law (de jure)". For similar approaches in other jurisdictions, see Mendes da Costa, D *Studies in Canadian Family Law* (1972) 787-791; O'Gus, AI and Barendt, EM *The Law of Social Security* (3rd ed, 1988) 354-357 (UK); Cousins, Mel *The Irish Social Welfare System: Law and Social Policy* (1995) 88-89; Carney, Terry and Hanks, Peter *Social Security in Australia* (1994) 232-233.

⁵ Ibid.

⁶ Freeman, Michael DA and Lyon, Christina *Cohabitation Without Marriage* (1987) 29-30, citing Ginsberg, M *Class, Capital and Social Policy* (1979), who describes the rule as "the implicit reinforcement of patriarchy within the social security system" (at 79). See also Scutt, JA *Women and the Law* (1990) 369-379.

⁷ Cranston, Ross *Legal Foundations of the Welfare State* (1985) 197.

⁸ McLure, Margaret A *Civilised Society* (1998) 224-225.

⁹ Fairbairns, "The Cohabitation Rule: Why it Makes Sense" (1979) 2 *Women's Studies International Forum* 319.

¹⁰ Cranston, *supra* note 7, at 193-200.

* is incapable of precise definition and therefore liable to be applied unfairly;¹¹ and

* is generally administered in a manner which involves extensive intrusion into the privacy of beneficiaries.¹²

This article focuses on developments in the law in New Zealand, where both legislation and administrative practice bear out many of these criticisms. First, the current provision¹³ was certainly based on an assumption of support,¹⁴ even though no duty to support arises outside the context of legal marriage.¹⁵ Secondly, although the relevant legislation is not gender specific in stating the rule,¹⁶ in practice it is applied almost invariably to women beneficiaries. As one illustration, whilst those receiving the “lone parent” benefit (the domestic purposes benefit)¹⁷ account for only 15.1 per cent of beneficiaries,¹⁸ lone parents account for 61 per cent of overpayments established under the conjugal status rule.¹⁹ Out of literally thousands of such overpayments since 1964, the Appeal Authority established by the

¹¹ Ibid.

¹² Ibid, 196. For examples in the context of New Zealand, see Black, John, Harrop, Stephen and Hughes, John *Income Support Law and Practice*, at para 1063.25. Although the provisions of the Privacy Act 1993 apply to the Department of Work and Income, which has taken over the administration of the relevant social security provisions from the Department of Social Welfare, the Department has wide powers of investigation under s 11 of the Social Security Act 1964, and the 1993 Act provides limits on disclosure where the detection or investigation of offences are concerned (Privacy Act 1993, s 27(1)(c)).

¹³ Social Security Act 1964, s 63(b).

¹⁴ For the background, see below. This is true also of Canada (Mendes da Costa, *supra* note 4, at 787); Britain (*Committee on One Parent Families* (“The Finer Report”), 1974, 340), Ireland (Cousins, *supra* note 4, ch 5), and Australia (*Commission of Inquiry into Poverty: Law and Poverty in Australia*, AGPS, Canberra (1975) 270).

¹⁵ Family Proceedings Act 1980, s 63(1).

¹⁶ Section 63(b) of the Act, examined in detail below, speaks of a man and a woman who are “living together in a relationship in the nature of marriage”.

¹⁷ This benefit is available (in very limited circumstances) to men who have the sole care of children (Social Security Act 1964, s 27B), but the recipients are overwhelmingly women (less than 9 per cent of recipients are men: Department of Social Welfare, *Statistical Report 1997*, Wellington, Government Print (1997) 74).

¹⁸ Department of Social Welfare, *supra* note 17, at 5.

¹⁹ Hon Roger Sowry, Minister of Social Welfare, press release, *Benefit Crime Awareness Campaign a Success*, 11 November 1998.

legislation has heard only two involving benefits granted to men.²⁰ Thirdly, failure to recognise cultural differences has led to difficulty where administrators confused Māori customary marriage with de facto marriage,²¹ and to problems in the case law where administrators have failed to recognise the extent of customary obligations to support following separation.²² These issues were compounded by controversy surrounding the benefit fraud campaign in 1997, which was alleged to present stereotyped images of those committing fraud.²³ Fourthly, the rule is stated as applying only to heterosexual relationships. Social security law, like family law, does not recognise other forms of marriage.²⁴ Whilst the Human Rights Act 1993 prohibits discrimination on the basis of sex, marital status, and sexual orientation, these provisions do not currently apply to limit or affect legislation.²⁵ Fifthly, the administration of the rule, as will be seen, has been marked by behaviour falling within the criticisms levelled above as to judgmental, arbitrary and intrusive application.

²⁰ *Social Security Appeal Authority Decisions No 31/92 and 70/93* (both unreported). This figure is probably affected also by deficiencies in the appeal process, described below.

²¹ Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare, *Puao-Te-Ata-Tu (Daybreak)*, Wellington, Government Printer (1986) 28-29.

²² Eg, *Social Security Appeal Authority Decision No 91/84*, unreported, in which the appellant's domestic purposes benefit was withdrawn when the Department of Social Welfare became aware that the beneficiary was living in the same house as her husband, from whom she had separated. Cultural custom forbade her family from barring him from the family home. The Appeal Authority reinstated her benefit.

²³ Members of the public were invited to inform on beneficiaries in confidence, through a telephone "hot-line". In this particular context, the advertisement showed a woman appearing to be either Māori or a Pacific Islander, seen shopping for designer clothes with the shadowy figure of a man in the background, whilst a "voice-over" told the viewer that she and her undisclosed partner had just had an expensive holiday which they had enjoyed by cheating the taxpayer.

²⁴ *Quilter v A-G* [1998] 1 NZLR 523, in which the Court of Appeal held that the Marriage Act 1955 does not allow same sex marriages. Cf the gender neutral definition of a spouse, including a person in a relationship in the nature of marriage, in s 25 of the Accident Insurance Act 1998.

²⁵ Human Rights Act 1993, s 151(1). This provision is subject to a "sunset clause", expiring on 31 December 1999 (s 152). The Human Rights (Amendment) Bill (1998) proposes to exempt further the Department of Social Welfare (amongst other Government Departments) from the provisions of the 1993 Act. That bill is currently proceeding through the House of Representatives. The New Zealand Bill of Rights Act 1990, which also prohibits discrimination, does not override existing legislation (cf *R v Rehberg* (1994) 111 DLR 4th 336).

Whilst criticisms of the rule have tended to focus on its formulation and implementation, feminist analyses in particular have seen the rule as one aspect of a denial of economic independence for women within social security regimes,²⁶ and the overall feminisation of poverty.²⁷ At issue here is the concept of “joint entitlement” (or the “core family unit”) as the basis for entitlement to a social security benefit, as opposed to treating two-adult households in terms of “individual” entitlement.²⁸ Although the Royal Commission on Social Policy made tentative suggestions in this respect in 1988, including the proposed introduction of testing on individual incomes,²⁹ those suggestions have not been adopted.³⁰

This article will examine a fundamental shift in the approach to the conjugal status principle in New Zealand, as a consequence of the decision of the Court of Appeal in *Ruka v Department of Social Welfare*.³¹ In *Ruka*, the

²⁶ Scutt, *supra* note 6, at 377-378.

²⁷ See the materials discussed in *R v Rehberg* (1994), 111 DLR 4th 336, in terms of women’s equality guarantees under the Canadian Charter of Rights and Freedoms.

²⁸ The “core family unit” is defined to be a heterosexual couple living together in a marriage, or marriage-type relationship, with or without dependent children, or a single person with or without dependent children. “The unit determines who is taken into account in a benefit assessment, determining: who a benefit claim relates to, and thereby the maximum rate; whose income is taken into account in the income test; and who is required to meet requirements such as a ‘work availability’ test” (Department of Social Welfare, *Strategic Directions: Post-Election Briefing Paper*, Wellington, Government Print (1996) 21).

²⁹ *Royal Commission on Social Policy*, Wellington, Government Printer (1988) Vol III, Pt 2, 492. Under what the Commission described as a “modified individual approach”, children would be regarded as financially dependent on adults, but no adult would be regarded as financially dependent on another adult. Similar proposals were examined in Ireland, which itself conducted a Commission on Social Welfare, Dublin, Stationery Office (1986) (see Cousins, *supra* note 4, ch 11). There is an extensive discussion of the various ways of conceptualising individualisation in the social security context in ch 6 of McCrudden, Christopher (ed), *Equality of Treatment between Women and Men in Social Security* (1994).

³⁰ The Commission’s four volume report, which was expansionist in terms of recommendations, was delivered at a time when the then Minister of Finance (Roger Douglas) was aiming towards a more austere, residualist model for social support. See generally McLure, *supra* note 8, ch 8; Kelsey, Jane *Rolling Back the State* (1993) ch 5; and Rudd, “The New Zealand Welfare State”, in Roper, Brian and Rudd, Chris *State and Economy* (1993).

³¹ [1997] 1 NZLR 154. The President of the Court hearing this case, Sir Ivor Richardson, had also chaired the Royal Commission on Social Policy, *supra* note 29.

Court followed the approach of the Ontario Divisional Court in *Re Proc and Minister of Community and Social Services*³² in holding that, in assessing whether a marriage-type relationship exists, particular weight must be given to the commitment of each party to the alleged relationship to support the other financially and to the level of emotional commitment, if any, between the people concerned. Since the alleged relationship in *Ruka* was characterised by vicious and regular beatings and rapes, the Court had also to consider what weight should be attached to the existence of battered woman's syndrome when failure to disclose the existence of a marriage-type relationship to social security authorities amounted to a criminal offence.

The aftermath of *Ruka* will then be considered. The Social Security (Conjugal Status) Amendment Bill, introduced in 1997, proposed to override the analysis in *Ruka* and to reinstate what had been the prevailing policy approach to the issue of conjugal status prior to the Court of Appeal's decision. Under that policy approach, no primacy was to be given either to financial interdependence or to emotional commitment and, indeed, neither were considered to be necessary ingredients of a relationship in the nature of marriage. That bill has not yet been enacted and remains before the Social Services Select Committee.³³ The background to the bill, and its provisions, warrant detailed examination for two reasons. First, it is apparent that, following *Ruka*, the Department of Social Welfare continued to a large extent to apply the pre-*Ruka* policy reflected in the bill as if that decision had never been delivered. Its successor, the Department of Work and Income, has followed the same course. Secondly, the rationale for that policy has never been expressed in more detail than in the background papers arguing for its implementation through the bill.

II. THE BACKGROUND TO THE CONJUGAL STATUS CLAUSE

The Social Security Act 1964 adopts the common pattern of categorising social security entitlement depending upon the circumstances giving rise to the need for assistance. The main categories of social security benefit arise

³² (1974) 6 OR (2d) 624; 53 DLR (3d) 512. The Court did not examine later decisions such as *Re Warwick & Minister of Community and Social Services* (1978) 21 OR (2d) 528 (Ontario Court of Appeal) and *R v Rehberg* (1994) 111 DLR (4th) 336. As noted below, the requirement under the Ontario Family Benefits Act, RSO 1970, that the people concerned be living together, emphasised in *Re Pitts & Ministry of Community and Social Services* (1985) 51 OR (2d) 302, was removed from New Zealand legislation in 1978.

³³ *Parliamentary Bulletin*, 99.20, 6 September 1999, 46. The progress of the bill is dealt with later in this article.

from unemployment, sickness, invalid status, widowhood, lone parenthood, and age-based retirement.³⁴ Each of these categories is subject to the application of the conjugal status rule, but, as noted above, the main area of application in practice has proved to be to women who are receiving the domestic purposes benefit granted to lone parents.

The background to the conjugal status clause reveals a mixture of moral, gendered and financial assumptions. Until 1972, entitlement to social security benefits in New Zealand could always be withheld on moral grounds. The earliest example is the Old Age Pensions Act 1898, under section 8 of which a person qualified for a pension only if, amongst other things, he or she was “of good moral character and had been leading a sober and reputable life in the previous five years”. This provision is occasionally pointed to as an early statutory distinction between the “deserving” poor and the “undeserving” poor.³⁵ The requirement that applicants for, and recipients of, benefits be of good moral character and sober habits was carried over in section 74(b) of the Social Security Act 1964, in conjunction with a requirement that the person concerned should not be living on a domestic basis as husband and wife with a person to whom he or she was not married. In 1972, the Royal Commission on Social Security in New Zealand emphasised the need to separate the “morals” requirement from the discretion to treat unmarried couples as though they were legally married.³⁶ The Royal Commission recommended deletion of the “good moral character” clause³⁷ and this recommendation was adopted.

The marital status of applicants was also dealt with, however, in section 63 of the 1964 Act. Under section 63(b), the Department of Social Welfare could regard as husband and wife any man or woman who, not being legally married, were in the opinion of the Department living together on a domestic

³⁴ For summaries see Mackinnon, “Social Welfare”, in Cooke, Sir Robin (gen ed), *The Laws of New Zealand* (1992) and Atkin, “New Zealand” in Blanpain R (gen ed), *International Encyclopedia of Laws: Social Security* (1992). As from 1 October 1998, the unemployed, those who are sick and invalids receive a common benefit called the “community wage” (Social Security Act 1964, s 89). Widows in some categories receive a widows benefit (Social Security Act 1964, s 21), lone parents receive a domestic purposes benefit (Social Security Act 1964, s 27B), and age-based New Zealand Superannuation is payable under the Social Welfare (Transitional Provisions) Act 1990.

³⁵ Easton, Brian *Social Policy and the Welfare State in New Zealand* (1980) 63.

³⁶ Report of the Royal Commission of Inquiry, *Social Security in New Zealand*, Wellington, Government Printer (1972) 349-350.

³⁷ *Ibid*, 350.

basis as husband and wife.³⁸ This provision was retained.³⁹ In this context, the “male breadwinner” concept was very much to the forefront of the Royal Commission’s thinking.⁴⁰ Further, following a High Court decision in 1978, in which it was held that the words “on a domestic basis” restricted the application of the rule to cases where the parties lived under the same roof on a basis of some permanence,⁴¹ the legislation was rapidly amended to remove that phrase.

III. THE INTERPRETATION OF THE CONJUGAL STATUS CLAUSE PRIOR TO *RUKA*

The present conjugal status provision is administered by the chief executive of the Department of Work and Income,⁴² under the general direction and control of the Minister of Work and Income.⁴³ In the case of each benefit, under section 63 of the 1964 Act:

For the purposes of determining any application for any benefit, or of reviewing any benefit already granted, or of determining the rate of any benefit ... the chief executive may in the chief executive’s discretion -

... (b) Regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of marriage - and may determine a date on which they shall be regarded as ... having entered into such a relationship, as the case may be, and may then in his discretion grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date accordingly.

The 1964 Act contains no definition of the phrase “a relationship in the nature of marriage” and, as Tipping J observed in *Thompson v Department*

³⁸ The responsibility for administering the clause lay at that time with a group of senior officers within the Department, the Social Security Commission.

³⁹ The interpretation placed on the subsection by the Commission was that it covered “a particular kind of relationship that is for practical purposes a marriage even though the parties have not entered into a legal commitment”. The factors taken into account were listed in a confidential memorandum, quoted in von Tunzelmann, “Administration of Social Welfare Benefits”, in Palmer, Geoffrey (ed) *The Welfare State Today* (1977).

⁴⁰ *Social Security in New Zealand*, supra note 36, at 351.

⁴¹ *Furmage v Social Security Commission* (1979) 2 NZAR 74.

⁴² As from 1 October 1998, the newly-created Department of Work and Income assumed the responsibility for administration of social security benefits that had previously been carried out by the Department of Social Welfare.

⁴³ Social Security Act 1964, s 5.

of *Social Welfare*.⁴⁴ it is an “imprecise concept”. Nothing in section 63, or elsewhere in the legislation, provides guidance as to how the discretions conferred by that section are to be exercised. In practice, as is common in similar social security regimes,⁴⁵ those officers of the Department to whom the discretion under section 63 is delegated⁴⁶ are subject to internal guidelines in the administration of that discretion.⁴⁷ A brief examination of the key High Court decisions will suffice to show how this issue was dealt with prior to the landmark decision of the Court of Appeal in *Ruka*.⁴⁸

In *Excell v DSW*⁴⁹ Fisher J held that:

a Cohabitation for legal purposes normally requires some form of mental commitment to live together as husband and wife and a manifestation of that commitment by conduct. No minimum period is involved. In cases of doubt an inference as to intention will usually need to be drawn from conduct.

b The conduct in question is concerned not with any single factor but with an aggregation of many. No single factor is enough nor will its absence be fatal. It is the cumulative quality, quantity, continuity, and duration of these factors that matters.

⁴⁴ [1994] 2 NZLR 369.

⁴⁵ See, eg, Britain (guidelines set out in the DHSS *Supplementary Benefits Handbook*, HMSO (currently 1984), considered in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498); Ireland (Guidelines considered in *Foley v Moulton* [1989] ILRM 169; see Whyte (1989) 11 Dublin Law University Law Journal 187); and Australia (Social Security Act 1991, s 4(3): see Carney, Terry and Hanks, Peter *Social Security in Australia* (1994) ch 9).

⁴⁶ As of 1 October 1998, the provision is administered by the newly-established Department of Work and Income.

⁴⁷ At the relevant time, the guidelines were contained in chapter 8 of the Department of Social Welfare’s internally published *Core Topics Manual*. These guidelines remain essentially unchanged despite the new administrative structure (Department of Work and Income, *Core Topics: Marital Status for Benefit Purposes*, 30 July 1998).

⁴⁸ [1997] 1 NZLR 154. Most adjudicated decisions under s 63 are made by the Social Security Appeal Authority, an independent appeal authority established by s 12A of the Social Security Act 1964. The numerous Appeal Authority decisions are analysed in Black, Harrop and Hughes, *supra* note 12, paras 1063.2-1063.26, and follow the same approach as the High Court by which the Appeal Authority is bound.

⁴⁹ (1991) 7 NZFLR 241. In this case the issue was rather whether the people concerned - a legally married couple - were “living apart from” one another under s 27B of the Social Security Act 1964, which establishes entitlement to the domestic purposes benefit (the “lone parent” benefit). It is noted because Fisher J adopted the Department of Social Welfare’s guidelines under the conjugal status clause, s 63(b), for this purpose.

Fisher J then went on to cite with approval an inclusive list of factors contained in the Department's internal administrative guidelines:

While the nature, quality and characteristics of a marriage state differ widely in the community, there are certain common elements which can be assessed. The officer must consider the behaviour of the couple, indicated by the extent to which they:

- share one dwelling as each party's principal place of residence;
- emotionally support and depend on each other;
- pool labour and financial resources;
- share household activities;
- provide domestic services for each other;
- share one bedroom and/or a sexual relationship;
- share companionship, leisure and social activities;
- share parental obligations;
- present to outsiders as a couple; or
- exclude emotional and sexual relationships with third parties.

The decision cannot be based on the absence or presence of any one single factor. It is the quality, quantity, continuity and duration of all the factors found to exist that matters.⁵⁰

In *Russell v Department of Social Welfare*,⁵¹ a case of alleged fraud through non-disclosure of a relationship in the nature of marriage, Hammond J approved the formulation in *Excell* continuing:

But the list of indicia there set out are not some kind of points scale or checklist which have to be met before a conviction can be entered. The indicia are a convenient working list of factors. The absence of a single factor, or even several, will not be fatal.

In *Smith v Police*,⁵² after outlining a list of external indicators similar to that in *Excell*, Quilliam J emphasised that

Plainly the relationship need not be such as to equate with marriage, but one would expect to find that it was such that other people would tend to look upon the parties in much the same light as if they were married.

⁵⁰ These factors were listed in the Department's Core Topics Manual, at para 8.2121 et seq.

⁵¹ Unreported, High Court, Hamilton, 5 November 1993, AP 78/93.

⁵² Unreported, High Court, Wellington, 20 June 1985, M 189/85.

This approach was applied in *Mauri v Department of Social Welfare*,⁵³ in which Sinclair J went on to say that it was impossible to define precisely the meaning of the term, so that each case would turn on its own facts “and will to a large degree turn on the nature of the persons involved, their attitudes to life and the standards they adopt”.

The authorities were reviewed by Tipping J in *Thompson v Department of Social Welfare*:⁵⁴

Inherent in the concept of a relationship in the nature of marriage are both mental and physical aspects. In deciding whether such a relationship has been entered into it will generally be helpful to consider the physical aspects first. Once they are determined the mental question can be addressed. As to the physical aspects of the relationship the questions in the following list will be relevant:-

- (1) Whether and how frequently the parties live in the same house.
- (2) Whether the parties have a sexual relationship.
- (3) Whether the parties give each other emotional support and companionship.
- (4) Whether the parties socialise together or attend activities together as a couple.
- (5) Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.
- (6) Whether the parties share household and other domestic tasks.
- (7) Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.
- (8) Whether the parties run a common household, even if one or other partner is absent for periods of time.
- (9) Whether the parties go on holiday together.
- (10) Whether the parties conduct themselves toward, and are treated by friends, relations and others as if they were a married couple.

A negative answer to one or more of the questions will not necessarily mean the absence of a relationship in the nature of marriage. Nor will positive answers to a number of the questions necessarily mean its presence. The weight and effect of all the answers must be assessed. In some cases other matters not on the list may well be relevant and require assessment in the overall picture.⁵⁵

Whilst some of the earlier cases had been equivocal on the necessity to establish an emotional commitment between the parties, concentrating instead on the physical or factual aspects of the relationship, Tipping J emphasised that this “mental ingredient” must be considered. For the first time in the case law, Tipping J placed the significance of emotional

⁵³ (1988) 4 NZFLR 481.

⁵⁴ [1994] 2 NZLR 369.

⁵⁵ At 373.

commitment above that of the other “physical” indicia of the relationship. In the judge’s view the “mental ingredient” involved some commitment by the parties to their relationship “for the foreseeable future”, with any lesser commitment being neither sufficient for nor consistent with a relationship in the nature of marriage.⁵⁶ As with proof of all states of mind it would usually be necessary to decide whether the necessary commitment exists by a process of inference from what the parties had said and done. Whilst “the assessment of whether a potentially disqualifying relationship existed was to be made on a purely objective basis” by the Department, “the ultimate decision will always be one of fact and degree”.⁵⁷ Tipping J observed that, once the “mental ingredient” of a commitment for the foreseeable future was established, an appropriate way of capturing the essential issue was to ask:

Does the evidence disclose that the parties so merged their lives during the time in question that they were for all practical purposes living together like a married couple?⁵⁸

The operation of this “checklist” approach, both before and after *Thompson*, had proved to be both problematic and controversial in practice. The recurring emphasis on “fact and degree” reinforces Calvert’s observation that there are two problems in marital status cases and that these problems are confused by characterising the question as being, overall, one of fact. The first problem is an evidentiary one: for example, do the parties live together? Does one of them support the other? The second problem is what Calvert refers to as the “legal” one, that is to say, what is the legal significance of the facts found?⁵⁹ Even those critics who accepted the justification for the conjugal status rule inclined to the view that the Department placed excessive emphasis on matters such as the existence of a sexual relationship between the alleged parties to the relationship⁶⁰ and outsiders’ perceptions of

⁵⁶ At 374.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Calvert, Harry *Social Security Law* (1978) 410-411.

⁶⁰ The existence or absence of a sexual relationship was not seen as being conclusive of the existence of a relationship in the nature of marriage (just as it is not conclusive in defining cohabitation within a legal marriage: *Thomas v Thomas* [1948] 2 KB 294). Nevertheless, any sexual relationship between the parties was treated as a relevant factor in two senses. First, in so far as it was used to distinguish the sharing of accommodation as a boarder or flatmate from other relationships. Secondly, in so far as a sexual relationship was seen as one “incident” of a legal marriage (ie, as one pointer towards the subjective quality of commitment stressed in the Department’s internal guidelines and in the case law).

their relationship,⁶¹ when addressing the legal significance of evidence, at the expense of more fundamental questions such as demonstrable willingness to provide financial support⁶² and mutual emotional commitment.⁶³ Nor, on the weight of authority, were financial or emotional support seen to be necessary components of a marriage type relationship, as the above survey demonstrates.

The combined effect of asking whether “other people” would tend to regard the parties as married, and judicial acceptance that there was no common standard to be applied,⁶⁴ was to leave a significant measure of uncertainty in the application of the test. It would have been small consolation for those faced with criminal prosecution to learn from one High Court judge that a relationship in the nature of marriage “is not difficult to recognise but [presents] problems of definition”.⁶⁵ In particular, the emphasis on a factual assessment in each case left no room for a developed principle relating to the role of financial support. Reliance on the perception of the relationship held by third parties also led to extreme cases where, for example, the tribunal’s view of whether a marriage type relationship existed was influenced by attitudes held by those who moved in the same social settings as the people concerned.⁶⁶ These issues were placed in stark relief by the material facts in *Ruka*.

⁶¹ Going out together socially and thereby appearing as a couple to outsiders was often taken to be one indicator of a relationship in the nature of marriage (*Thompson v Department of Social Welfare* [1994] 2 NZLR 369).

⁶² In *Smith v Police*, supra note 52, where the couple were careful to share expenses, this was held not to rule out a relationship in the nature of marriage. In *Mauri*, supra note 53, the Court went further and described the absence of any financial contribution from the man in question as possibly being referable to the appellant’s “obvious desire to retain her benefit”.

⁶³ Prior to *Thompson v Department of Social Welfare*, supra note 44, the High Court decisions displayed reluctance to elevate emotional commitment above the other indicia. In *Police v Meikle* [1985] BCL 376, the Court referred to the difficulty of requiring permanence “under modern conditions”. In *Mauri*, supra note 53, the apparent lack of any emotional commitment was discounted as being “apparently a situation which [the appellant] was prepared to tolerate and put up with”.

⁶⁴ “[The] incidents and attributes of marriage are not the same for all people”, per Tipping J in *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, 374.

⁶⁵ Per Eichelbaum J in *Police v Meikle* [1985] BCL 376.

⁶⁶ Particularly in relation to membership of “gangs” with common perceptions as to the respective roles of the parties in a relationship (see eg *Social Security Appeal Authority Decision No 17/93*, unreported, in which the man concerned had never involved himself in parenting and “[placed] more importance on his relationship with [gang]

IV. THE DECISION IN *RUKA*

*Ruka v Department of Social Welfare*⁶⁷ was an appeal against conviction for benefit fraud in relation to the appellant's receipt of a lone parent's benefit (the domestic purposes benefit).⁶⁸ Isabella Ruka, had been living with a man (identified in the judgment only as T) for 18 years. For 16 years, she was viciously beaten by T. During this period, he beat her four or five times a week (sometimes using an axe and a baseball bat) to the point where she was hospitalised twice with broken bones, half of her teeth were smashed and her eyes were so severely blackened that she could not open them. Pregnancy did not stop the beatings. When their child was born, he beat her when the baby cried. After the first year, as one judge put it in the Court of Appeal, there was "nothing less than a long series of rapes". T did not take on parental responsibilities. He stopped her from seeing her family or friends. He contributed nothing to the running of the house in which they lived. Nor did he share his earnings (but, at the same time, he forced money from her). Threatening her with a shotgun, he repeatedly promised to hunt her down and kill her if she left him. She believed him. His sister described the relationship in evidence as almost being one of "master and slave".⁶⁹

For a good part of the 16 years, Isabella Ruka worked. At other times she went on a domestic purposes benefit to maintain herself and her son, signing declarations that she was not living in "a relationship in the nature of marriage" with her child's father. Despite her dreadful situation, the Department of Social Welfare prosecuted her for benefit fraud on the basis of these declarations and she was convicted. Both the District Court Judge and the High Court Judge accepted that Isabella Ruka was a victim of battered woman's syndrome. However, the District Court Judge held that, despite the evidence of extreme violence, a relationship in the nature of marriage existed, "albeit an appalling one". The High Court Judge upheld that decision. At issue on appeal was whether the appellant and T had been

members and his bikes than he [did] on his relationships with women": the Appeal Authority held that this was no different from other relationships within the gang and that the relationship should not be measured against relationships in "the wider community").

⁶⁷ [1997] 1 NZLR 154. The following summary of facts is drawn from a newspaper article by Jim Lamb and John Hughes, published in *The Press*, 21 October 1997.

⁶⁸ There were seven charges of wilfully omitting to supply material particulars to the Department of Social Welfare (under s 127 of the Social Security Act 1964) and six charges of fraudulently using a document (the benefit renewal form) to obtain a pecuniary advantage (under s 229A of the Crimes Act 1961).

⁶⁹ T was never prosecuted, Isabella Ruka having declined to give evidence against him.

“living in a relationship in the nature of marriage” within the meaning of section 63 of the Social Security Act 1964. All of the criminal charges turned on failure to disclose the existence of a relationship of this type.

The appeal was allowed and the conviction quashed. The Court of Appeal, sitting as a Full Court, held, by a majority, that there was no relationship in the nature of marriage within the meaning of section 63. The judges in the majority⁷⁰ emphasised the statutory context in determining whether or not a relationship in the nature of marriage existed. The “checklist” approach outlined above, whilst conceded as being helpful in some circumstances, was seen as being less useful than a consideration of the purpose of social security legislation. The Court observed that “a circumstance which can be seen to be directly related to that purpose is to be given particular weight in determining whether a relationship is one in the nature of marriage”.⁷¹ Crucially, the judges in the majority held that the expression “relationship in the nature of marriage” necessarily required a comparison with what they described as the positive features of a legal marriage:

The comparison must seek to identify whether there exist in the relationship of two unmarried persons those key positive features which are to be found in most legal marriages which have not broken down (cohabitation and a degree of companionship demonstrating an emotional commitment). Where these are found together with financial interdependence there will be such a merging of lives as equates for the purposes of the legislation to a legal marriage.⁷²

Two of those “key positive features” were willingness to provide financial support to the other partner, if the need existed (labelled “financial interdependence” in the judgment),⁷³ and continuing emotional commitment. The majority went on to hold that the existence of battered woman’s syndrome could not provide the justification for the commission of benefit fraud, but could be taken into account in determining whether a relationship in the nature of marriage existed.⁷⁴

The dissenting judges, Gault and Henry JJ, emphasised rather what they described as “an objective commonsense assessment of the factors which go

⁷⁰ Richardson P and Blanchard J (in a joint judgment delivered by Blanchard J) and Thomas J.

⁷¹ [1997] 1 NZLR 154, 161, per Richardson P and Blanchard J, and 179, per Thomas J.

⁷² At 162, per Richardson P and Blanchard J. See also 179, per Thomas J.

⁷³ Whilst carrying potentially misleading associations beyond its defined application in *Ruka*, this phrase will be used in the following discussion for the sake of brevity.

⁷⁴ At 162-163, per Richardson P and Blanchard J. See also 173, 182-184, per Thomas J.

to make up a particular relationship”, so as to reach “an objective overall conclusion” after weighing these factors against one another.⁷⁵ In relation to the factors stressed by the majority, the dissenting judges held that financial interdependence was not an essential feature of a marriage type relationship (although “[complete] financial independence of each of the parties may well be one factor in the overall equation”).⁷⁶ The judges accepted as being legitimate an approach which placed emphasis on the “assumption” of “a relationship which has the trappings or character of a marriage, good or bad”, and required “some outward and objectively discernible manifestation that it had lost that character” before it could be said to have ceased.⁷⁷ Although the judges in the majority did not directly address this argument, it is suggested that its flaws are illustrated in two observations made in the judgment of Thomas J. First, the concept of a marriage type relationship must necessarily extend beyond the “physical indicia ... of a de facto relationship in common parlance”.⁷⁸ Secondly, the approach of the dissenting judges repeats the inconsistency in the approach of the trial judge, who had held that the appellant had “elected” to continue with a marriage type relationship “although it might have been almost impossible for her to get out of it”.⁷⁹ As one commentator has observed, the argument of the dissenting judges is circular:

Is continual beating and rape for 17 years to the point where she was too scared to leave not an “objectively discernible manifestation” that the relationship was no longer one in the nature of a marriage? Is it not significantly understating Isabella’s psychological state to describe it as not being “a current positive mental approach”? Abuse over that period of time must not be consistent with a relationship that looks (or feels) like a marriage. Is all that is considered relevant the fact that they physically (mostly) shared the same roof?⁸⁰

Further, the dissenting judges argued that whilst violence against women was “to be deplored”, “[r]egrettably, however, it does occur, sometimes in extreme form. ... It occurs where the parties are married and it occurs when the parties are unmarried”.⁸¹ Nowhere, perhaps, is the key difference between the judges in the majority (who emphasised the positive features of de jure marriage in assessing its de facto counterpart), and the dissenting

⁷⁵ At 165.

⁷⁶ At 167.

⁷⁷ Ibid.

⁷⁸ At 179.

⁷⁹ At 180.

⁸⁰ McDonald, “A Relationship in the Nature of Marriage” [1996] NZLJ 423.

⁸¹ [1997] 1 NZLR 154, 166.

judges, more apparent than at this point. According to the judges in the majority:

[It] is not to be thought that because certain negative features (eg, physical abuse, lack of emotional commitment) are found in some de jure marriages, the same factors in a relationship between a man and a woman who are not married are to be disregarded in determining whether that relationship is in the nature of marriage.⁸²

The three key ingredients of the majority judgments, financial interdependence, emotional commitment and the issues raised by battered woman's syndrome, can now be examined separately.

1. *Financial interdependence*

Stripped of all other incidents which it shares with other relationships, a de jure ("legal") marriage is characterised by the parties' mutual obligation to provide financial support.⁸³ Prior to *Ruka* it had long been argued, unsuccessfully, that it followed that willingness to provide financial support should thus become a necessary component in assessing whether a marriage type relationship exists, particularly given the purpose of social welfare legislation and the absence of a legal obligation to support unmarried "partners".⁸⁴ The majority in *Ruka* accepted this approach. In the joint judgment of Richardson P and Blanchard J, the judges stated that:

In our view a relationship in the nature of marriage for the purpose of the Social Security Act is one in which an essential element is that there is an acceptance by one partner that (to take the stereotypical role) he will support the other partner and any child or children of the relationship if she has no income of her own or to the extent that it is or becomes inadequate. The commitment must go beyond mere sharing of living expenses, as platonic flatmates or siblings living together may do; it must amount to a willingness to support, if the need exists. There must be at least that degree of financial engagement or understanding between the couple. It will not, however, be negated by a refusal to support, or an arrangement that support will not be given, which is motivated by the knowledge that the dependent partner will then be able to claim a benefit. Such a stratagem cannot create a genuine absence of support.⁸⁵

⁸² Ibid, 162.

⁸³ This arises under s 63(1) of the Family Proceedings Act 1980.

⁸⁴ Hughes, "Domestic Purposes Benefit: Lessons from the *Furmage* Case" [1979] NZLJ 32.

⁸⁵ [1997] 1 NZLR 154, 161.

In so holding, the judges applied the analysis in *Re Proc and Minister of Community and Social Services*.⁸⁶ The judges noted that, although, unlike the Ontario statute in *Re Proc*, the legislation did not say that benefits are to be generally available on the basis of need, "it is apparent that absence or inadequacy of financial support of an applicant with a dependent child is a central concern".⁸⁷ This can be contrasted with the approach to *Re Proc* in the Australian courts where, under a similar legislative structure to that in New Zealand, the Federal Court had rejected a "purposive" argument based on *Re Proc*. In that Court's view, need by itself was "neither a qualifying nor a disqualifying factor when eligibility is in question" and the true purpose of the statute was to provide support based on the qualifying categories of applicant.⁸⁸ This argument, which ignores the underlying rationale for those categories and is clearly at odds with the assumption of economic dependence which underpins the conjugal status rule historically, was not considered directly by the Court in *Ruka*. However, it was clearly dismissed by implication.

Thomas J concurred with the joint judgment of Richardson P and Blanchard J, stating that:

I believe that the objective of s 63(b) is clear. It is to ensure that unmarried couples who enter into a relationship akin to marriage are not treated more favourably for benefit purposes than those who are legally married. Such an objective presupposes that married persons assume a mutual commitment to the maintenance of their relationship. In the context of s 63(b) this responsibility must necessarily include, not only a commitment to the relationship, but some form of financial support or interdependence. The financial interdependence may be direct, being actual support, or indirect, reflecting a mutual understanding about the financial arrangements relating to the relationship. ...

A relationship will not be a relationship in the nature of marriage for the purposes of s 63(b) ... unless it exhibits [a] mutual commitment and assumption of responsibility. In the context of the Social Security Act, this will necessarily include financial support or interdependence or, at least, a mutual understanding about the parties' financial arrangements of the kind I have suggested.⁸⁹

As we shall see, the emphasis on the need for mutual financial commitment provided a powerful spur for the introduction of draft legislation overriding *Ruka*, on the assumption that partners in a marriage type relationship could

⁸⁶ (1974) 6 OR (2d) 624; (1974) 53 DLR (3d) 512.

⁸⁷ [1997] 1 NZLR 154, 161.

⁸⁸ *Lambe v Director-General of Social Services* (1981) 4 ALD 362, 367.

⁸⁹ [1997] 1 NZLR 154, 181.

easily separate their finances and create a “sham” appearance of independence. This had been a recurring theme in the unwillingness of earlier courts to place primacy on financial matters, to the point where people under investigation for benefit fraud who had been meticulous in separating their finances were liable to be accused of subterfuge.⁹⁰

2. *Emotional commitment*

The majority in *Ruka* also emphasised the need for emotional commitment as a cumulative condition. Richardson P and Blanchard J stated that:

Where financial support is available nevertheless there will not be a relationship in the nature of marriage for this purpose unless that support is accompanied by sufficient features evidencing a continuing emotional commitment not arising just from a blood relationship. Of these, the sharing of the same roof and of a sexual relationship (especially if it produces offspring) are likely to be the most significant indicators. But since the amendment to s 63 in 1978, the sharing of a household is not essential. And, particularly in the case of older couples, the absence of sexual activity will not in itself deprive the relationship of the character of a marriage.⁹¹

Thomas J concurred, holding that what distinguished marriage from the relationship of couples who “may nevertheless share premises and living expenses” was an “underlying commitment to the relationship”. A relationship would not be a “relationship in the nature of marriage” for the purposes of the legislation “unless it exhibits this mutual commitment and assumption of responsibility”.⁹² As the judgments illustrate, the practical effect of this approach was not to render redundant those external indicators which had been the foundation of the “checklist approach”. Rather, two of those indicators - financial interdependence and emotional commitment - were now necessary cumulative conditions for establishing the existence of a marriage type relationship. The remainder of the indicators in the “checklist”, such as the sharing of accommodation, division of household roles and the sharing of parental obligations, now assumed evidential significance in pointing towards - or away from - a finding of financial interdependence and mutual emotional commitment.

3. *The relevance of battered woman’s syndrome*

Battered woman’s syndrome, as a species of post traumatic stress disorder:

⁹⁰ See the cases outlined at supra note 62.

⁹¹ [1997] 1 NZLR 154, 161-162.

⁹² At 181.

has been described as the culmination of three specific stages: tension building, followed by a severe beating, the severity of which increases over time, followed by contrition, promises and temporary cessation of the violence. These three stages can recur many times. As a response to such violence (which will also usually include sexual and emotional abuse) women may acquire a condition described as 'learned helplessness' meaning they lose the ability to predict whether their natural responses will protect them after they experience inescapable pain in what appear to be random and variable situations. A woman in a relationship involving this cycle will be fearful, have low self-esteem and will often be isolated from others and unable to talk about the abuse.⁹³

Prior to *Ruka*, expert evidence about battered woman's syndrome had been admitted in relation to perceptions of an imminent threat in pleas of self defence⁹⁴ and coercion and duress.⁹⁵ In New Zealand, as elsewhere, the syndrome has aroused controversy. For example, the medical legitimacy of the syndrome has been questioned;⁹⁶ its responsiveness to cultural differences in relation to the behaviour of women has been questioned;⁹⁷ and concerns have been raised as to the appropriateness of the syndrome as an evidentiary tool for redressing concerns about the gendered nature of criminal defences.⁹⁸ Three particular questions were raised for consideration in *Ruka* in relation to battered woman's syndrome:

- 1 Can the fact that a woman is suffering from 'battered woman's syndrome' be taken into account in establishing whether she is living in a 'relationship in the nature of a marriage' with the man who is battering her?
- 2 Can the existence of 'battered woman's syndrome' provide the basis of a finding that a woman lacks the necessary mental commitment to a relationship so that she cannot be said to be living in a 'relationship of marriage' with the man who is battering her?
- 3 If so, could such a finding justify dismissal of charges against her ... alleging fraudulent receipt of a social welfare benefit ... when not entitled to do so because she was allegedly living in a relationship in the nature of marriage?⁹⁹

⁹³ McDonald, "Battered Woman Syndrome" [1997] NZLJ 436.

⁹⁴ *R v Oakes* [1995] 2 NZLR 673; *R v Wang* [1990] 2 NZLR 529.

⁹⁵ *R v Witika* [1993] 2 NZLR 424. See generally Robertson, "Battered Woman Syndrome: Evidence in Action" (1998) 9 Otago LR 277.

⁹⁶ Goodyear-Smith, "Re Battered Woman's Syndrome" [1998] NZLJ 39.

⁹⁷ Beri "Justice For Women Who Kill: A New Way" (1997) 8 Aust Fem LJ 113.

⁹⁸ McDonald, "No Defence of Battered Woman's Syndrome" (1998) 507 LawTalk 33; Seuffert, "Battered Women and Self-Defence" (1997) 13 NZULR 292.

⁹⁹ [1997] 1 NZLR 154, 157.

Having held that financial interdependence and mutual emotional commitment were essential elements of a relationship in the nature of marriage, and that they were absent in *Ruka*, the majority did not rely on the effect of battered woman's syndrome in formulating the reasons for their decision. The common law defence of necessity, to which battered woman's syndrome had been held to be relevant in *R v Lalonde*,¹⁰⁰ had not been put in issue on appeal. Nor was the issue whether battered woman's syndrome may negative criminal intent directly in issue on appeal once the emphasis on financial and emotional support had been established. The Court of Appeal did not consider, therefore, the argument that the prolonged violence to which Isabella Ruka had been subjected, and the constant state of stress which then ensued, would have made her incapable of making rational decisions, particularly in respect of T. Two of the judges in the majority, Richardson P and Blanchard J, did suggest, obiter, that "as opposed to homicide cases" battered woman's syndrome could not negative fraudulent intent.¹⁰¹ In summary, according to these judges, the battered woman's syndrome did not itself provide a defence but might be relevant in determining whether there was a marriage type relationship:

If it had been necessary to consider the effect of the battered woman's syndrome suffered by Miss Ruka, that would also have been of some consequence. As she explained and the psychologist confirmed, she felt like Mr T's slave and was too terrified of him to leave. She had been threatened with death. She believed he had the ability and intent to carry through with what he threatened anywhere she might go in New Zealand. The evidence and other material put before the Court strongly suggests that a battered woman is at greatest risk when she leaves or attempts to leave the relationship. It provides an explanation for the continued sharing of the same accommodation and the other linkages, real or only apparent, between them. Unlike someone not suffering battered woman's syndrome the appellant had an inability to choose to live elsewhere. The circumstance of living under the same roof, indeed sharing the same bed, is misleading and must carry little weight. The existence of the

¹⁰⁰ (1995) 37 CR (4th) 97, 107. In that decision, which also involved failure to disclose a marriage-type relationship, Trainor J held that the battered woman's syndrome also went to the mens rea of fraud. See also the collection of papers on this topic in ch 13 of Lemon, Nancy KD *Domestic Violence Law Reader* (1996). The Crimes Act 1961 does not provide for a general defence of necessity. Common law defences, however, are expressly preserved by s 20 of the 1961 Act. The Court of Appeal has expressed concern at the "extreme vagueness" of the defence (*R v Woolnough* [1972] 2 NZLR 509, 516) but has left open the question whether the defence is available (*Kapi v Ministry of Transport* (1991) 8 CRNZ 49, 55).

¹⁰¹ [1997] 1 NZLR 154, 157, citing *R v Oakes* [1995] 2 NZLR 673 and *R v Lavallee* [1990] 1 SCR 852.

syndrome does not in itself provide a defence, but it is a factor available to be taken into account in the determination of whether a relationship in the nature of marriage existed.¹⁰²

The other judge in the majority, Thomas J, after an extensive discussion of *R v Lavallee*,¹⁰³ noted that the case had proceeded on the basis that Isabella Ruka had exhibited certain of the characteristics of a person suffering from battered woman's syndrome:

But while the syndrome represents an acute form of the battering relationship ... it is probably preferable ... to avoid reference to it and to simply speak of the battering relationship. There is a 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 ... [The] syndrome, where it is found to exist, is not in itself a justification for the commission of a crime. It is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent. It is not, therefore, simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and, if so, treating that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case. In determining whether a battered woman is living in a relationship in the nature of marriage, therefore, the ultimate question is whether the evidence establishes that she possesses those symptoms or characteristics which negative or tend to negative any element which would otherwise point to the relationship being one in the nature of marriage.¹⁰⁴

The feminist potential in acceptance of battered woman's syndrome had been argued to carry associated pitfalls in this context, as in others.¹⁰⁵ The woman's experience may come to be categorised in terms of an individual psychiatric response rather as being the result of underlying causative conditions.¹⁰⁶ Here it has been suggested that the approach of the majority in

¹⁰² [1997] 1 NZLR 154, 162-163.

¹⁰³ [1990] 1 SCR 852.

¹⁰⁴ [1997] 1 NZLR 154, 173-174.

¹⁰⁵ See Young, "Conjugal Status and Legal Violence: A Comparative Analysis" (1993) 31 *Osgoode Hall Law Journal* 761, 803.

¹⁰⁶ See the articles *supra* notes 96-98. See also the contrasting studies in Part II of Gelles, Richard J and Loseke, Donileen R *Current Controversies on Family Violence* (1993). The divergent approaches are summarised in Lockton, Deborah and Ward, Richard *Domestic Violence* (1997) ch 2.

Ruka represents “an appropriate way for the law to take account of the relevance of prior abuse ... through expert evidence of a more general educative nature”,¹⁰⁷ allowing expert explanations “in terms of social problems rather than individual pathology”.¹⁰⁸ In contrast, reliance on battered woman’s syndrome as a psychiatric model has been said to be “problematic because it sets up a stereotypical standard for abused women to meet”, portraying them as weak and helpless. In that it sets an “ideal woman” standard with a model of “learned helplessness”, it fails to respond to cultural differences in the behaviour of abused women, and does not properly accommodate the stories of women “who do fight back on a regular basis”.¹⁰⁹ A year after *Ruka*, the Women’s Refuge movement emphasised that, whilst the battered woman’s syndrome was a pressing issue, most of the women who came to refuge “are not helpless frozen women, but the opposite. They do act for themselves ...”.¹¹⁰

Although battered woman’s syndrome was not central to the decision in *Ruka*, it came to occupy a significant role in the draft legislation which the Court of Appeal’s decision precipitated.

V. THE DEPARTMENTAL RESPONSE TO *RUKA*

The immediate response by the Department of Social Welfare to the decision in *Ruka* illustrates vividly Cranston’s analysis of three characteristics of welfare bureaucracies. First, there is the “passivity” of social welfare administration, in terms of failure to take effective steps to publicise legal change for those reliant on the system. Secondly, welfare bureaucracies are characterised by “routinization”, a term describing the delay experienced in new developments penetrating the daily practices of the bureaucracy. Thirdly, there is the problem of “take up”, which includes weak provision for effective control of rule-breaking by bureaucracies. This weakness is exacerbated by the general characteristics of social welfare claimants in terms of knowledge, capacity and motivation, limiting effective challenge to decisions taken by welfare authorities.¹¹¹

In terms of passivity, even a year after the decision in *Ruka*, local offices of the Department of Social Welfare continued to provide explanatory

¹⁰⁷ McDonald, *supra* note 93.

¹⁰⁸ McDonald, *supra* note 98.

¹⁰⁹ *Ibid.*

¹¹⁰ Ministry of Women’s Affairs, *Social Security (Conjugal Status) Amendment Bill: Approval for Introduction*, 22 September 1997, Appendix 1.

¹¹¹ Cranston, *supra* note 7, 209-220.

pamphlets to beneficiaries based on the pre-*Ruka* guidelines, and including a clear statement that “[t]he absence of financial support does not mean a marriage type relationship does not exist”.¹¹² Welfare advocacy groups regularly reported that letters sent to beneficiaries from Departmental investigators, requiring the beneficiary to attend an interview based on information as to marital status received by the Department, were couched in terms of the pre-*Ruka* guidelines.¹¹³

To an extent, this was explicable in terms of “routinization”. Whilst staff were sent an information bulletin shortly after the *Ruka* decision,¹¹⁴ the Department’s guidelines on marital status, contained in the internal manual to which staff normally turn, were not altered. This remains the case. Almost three years after the Court of Appeal in *Ruka* stressed the necessity for financial interdependence and emotional commitment, without which a relationship in the nature of marriage would not exist, the current guidelines tell staff that “[the] decision cannot be based on the absence or presence of any one single factor. It is the quality, quantity, continuity and duration of all the factors found to exist that matters”.¹¹⁵

Further, the information bulletin itself arguably understated the effect of *Ruka* when it briefed staff that “a mutual commitment to financially support each other when required is a primary factor”, as opposed to a necessary condition.¹¹⁶ The bulletin also placed a heavy emphasis on the presence in *Ruka*’s case of battered woman’s syndrome, to the point where the decision in *Ruka* might have been misinterpreted as applying only where battered

¹¹² NZ Income Support Service, *Are You in a Relationship?* (undated). At the time, the Income Support Service was a division of the Department of Social Welfare. During this time, the author attended several investigative interviews conducted by the Department at which departmental officers produced this pamphlet as a guideline.

¹¹³ Again, the author has seen a number of letters of this type. These range from an elaborate recitation of the “checklist” held in *Ruka* not to be the definitive approach, to statements that an offence was committed where two people in receipt of individual benefits were perceived by others in the community to be in a marriage type relationship. The letters are on file with the Beneficiary Advisory Service, Christchurch, New Zealand.

¹¹⁴ Department of Social Welfare, *Changes to the definition of a “relationship in the nature of marriage”*, Information Bulletin 1996/087.

¹¹⁵ Department of Work and Income, *Core Topics: Marital Status for Benefit Purposes* (1998) 3.2.2.4. The earlier guidelines, reflecting this approach, were contained in Department of Social Welfare, *Core Topics Manual*, ch 8.

¹¹⁶ Supra note 114.

woman's syndrome was present.¹¹⁷ As one indicator, staff were told in the circular that past decisions "where violence in the de facto relationship existed and was made known to the Department at the time (ie cases where the relationship was substantially like Ruka)" were to be revisited, but not past cases where financial independence had been claimed¹¹⁸ (despite the need for financial interdependence being the crux of the *Ruka* decision). This was a conscious decision by the Department's legal division, approved by the Minister of Social Welfare.¹¹⁹

This unsatisfactory mix was then compounded by the problem of "take up". First, those applying for a benefit in circumstances affected by *Ruka*, if dependent solely on the Department's published advice to members of the public (as would usually be the case), would have been unaware of the effect of the *Ruka* decision. Secondly, those whose benefits had been affected by earlier decisions thrown into question by *Ruka* would be similarly prejudiced, particularly since the Department had decided not to reopen files which did not involve extreme levels of domestic violence. Thirdly, if officers of the Department cancelled or suspended a benefit on the basis of the unchanged internal policy guidelines, in circumstances which did not meet the *Ruka* criteria, the beneficiary had the right to apply for an internal review of the decision.¹²⁰ However, under the legislation, benefits review committees for each office of the Department consist of two officers of the Department and a community representative (whose sources of information on the changes are those just described).¹²¹ The decision of two members is the decision of the committee.¹²² Legal aid is not available at the review stage. Appeal then lies to the independent Social Security Appeal Authority.¹²³ Errors in understanding the implications of *Ruka* by review

¹¹⁷ In the author's experience this was, and remains, a common misperception amongst departmental staff.

¹¹⁸ *Supra* note 114.

¹¹⁹ NZ Income Support Service, Legal Division, *Memorandum to the Minister of Social Welfare*, 11 November 1996.

¹²⁰ Social Security Act 1964, s 10A(1).

¹²¹ The pool from which these officers are selected includes officers from the same office as the person who made the decision under review. The problem is compounded by the fact that the Department's investigators (now labelled the Benefit Crime Team but at the relevant time called the Investigation Unit) tend to occupy one office in any given district. It is thus common to find members of the same local team of investigators both presenting the Department's case and sitting on the benefits review committee.

¹²² Social Security Act 1964, s 10A(2). For more detailed discussion, see *Income Support Law and Practice*, *supra* note 12, at paras [1010A.2]-[1010A.10].

¹²³ Social Security Act 1964, s 12J.

committees could thus be corrected. However, the Appeal Authority has only twice cited the *Ruka* decision as being the direct basis for allowing an appeal in the several cases concerning alleged conjugal status since 1996.¹²⁴ Crucially, in this context, the Authority has never addressed the issue arising from inconsistency between the ratio of *Ruka* and the departmental guidelines. Further, the Appeal Authority itself is administered in a manner which has been described as deterrent to beneficiaries, and appeals are comparatively rare.¹²⁵

All of this might go to explain how, fully one year after the decision in *Ruka* was delivered, the Minister of Social Welfare announced that there was no indication that any benefit had been granted as a result of the Court of Appeal's decision.¹²⁶ In *R v Knight*,¹²⁷ decided at the same time, the Court of Appeal was told that there was no suggestion that *Ruka* had triggered a significant number of appeals.¹²⁸

¹²⁴ Social Security Appeal Authority Decisions numbered 42/97 (SSA 194/95), 26 March 1997, unreported, and 124/97 (SSA 29/97), 25 September 1997, unreported. In SSAA Decision No 50/99 (SSA 180/96), 8 June 1999, unreported, no case law was cited although the factors in *Ruka* appear to have been applied. In SSAA Decision No 95/97 (SSA 145/94), 21 July 1997, unreported, the Department itself had withdrawn its case as having insufficient evidence to proceed, on the basis of *Ruka*. The requirements in *Ruka* were held to have been satisfied in Social Security Appeal Authority Decisions numbered 91/97 (SSA 22/97), 9 July 1997, unreported, and 92/97 (SSA 205/96), 21 July 1997, unreported. In other decisions, either the Appeal Authority has continued to cite the earlier guidelines in *Excel* and *Thompson* (Social Security Appeal Authority Decision No 75/97, (SSA 59/96), 3 June 1997), or has cited those guidelines in combination with *Ruka* (Social Security Appeal Authority Decision No 136/97, (SSA 77/97), 17 December 1997, unreported).

¹²⁵ For more detailed discussion, see *Income Support Law and Practice*, supra note 12, at para [1011J.3].

¹²⁶ The Hon Roger Sowry (1997) 29 *New Zealand Parliamentary Debates Questions Supplement* 3869.

¹²⁷ [1998] 1 NZLR 583.

¹²⁸ In this decision, the issue was whether to extend time for appeal against conviction on the basis of the previously held misconception as to the test of a relationship in the nature of marriage. One relevant consideration on the application was the "floodgates" argument.

VI. LEGISLATING *RUKA* AWAY:
THE SOCIAL SECURITY (CONJUGAL STATUS) AMENDMENT BILL

The *Ruka* decision was delivered shortly before the election of New Zealand's first coalition government. The Department of Social Welfare warned the incoming Minister of Social Welfare that the implications of the judgment might be far-reaching in terms of family law and social security,¹²⁹ and pressed strongly for the legislation to be amended. The result was the Social Security (Conjugal Status) Amendment Bill (1997), a bill designed to override the *Ruka* analysis both in terms of the ratio of the decision, relating to the requirements of mutual financial and emotional commitment before a marriage type relationship could exist, and the obiter observations concerning the effect of battered woman's syndrome. The bill will be summarised before examining each of these aspects in detail.¹³⁰

Clause 3 of the bill lists matters to which the chief executive must have regard in exercising the discretion to treat a relationship as a relationship in the nature of marriage.¹³¹ The list is based upon a draft list in a lapsed 1990

¹²⁹ Department of Social Welfare, *Strategic Directions: Post-Election Briefing Paper* (1996).

¹³⁰ Since the bill was introduced, the Department of Work and Income has taken over the income support role of the Department of Social Welfare. References in the bill to the "Director-General of Social Welfare" have been modified in the text so as to refer instead to the chief executive of the Department of Work and Income.

¹³¹ The sub-clause reads: "In exercising the discretions [in s 63], the [chief executive] may have regard to all the circumstances of a relationship, and must have regard to the following matters: (a) The financial aspects of the relationship, including- ... (ii) Any joint ownership of real estate or other significant assets, and any joint liabilities; and (iii) Any significant pooling of financial resources; and (iv) Any legal obligations owed by one person in respect of the other person; and (v) Any arrangements for the sharing of day-to-day household expenses: ... (f) The nature of household arrangements, including- ... (vii) Arrangements for providing care and support of children; and (viii) The living arrangements of the 2 persons; and (ix) Arrangements for the carrying out of household tasks: ... (j) The social aspects of the relationship, including- ... (xi) Whether the 2 persons hold themselves out as being in a relationship; and (xii) Whether the 2 persons plan or engage in social activities together; and (xiii) Any assessment by any person about the nature of the relationship that comes to the attention of the [chief executive] or that is otherwise obtained by or made available to the [chief executive]: ... (n) Any sexual relationship between the 2 persons: (o) The nature of the commitment of each of the 2 persons to the other, including- ... (xvi) The length of the relationship and whether the relationship seems likely to continue for the foreseeable future; and

bill, which had attempted the same task although for markedly different reasons.¹³² However, there are significant differences between the two draft lists. At several points the earlier draft had emphasised as being significant the “basis” for external indicators of a relationship, such as pooling of resources, child care, social arrangements and matters such as housework, so as to emphasise the parties’ own assessment of the relationship. The new draft removes this emphasis and simply lists the activities as such, placing renewed emphasis on what the dissenting judges in *Ruka* had referred to as the “trappings” of a marriage.¹³³ The old draft had listed for consideration also whether the people concerned thought that the relationship was likely to continue indefinitely and whether they saw it as a marriage type relationship. The new draft removes these matters from the list of indicators. Conversely, and consistently with the emphasis on outsiders’ perceptions of the “trappings” of the relationship, the new bill states that the chief executive may take into account “any assessment by any person about the nature of the relationship that comes to the attention of the [chief executive] or that is otherwise obtained by or made available to the [chief executive]”.¹³⁴

As one commentator noted of the earlier draft:

... because no indication is given of how the various circumstances are to be evaluated, the definition is open-ended. Indeed it is less a definition than a rule relating to the determination process.¹³⁵

This analysis applies a fortiori to the new draft in clause 3, which goes on to state that, in deciding that a marriage-type relationship exists, the chief executive is not required to establish that any of the listed circumstances exist; is not required to establish financial interdependence; and is not required to give the presence or absence of any particular circumstance or feature any greater weight than any other circumstance or feature (so that, for

(xvii) Any companionship and emotional support that the 2 persons provide to each other.”

¹³² The Social Welfare (No 2) Bill 1990. This bill was introduced by the then Labour Government as one part of an attempt to merge New Zealand’s social security entitlements with entitlement to compensation under the “no-fault” accident compensation scheme, replacing the various categories with a universal benefit. It did not survive the election of a National Government in 1990. See Palmer, “New Zealand’s Accident Compensation Scheme: Twenty Years On” (1994) 44 *University of Toronto Law Journal* 223.

¹³³ [1997] 1 *NZLR* 154, 166.

¹³⁴ Social Security (Conjugal Status) Amendment Bill, cl 3(2)(iii).

¹³⁵ Atkin, WR *Living Together Without Marriage* (1991) 17.

example, in effect the opinion of neighbours about the relationship may count for as much as the nature of any emotional or financial support that the people concerned offer one another).¹³⁶ The explanation provided in the bill, in line with the economic rationalism which permeates its explanatory note, is that to elevate one or more of the criteria “would potentially introduce perverse incentives for people to rearrange their circumstances for the purposes of securing a social security benefit”.¹³⁷ In effect, the result is a wider and more ambiguous version of the policy under which Isabella Ruka was originally convicted.

The treatment of domestic violence in the bill cannot be described as being other than extraordinary. First, the bill states that, in determining whether a marriage type relationship exists, “the [chief executive] must not have regard to the existence or effect of violence or threats by either person in the relationship towards the other”.¹³⁸ Secondly, the bill provides that an emergency benefit¹³⁹ may be granted where:

- (a) The [chief executive] has grounds for believing that the relationship of a man and a woman who are married or have entered into a relationship in the nature of marriage is so characterised by violence or threats by one towards the other that the person subjected to the violence or threats is deprived of the ability to decide whether, or how, to escape from the violence or threats or to leave the relationship; and
- (b) The [chief executive] is satisfied that the person subjected to the violence or threats has inadequate financial support for herself or himself or any dependent children, or both ...¹⁴⁰

¹³⁶ Supra note 134, cl 3 (3).

¹³⁷ Ibid, explanatory note, ii.

¹³⁸ Ibid, cl 3(4). In response to opposition to this provision, and after defending it, the Department drafted a proposed amendment which it lodged with the select committee and under which violence would not be “in itself sufficient” for people to be considered not to be living in a marriage type relationship. On obtaining evidence of the extreme levels of violence required for access to an emergency benefit, the Director-General would have had to grant an emergency benefit rather than implementing the discretion to treat the two people as if they were married (under a redrafted clause 3(4)(5)) (attachment, letter from Clerk to Social Services Select Committee dated 8 May 1998).

¹³⁹ The emergency benefit, under s 61 of the Social Security Act 1964, is a “safety net” benefit, granted on grounds of hardship, where no other entitlement to a benefit exists. The benefit is means-tested. See generally *Income Support Law and Practice*, supra note 12, at paras 1061.1-1061.17.

¹⁴⁰ Supra note 134, cl 2(1).

The bill then goes on to provide a six month cap on the entitlement, after which the benefit ceases, as a monetary incentive to leave the relationship.¹⁴¹ All major decisions on legislation are taken through the Cabinet, of course, usually after the material has been filtered through the cabinet committee structure. The “cap” (originally mooted at a possible three month period) resulted from the suggestion of the Cabinet Committee on Health and Social Policy, headed by the current Prime Minister, Mrs Jenny Shipley (then Minister for Women’s Affairs).¹⁴²

1. The criteria for a relationship in the nature of marriage

In relation to the new criteria for establishing a marriage type relationship, the bill represents a radical departure from legal convention, under which administrative policy is changed to conform to binding court decisions (pending any legislative response). The explanatory note to the bill states quite openly that the Government intends to change the law retrospectively¹⁴³ to fit administrative criteria “currently contained in [departmental policy]”, more than a year after the Court of Appeal delivered its decision.¹⁴⁴ These criteria are, as has been seen, totally inconsistent with the Court of Appeal’s decision.

¹⁴¹ Ibid, cl 2(2). Again, after the almost invariably adverse submissions on the bill had closed, the Department submitted a proposal for a redrafted clause 2 under which the period was extended to no more than 12 months, “violence” was defined as including physical, sexual and psychological abuse, and the emphasis was shifted from inability to leave the relationship to the person concerned being “unable to decide how to protect herself or himself from violence or to end the relationship”.

¹⁴² Cabinet Committee on Health and Social Policy, *Minutes of a meeting on 3 September 1997*, HSP (97) M 27/3. The Department of Social Welfare then decided that three months was too short a period for an effective safety plan to be created (NZ Treasury, *Memorandum T97C/3/95*, 10 September 1997, para 13).

¹⁴³ *Supra* note 134, cl 4. The bill is expressed as being retrospective to the date of its introduction, save for decisions made before that date by benefits review committees, the Social Security Appeal Authority or any court (cl 5).

¹⁴⁴ Ibid, explanatory note, ii. In its briefing paper to Cabinet, the Department argued that “[a] change in the law to allow equal consideration of all existing ‘administrative’ criteria would alleviate the current and significant operational difficulties and more importantly ensure the assessment of benefit entitlement according to the *intent* of the policy (rather than the current legal interpretation of the law [sic])” (Minister of Social Welfare, *Defining Marital Status for Social Security Purposes*, undated paper for the Chair, Cabinet Committee on Health and Social Policy, 1997, para 49).

The Department of Social Welfare had urged an amendment on three main grounds, elaborated in background papers supplied to the New Zealand Cabinet (most of whom would have been unfamiliar with the legal and other issues and heavily dependent on the Department for guidance in this respect).¹⁴⁵ The first ground on which the Department relied was a purported need to reduce perceived operational difficulties in complying with the *Ruka* judgment. The Department had initially advised its Minister in an internal memorandum on *Ruka* that “[c]ases of financial dependence [sic] can be dealt with adequately by investigators as we are used to this sort of investigation and weighing up the traditional indicators”.¹⁴⁶ This advice proved to be starkly contradicted by the argument it advanced in wider policy circles. Here the Department argued, without supporting reasoning, that the approach to financial interdependence in *Ruka* would undermine the core family unit of assessment for social security purposes,¹⁴⁷ an analysis which begged the crucial question of how such a “family unit” based on a relationship in the nature of marriage was properly to be defined. This was symptomatic of the Department’s approach throughout the background papers, described by officials in another Ministry as being fuelled solely by the Department’s concern at the effect of the *Ruka* decision on its administrative practices rather than the conceptual validity of the Court of Appeal’s finding, which the papers nowhere addressed.¹⁴⁸

The background papers illustrate the lengths to which the Department was prepared to go to in order to protect its established administrative procedures. First, the *Ruka* decision did not mean that technical separation of a couple’s finances would preclude a relationship in the nature of marriage. As has been seen, the Court of Appeal made it quite clear that “financial interdependence” was not negated by separate bank accounts, but rather that what counted was a willingness between partners, which may be inferred from their circumstances, to support one another financially should that be necessary. The Court emphasised that a “sham” separation of finances would not negate a relationship in the nature of marriage. These crucial legal findings were either ignored, misrepresented or marginalised in the Departmental background papers. The Department repeatedly claimed that a technical separation of finances would have the potential to take couples

¹⁴⁵ Minister of Social Welfare, *ibid*, Executive Summary, 1.

¹⁴⁶ Department of Social Welfare, Legal Division, *Report to the Minister of Social Welfare, Department of Social Welfare v Ruka*, 11 November 1996.

¹⁴⁷ Cabinet Committee on Health and Social Policy, *Paper HSP (97) 64*, 28 July 1997.

¹⁴⁸ Ministry of Women’s Affairs, *Comment on Draft Cabinet Paper seeking legislative change as a result of the Court of Appeal majority judgment*, 20 June 1997, 1-2.

outside the rule,¹⁴⁹ a suggestion which made its way into the briefing papers supplied to other Ministers.¹⁵⁰

Secondly, whilst the Department argued that the “financial interdependence” requirement would pose significant administrative problems, this was, of course, irrelevant if the Court of Appeal’s interpretation of section 63 was correct, an argument which the Department did not address. In any event, whether such problems would be significant appears debateable, for three reasons. First, financial aspects of the relationship are enshrined in the bill as an indicative, although not necessary, factor. This being so, if all of the criteria are seen to be equal, as the bill initially appears to intend, financial interdependence must continue to be investigated (just as it was before *Ruka*) and, on this basis, the need to establish its existence should not then present any added difficulty. Secondly, the Department has wide statutory powers to investigate the financial circumstances of beneficiaries, and regularly does so, so that the administrative difficulty of establishing immediate financial interdependence has been heavily exaggerated.¹⁵¹ Thirdly, the issue of financial interdependence (and emotional commitment) is not new to *Ruka*, as the bill itself demonstrates.

What the Department appeared to intend was that it should be able to ignore financial considerations and emotional commitment when deciding whether the people concerned are in a relationship in the nature of marriage, if and when it became administratively arduous for the Department or contradicted the impression provided by the presence of other indicators. This is illustrated by repeated and logically circular statements in the background papers that some relationships would fall within section 63 if financial interdependence and emotional commitment could be ignored,¹⁵² and a repeated emphasis on the difficulty of establishing a relationship in the nature of marriage in the Social Security Appeal Authority and the courts if the correct legal test for the existence of such relationships has to be applied.¹⁵³

¹⁴⁹ *Ibid.*

¹⁵⁰ Sec, eg, NZ Treasury, *Aide Memoire - Ruka paper at HSP*, 3 September 1997 (“married couples could arrange their finances so as to be financially independent of each other, in an attempt to qualify for the [lone parent benefit]”).

¹⁵¹ For further discussion, see *Income Support Law and Practice*, supra note 12, paras 1011.1-1011A.5.

¹⁵² Minister of Social Welfare, supra note 144, at 142.

¹⁵³ *Ibid.*

The second ground on which the Department relied was the need to reduce perceived “fiscal risk”. In estimating the extent of the fiscal risk, the Department adopted an extremely crude measure. First, it took a significantly flawed estimate of the level of “benefit fraud overpayments” attributable to couples living in a relationship in the nature of marriage as being M\$16.8.¹⁵⁴ Then it estimated the average increase in time taken on investigations following *Ruka* at 25 per cent, and applied it to the overpayments figure to arrive at an estimate of “reduction in the amount of revenue that might otherwise have been collected” of approximately M\$4.¹⁵⁵ This approach survived, ultimately to be presented to the Cabinet despite earlier observations by the New Zealand Treasury that the fiscal risk appeared to be negligible and that earlier figures advanced by the Department did not “seem to make any sense” (an analysis shared by officials from the Ministry of Women’s Affairs, who described early figures advanced by the Department as “misleading”).¹⁵⁶ An accurate figure could

¹⁵⁴ The figure was flawed both globally and in the context of relationships in the nature of marriage. The New Zealand Statistical Association criticised the Department for including, within “fraud” figures, all overpayments of benefit, including genuine mistakes and departmental error, concluding that the Department’s figures could be as much as 60 per cent inflated. Here, the Association cited inaccuracies and the inclusion of non-fraud benefit overpayments within returns made by the Department’s Benefit Crime Unit for accounting purposes (*Dialogue*, No 99, June 1998). In the narrower context, even within this flawed framework, no effort was made to isolate those cases where an application of *Ruka* would have changed the result.

¹⁵⁵ Minister of Social Welfare, *Defining Marital Status for Social Security Purposes*, supra note 144, at paras 30-31. No explanation was provided of how, if at all, the purported increase in investigation time translated directly into a proportionate reduction in “revenue”. Nor was there any explanation of how the reduction in the criteria to be established by the Department could lead to an increase in investigation time (particularly since most investigation time prior to *Ruka* appeared to be devoted to matters which were not related to financial interdependence, and concentrating on financial interdependence could thus represent a saving).

¹⁵⁶ NZ Treasury, *Comments on Ruka Paper*, 20 June 1997; Ministry of Women’s Affairs, *Draft Cabinet paper seeking legislative change as a result of the Court of Appeal majority judgment*, supra note 148, at 2. These were comments on an early draft which has been withheld. Following discussions with the Department, “on the basis that [the Department of Social Welfare] were better placed to judge the risks and benefits Treasury agreed that legislation to address this issue was desirable” (letter from Hon Winston Peters, Deputy Prime Minister and Treasurer, 23 October 1997). Curiously, although vigorously critical of the methodology of the Department of Social Welfare in calculating the fiscal risk, the Treasury repeated the Department’s estimate without

be determined only by the development and implementation of clear policy based on the *Ruka* decision, tested by case law, a step which was urged on the Department by other Government officials¹⁵⁷ but which it was anxious to avoid.

A further telling example of what other government departments described as “significantly overstating” the potential impact of the *Ruka* decision, and as reflecting “a total lack of balance”,¹⁵⁸ lay in the purported effect of *Ruka* on married couples. Section 63(b), on which *Ruka* was based, expressly applies only to couples who are not legally married. The Department correctly told its own staff that the *Ruka* decision had no application to married couples,¹⁵⁹ having received legal advice to this effect from the Solicitor-General.¹⁶⁰ Nevertheless, the Department then repeatedly claimed in background policy papers that it had the potential to do so, thus exaggerating the potential fiscal impact of the decision.¹⁶¹

Finally, in this context, as the Ministry of Justice pointed out, the purported difficulty in establishing financial interdependence is not really relevant, not least since other criteria used by the Department and contained in the bill are also problematic to determine conclusively.¹⁶² In addition, in December 1996, after extensive initial publicity about the *Ruka* decision, the Department reported that *Ruka* had had “little impact on Income Support, apart from more thorough investigation practices”.¹⁶³

The third argument by the Department, that the proposed amendments will “provide protection against possible adverse judicial action”,¹⁶⁴ is logically

comment when briefing the Cabinet (NZ Treasury, *Report to the Cabinet Committee on Health and Social Policy*, T97C/2446, 28 July 1997).

¹⁵⁷ Ministry of Women's Affairs, *ibid.*

¹⁵⁸ *Ibid.*, 4. See also Department of Labour, Labour Market Policy Group, *Comments on the Ruka Paper*, 20 June 1997.

¹⁵⁹ *NZISS Information Bulletin 1996/087*, *supra* note 114.

¹⁶⁰ See the papers cited at *supra* note 156. The opinion in question has been withheld on grounds of legal privilege (Mr Roger Sowry, Minister of Social Welfare, letter to the author, 6 November 1997).

¹⁶¹ Minister of Social Welfare, *Defining Marital Status for Benefit Purposes*, *supra* note 144, at 25-26.

¹⁶² Ministry of Justice, *Ruka Paper*, 18 June 1997, 2.

¹⁶³ Department of Social Welfare, *Report to the Minister of Social Welfare, Court of Appeal Judgment and Its Effect on Legislation, Policies and Practices*, 23 December 1996.

¹⁶⁴ Minister of Social Welfare, *supra* note 144, at 142.

circular and self-serving. Following *Ruka*, adverse judicial action would only result if the Department elected to continue to ignore the Court of Appeal.

2. *The treatment of domestic violence under the bill*

Whilst it was clear from the emphasis and content of the background papers that the primary motivation for the bill was administrative and fiscal, the then Minister of Women's Affairs presented the bill publicly as being prompted by the desire to assist women suffering from the battered women's syndrome.¹⁶⁵ Overwhelmingly, however, expert opinion (and particularly opinion from the Ministry of Women's Affairs) supported the view that, if enacted, the bill would have a profound and perversely negative impact on women in violent relationships.¹⁶⁶ Women lawyers argued that, in this respect, legislation based on the bill would put lives at risk.¹⁶⁷

As has been seen, the bill states that violence or threats of violence cannot be taken into account in deciding whether a relationship is a relationship in the nature of marriage,¹⁶⁸ and links this with "capped" access to an emergency benefit for women in violent situations limited to six months after which, if the woman has not left the relationship, all social security support will be removed.¹⁶⁹ The contrast between these provisions and those of the Domestic Violence Act 1995 could scarcely be stronger. The object of the 1995 Act is stated as being to reduce and prevent violence in domestic relationships by recognising that all forms of domestic violence are unacceptable behaviour and by ensuring that there is effective legal protection for victims of domestic violence.¹⁷⁰

In relation to the period of "capped" access to social security, the bill states in its explanatory note that:

¹⁶⁵ The Hon Jenny Shipley, Minister of Women's Affairs, press release, *Women in Violent Relationships Deserve Support*, 22 September 1997. See Boston, Jonathon and Dalziel, Paul (eds) *The Decent Society* (1992) ch 1, and Boston, Jonathon, Dalziel, Paul and St John, Susan (eds) *Redesigning the Welfare State in New Zealand* (1999) chs 1 and 2.

¹⁶⁶ Memoranda to the Minister of Women's Affairs dated 18 July 1997 and 28 July 1997.

¹⁶⁷ *Lawyers Slam Mysogynist Bill*, NZ Herald, 20 September 1997, 3; and fax from Wellington Women Lawyers' Association to Ministry of Women's Affairs dated 23 September 1997.

¹⁶⁸ *Supra* note 134, cl 3(4).

¹⁶⁹ *Ibid*, cl 2.

¹⁷⁰ Domestic Violence Act 1995, s 5(1). See generally Webb, HWR and others, *Family Law in New Zealand* (8ed, 1997) ch 7.

During the 6 month period the woman will be case-managed to help move her out of the violent relationship. Protocols will be developed for Income Support staff to help achieve this. The protocols will cover procedures for referral to specialist help from organisations and people such as women's refuge, lawyers, police, and child specialist services, accessing the provisions of the Domestic Violence Act, and the establishment of a case management plan involving reciprocal obligations and a safety plan.¹⁷¹

This aspect of the policy, which was not contained in the body of the bill,¹⁷² illustrated most vividly the bill's origin in the desire to cut welfare costs rather than to provide support for women in violent and abusive relationships.¹⁷³ The concept of a protocol was intrinsically linked with the decision to cap the period for which an emergency benefit could be paid, but that period was both suggested, and set, by cabinet committee before consultation with interested groups.¹⁷⁴ In this respect, the Minister claimed that the National Collective of Independent Women's Refuges ("NCIWR") had been consulted on the development of policy leading up to the bill,¹⁷⁵ had expressed its full support for its approach, and had offered to share its expertise in terms of developing protocols.¹⁷⁶ The NCIWR, however, immediately expressed concern that this suggestion had been made,¹⁷⁷ and denied that it had been involved at any stage in the drafting of the legislation which it described as being "fundamentally flawed".¹⁷⁸ Notwithstanding this rebuttal, the Minister of Social Welfare continued to cite the NCIWR in Parliament as intended "partners" in the development and enforcement of the protocols.¹⁷⁹

¹⁷¹ Supra note 134, Explanatory note. No provision was made in the bill itself for any of these aspects.

¹⁷² Although present in proposed redrafted clauses presented to the select committee after submissions had closed (in a proposed new cl 2A).

¹⁷³ National Collective of Independent Women's Refuges Inc, *The NCIWF Says No to the Social Security (Conjugal Status) Amendment Bill*, press release, 24 September 1997.

¹⁷⁴ Cabinet Committee on Health and Social Policy, *Minutes of meeting held 3 September 1997*, document HSP (97) M 27/3, 2. As noted above, this committee was chaired by Mrs Shipley.

¹⁷⁵ (1997) 29 *New Zealand Parliamentary Debates Questions Supplement* 3862.

¹⁷⁶ Minister of Social Welfare, *Defining Marital Status for Social Security Purposes*, Paper for the Chair, Cabinet Committee on Health and Safety Policy, undated, 1997, para 47.

¹⁷⁷ Ministry of Women's Affairs, *Social Security (Conjugal Status) Amendment Bill: Approval for Introduction*, 22 September 1997, Appendix 1.

¹⁷⁸ *The NCIWR Says No to the Social Security (Conjugal Status) Amendment Bill*, supra note 173.

¹⁷⁹ (1997) 29 *New Zealand Parliamentary Debates Questions Supplement* 3870-3871.

The approach to domestic violence in the bill is based on three assumptions. The first assumption is that to treat a women suffering from domestic violence as not being in a relationship in the nature of marriage would be seen as the State condoning violence.¹⁸⁰ Secondly, it was anticipated that false claims of violence would otherwise be made to gain access to benefits.¹⁸¹ Thirdly, it was argued that women will otherwise be tempted to stay in violent relationships for financial reasons.¹⁸² It is suggested that each of these assumptions is misplaced, the first being based on false logic and the second and third being based on a misunderstanding of the complexities of domestic violence generally and the battered woman's syndrome in particular.

In relation to the first assumption, it is suggested that the effect of applying *Ruka*, and allowing the consideration of violence in deciding whether a relationship in the nature of marriage exists, does not condone violence. On the contrary, it sends the message that, to quote a judge who was cited with approval in *Ruka*, "[i]n the late 20th century, it is no longer appropriate that the definition of ... a relationship in the nature of marriage includes violence as an accepted ingredient".¹⁸³ The effect of the bill, in contrast, is to send the message from the State that, for beneficiaries, domestic violence is consistent with the state of marriage.

Further, the assumption ignores the fact that it would be entirely possible to work with women so as to ease their exit from violent situations whilst recognising that they are not in a relationship in the nature of marriage. Indeed, prior to the decision in *Ruka*, there had been repeated observations by the Social Security Appeal Authority that the departmental methodology in this area was flawed and that violence should be taken into account in assessing marital status and the woman assisted (in contrast to the established policy of recovery of overpayments, imposition of penalties and prosecution).¹⁸⁴ Whilst the Department's *Investigations Unit Manual* made

¹⁸⁰ Office of the Minister of Social Welfare, *Social Security (Conjugal Status) Amendment Bill: Approval for Introduction - Supplementary Information*, paper attached to Cabinet Committee on Health and Social Policy paper HSP (97) 84.

¹⁸¹ *Ibid.*

¹⁸² The Hon Jenny Shipley, Minister of Women's Affairs, press release, *Women in Violent Relationships Deserve Support*, 22 September 1997.

¹⁸³ [1997] 1 NZLR 154, 181. The quotation was from Judge Shaw in *Department of Social Welfare v Te Moananui*, unreported, District Court, Henderson, 18 March 1996.

¹⁸⁴ For discussion of the case law, see *Income Support Law and Practice*, supra note 12, at para 1063.24.

provision for this to occur,¹⁸⁵ the case law, including *Ruka*, suggests that this provision was overlooked in practice.

The second assumption, that false claims of violence will be made to gain access to benefits, implies that such claims are easy to falsify and that collusion between the woman and the man concerned will occur. In fact, “faking” the symptoms of battered woman’s syndrome would be extremely difficult since the syndrome commonly represents the last stages of long-running and extreme violence.¹⁸⁶ The concept of collusion is clearly at odds with the reality of the syndrome in which a range of tactics, including violence and sexual abuse, are used to “gain and maintain power and control over the woman”.¹⁸⁷ The assumption that false claims might be made is simply one aspect of the pervasive fear in the background documents that the syndrome can be either falsified or “managed” for economic ends. When the Cabinet Committee on Health and Social Policy first considered the bill, it concluded, significantly, that “it was not the intention of Ministers that women who did not already receive a benefit should *use* the condition of BWS to enter the benefit system” (emphasis added).¹⁸⁸

The third assumption, that women suffering from the battered woman’s syndrome will be motivated by economic incentives to stay in the relationship, is completely at odds with the evidence in *Ruka*. At times the man involved actively opposed Isabella Ruka’s receipt of a benefit for herself and her children.¹⁸⁹ Indeed, one common means used by men to control women in this situation prior to *Ruka* (particularly when the woman was attempting to leave the relationship) had been to take measures to have the benefit stopped by alleging to the Department that a marriage-type relationship existed. It has been observed that “[t]heir reward for breaking

¹⁸⁵ Department of Social Welfare, *Investigation Unit Procedures Manual*, ch 6, 11. This remains the case under the current policy.

¹⁸⁶ See the summary of writing on the syndrome in Seuffert, *supra* note 98, at 302-304.

¹⁸⁷ *Ibid*, 303, adding that “the use of these tactics is facilitated by societal attitudes towards women and domestic violence” and that “[this] analysis shifts the focus from the woman’s psychological state to the actions of the abuser and society’s response to those actions”.

¹⁸⁸ Cabinet Committee on Health and Social Policy, minutes of a meeting dated 3 September 1997, document HSP (97) M27/3.

¹⁸⁹ [1977] 1 NZLR 154, 175, per Thomas J (“When she discussed the receipt of a benefit with Mr T, he would say that she had to get some money because no money was coming from him. At other times he would tell her to stop getting the benefit but, at the same time, he would expressly refuse any financial support to assist her.”)

free was a large overpayment and in most cases prosecution and a criminal record".¹⁹⁰

Expert evidence was called in *Ruka* suggesting that women who suffer from the battered woman's syndrome do not leave the relationship because they are incapable of making rational choices. This frozen capacity would then presumably extend to an inability to choose to succumb to the theoretical "perverse incentives" of economic rationalism.¹⁹¹ Yet, as noted above,¹⁹² considerable danger has been seen to lie in such expert evidence, and indeed in the use of the "syndrome" itself, because of the stereotypical focus then created. The assumption that a woman might stay in an abusive relationship so as to continue to receive a social security benefit may be challenged on a more simple basis. Even if one assumes that rational economic planning is possible in such an environment, the relationship itself does not provide the basis for entitlement (or for continuing entitlement) to a social security benefit. To the contrary, and even after *Ruka*, the external indicators that a relationship exists will usually operate so as to imperil entitlement.¹⁹³ This is all the more so given that battered women may not have any control over whether they appear to outsiders to be in a relationship with their abusers.¹⁹⁴

The over-arching influence of economic rationalism is also responsible for the proposed cessation of any other access to social security payments if the currently vague promises of "case management" have not worked and the woman remains in the relationship after the six month period has elapsed. In this context, the Ministry of Women's Affairs observed that:

- * it is notoriously difficult to persuade women with battered woman's syndrome to leave an abusive relationship;
- * many sufferers strenuously resist attempts to move them out of the relationship;

¹⁹⁰ Combined Beneficiaries Union, *Submissions on the Social Security (Conjugal Status) Amendment Bill*, 1997, 8.

¹⁹¹ Seuffert, *supra* note 98, at 325, quotes Anderson J as stating, in the context of expert evidence, that a woman might be faced with no economic alternative but to stay or otherwise be "bonded by economic hardship" to accept a relationship that she had learned to be helpless to leave (*R v Zhou*, unreported, High Court, Auckland, 8 October 1993, T7/93).

¹⁹² *Supra* notes 105-108.

¹⁹³ Particularly since the benefit most often involved is the domestic purposes benefit, designed for lone parents. *Supra* notes 16-19.

¹⁹⁴ See, eg, the evidence in *R v Oakes* [1995] 2 NZLR 673 (CA), discussed in Seuffert, *supra* note 98, at 318.

- * "there is ample evidence that women who are victims of domestic violence are most at risk soon after they leave the relationship";
- * in many cases encouragement to leave the relationship is unrealistic;
- * the Department of Social Welfare failed to consult it and other expert agencies about the potential effectiveness and feasibility of the six month time limit proposal;¹⁹⁵ and
- * a possible perverse effect of the bill could be a greater confusion between measures to assist the larger group of battered women who do seek help to leave violent relationships,¹⁹⁶ and who might avail themselves of the proposed support, and the very much smaller group of women who could genuinely be said to be suffering from "battered woman's syndrome", who would probably not do so.¹⁹⁷

Finally, reverting to Cranston's analysis of problems of "take up", the provision for an emergency benefit of only six months, if enacted, assumes that a woman who is suffering from the battered woman's syndrome will have the will-power to make an application. Any such applicant would be aware that, if she failed, the Department would in all probability take steps to establish a relationship in the nature of marriage.¹⁹⁸ Even if the applicant succeeded, the Minister of Social Welfare conceded that the Department would be obliged by the legislation to attempt to recover "overpayments"

¹⁹⁵ Ministry of Women's Affairs, letter to Social Policy Agency, Department of Social Welfare, 20 June 1997. Paradoxically, the Ministry nevertheless earlier supported the concept of a time limit "as it conveys that support is temporary and that there is an expectation on these women that they will move out of the violent relationship as soon as possible" (*Draft Cabinet paper seeking legislative change as a result of the Court of Appeal majority judgment*, facsimile to Department of Social Welfare, Social Policy Agency, 17 July 1997).

¹⁹⁶ The NCIWR noted that few of the women who come to Refuge are suffering from battered woman's syndrome. "Most are not helpless frozen women but the opposite. They do act for themselves - getting the right help is largely a matter of timing" (Ministry of Women's Affairs, *Social Security (Conjugal Status) Amendment Bill - Approval for Introduction*, 22 September 1997, Appendix 1).

¹⁹⁷ Ministry of Women's Affairs, *ibid.*, 2.

¹⁹⁸ Indeed, as advocacy groups pointed out, the simple taking of steps to leave the relationship might be construed by the Department as suggesting that the syndrome is not present. By analogy, positive actions in the context of self-defence have been suggested to be inconsistent with the passivity or "learned helplessness" which some experts associate with the battered woman syndrome (see Seuffert, *supra* note 98, at 324).

from the period before she applied.¹⁹⁹ Obvious conflicts would arise also from the joint administration of the “case management” and the penalty provisions by the same Department.²⁰⁰

VII. CONCLUSIONS

The Social Services Select Committee, which considered the Social Security (Conjugal Status) Amendment Bill, reported to the House of Representatives on 8 May 1998.²⁰¹ Following a tied vote in the committee, the House was required to resolve whether or not the bill would proceed.²⁰² The majority of the committee recommended that, if the bill was to proceed, it should remain before the House until February 1999 and then be referred back to the committee, which would continue to monitor developments in the meantime. The collapse of the Coalition Government which had sponsored the bill, coupled with the imminence of a general election in November 1999, has left its immediate future uncertain and it seems probable that the bill will continue to lie before the House for some time.

Regardless of the future of the bill, its background and the ideas it embodies provide valuable cautionary lessons for New Zealand and other similar jurisdictions. It is suggested that the decision in *Ruka* accurately reflected the purpose of the principle underlying the marital status rule in social security and set out a clear and workable test. Parity between legally married couples and “de facto” couples was achieved by a comparison focussing on the relevant aspects of a “legal marriage”, resulting in neither advantage for, nor disadvantage to, couples who are not legally married, whilst allowing

¹⁹⁹ “There is no provision in the Social Security Act that will allow for the write off of the overpayment nor is there discretion not to establish the overpayment and recover money, although recovery action could be suspended as an interim measure” (question for written answer 14766, 29 October 1997).

²⁰⁰ Combined Beneficiaries Union, *Submissions on the Social Security (Conjugal Status) Amendment Bill*, 6 October 1997, 2.

²⁰¹ House of Representatives, Social Services Committee, *Report on the Social Security (Conjugal Status) Amendment Bill*, No 53-1, 7 May 1998.

²⁰² What was then the Coalition Government did not have a majority on the select committee. The committee consisted of three members representing the coalition Government (two members of the National Party and one member from the New Zealand First party), one member from the ACT party, and one member each from the Labour Party and the Alliance. The ACT member voted against the bill (apparently on the ground that it created a new entitlement to social security), along with the Labour Party and Alliance.

support consistent with the purpose of a social security regime.²⁰³ In this respect, the New Zealand courts distanced themselves from an approach which they had followed for decades in common with courts in Britain, Ireland and Australia,²⁰⁴ and adopted relevant aspects of the approach adopted more recently by Canadian courts.²⁰⁵

The process under which the bill was developed in response to the decision in *Ruka* provides some telling lessons in public administration. First, a fundamental issue of principle in terms of the purposes of the social security scheme was successfully presented by officials in the administering department as relating primarily to the mechanics of administration. In part, the motivation to present the issue in this way can be attributed to the separation of the Department into "business units" under state sector restructuring.²⁰⁶ For the Income Support Service, the division within the Department of Social Welfare responsible for administering social security benefits at the relevant time, sums recouped from beneficiaries as notional overpayment (in this area as in others) represented a significant saving. The nature of the people affected presented little in the way of a "business risk" through further legal challenge arising from the failure to implement the *Ruka* judgment fully.²⁰⁷ At the same time, by exaggerating the potential for benefit abuse, the Department enhanced its case for further funding of fraud prevention.²⁰⁸ It is difficult to overstate the effect of strong departmental advice on members of a cabinet committee, most of whom, in all probability,

²⁰³ Of course, whether the rule is justifiable as such remains a continuing cause for debate. See the analyses set out *supra* notes 26 and 27.

²⁰⁴ *Supra* note 44.

²⁰⁵ Subject to the fundamental difference arising from the absence of a requirement for actual cohabitation in New Zealand (*supra* note 41).

²⁰⁶ See in particular, Petrie, Murray *Organisational Transformation: The Income Support Experience*, Wellington, Social Policy Agency, Department of Social Welfare (1998).

²⁰⁷ By way of illustration, the Department had earlier delegated to a computer programme employing a mechanical formula what was clearly a matter to be decided on the individual discretion of its officers (in relation to "special benefits" on grounds of hardship). When the High Court held that this approach was invalid in *Ankers v Attorney-General* [1995] NZFLR 193, affecting potentially 150,000 other claims, a contingency fund was set up to meet potential liability. Few claims were made on the fund. See generally McClure, *supra* note 8, ch 6. Petrie notes that "[t]hese risks and costs were recognised, at least in part by [Income Support Service] management. They were seen as an inevitable part of using a powerful and necessarily simplistic performance measure to radically change the culture and operating efficiency of the organisation" (*supra* note 206, at 30).

²⁰⁸ *Supra* note 154.

would have had a minimal grasp of the underlying issues.²⁰⁹ This is particularly so when the result of the Department's advice would serve the overall thrust in Government policy towards paring back entitlement to social security.²¹⁰

At the same time, whilst the current New Zealand Government is rightly regarded as being perhaps the world's strictest adherent to the course of pure economic rationalism, the application of that theory to the battered woman's syndrome must represent the theory's wilder shores. Ultimately, the Court of Appeal's decision in *Ruka* was about how a social democratic state defines marriage for its most vulnerable citizens. In the Court's opinion, viewed positively, the concept of marriage includes mutual financial and emotional support and excludes violence. In reversing this approach, the bill probably represents the first attempt by a democracy to enact legislation implying that domestic violence is consistent with the marriage relationship for social security purposes.

²⁰⁹ With the exception of the Chair of the Committee, Mrs Jenny Shipley, who had held office as Minister of Social Welfare.

²¹⁰ Petrie, *supra* note 206, at 9 and 34, notes (although not in this specific context) that "[i]n a public sector setting a key principal/agent relationship was seen to be that between a Minister and a department head. The new institutional economics framework prescribed the use of mechanisms to align the incentives of agents with the objectives of principals", and that "[the] Director General of Social Welfare was ... concerned to ensure the businesses' ... activities were aligned with the Government's overarching objectives".

**(JUSTIFIABLE) HOMICIDE WHILST EFFECTING AN
ARREST: WHEN IS THIS LAWFUL? A COMPARISON
BETWEEN THE SOUTH AFRICAN AND NEW ZEALAND
SYSTEMS OF LAW**

BY MICHAEL SPISTO* AND FRAN WRIGHT**

This article compares and contrasts the South African and New Zealand systems of law with regard to the question of the lawfulness or otherwise of homicide committed whilst effecting arrests. This article also identifies the main statutes and discusses the most important court decisions handed down in recent years in each legal system, each of which has attempted to regulate and control the actions of arresting officers so that unnecessary homicides do not result during arrests.

The various problems and short-comings that the courts have encountered when interpreting the requisite statutes have also been identified and discussed for each legal system. This article, in its conclusion, recommends certain proposals that could be considered by both legal systems in reducing the number of homicides that occur in the course of making an arrest.

**I. THE LAW RELATING TO HOMICIDE WHILST
EFFECTING AN ARREST IN SOUTH AFRICA**

Section 49(2) of the South African Criminal Procedure Act 1977 authorises arrestors and those persons who are statutorily empowered to assist with an arrest, to kill someone who resists an arrest or takes flight, where that person is to be arrested for an offence referred to in schedule 1 of the Act.¹ However, before this homicide can be lawful, strict requirements have to be complied with by the arrestor. If the arrestor is to be charged with homicide, the state must prove beyond a reasonable doubt that the arrestor intentionally killed the deceased. Then the burden falls upon the accused to prove on a

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¹ Du Toit, E De Jager, F Paizes, A Skeen A and Van der Merwe, S *Commentary on the Criminal Procedure Act* (1987) 1-33. See also Appendices 1 and 2 attached.

balance of probabilities that he or she met with the requirements of section 49(2).

In *R v Britz*, Schreiner J A indicated that, because firearms may be too readily used to prevent an escape of a person who is suspected of committing a non-serious offence, and because laws emphasise the value of human lives, the legislature must have intended that an arrestor who has killed another and seeks to use the special protection under section 49(2), should have the ultimate onus of proving that his or her actions were in fact justified. Schreiner J A noted that offences included as schedule 1 offences vary in seriousness and reprehensibility, and in this regard people who have acted unreasonably may still be protected. He submitted that these dangers would be materially increased if the onus lay upon the Crown.² Hence, the burden of proof is an important safeguard to the individual for it places upon the arrestor an obligation to show that the force he or she used was not excessive under the given circumstances.

In regard to section 49(2), the arrestor must show that he or she intended to arrest the deceased, and was as such authorised to do so. Furthermore, the arrestor must have known or reasonably have suspected the deceased of having committed a schedule 1 offence, and this must be the sole object of the intended arrest.³ In *Wiesner v Molomo*, it was indicated that there must be an objectively reasonable suspicion that the deceased had committed a schedule 1 offence.⁴ Hence, if the arrestor's suspicion of the commission of an offence mentioned in schedule 1 is found to be reasonable, by considering the circumstances that led the arrestor to suspect a schedule 1 offence, and if the arrestor is entitled to arrest, he or she is not deprived of the protection afforded under section 49(2). In *S v Nell and another*, it was noted that, when the arrestor subjectively, but unreasonably, believed that the accused had committed a schedule 1 offence, the arrestor could not be afforded the protection under section 49(2).⁵ Hence section 49(2) requires a reasonable suspicion, and an unreasonable suspicion, no matter how honestly arrived at by the arrestor, will provide no protection under section 49(2). Where the circumstances relating to a schedule 1 offence are present, it is unnecessary to weigh the intentional causing of death against the seriousness of the suspected offence.

In *R v Britz*, Schreiner J A remarked:

² 1949 (3) SA 293 (A), 303-304.

³ Barrow, 0 J *Handbook on the Criminal Procedure Act 51 of 1977* (1986) 29.

⁴ 1983 (3) SA 151 (A), 159 B.

⁵ 1967 (4) SA 489 (SWA), 496 D.

If the circumstances specified in the section are present, the conditions for protection are completely fulfilled and, however unreasonable the arrestor may have been, the killing is deemed to be justifiable.⁶

It would appear from this statement that unreasonable conduct is acceptable by the arrestor and section 49(2) protects persons who should not be protected. Hence, because schedule 1 offences include not only heinous offences such as murder and treason, and also trivial offences such as simple theft, it would permit, in certain circumstances “the owner of a fruit stall ... to shoot and kill an unknown fleeing youth who has stolen an apple”.⁷

It is also fundamental for the arrestor to prove that, although an attempt was made to arrest the deceased, the deceased either resisted the arrest or fled.⁸ In *S v Swanepoel*, the arrestor was unable to prove that he could have believed that the deceased was escaping. Hence, Rabie CJ came to the conclusion that the arrestor’s reliance on section 49(2) could not succeed.⁹

It is also crucial for the arrestor to show that the accused was aware of the attempt to arrest him or her while escaping, and that this attempted arrest resulted in the accused’s death. Hence, it was noted that the requirement of s49(1), regarding the use of force by an arrestor where the accused has committed a schedule 1 offence and tries to escape, being clear to the accused that an attempt is being made to arrest him, is also applicable to section 49(2) regarding homicide.¹⁰

Hence, the phrase in section 49(1)(b) “flees when it is clear that an attempt to arrest him has been made” requires that it must be clear to the accused at the time of being arrested that the arrestor is attempting to arrest the accused. If these requirements are not read into section 49(2), it would lead to an untenable result that lesser requirements would be laid down for justifiable homicide than for a mere wounding in terms of section 49(1). Hence, in *S v Barnard*,¹¹ Van Heerden JA could not find in favour of the arrestor in terms of section 49(2) because it was evident that the deceased did not know that the arrestor was attempting to arrest him.

⁶ Supra note 2, at 303-304.

⁷ Landsdown, AV and Campbell, *J South African Criminal Law and Procedure vol V Criminal Procedure and Evidence* (1982) 261-307.

⁸ Barrow, supra note 3.

⁹ 1985 (1) SA 576 (A), 590 A.

¹⁰ *S v Barnard* 1986 (3) SA 1 (A), 7 C-G; *Macu v Du Toit* 1983 (4) SA 629 (A), 645 E-H.

¹¹ At 10 F-G.

It would also appear to be significant, according to the phrasing of section 49(2), that the arrestor who tries to effect an arrest, and who kills the accused, must have intended to kill the accused since there was no other way of preventing the accused from fleeing.¹² This view has been supported in an obiter dictum in *S v Swanepoel*.¹³ Hence, it would seem that section 49(2) will not apply if the state cannot prove beyond a reasonable doubt that the arrestor had the intention to kill the deceased. It follows that the arrestor may be convicted of culpable homicide if the state can prove beyond a reasonable doubt all the elements of culpable homicide.

Probably the most significant and difficult criterion to prove is the fact that there were no other practicable and reasonable means of arresting the deceased or preventing the deceased from fleeing other than by killing him or her. Cilliers JA indicated that an alternative means cannot be considered unless it is practicable and reasonable, noting also that one cannot expect the arrestor to have had time to consider which means is most effective to avoid killing the accused, since, by that time, the accused would have fled.¹⁴ Rumpff CJ, however, noted that s49 (2) authorises the lawfulness of killing only when no other lesser force could have been used.¹⁵

From this it follows that section 49(2) requires an element of reasonableness in deciding whether it was possible to arrest without killing.¹⁶ In *S v Gumbi*,¹⁷ it was noted that what could have been done means what could *in reason* have been done, having regard to the facts which the arrestor knew or ought to have known. Hence, all the circumstances and merits of the case will be considered in terms of this subsection. This is to establish whether the deceased could not have been arrested or prevented from fleeing with less force in a different manner.¹⁸ Consequently, this requirement will be strictly construed using an objective approach to reasonableness. Hence, the particular view of the arrestor, relating to what was or was not possible, will be ignored.¹⁹ However, the court should place itself in the position of the arrestor and consider the circumstances that led the arrestor to take those measures that he or she thought to be correct.

¹² Du Toit, *supra* note 1, at 1-33.

¹³ 1985 (1) SA 576, 588 I-589 A.

¹⁴ *Macu v Du Toit*, *supra* note 10, at 635 H.

¹⁵ *Matlou v Makhubedu* 1978 (1) SA 946, 958 A.

¹⁶ *Landsdown and Campbell*, *supra* note 7, at 261-307.

¹⁷ 1962 (1) SA 188 D.

¹⁸ *Macu v Du Toit*, *supra* note 10, at 635 D.

¹⁹ *Landsdown and Campbell*, *supra* note 7, at 261-307.

In *R v Labuschagne*,²⁰ it was indicated that, although the conditions required by the subsection are present, and there may be justification despite unreasonableness, this does not mean that reason is to be disregarded in deciding whether it was possible to arrest without killing. Schreiner J A in this regard mentioned three possible ways that the arrestor may have prevented the deceased from escaping without killing the deceased. First, an attempt should be made to catch the accused. Secondly, if a firearm is to be used, the accused should be shot in the leg. Thirdly, one should obtain the assistance of others. Therefore, if these methods were not possible, and the arrestor succeeded in showing this, the killing was justified in this case.²¹

In *Matlou v Makhubedu*,²² regarding the issue of reasonableness, it was noted that the use of a weapon should be regarded as an extreme measure, and, in general, a weapon may not be used without first sounding a warning shot. It is also clear that the use of a weapon will depend upon whether the use thereof was reasonable in the circumstances.

Furthermore, it is noted that the words “cannot arrest him or prevent him from fleeing by other means” cannot be so widely construed so as to include also the notion of exercising a discretion whether or not to arrest.²³ Hence, section 49(2) applies only to the manner of effecting an arrest. In *Mazeka v Minister of Justice*,²⁴ it was stated that killing, by using excessive force not covered by the protection allowed under section 49(2), will result in culpable homicide, unless the excess was so unreasonable that it could only justify a verdict of murder.

It is important to note that section 49(2) justifies not only an arrestor who has intentionally killed another whom he or she is seeking to arrest, but also a person charged with assault. This is because it would never have been the intention of the legislature to place an arrestor who has killed in a better position than the arrestor who has merely wounded. In this regard Rumpff CJ noted that the arrestor could use any wilful degree of force, even that resulting in death, if the intention was to wound the suspect, but accidentally caused the suspect’s death. Hence, he submitted that the word “killing” in section 49(2) should be construed as including “intentional wounding”.²⁵

²⁰ 1960 (1) SA 632 (A).

²¹ *R v Britz*, supra note 2, at 303-304.

²² Supra note 15, at 961 A.

²³ *S v Scholtz* 1974(1) SA 120 (W), 126 H.

²⁴ 1956 (1) SA 312.

²⁵ *Matlou v Makhubedu* 1978 (1) SA 946 (A), 957 F.

A recent judgment handed down by Van Heerden JA listed the requirements to be complied with in order that homicide be deemed justifiable in terms of section 49(2):

- (a) the arrestor must have reasonably suspected the deceased of committing a schedule 1 offence;
- (b) the deceased was on the verge of being arrested;
- (c) the deceased must have been aware that the arrestor's intention was to arrest the deceased;
- (d) the deceased must have had the intention to foil the attempted arrest by fleeing;
- (e) there was no other way, given the circumstances, of preventing the deceased from fleeing, other than by killing him.²⁶

This judgment is very significant for it attempts to indicate formally the requirements that must be complied with if the killing by the arrestor is to be legally justified. This is very important to the individual for it safeguards his or her right of liberty against excessive or unwarranted behaviour on the part of the arrestor, and it does this by clearly stating the specific requirements that must be complied with.

Van Heerden JA indicated that, if the arrestor has satisfied all the requirements listed above, the arrestor is to be free of any guilt. However, he noted that it does not necessarily follow that, if one or more of the requirements were not satisfied, the arrestor would have committed an offence.²⁷ This is untenable and indicates a flaw in his judgment. If specific requirements are formally laid down and then later not strictly adhered to, with the result that the requirements become more lenient, these formal requirements do not seem as crucial as one would have *prima facie* believed. The end result is that the individual will not be as closely safeguarded against the excessive and arbitrary power of the state. Hence, it is noted that there still seems to be uncertainty regarding the actual requirements that need to be complied with in terms of section 49(2).

It is, however, clear that the arrestor will not be accountable if the arrestor reasonably believed that the requirements above had been satisfied. Van Heerden JA notes that "reasonably believed" is equivalent in meaning to what "a reasonable man in his position would have believed". In the particular case, the arrestor could not show that he satisfied the requirements (c) and (d) above, or that he could "reasonably have believed that this was

²⁶ *S v Barnard*, supra note 11, at 78D-79 E.

²⁷ *Ibid.*

the case". Hence, the arrestor could not rely on the protection of section 49(2).

Hence, it is evident that there is still a relative amount of uncertainty regarding the requirements to be complied with under section 49(2). This is perhaps because the legislature itself is uncertain what it should do. On the one hand, the legislature cannot tolerate excessive and unwarranted behaviour of the arrestor and sees itself as having an inherent obligation to protect the individual against this, for he or she may in fact be innocent. On the other hand, the legislature does not want to inhibit the power of the arrestor such that the arrestee can resist an arrest and escape.

Therefore, it would appear that the legislature needs to strike an appropriate balance between these two considerations so that South African law can be seen to be impartial and unbiased with the result that the guilty party will ultimately bear the blame. What complicates the issue is the understanding of the term "unreasonable". It is evident that the law is unable to give it a precise meaning and attaches a rather vague definition to it - that is, what was reasonable in the given circumstances, and whether the person who was killed, could have been brought under control or prevented from fleeing by means of a less severe force. These questions are by no means easy to answer in every situation and sometimes do not provide a clear answer. However, these questions are perhaps the best way of providing an answer because they consider an element of impartiality which is crucial if the individual is to have any protection against the state.

II. THE LAW RELATING TO HOMICIDE WHILST EFFECTING AN ARREST IN NEW ZEALAND

This section of the article will outline the New Zealand legislation applicable when a suspect is killed while being arrested. The New Zealand Crimes Act 1961 contains a number of defences that might be used in such a situation and such cases may also be brought within the ambit of self-defence. There is very little case law explaining the scope of the various defences or discussing the potential overlaps between them, and much of what will be said is, of necessity, speculative.

The Crimes Act sets out the defences that may be used when a police officer or a private citizen uses force in arresting a suspect or preventing his or her escape. The defences specific to this situation are in sections 39 and 40:

39. Force used in executing process or in arrest -

Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him of such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner:

Provided that, except in the case of a constable or a person called upon by a constable to assist him, this section shall not apply where the force used is intended or likely to cause death or grievous bodily harm.

40. Preventing escape or rescue -

(1) Where any person is lawfully authorised to arrest or to assist in arresting any other person, or is justified in or protected from criminal responsibility for arresting or assisting to arrest any other person, that authority, justification, or protection, as the case may be, shall extend and apply to the use of such force as may be necessary-

(a) To prevent the escape of that other person if he takes to flight in order to avoid arrest; or

(b) To prevent the escape or rescue of that other person after his arrest-unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner:

Provided that, except in the case of a constable or a person called upon by a constable to assist him, this subsection shall not apply where the force used is intended or likely to cause death or grievous bodily harm.

Sections 39 and 40 apply to anyone who makes an arrest or tries to prevent a suspect from fleeing. The first condition that must be met is that the arrest itself is justified or is one for which there is protection from criminal responsibility. There is no common law power of arrest in New Zealand: all powers of arrest are statutory.²⁸ Arrest without warrant by a police officer is permitted if the officer finds a person disturbing the public peace or committing an offence punishable by imprisonment, or if he or she has good reason to suspect that either of these has occurred.²⁹ If the officer calls upon another person to assist, that person is justified in assisting unless he or she believes that the officer has no reasonable grounds for the belief or suspicion

²⁸ *Police v Cox* [1989] 2 NZLR 293, 295. If the arrest is unlawful, there has been a breach of the New Zealand Bill of Rights Act 1990, with the consequence that all evidence of events after the time of the arrest would be inadmissible (*R v Goodwin* [1993] 2 NZLR 153, *R v N* (unrep, CA 269/98, 2 December 1998)).

²⁹ Crimes Act 1961, s 315.

that a relevant offence has occurred.³⁰ A private citizen is justified in making an arrest (that is, no action in criminal or civil law may be brought) if the citizen found the arrestee committing an offence under the Crimes Act carrying a penalty of three or more years' imprisonment. There is protection from criminal (but not civil) responsibility if he or she found the arrestee at night in circumstances giving reasonable and probable grounds for believing that a Crimes Act offence was being committed, or at any time if he or she has reasonable and probable grounds for believing that a Crimes Act offence has been committed or if the arrestee is escaping from and is still being freshly pursued by a person who has lawful authority to arrest him or her.³¹

Where the arrest itself is justified or there is protection from criminal responsibility for the arrestor,³² necessary force may be used in carrying out the arrest, subject to the proviso that there is no defence if the force used is intended to kill or is likely to kill. The arrestor cannot receive more protection for the use of force than was given for the arrest itself: if the arrest was justified, no liability will arise at all, but if it was one for which there was simply protection from criminal responsibility, that protection can be extended to the force used in conducting the arrest.³³

There is a separate group of defences concerned with the use of force in defence of property. Sections 52, 53 and 56 govern defence of movable property, land and buildings. These allow the use of reasonable force but do not justify striking or doing bodily harm to the offender. Section 55 allows the peaceable possessor of a dwelling house to use necessary force to prevent forcible entry. This also covers the use of force to prevent burglars from continuing a burglary after they have entered a home. It is necessary under section 55 for the user of force to be the peaceable possessor of the home in question. This is the only arrest or crime prevention-focussed defence that is capable of being extended to the use of deadly force by someone other than a police officer.

³⁰ Crimes Act 1961, s 34.

³¹ The Court of Appeal has recently confirmed that these provisions in the Crimes Act are the only authority for a "citizen's arrest" and there is no residual power of arrest for less serious offences: *R v N*, supra note 28. The distinction between justification and protection from criminal responsibility is explained in *R v N*, supra note 28, at 12.

³² A complication here is the application of the New Zealand Bill of Rights Act 1990 to citizens' arrests, as discussed in *R v N*, supra note 28. This issue will not be considered in this article, since it does not impact upon the legality of the use of force.

³³ Although in theory this lays the arrestor open to a civil action, the civil remedies available to the arrestee are limited as a result of New Zealand's accident compensation legislation.

The burden of proof is on the prosecution, beyond a reasonable doubt. The only burden that lies upon the defendant is an evidential one: the evidence must include a “credible narrative” that might lead a jury to entertain the reasonable possibility that a defence is made out.³⁴ The application of this principle to a defence under section 40 was explained in *Hill v Police*:

For the defence to fail ... the prosecution must prove beyond reasonable doubt that either the accused did not have reasonable and probable grounds for his arrest or that he used more force than was necessary or that he could have arrested them in a less violent manner.³⁵

The same applies to the other defences discussed here.

The availability of a defence under sections 39 and 40 is not defined in terms of the offence suspected or interrupted by the arrestor. In theory, the defence is available whatever the offence, provided that the arrest cannot be made or the escape prevented “by reasonable means in a less violent manner”. Section 55 is limited to the offence of breaking and entering a dwelling house and this defence allows whatever force is “necessary” to prevent forcible entry. The test is an objective one.³⁶

One factor that must be taken into account is whether the person making the arrest had carried out his or her duties under section 316 of the Act. Section 316(1) states that:

It is the duty of everyone arresting any other person to inform the person he is arresting, at the time of the arrest, of the act or omission for which the person is being arrested, unless it is impracticable to do so, or unless the reason for the arrest is obvious in the circumstances. The act or omission need not be stated in technical or precise language, and may be stated in any words sufficient to give that person notice of the true reason for his arrest.

According to section 316(4), the failure to observe this duty does not, of itself, result in criminal responsibility for any force used in making the arrest, but it “shall be relevant to the inquiry whether the arrest might not have been effected ... by reasonable means in a less violent manner”. The rationale is probably that a person who understands that he or she is being arrested, and why, is less likely to resist arrest. The requirement to use only

³⁴ *R v Matoka* [1987]1 NZLR 340, 344; *R v Tavete* [1988]1 NZLR 428, 430.

³⁵ (1994)12 CRNZ 89, 94 (HC), per Ellis J.

³⁶ *Ibid*, at 93.

force that is strictly necessary therefore involves a duty to act in a manner that minimises the likelihood that force will become necessary.

Apart from this, there is little guidance. The sections are rarely used, so that courts have not had the opportunity to indicate what they mean. There is no case law discussing their use when deadly force has been used. Section 55 was used in *R v Frew*, where a homeowner lay in wait for burglars and then shot an intruder in the knee. Unfortunately, the issue of whether the force used was reasonable received little attention, since it was a “jury point”. Tipping J simply commented that he agreed with the jury that excessive force had been used.³⁷

The most useful source of information about how sections 39 and 40 might be interpreted is the police *Manual of Best Practice* and the reports of the Police Complaints Authority. The *Manual of Best Practice* indicates that a firearm is to be used only in the following circumstances:

1. In defence of the officer or another if the officer fears death or grievous bodily harm and protection cannot reasonably be provided by less violent means, or
2. To arrest an offender if he or she poses a risk of death or grievous bodily harm in the course of resisting arrest, the arrest cannot be reasonably effected less violently or delayed without causing danger, or
3. To prevent escape of an offender who has taken flight to avoid arrest or escaped after arrest, who poses a risk of death or grievous bodily harm to any person, and only if the flight or escape cannot reasonably be prevented less violently.³⁸

The Manual also states that the offender is not to be shot unless he or she has first been called on to surrender, unless this is impracticable or unsafe, and that that shooting must be the only way in which he or she can be disarmed or arrested and that delay in apprehension would be dangerous or impracticable. These requirements are clearly intended to reflect the formal requirements of sections 39 and 40, and, where they have been complied with, the discretion not to prosecute would appear to be exercised.

The police Manual highlights an important feature of the law relating to the use of force against suspects: the overlap between the defences designed specifically for this purpose and the more general defence of self-defence, as

³⁷ (1992) 9 CRNZ 445, 451.

³⁸ Manual of Best Practice, General Instruction F61, quoted in *Report by the Police Complaints Authority on the Fatal Shooting of Terence Kehoma Thompson at Hastings on 24 June 1996*, 31.

defined in section 48.³⁹ There are two ways in which a person making an arrest or trying to prevent an offence from being committed might be said to be acting in self-defence. The first is if the arrest is of someone who was threatening or attacking the defender or someone else whom the defender sought to protect. Thus, section 48 would assist in many cases where the original offence was one of violence. A second use of section 48 would be where a lesser degree of force has been resisted, requiring the use of force in self-defence.

There is also a potential overlap between section 48 and section 41, which justifies the use of force to prevent violent crime or suicide⁴⁰ if the force is used while the offence is still incomplete. The Canadian Supreme court considered the relationship between self-defence and the use of force to prevent crime in *Hebert v R*. It held that the Canadian equivalent of section 41 was “clearly designed to permit an innocent bystander, who witnesses an offence being or about to be committed, to use force to prevent the offence from occurring. It would make no sense to classify a personal assault as the commission of an offence which triggers the use of [the equivalent of section 41]. If this were the case, [the provisions relating to self-defence] would be redundant”.⁴¹

There is some force in this argument and the potential for redundancy is even greater than the Canadian court suggests, given that the New Zealand self-defence provision also covers defence of another. Where there is a violent offence against the person threatened, the only situation in which section 41 might be more favourable than section 48 would be if the necessity of the situation dictated a greater degree of force than was proportionate to the threat posed. Section 41 refers simply to reasonable necessity, and this does not necessarily import the proportionality aspect of reasonable force required under section 48. However, since section 41 is restricted to “immediate and serious injury”, the difference between what is “reasonable force” and what is “reasonably necessary” is probably not a large one. Given that section 48 does not require that the defender’s belief

³⁹ Crimes Act 1961, s 48: “Every one 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.”

⁴⁰ Crimes Act 1961, s 41: “Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.”

⁴¹ (1996) 135 DLR (4th) 577, 582.

that a threat exists is a reasonable one, and that section 41 does have a reasonable belief component, it is unlikely that section 41 would be used except to prevent suicide or offences against property rather than the person. The redundancy is a practical one, since there is no apparent benefit in using section 41 as an alternative to section 48.

In practice, when section 48 provides a more favourable defence, it is likely to be used in preference to the more specific alternatives. An example of where section 48 might be preferred is where a mistake (especially an unreasonable mistake) has been made about the danger posed by the suspect. Another situation is where there was no statutory authorisation for the arrest or use of force to prevent crime or for the amount of force actually used. This particular overlap, therefore, has the consequence of diluting the restrictions to the permission to use force that are written into sections 39 and 40. Indeed, even where the arrestor is a police officer, section 48 might well be preferred, since its meaning is much clearer.

That this occurs - and for good reason - is indicated by the reports of the Police Complaints Authority. The authority investigates, *inter alia*, all fatal shootings by police officers. Although the Authority does not determine whether criminal charges will be laid, it does express an opinion.

One relevant report is into the shooting of Trudy Jane Speirs in July 1996. She took a dairy owner hostage during a robbery. She was armed with a knife and threatened to kill him; some threats were made in the presence of police officers. The incident ended when an officer shot her twice. She was then handcuffed and removed by ambulance. The subsequent report emphasised that the action was taken to protect the hostage:

Police personnel managing the incident had to accept responsibility for the life of the hostage. If the armed offender takes a hostage, and it has not been satisfactorily established why, but it seems at least as a form of security, or bargaining chip, or as part of the robbery, the law enforcers have a strong obligation to rescue the hostage. All negotiations and tactics must be fashioned towards that desirable end.⁴²

The Complaints Authority was not charged with determining whether the officer concerned should face prosecution, but it noted in its report that a police investigation had reached the conclusion that there was no criminal liability. The Authority itself sought a further opinion. The Auckland Crown Solicitor concluded:

⁴² *Report by the Police Complaints Authority following the shooting of Trudy Jane Speirs by a Police Officer on 29 August 1996 at Auckland, 3.*

I have no hesitation whatsoever in concluding that the defence in section 48 ... is made out and that there is no evidence whatsoever of any culpable conduct on the part of [the officer].⁴³

Apparently the police investigation also referred to section 48. There are two reasons for adopting this approach. The first is that it is unclear precisely which of the more specific defences would be relevant. Speirs could not be said to be “resisting” arrest or trying to escape from arrest since, at the time when she was shot, no attempt appears to have been made to arrest her. The second reason for preferring section 48 was that non-violent means of bringing the incident to an end had not at that stage been exhausted. Contact had been made with two people known to Speirs and they were being brought to the scene. This is not to say that there was no urgency to the situation: the problem was that it was of a kind not necessarily contemplated by the defences provided under sections 39 and 40, whereas the situation contemplated by section 48 was clearly in existence.

Another Complaints Authority report relied on both section 39 and section 48. Terence Kehoma Thompson was shot dead near Hastings in June 1996. Thompson was being hunted because he was thought to have killed a police officer some days before. He was confronted in an orchard, and the officer who then shot him described his purpose as being “capture”, or “[t]o arrest him with least possible fuss”. He said that he believed Thompson had two firearms. He saw Thompson reach under his clothing and heard him say “Shoot me, Shoot me”. The police officer fired one fatal shot at Thompson. A report by counsel concluded that the shooting was justified, both under section 39, because there was resistance to arrest and the arrest could not have been made by less violent means, and under section 48, because the officer believed himself to be endangered. This clearly demonstrates the scope for overlap.

III. CONCLUSION

A comparison has been made between two different legal systems when arrestors effect arrests. The two legal systems, the South African and the New Zealand systems, have been seen to be noticeably different in both their substantive content and in their application of law. In this article, with regard to the law relating to homicides whilst effecting arrests, the major characteristics and features of each system have been outlined and analysed and, most importantly, the short-comings inherent in each system have been noted. It is interesting to note that the authorisation that arrestors may have when effecting arrests is a highly complex issue, and both legal systems have

⁴³ Ibid, 19.

attempted to overcome the difficulties associated therewith by enacting legislation unique to its own country's principles and values. However, it is evident from the discussions that loopholes exist in both legal systems and that both systems are imperfect. Thus, although the legislature does not wish to authorise excessive force on the part of the arrestor, because it has an inherent obligation to protect the individual against this, the legislature, at the same time, does not wish to inhibit the power of the arrestor so that the arrestee can resist an arrest and escape. The two systems have attempted to strike an appropriate balance between the aforementioned considerations, but it is submitted that neither country has an ideal system in place as yet.

In this conclusion, the major features unique to each system will be outlined and a workable suggestion will be proposed which will draw on some of the unique elements of each. This suggestion could then be considered by both the South African and the New Zealand legislatures when reviewing their respective legal systems on this issue.

Considering the South African criminal legal system, it was evident in the discussion that arrestors, and those persons who are statutorily empowered to assist with an arrest, are authorised to kill someone who resists an arrests or takes flight, where that person is to be arrested for an offence referred to in schedule 1. If one examines the schedule 1 offences, it will be evident that these vary in both seriousness and reprehensibility. Thus, a person may be shot and killed by an arrestor for an offence which is not serious or even for one which could arguably be fairly petty or even trivial in nature or content. Furthermore, under the South African system, the legislation authorises the lawfulness of killing when no other lesser force could have been used. Thus, an element of reasonableness is required in deciding whether it could have been possible to effect an arrest without killing that person. Various South African judgments have been handed down in an attempt to list the requirements to be complied with in order to define the notion of *reasonableness* and, consequently, when it may be deemed to be a homicide which is justifiable. However, as noted in this article, there are various flaws in the judgments which have created uncertainty in the application of the respective legislation. Thus, the notion of *reasonableness* has given rise to problems, as the law has defined it far too vaguely leading to uncertainty and speculation in its application.

It can, therefore, be stated that these sections of the South African criminal legislation are too harsh and uncertain. It is obvious that schedule 1 offences need to be trimmed down. Arrestors do still need to have the power to commit justifiable homicide when effecting arrests, but the application of this authorisation should only be permitted in those situations narrowly

redefined by schedule 1, where the subject flees *and* in situations where the lives of the arrestors or members of the public are in immediate danger. To remove the power completely from the arrestors to commit homicides justifiably whilst effecting arrests would not be logical or productive, as members of the public and the arrestors themselves would not be protected in those situations in which their lives would be in immediate danger. Furthermore, it may be prudent to consider redefining section 49 of the South African Criminal Procedure Act so that the legislation becomes less discretionary on the part of the arrestor in such a way that the notion of what is or is not reasonable does not form the basis of the consideration.

We now consider the major features of the New Zealand legislation. It has been seen that the Crimes Act sets out the defences that may be used when the arrestor uses force in effecting an arrest or in preventing a suspect from fleeing. It was evident in sections 39 and 40 of the Act that only a constable, or a person authorised by a constable, may use force powerful enough to cause the death of the arrestee where the arrest itself is justified or is one for which there is protection from criminal responsibility. That is, in terms of the aforementioned sections, there must have been resistance to an arrest and the arrest could not have been made by using less violent means. However, similar to the South African legislation, the wording thereof is too imprecise, vague and discretionary on the part of the arrestor. That is, it may not always be possible for the arrestor, faced with a potentially harmful situation, to decide whether his or her life might be in immediate danger at that stage and therefore, at that split second, to judge what are “reasonable means”. To hesitate might cost the arrestor his or her life. By killing the arrestee, this might lead to criminal and or civil implications on the part of the arrestor if the (lay) jury believe, beyond a reasonable doubt, that the arrestor did not have reasonable or probable grounds for the arrest, or that the arrestor used more force than was necessary, or that the arrestor could have effected the arrest in a less violent manner. Thus, the availability of this defence is not defined in terms of the offence suspected and is uncertain on the whole when needing to use it. Although it is evident that the Manual of Best Practice provides some kind of indication on how sections 39 and 40 might be interpreted, the courts have not had adequate opportunity to test these sections when deadly force has been used. Thus, the sections remain largely speculative and unclear in their application. This is unsatisfactory.

Section 48 of the Crimes Act also refers to the use of force against suspects and would assist where the original offence was one of violence. However, if it is used in the more general sense of self-defence where the arrestor is a police officer, section 48 might be preferred in so far as its meaning is clearer. That is, there need not be statutory authorisation regarding the use or

amount of force for the arrest. However, this section dealing with self-defence should not be allowed to displace difficult legislation that ought to be applied in the proper context.

In summation, it is submitted that the legislatures of the two legal systems ought to note precisely which offences are heinous offences and in which circumstances justifiable homicide can exist without the possibility of the arrestor fearing that criminal and or civil suits could be instituted against him or her. This would enable the arrestor to know precisely for which crimes and in which circumstances he or she could kill an arrestee justifiably and without any comeback. It is proposed that heinous crimes should only include murder, robbery, arson, rape, kidnapping, childstealing and assault when a dangerous wound is inflicted. Such homicide would be justifiable only where these crimes have already taken place, where the suspect flees *and* where the arrestor subjectively believed (not objectively as against another reasonable arrestor) that his or her life, or the life or lives of a member or members of the public, was or were in immediate danger.

APPENDIX 1

Schedule 1 of the South African Criminal Procedure Act 51 of 1977.

[Schedule 1 substituted by section 17 of Act No 26 of 1987.]

(Sections 40, 42, 49)

Treason.

Sedition.

Public violence.

Murder.

Culpable homicide.

Rape.

Indecent assault.

Sodomy.

Bestiality.

Robbery.

Kidnapping.

Childstealing.

Assault, when a dangerous wound is inflicted.

Arson.

Malicious injury to property.

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision.

Receiving stolen property knowing it to have been stolen.

Fraud.

Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage.

Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

APPENDIX 2

Section 49 of the South African Criminal Procedural Act 51 of 1977.

49. Use of force in effecting arrest.

(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.

THE DEVELOPMENT OF THE PUBLIC INTEREST DEFENCE TO BREACH OF CONFIDENCE

BY CHERYL SIMES*

I. INTRODUCTION

A lawyer wants to inform his former employer's clients, and the media, that the employer breached the Credit Contracts Act.¹ A New Zealand newspaper wants to publish the memoirs of a former British spy.² A psychiatric nurse wants to prevent the discharge into the community of a potentially dangerous patient.³ A television station wants to reveal the anti-tax schemes of a corporation, based on information leaked by an employee.⁴ A newspaper wants to identify a mother who killed her child.⁵

Each scenario has required the New Zealand courts to consider the public interest defence to an action for breach of confidence. Breach of confidence has three elements: information that is confidential, the imparting of that information in circumstances of confidence, and the unauthorised use of that information.⁶ If, however, the disclosure or use was in the public interest, the breach of confidence action will fail. The principles involved extend beyond confidential information obtained as an employee, to other types of confidential information and other relationships of confidence.

What, then, are those principles? They are less immediately obvious than one might expect.

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¹ *M v R*, unreported, High Court, Auckland, 24 April 1998 (CP 590/97).

² The "Spycatcher" cases: *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA); *Attorney-General for United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180 (CA).

³ Privacy Commissioner, *Statement ... on the Neil Pugmire Case, Case Note 2049 (1996)*, <http://www.knowledge-basket.co.nz/privacy/speeches/privfeb.htm>.

⁴ The "winebox" cases, including *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559 and *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43 (CA).

⁵ *T v Attorney-General* (1988) 5 NZFLR 357.

⁶ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47, approved in *AB Consolidated v Europe Strength Food Co* [1978] 2 NZLR 515, 520 (CA).

That New Zealand law recognises the existence of a public interest defence to an action for breach of confidence is not in question:

it has never been in dispute that in principle the law of New Zealand recognises that a public interest ... defence or justification is available in appropriate cases.⁷

On the other hand, when one seeks guidance on “appropriate cases”, almost all authorities cited, whether in a 1973 report,⁸ or in New Zealand texts published in 1996⁹ and 1997,¹⁰ are English or Australian cases, not New Zealand. One cannot now simply assume that New Zealand courts will follow those decisions. Divorced from a New Zealand context, such citations are at best persuasive.

In an action for breach of confidence, a defendant relying on an overriding public interest in disclosure has the onus of identifying and establishing the relevant public interest.¹¹ Without a clear New Zealand precedent, such a defendant must potentially try to predict the extent to which New Zealand courts will follow the English or Australian precedents.

This article identifies aspects of the public interest defence already established in New Zealand law, and compares them to the English and Australian approaches. It also attempts further to identify likely New Zealand parameters of the defence. The writer draws on other New Zealand case law, and legislation, to consider how the broader law views the “public interest” in relation to disclosure of confidential information.

Confidential information is perhaps at the core of the “fusion” of law and equity, having never been absolutely on one side of the line in the first place.¹² These mixed origins offer particular legitimacy to a research

⁷ *Attorney-General for United Kingdom v Wellington Newspapers Ltd (No. 2)* [1988] 1 NZLR 180, 182 (CA), per Cooke P.

⁸ Torts and General Law Reform Committee, Report, 17, cited by Brown, A and Grant, A *The law of intellectual property in New Zealand* (1989) 671.

⁹ Dal Pont, GE and Chalmers, DRC *Equity and trusts in Australia and New Zealand* (1996) 101-109.

¹⁰ Todd, S and Bedggood, M “Tortious aspects of unfair competition” in Todd, S (ed) *The Law of Torts in New Zealand* (2nd ed, 1997) 811-813. See also Katz, J *Laws of New Zealand: Intellectual Property: Confidential Information* (1995) 184-190.

¹¹ *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559, 564, per Henry J.

¹² Note the ambivalence of New Zealand courts on the importance of rooting breach of confidence in equity: contrast the statement in *Attorney-General for United Kingdom v*

approach that includes inferences from other areas of law. One may note, for instance, Cooke P's obiter discussion of the possible application of the "newspaper rule" (from defamation and slander of goods) to breach of confidence.¹³ Paul Roth, also, has drawn on breach of confidence to elucidate the Privacy Act.¹⁴ In discussing public interest immunity from discovery, a breach of confidence case is considered relevant.¹⁵ Jeffries J was ready to apply, *mutatis mutandis*, principles of and modifications to the ethical principle of medical confidence, to confidential information supplied under a statutory obligation.¹⁶ Similarly, the Privacy Commissioner has drawn analogies from other statutes, and from medical discipline for breaching patient confidences, when considering privacy breaches.¹⁷

Such inferences, however, must still take account of the differing contexts from which they are drawn. Underpinning this analysis is a particular concern for notions such as unconscionability, said to be the equitable essence of breach of confidence.¹⁸

It is submitted below that the New Zealand courts have rejected the literal rule of "there is no confidence as to the disclosure of iniquity".¹⁹ Instead, the courts consider whether disclosure of the "iniquity" is sufficiently in the public interest to outweigh the obligation of confidence. This depends on a range of factors: the relationship to which the information refers; the nature and extent of disclosure; the import of the information being disclosed; and, especially, the effect of disclosure in preventing or causing harm. The courts

Wellington Newspapers [1988] 1 NZLR 129, 172 (CA), per Cooke P, with that in *Smith Kline and French Laboratories Ltd v Attorney-General* [1989] 1 NZLR 385, 396, per Jeffries J.

¹³ *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43, 48 (CA).

¹⁴ Roth, P *Privacy law and practice* (1995-1998) C/245B: Roth discusses *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health* (1991) 28 FCR 291, 302-03 (FCA).

¹⁵ *McGechan on Procedure* (1996) 5-8(g), referring to *Attorney-General for United Kingdom v Wellington Newspapers* [1988] 1 NZR 129 (CA).

¹⁶ *Smith Kline & French Laboratories v Attorney-General* [1989] 1 NZLR 385, 396, referring to *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513.

¹⁷ See, for instance, Privacy Commissioner, *supra* note 3.

¹⁸ Dal Pont and Chalmers, *supra* note 9, at 96. See also *Stephens v Avery* [1988] 2 All ER 477, 482 (Ch).

¹⁹ *Gartside v Outram* (1857) 26 LJ Ch (NS) 113, 114.

do not confine “iniquity” to criminality. The onus and standard of proof appear partly to differ from the English and Australian approaches.

II. DISCLOSURE OR NOT? - BALANCE, NOT FORMULA

1. Principle

The clearest New Zealand authority summarising the public interest defence - particularly the “iniquity” aspect - is from the Court of Appeal:

Iniquity is not limited to the proposed or contemplated commission of crimes or civil wrongs. It extends to crimes, frauds and misdeeds, committed as well as in contemplation, and to disclosures of things done in breach of national security, *provided always, and this is essential, that the disclosure of them is in the public interest ...* By public interest is meant ... something which may be of real concern to the public.²⁰

Thus it is clearly necessary not only to perceive an element of iniquity (or other harm or other public interest), but to consider also whether disclosure of that element is sufficiently in the public interest to outweigh the obligation of confidence.

This may be contrasted with the alternative approach in which an appropriate level of iniquity (or other harm) would, once established, either automatically nullify the confidence or automatically justify disclosure.

2. Application

New Zealand courts, unlike the High Court of Australia,²¹ have not agreed that criminal conduct (or other iniquity or wrongdoing) necessarily nullifies confidentiality. Instead, they have first considered whether there is a breach of confidence, and then decided whether or not a public interest in disclosure outweighs (or, in interlocutory applications, may outweigh) this breach. The level of iniquity becomes one element to be weighed along with other circumstances, rather than being the sole determinant.

²⁰ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 178 (CA), per McMullin J (emphasis added). McMullin J appears to have drawn this from Lord Denning’s summary in *Initial Services Ltd v Putterill* [1967] 3 All ER 145, 148, but with the addition of “things done in breach of national security”.

²¹ *A v Hayden* (1984) 156 CLR 532, 557, 563, 574, 587-88, 592, 597-98 (HCA).

*T v Attorney-General*²² is perhaps the clearest example of this. It involved the disclosure of confidential personal information about a woman who had killed her child. The plaintiff sought to prevent the media from publishing information from a confidential report by the first defendant which had inadvertently been provided to the media. The media submitted that the respective iniquities of the plaintiff (killing her child) and the Attorney General (through the Director-General's failure to protect the child in the Department's care) were a bar to equitable relief. Ellis J disagreed. Ellis J first allowed the obligation of confidence to outweigh the iniquity, then also declined to allow the iniquity to bar relief.²³

In weighing factors favouring publication, I consider the initial position taken by the court should be that the confidential information should not be published unless there are compelling factors in the competing public interest to the contrary.²⁴

If confidential information related to children, "the interests of the child (and perhaps children in general) will be considered paramount".²⁵ But neither freedom of the press, iniquity, nor prior publication compelled disclosure of the full report as such.²⁶ Ellis J weighed the question of harm to the plaintiff and to the Department together with the other matters going to an overall assessment of how the public interest was best to be served.²⁷ It was clear that publication would harm the plaintiff, and also, by undermining the essential relationship between social workers and their clients, the Department. (Ellis J drew a close parallel with *X v Y*,²⁸ in which a newspaper was restrained from identifying doctors who were still practising although they had contracted AIDS).

This approach is clearly analogous to the statutory "likely effect of the disclosure on the confidant or any other person".²⁹

In a different context, Henry J adopted,³⁰ as summarising "the present nature" of the iniquity rule, an Australian summary:

²² *T v Attorney-General* (1988) 5 NZFLR 357.

²³ At 374.

²⁴ At 373.

²⁵ At 372.

²⁶ At 373-76.

²⁷ At 375.

²⁸ *X v Y* [1988] 2 All ER 648.

²⁹ Evidence Amendment Act (No. 2) 1980, s 35(2)(c).

³⁰ *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559, 564.

publication of otherwise confidential material might be permitted in cases in which there is shown to be some impropriety which is of such a nature that it ought, in the public interest, to be exposed.³¹

His Honour appears to have considered that the nature of the impropriety was the sole determinant of whether it was in the public interest to expose that impropriety. Yet, in saying that publication “might” rather than “would” be permitted, he clearly recognised that the decision was discretionary, at least as to the extent of disclosure. The interlocutory judgment did not fully explore the issue.

On the other hand, in three other New Zealand cases, courts have taken a different approach. Instead of beginning with a clear breach of confidence and then deciding whether the breach was outweighed by a public interest in disclosure, they have ruled that either the confidentiality of the information, or the breach of that confidentiality, was nullified. First, although overturned on appeal, Davison CJ ruled that government information was prima facie not confidential information, unless confidentiality was proved to be in the public interest.³² Secondly, Jeffries J twice ruled that disclosure was not a breach. Disclosing a letter to a senior practitioner while seeking advice on an ethical matter was not a breach of confidence;³³ and there was no breach if information was used for statutorily-approved purposes in the interests of protecting public health.³⁴ None of these cases is irreconcilable with the principle that, once the court does establish a breach of confidence, that breach may be deemed justified in the public interest.

3. Analogous law

The approach in *T v Attorney-General* is consistent not only with Australian and English precedent,³⁵ but also with other New Zealand law affecting the disclosure of confidential information in the public interest.

³¹ *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513, 525, per Powell J.

³² *Attorney-General for the United Kingdom v Wellington Newspapers* [1988] 1 NZLR 129 (CA).

³³ *McKaskell v Benseman* [1989] 3 NZLR 75, 88. Note also that in this case the analysis of breach of confidence was in tort and contract, rather than equity.

³⁴ *Smith Kline & French Laboratories Ltd v Attorney-General* [1989] 1 NZLR 385, 396.

³⁵ *Dal Pont and Chalmers*, supra note 9, at 102-3; *Initial Services Ltd v Putterill* [1967] 3 All ER 145 (CA); also Gibbs CJ's dissent in *A v Hayden* (1984) 156 CLR 532, 545-546 (HCA).

For instance, the public interest in securing justice may, in a criminal investigation, justify disclosing information that would otherwise be privileged.³⁶ The information must be sufficiently relevant and significant to outweigh the public interest in upholding the confidence.³⁷ (If, on the other hand, there is no additional, special reason for confidentiality, the level of relevance and significance need not be great: the usual public interest in preventing crime and in the administration of justice will justify disclosure of criminal activity).

Section 35 of the Evidence Amendment Act (No. 2) 1980 allows a court to excuse a witness from giving any particular evidence if giving that evidence would breach a confidence. Under section 35, there must be not only confidential information imparted in confidential circumstances, but also a special relationship: therefore the analogy must not be taken too far. It is worth noting, however, that the section requires the court to consider whether the public interest in disclosure is “outweighed” by the public interest in the preservation of confidences.³⁸ Considerations include the manner and circumstances in which the information was given, the purpose for which it was given, the seriousness of the reasons for seeking disclosure, and whether there are other means of obtaining the evidence.³⁹ This provision is similar to the common law privilege for confidential relationships, which focuses on the existence of a confidential relationship that “ought to be sedulously fostered”.⁴⁰

The public interest in avoiding delays in the administration of justice may sometimes favour disclosure⁴¹ and at other times require non-disclosure.⁴² *Brannigan* was an application for leave to appeal to the Privy Council. The Court of Appeal had upheld the ruling of Davison CJ, the “winebox”

³⁶ *Attorney-General v Transport Accident Investigation Commission*, unreported, High Court, Wellington, 18 December 1996 (CP 164/96, CP 180/96). This was upheld on appeal in *New Zealand Airline Pilots Association Ltd v Attorney-General*, unreported, Court of Appeal, 16 June 1997 (CA 300/96). See also *R v Lory (Ruling 8)* [1997] 1 NZLR 44, 50-51; *R v S* (1996) 13 CRNZ 637, 641.

³⁷ The evidence was insufficiently material in *R v Bain (No. 5)*, unreported, High Court, Dunedin, 11 May 1995 (T 1/95). In *R v S*, *ibid*, 641-42, it went to the central issue of credibility.

³⁸ Evidence Amendment Act (No 2) 1980, s 35(2).

³⁹ *R v Secord* [1992] 3 NZLR 570, 575 (CA, Full Court) (obiter).

⁴⁰ The Wigmore test, cited in *R v Lory (Ruling 8)* [1997] 1 NZLR 44, 50.

⁴¹ *Brannigan v Davison* (1996) 9 PRNZ 277, 281 (CA).

⁴² *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559, 567.

Commissioner, who had required the giving of evidence and production of documents. Although affirming the strong public interest in having the Commission proceed as soon as reasonably practicable, the Court of Appeal granted leave to appeal to the Privy Council because there was in fact no evidence that such an appeal would delay the Commission's work.⁴³

Fairness to an accused may sometimes justify the disclosure of otherwise confidential material to ensure that the accused has access to all material relevant to his defence.⁴⁴ At other times it may require that evidence not be admitted, as, for instance, if the evidence was obtained unfairly.⁴⁵

4. Nature of relationship

The "special relationship" factor may extend to actions for breach of confidence (where confidentiality is a sword), rather than being confined to claims of privilege (where confidentiality is a shield).

One perceives therefore a reducing scale of seriousness: breach of confidence in a fiduciary relationship;⁴⁶ breach of confidence that also breaches privacy;⁴⁷ breach of confidence alone;⁴⁸ and breach of privacy alone.⁴⁹ Thus, in situations involving breach of privacy but not breach of confidence, a rather lower level of public interest may justify disclosure.⁵⁰ This may support a hypothesis that confidential information is seen not "in terms of exchange, or commodity value, but as part of an ongoing web of communication", or part of a process of relationship-building.⁵¹ The stronger the relationships, the stronger their claims to protection "as processes of

⁴³ *Brannigan v Davison* (1996) 9 PRNZ 277, 281 (CA).

⁴⁴ As in *R (T 65/96) v R* (1996) 14 CRNZ 635, 641; *R v S* (1996) 13 CRNZ 637, 641-42; also *R v McNicol* [1995] 1 NZLR 576, 579-80 (CA), where the Court acknowledged the possibility of allowing disclosure about police informants if relevant to showing that the accused was innocent of the offence.

⁴⁵ *R v H* [1994] 2 NZLR 143 (CA); *R v Rapana* [1995] 2 NZLR 381.

⁴⁶ Eg *X v Y* [1988] 2 All ER 648; also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513.

⁴⁷ *T v Attorney-General* (1988) 5 NZFLR 357; *Stephens v Avery* [1988] 2 All ER 477 (Ch).

⁴⁸ Often, but not necessarily, commercial cases.

⁴⁹ As in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; also *Kaye v Robertson* [1991] FSR 62.

⁵⁰ See detailed discussion in Laster, "Commonalities between breach of confidence and privacy" (1990) 14 NZULR 144.

⁵¹ Wright, "Confidentiality and the public/private dichotomy" [1993] EIPR 237, 241.

communication, negotiation, shared interests, reciprocal loyalty or (in the event of breakdown) minimal ethical requirements of conscionable conduct".⁵²

However, any reduction in scale should not be over-stated. New Zealand law specifically protects individual privacy, as in the Privacy Act 1993. For instance, claims of the "public interest" did not validate the surreptitious filming of an interview in which a woman revealed that she had been the victim of sexual abuse: Eichelbaum CJ ruled that "privacy", as protected also by the Broadcasting Act, should receive a liberal interpretation.⁵³ This New Zealand approach may be contrasted with the English case of *Kaye v Robertson*.⁵⁴

5. There may be confidence as to the disclosure of iniquity

The above cases indicate that New Zealand courts are likely to reject the literal notion that there is no confidence as to the disclosure of iniquity. They are more likely to accept that the confidence exists, and then decide whether the public interest in disclosure is more important. "Iniquity" (or other public interest) will be only one element put into the balance. The relevance and significance of the information, and the nature of the relationship between the parties, will also be considered. Particular attention is paid to the effect of disclosure in preventing or causing harm.

This suggests that, for all the talk of "equity" (the court in *T v Attorney-General* was consciously offering equitable intervention),⁵⁵ the emphasis is on consequences rather than conscience.

III. DISCLOSURE TO WHOM: TO AUTHORITIES OR TO THE PUBLIC?

Whether disclosure to the public is acceptable depends primarily on what is necessary to prevent harm, and sometimes to provide public accountability. Also relevant are the extent of any wrongdoing, the nature of the relationship (discussed above), and the state of the proceedings (interlocutory or substantive). One is required to balance the several interests involved.

⁵² Ibid, 242.

⁵³ *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720.

⁵⁴ [1991] FSR 62.

⁵⁵ *T v Attorney-General* (1988) 5 NZFLR 357, 374.

1. *Wrongdoing: disclosure to the public?*

The Court of Appeal ruled that it was in New Zealand's public interest that information about penetration of and wrongdoing by the British Security Service should be available to the New Zealand public⁵⁶ - even, apparently, when the New Zealand Government supported the British attempt to prevent publication. This was because of the implications for New Zealand's own national security. There is an apparent contrast with the English courts' refusal to justify public (media) disclosure of misconduct affecting national security.⁵⁷ (It is not clear, however, exactly how the New Zealand public, as against the New Zealand authorities, was expected to remedy the problem.) But the "Spycatcher" facts offer scant precedent for more usual scenarios.

On the other hand, disclosure to the public was firmly rejected in *T v Attorney-General*.⁵⁸ In deciding whether disclosure of the full departmental report to the public was justified, Ellis J adopted the principle that "the question of immorality as a bar to relief [from publication]" involved "an assessment by the Judge based on questions of degree". Contrary to what might have been expected, his Honour weighed, not the degree of misconduct by respective parties, but the obligation of confidentiality against the degree of publication necessary to satisfy the public interest. Despite the obvious "iniquities",⁵⁹ Ellis J ruled that the public at large "only needs to know the essential features". The Amended Report, although less detailed and less readable than the full report, preserved those features, and so publishing the Amended Report met those needs. The full report would still be available to professionals who needed it.⁶⁰

Ellis J prohibited publication of the full report. But, because some of the confidential information had already been published when the events concerned first occurred, and was therefore independently known, the media were allowed to use other sources to find out what they could, as long as they did not use the report as a springboard for their investigations.⁶¹

⁵⁶ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 177 (CA).

⁵⁷ *Ibid.*

⁵⁸ (1988) 5 NZFLR 357.

⁵⁹ At 373-74.

⁶⁰ At 374-75.

⁶¹ Paraphrased from 376-77.

Although the two cases were very different, *T v Attorney-General* approved *Stephens v Avery*. In *Stephens v Avery*,⁶² unlike *T v Attorney-General*, the judge basically decided that there was no iniquity to consider: the plaintiff's conduct had not been what the general public would consider "grossly immoral". Moreover, "grossly immoral" conduct meant producing a tendency towards immoral conduct, and therefore the appropriate public interest response by the defendants was hardly to aggravate that tendency by "spread[ing] the news of such conduct nationwide for their own profit".⁶³ This latter approach confirms the "prevention of harm" consideration.

Similar principles appear to apply to commercial information. Wrongdoing may, in the public interest, be disclosed in the media, not merely to enforcement authorities. The difficulty is in knowing what exactly is the determinant of wrongdoing "which should or could properly be made public".⁶⁴

On the one hand, the Court of Appeal has approved⁶⁵ *Initial Services v Putterill*,⁶⁶ which allowed disclosure to the press of breaches of a statutory duty. In *Initial Services*, Salmon LJ and Wynn LJ considered that to strike out a defence because the defendant went to the wrong person to disclose the information would be impossible,⁶⁷ while Denning LJ reasoned that had the information been disclosed to the appropriate authority (registrar) it would then have been publicly accessible anyway.⁶⁸ Further, in one of the "winebox" cases, Henry J accepted, in general terms, that information allegedly about companies avoiding or circumventing New Zealand taxation, investment and company law warranted disclosure, including to the public.⁶⁹ The Court of Appeal, recognising "fraud on the revenue" as potentially allowing disclosure, upheld the lower courts' interlocutory decisions.

⁶² *Stephens v Avery* [1988] 2 All ER 477 (Ch); in *T v Attorney-General* (1988) NZFLR 357, 365, Ellis J quoted the headnote.

⁶³ *Stephens v Avery* [1988] 2 All ER 477, 480.

⁶⁴ *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43, 48 (CA), per Cooke P.

⁶⁵ In *European Pacific*, *ibid.* See also McMullin J in *Attorney-General for United Kingdom v Wellington Newspapers* [1988] 1 NZLR 129, 178 (CA), as discussed *supra* note 20.

⁶⁶ *Initial Services Ltd v Putterill* [1967] 3 All ER 145, 149 (Lord Denning) and 150-51 (Salmon LJ).

⁶⁷ At 150-51, and 152.

⁶⁸ At 149.

⁶⁹ *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559, 564.

However, in that same case, the appellate court left the key question of “the permissible extent of publication in such a case”⁷⁰ to be determined at the substantive hearing. It did draw the trial court’s attention to English authority on the public interest defence.⁷¹ (In an obiter discussion, Cooke P also noted that an order to reveal the *source* of the information might be declined precisely because what the source had disclosed was an iniquity).⁷²

On the other hand, when considering alleged breaches of the Credit Contracts Act and other protective legislation, the High Court declined to allow disclosure to the media. The public interest was satisfied instead by limited disclosure to “those agencies with a statutory remit to receive and investigate such matters”.⁷³ The court added that this limitation could potentially be reconsidered in the future, given that the news media had not been represented in the proceedings.

2. *Wrongdoing: disclosure to authorities?*

In interlocutory proceedings, to ensure that the substantive issue is not predetermined, a stricter test applies. Disclosure must be only such as is *necessary* to enable enforcement authorities to ensure that the conduct does not recur and to take action against what has occurred. Thus, Henry J granted an interim injunction to prevent disclosure to the general public: disclosure was not necessary, because the transactions were in the past, and because the “appropriate enforcement authorities” already had the information.⁷⁴ The Court of Appeal agreed.⁷⁵ Like Henry J, the Court of Appeal applied *Francome v Mirror Group Newspapers Ltd*,⁷⁶ in which the public interest was served by delivering the information to the authorities rather than permitting its publication by the defendant.⁷⁷

⁷⁰ *European Pacific v Television New Zealand* [1994] 3 NZLR 43, 46 (CA).

⁷¹ At 46-47. Cooke P referred to *Attorney-General v Observer Ltd* [1990] 1 AC 109 (HL), 222-23, 262, 279-80, 283, and to Cripps, Y *The legal implications of disclosure in the public interest* (1986) 79-82 (since superseded by a new edition, 1995), and went on also to cite *Initial Services Ltd v Putterill* [1967] 3 All ER 145 (CA).

⁷² *European Pacific v Television New Zealand* [1994] 3 NZLR 43, 48, noting *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1175 and 1201, and *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 44.

⁷³ *M v R*, unreported, High Court, Auckland, 24 April 1997 (CP 590/97).

⁷⁴ *European Pacific v Fourth Estate Publication Ltd* [1993] 1 NZLR 559, 564.

⁷⁵ *European Pacific v Television New Zealand Ltd* [1994] 3 NZLR 43, 48 (CA).

⁷⁶ [1984] 2 All ER 408, 413, 415, 416.

⁷⁷ Similarly, in rejecting attempts to require the defendants to reveal their informant, His Honour found disclosure at the interlocutory stage was not “*necessary*, in the sense that

In *R v H*,⁷⁸ the relevant disclosure (of company bribes to a fisheries official) was by a company employee to the police; disclosure to a wider public was not discussed. The issue was the admissibility of the resulting evidence, not the civil liability of the informant, but the Court of Appeal indicated that the public interest defence would have applied if the latter had been in issue.⁷⁹ This was surely scarcely surprising. By referring to “the iniquity or public interest plea”,⁸⁰ or “the iniquity/public interest rule”,⁸¹ in the singular, the Court of Appeal also appeared to correct Barker ACJ’s discussion of the “‘iniquity’ defence” and the “defence of ‘public interest’” as alternatives.⁸²

Criminal wrongdoing, such as corruption,⁸³ serious fraud,⁸⁴ or direct threats of violence against innocent persons,⁸⁵ will not merely justify disclosure to enforcement authorities, but require it.

3. Public health and personal safety: only to authorities?

Where wrongdoing is not involved, disclosure of serious risks to personal or public safety is justified only if made to authorities who can act to prevent the harm.⁸⁶

Is wider disclosure justifiable if the authorities have failed to act? Neil Pugmire disclosed to an opposition politician the dangers posed by the release of a particular psychiatric patient. The Privacy Commissioner found that this disclosure exceeded what was necessary and interfered with the

there is a compelling reason for it” (*European Pacific v Fourth Estate Publication Ltd* [1993] 1 NZLR 559, 567). Henry J distinguished *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, and applied *Francome v Mirror Group* [1984] 2 All ER 408.

⁷⁸ *R v H* [1994] 2 NZLR 143 (CA).

⁷⁹ At 149.

⁸⁰ At 148.

⁸¹ At 149.

⁸² At 145.

⁸³ At 148 (Richardson J), from *Fraser v Evans* [1969] 1 QB 349, 362, and *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, 423.

⁸⁴ *R v Curtis*, unreported, Court of Appeal, 3 December 1993 (CA 346/93). This case is discussed by Morgan, “The public duty exception in *Tournier*: getting there the hard way in New Zealand” (1994) 9 *Jnl of International Banking Law* 241, 243.

⁸⁵ *R v Lory (Ruling 8)* [1997] 1 NZLR 44, 50.

⁸⁶ *Furniss v Fitchett* [1958] NZLR 396, 405-406 (Barrowclough CJ, obiter); *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 521. Compare *W v Edgell* [1990] 1 All ER 835.

patient's right to privacy.⁸⁷ Pugmire had apparently already tried unsuccessfully to ensure action by more appropriate authorities.⁸⁸ The Privacy Commissioner's concern was with Pugmire's disclosure of specific, identifying information.

It seems that disclosure to the public, even in order to protect potential patients or clients, is not valid if there is a duty of confidence, unless other attempts to persuade authorities to act have failed, or there is an immediate serious threat to an identifiable individual who can be warned directly.⁸⁹

The duty of confidence is the deciding factor here. In *G v G*,⁹⁰ the general public was warned indirectly. But, in that case, the defendant's identity was not subject to a duty of confidence: the judge merely declined to continue name suppression. One may contrast *X v Y*, where the court forbade media identification, from leaked hospital records, of doctors who had AIDS. The public interest in confidentiality and maintaining patient trust, especially in reference to AIDS patients' hospital records, outweighed the "very small theoretical risk" to individuals whose doctors had AIDS.⁹¹

If authorities fail to act, this will potentially warrant disclosure of relevant confidential information to someone who is seeking a remedy after being harmed as a result of that failure to act.⁹²

4. Public accountability: a new ground for disclosure?

The Court of Appeal readily accepted public disclosure in the Spycatcher case. This should not be misinterpreted as emphasising the public interest in government accountability: Spycatcher involved an overseas government, and on that basis was distinguished from other authorities.

⁸⁷ Privacy Commissioner, *supra* note 3.

⁸⁸ De Maria, "Whistleblowing: public interest disclosure laws in Australia in New Zealand" (Dec 1995) 20(6) *Alternative Law Jnl* 270, 274.

⁸⁹ See discussion in Paterson, "AIDS, HIV testing, and medical confidentiality" (1991) 7 *Otago LR* 379, 392-395, also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 *NZLR* 513.

⁹⁰ *G v G* (1996) 15 *FRNZ* 22, 35-36.

⁹¹ *X v Y* [1988] 2 *All ER* 648, discussed in Dal Pont and Chalmers, *supra* note 9, at 104, and in Paterson, *supra* note 89, at 392-393.

⁹² See, for example, the facts of *Campbell v Tameside Metropolitan Borough Council* [1982] 2 *All ER* 791.

Other areas of law in New Zealand do contain hints that disclosure to the public may be valid on grounds of public accountability. First, confidential commercial information had to be disclosed in public, not merely in private, in order to maintain public confidence in a commission of inquiry that had been established specifically in response to public concerns.⁹³ Secondly, in defamation law, New Zealand has recently accepted an extension of “qualified privilege”, on the basis that the public interest warrants a defence of “political expression”. The court recognised the public interest in receiving information about the exercise of public functions and powers.⁹⁴

Thus disclosure, even to the general public, may be valid for reasons other than the necessary prevention of harm. Will an emphasis on public accountability then detract from the equitable emphasis on keeping confidences?

5. Proceed with caution

Despite the courts’ apparently liberal approach to the public disclosure of government or commercial wrongdoing, most disclosures are likely to be weighed against necessity, or at least proportionality. Disclosure to the wider public is unlikely to be approved if it bypasses appropriate authorities.⁹⁵ Disclosure to the wider public may in certain circumstances be approved if it accompanies disclosure to appropriate authorities.

IV. DISCLOSURE OF WHAT?

When the courts are weighing the public interest in disclosure, the subject matter being disclosed remains a central element in the balance. Included is not only the traditional “iniquity”, but broader prevention of harm. I submit that the parameters are likely to be similar, but not identical, to those applicable in England and Australia.

⁹³ *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517, 523-24, 528-29, 534-35 (CA).

⁹⁴ *Lange v Atkinson* [1997] 2 NZLR 22, 46-47. Upheld by the Court of Appeal at [1998] 3 NZLR 424. The matter was then appealed to the Privy Council, which referred the matter back to the Court of Appeal.

⁹⁵ Note in comparison that New Zealand’s two recent whistle-blowing bills both required that disclosure occur through specified channels, and did not protect disclosure to the public. See Whistleblowers Protection Bill (1994 No. 20-1) cl 6(b); Protected Disclosures Bill (1997 No. 208-1) cl 6-10.

1. “Iniquity” - broad rather than narrow

The “defence of iniquity” is recognised as “probably the prime instance” of the principle that “the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest”.⁹⁶ Defining “iniquity” has not always been easy.

“Iniquity” may encompass past wrongs as well as present or future, and civil as well as criminal wrongs.

Iniquity is not limited to the proposed or contemplated commission of crimes or civil wrongs. It extends to crimes, frauds and misdeeds, committed as well as in contemplation, and to disclosures of things done in breach of national security.⁹⁷

As already discussed, New Zealand “iniquity” cases have involved the killing of a child by his mother,⁹⁸ security-service wrongdoing and possible infiltration,⁹⁹ corporate tax schemes and investigative authorities’ inaction,¹⁰⁰ breaches of the Credit Contracts Act,¹⁰¹ and corrupt payments to a fisheries officer.¹⁰²

As regards criminal wrongs, one may draw parallels with other areas of law in which the administration of justice has favoured disclosure of otherwise confidential information. These include allegations of taxation law abuse by major New Zealand companies;¹⁰³ allegations of abuse of the taxation function by the Cook Islands Government;¹⁰⁴ and disclosure of bank account details, to enable the recovery of money fraudulently obtained.¹⁰⁵

⁹⁶ *European Pacific Banking Corporation v Television New Zealand* [1994] 3 NZLR 43, 46 (CA), per Cooke P.

⁹⁷ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 178 (CA).

⁹⁸ *T v Attorney-General* (1988) 5 NZFLR 357.

⁹⁹ *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA).

¹⁰⁰ *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559; *European Pacific Banking Corporation v Television New Zealand* [1994] 3 NZLR 43 (CA).

¹⁰¹ *M v R*, unreported, High Court, Auckland, 24 April 1998 (CP 5990/97).

¹⁰² *R v H* [1994] 2 NZLR 143 (CA).

¹⁰³ *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA); *Controller & Auditor General v Davison* [1996] 2 NZLR 278, 290 (CA).

¹⁰⁴ *Controller & Auditor General v Davison*, *ibid*, 306-307, 309.

¹⁰⁵ Morgan, *supra* note 84, at 243.

As regards civil wrongs, New Zealand courts may well follow their English counterparts¹⁰⁶ in supporting the public disclosure of conduct that deceives consumers. After all, in implementing the Fair Trading Act 1986, the courts have recognised the public interest in freedom from deception.¹⁰⁷ On a related subject, incorrect odometer readings in imported vehicles justified the vehicles' seizure under a customs ban which the court upheld as being necessary in the public interest.¹⁰⁸ Similarly, the protection of genuine trademarks from free-riding competitors is in the public interest.¹⁰⁹

Given that the Fair Trading Act bans misleading conduct, not merely deceptive conduct, New Zealand courts may also potentially approve disclosures that correct an image that had been falsely projected.¹¹⁰ The court in *Re Dickinson* came close to this, where the public interest in a fair determination of market rents favoured disclosure of subpoenaed information about other rental and collateral agreements, despite confidentiality clauses in those agreements.¹¹¹ Maintaining the confidentiality of these agreements would, in the peculiar context of the creative accounting prevalent in the property market at the time, have perpetrated false, almost fraudulent, impressions of actual market rents.¹¹² The information was disclosed only as much as was necessary for the arbitration.

But if New Zealand courts do uphold the public disclosure of confidential information about misleading conduct, they will be going against Australian authority: *Castrol Australia Pty Ltd v EmTech Associates Ltd*,¹¹³ and *Corrs Pavey v Collector of Customs*.¹¹⁴

¹⁰⁶ *Initial Services Ltd v Putterill* [1967] 3 All ER 145, 148 (CA).

¹⁰⁷ *ER Squibb & Sons v ICI NZ Ltd* (1988) 2 NZBLC 103,382, 103,402; *Magellan Corporation Ltd v Magellan Group Ltd* (1995) 6 TCLR 598, 614.

¹⁰⁸ *Collector of Customs v Kilburn Car Sales Ltd*, unreported, High Court, Auckland, 18 November 1996 (M 20/95).

¹⁰⁹ *Levi Strauss & Co v Kimbyr Investments Ltd* [1994] 1 NZLR 332, 362.

¹¹⁰ See *Woodward v Hutchins* [1977] 1 WLR 760, 763-764.

¹¹¹ *Re Dickinson* [1992] 2 NZLR 43, 47, 49, 51 (CA).

¹¹² See Fisher J's comments on this practice, and on *Re Dickinson*, *ibid*, in *Wattie v Commissioner of Inland Revenue* (1996) 17 NZTC 12,712, 12,715; overturned on other grounds on appeal in *Wattie v Commissioner of Inland Revenue* (1997) 18 NZTC 13,297 (CA).

¹¹³ *Castrol Australia Pty Ltd v EmTech Associates Ltd* (1980) 51 FLR 184, 216.

¹¹⁴ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428, 446.

The courts recognise the public interest in the maintenance or security of economic institutions, “among them commercial morality”.¹¹⁵ The public interest in maintaining standards of honesty in the commercial community may even outweigh solicitor-client privilege.¹¹⁶

Negligence and incompetence, without any intent, may perhaps not be enough to bring the defence into operation.¹¹⁷ Yet, in *Campbell v Tameside Metropolitan Borough Council*,¹¹⁸ a plaintiff was granted access to confidential psychological reports on a school pupil following a violent attack by that pupil for which the plaintiff held the education authority responsible. Disclosure of past negligence was barred in *Schering* principally because the defendant’s unconscionable conduct was not outweighed by any genuine need for disclosure: the suspect drug had been withdrawn from the market, and individuals affected were already engaged in litigation to seek remedies.¹¹⁹

From these decisions, it appears that negligence resulting in personal harm may, if meeting the other tests for “public interest” disclosure, be disclosed; while past negligence, or negligence affecting only property, may not be disclosed.¹²⁰

Does a breach of statutory duty justify disclosure? There is a general principle that it is not appropriate to grant relief contrary to the object of an enactment, because to do so is against the public interest preserved by the enactment.¹²¹ Thus, extensions of time for dealing with mining privilege applications were overturned, as being contrary to the statutory time requirements. This was because the time limits were imposed primarily in the public interest, to limit the time during which proprietary rights were threatened.¹²² In breach of confidence, by analogy, someone who has

¹¹⁵ *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659, 690 (EC) (Goddard, Chief Judge).

¹¹⁶ *Schroder v Foulkes*, unreported, High Court, Auckland, 17 March 1993 (CP 871/92).

¹¹⁷ *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 All ER 41, 49-50.

¹¹⁸ [1982] 2 All ER 791, 797; discussed in Dal Pont and Chalmers, *supra* note 9, at 105.

¹¹⁹ *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, 337-338 (CA).

¹²⁰ This would be consistent with legislative proposals to allow disclosures of significant or serious (current) risks to public health or safety, or to the environment (see Whistleblowers Protection Bill, cl 2; Protected Disclosures Bill, cl 5(1)).

¹²¹ *NZI Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528, 548 (CA); similar principle in *Supercool Refrigeration & Air Conditioning v Hoverd Industries Ltd* [1994] 3 NZLR 300, 314-315.

¹²² *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529, 536 (CA).

breached a statute should not obtain relief against someone else who discloses that the statute has been breached. (Contrary Australian authority¹²³ should be acknowledged but not necessarily followed). Yet the court in *M v R* restricted disclosure of the “allegedly unlawful conduct or conduct which does not achieve the objects of the Credit Contracts Act”,¹²⁴ allowing disclosure only to enforcement authorities, rather than to clients or the public.¹²⁵ This was however only an interim injunction, not the substantive trial of either the alleged statutory breaches or the action for breach of confidence.

2. *Private immorality*

Matters of a “grossly immoral” tendency fall within the “iniquity” definition; but only where there is still “a generally accepted moral code”.¹²⁶ Thus, any such matters must be *generally* recognised as “grossly immoral”.¹²⁷

Even if the information concerns “grossly immoral” matters, the disclosure itself must be in the public interest. English courts focus principally on the behaviour of the confidant, and will enforce a duty of confidence against unconscionable disclosure.¹²⁸

In New Zealand, “compelling” grounds for disclosure would be necessary.¹²⁹

3. *Public health*

In England and Australia, confidences may be breached in order to prevent harm to the health and welfare of the general community or to a particular member of the community.¹³⁰ Whether disclosure is justified will depend on the likelihood and severity of the danger involved.

¹²³ Katz, *supra* note 10, at 187, referring to *David Syme & Co Ltd v General Motors-Holdens Ltd* [1984] 2 NSWLR 294.

¹²⁴ *M v R*, unreported, High Court, Auckland, 24 April 1998 (CP 590/97).

¹²⁵ *Ibid.*

¹²⁶ *Stephens v Avery* [1988] 2 All ER 477, 481 (Ch).

¹²⁷ At 480.

¹²⁸ At 482.

¹²⁹ *T v Attorney-General* (1988) 5 NZFLR 357, 373.

¹³⁰ Dal Pont and Chalmers, *supra* note 9, at 104.

New Zealand law recognises the interests of public health as a public interest.¹³¹

The strongest New Zealand authority in this aspect of the public interest defence may appear to be¹³² Jeffries J's decision in *Smith Kline & French Laboratories Ltd v Attorney-General*.¹³³ But Jeffries J did not directly consider the public interest defence, finding instead that there was no *breach* of confidentiality.

In this case, in order to assess the safety of an identical (generic) drug submitted by a competitor, the Department of Health had used confidential information supplied years previously by the manufacturer of the original drug when that drug was submitted for approval. The relationship was not contractual, or fiduciary, but imposed by statute. His Honour assessed the purpose of the statute concerned as being to avoid catastrophes such as thalidomide. The "health of the nation" was of "the foremost public importance" when the Minister and Department were granting consent to new medicines.¹³⁴ The information in question was used only internally within the Department, not conveyed to commercial rivals or anyone else.¹³⁵ In these circumstances, the use was not unauthorised and there was no breach.

His Honour approved the majority reasoning of the parallel English decision:¹³⁶ the protection of public health was the fundamental purpose of the drug-licensing system, and therefore the licensing authority could use the information for all or any of its duties as might be appropriate. His Honour distinguished¹³⁷ the Australian case of *Castrol Australian Pty Ltd v EmTech Associates Pty Ltd*¹³⁸ on the different purposes of the statutes involved.

¹³¹ *ER Squibb & Sons v ICI NZ Ltd* (1988) 2 NZBLC 103,382, 103,406.

¹³² As in Dal Pont and Chalmers, supra note 9, at 105 note 116.

¹³³ *Smith Kline & French Laboratories Ltd v Attorney-General* [1989] 1 NZLR 385 (appealed on other grounds but without challenging the decision on confidentiality: *Smith Kline & French Laboratories Ltd v Attorney-General* [1991] 2 NZLR 560, 561 (CA)).

¹³⁴ At 396.

¹³⁵ *Ibid.*

¹³⁶ *R v Licensing Authority, ex parte Smith Kline & French Laboratories Ltd* [1988] 3 WLR 896 (CA); upheld on appeal [1989] 2 WLR 397, 398 (HL).

¹³⁷ *Smith Kline & French Laboratories Ltd v Attorney-General* [1989] 1 NZLR 385, 398.

¹³⁸ (1980) 51 FLR 184.

A similar outcome occurred in the parallel Australian case.¹³⁹

Beyond the rather specialised facts of *Smith Kline*, it is unclear to what extent New Zealand courts would approve disclosure of confidential information on the grounds of public health.

One may infer from the Privacy Act 1993 that, if disclosure of *personal* information were involved, the danger to health would have to be serious and imminent, and disclosure would be restricted to the level necessary to prevent harm.¹⁴⁰

In relation to more general commercial information, the focus is likely to be on whether the public or any individual needed protection, or at least redress. In *Schering*,¹⁴¹ these needs had already been met, so disclosure in breach of confidence was not justified. Conversely, by extension, if those needs had not already been met, disclosure in breach of confidence would indeed have been justified.

In New Zealand, memories of the National Women's Hospital "unfortunate experiment" suggest a court might well view disclosure favourably, depending on the circumstances of disclosure and the seriousness of the information.

4. Personal safety

In England, a psychiatrist may reveal to the appropriate authorities that his or her patient is likely to be more dangerous if released than other doctors believe.¹⁴² This requires "a real risk of consequent danger to the public".¹⁴³

On similar principles, a New Zealand court has recognised (obiter) that the public interest in disclosure would outweigh the public interest in confidentiality in circumstances where a doctor fairly and reasonably believed that danger to another life was imminent. Such disclosure would

¹³⁹ *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87, 125-26 and 134-136.

¹⁴⁰ Privacy Act 1993, s 6 IPP 10(d).

¹⁴¹ *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, 337-338.

¹⁴² *W v Edgell* [1990] 1 All ER 835, 846 and 852.

¹⁴³ At 853.

have to be to appropriate authorities.¹⁴⁴ The particular case involved a doctor who disclosed information about a patient whom he believed to be unfit to drive a bus. Disciplinary sanctions were upheld because the doctor had disclosed the patient's medical information without knowing that a heart surgeon had certified the patient as fit to drive a passenger vehicle.¹⁴⁵

Even more strongly, Hammond J urged that therapists or counsellors who knew of information threatening to others, such as a direct threat of violence against innocent persons, could not ignore those others.¹⁴⁶

The broader law recognises that the public interest includes, for instance, the right to protection against acts of violence.¹⁴⁷ This may extend not only to physical harm, but also to emotional harm. When awarding exemplary damages for assault and battery, Cartwright J permitted publication of the defendant's name and occupation "in the broader public interest".¹⁴⁸ The "public interest" was that prospective women patients would know the defendant's attitudes to women and his inability to control himself under stress.¹⁴⁹ But note that this case involved no breach of confidence, only a decision on whether, in a civil action, to continue name suppression.

5. "Public benefit": not enough for breach of confidence?

It is not just disclosure of information that is at issue, but disclosure of *confidential* information. The courts have been cautious about increasing the "public interest" that may outweigh the recognised public interest in maintaining confidentiality. Are there, then, additional public interests, outside iniquity and public health and welfare, that justify breaching a confidence?

Pizer included "the public interest in the realisation of the democratic ideal" as justifying disclosure about government activity.¹⁵⁰ This Australian

¹⁴⁴ *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 521. Note also Barrowclough CJ's obiter comments in *Furniss v Fitchett* [1958] NZLR 396, 405-406.

¹⁴⁵ *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513.

¹⁴⁶ *R v Lory (Ruling 8)* [1997] 1 NZLR 44, 50.

¹⁴⁷ *Re M* [1991] 1 NZBORR 217, 236.

¹⁴⁸ *G v G* (1996) 15 FRNZ 22, 36.

¹⁴⁹ At 35.

¹⁵⁰ Pizer, "The public interest exception to the breach of confidence action: are the lights about to change?" (1994) 20 Monash ULR 67, 76-77, from *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

approach required the judiciary to view the disclosure of governmental information “through different spectacles”, and reversed the onus of proof by requiring the government to prove that the public interest demanded non-disclosure. It was adopted briefly in New Zealand by Davison CJ, but was promptly rejected by the Court of Appeal.¹⁵¹

It is well recognised that “public interest” is not simply to be equated with “public benefit”, especially when proprietary rights (as in confidential information) are involved.¹⁵²

Although apparently not made expressly, this distinction is implied in *Harding Signals Ltd v Cooper*.¹⁵³ The High Court rejected the argument that it was in the public interest that the city council had a lower tender to consider. (The defendants had misused confidential information and submitted a tender lower than that of their former employer).¹⁵⁴

6. Conclusion

The “public interest” encompasses the prevention or redress of wrongdoing, including aspects of civil wrongdoing, and the prevention of harm to public health or safety. This is similar in scope to comparative English and Australian approaches, and is supported also by other branches of New Zealand law.

One may hope that any new “public interest” grounds for disclosure of confidential information will be most carefully evaluated. As noted above, confidentiality is a higher duty than privacy.¹⁵⁵ The courts should not lightly extend the grounds on which candour and trust may be breached.

¹⁵¹ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA), 145, 176.

¹⁵² *Lion Laboratories Ltd v Evans* [1985] 1 QB 526, 538, 550 (CA). See also Pizer, *supra* note 150, at 74-75.

¹⁵³ Unreported, High Court, Christchurch, 10 November 1982 (A280/82) (see note in Brown and Grant, *supra* note 8, at 8.35).

¹⁵⁴ *Ibid.*

¹⁵⁵ Laster, *supra* note 50, at 161-163.

V. ONUS AND STANDARD OF PROOF

1. Onus is on defendant

In an action for breach of confidence in New Zealand, the defendant carries the onus of proving that disclosure is in the public interest. This is the case, whether the information concerned is about government, commercial, or private matters.

Regarding government information, this is different from the English and Australian approaches. English¹⁵⁶ and Australian¹⁵⁷ courts have accepted that government information should be disclosed unless those opposing disclosure can prove that the public interest requires non-disclosure.

In the New Zealand Spycatcher case, Davison CJ adopted this approach. His Honour drew on the Australian analysis in *John Fairfax*, namely, that breach of confidence was rooted in equity's protection of personal, private and proprietary rights, and that "when equity protects government information it will look at the matter through different spectacles". Reversing the usual onus of proof, he required the Attorney General to establish that restraint of publication was in the public interest.¹⁵⁸

This approach was overturned on appeal. Cooke P applied the standard test for breach of confidence. The plaintiff had only to show that the information was prima facie confidential: "[t]he claim may be then rebutted by a public interest defence".¹⁵⁹ Cooke P did not, however, totally reject the English and Australian authorities. Having rejected their view of the onus of proof, he recognised that determining the public interest "will or may require a balancing exercise of the kind undertaken ... in the cases last cited".¹⁶⁰

Thus, although the Official Information Act 1982 is rooted in the principle that official information is available unless there is good reason for

¹⁵⁶ Pizer, *supra* note 150, at 77; *Attorney-General v Guardian Newspapers (No. 2)* [1988] 3 All ER 545, 640-642 (HL).

¹⁵⁷ *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485, 492-493 (HCA).

¹⁵⁸ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 144-145 (CA).

¹⁵⁹ At 176.

¹⁶⁰ At 176, citing *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, and *Attorney-General v Jonathan Cape Ltd* [1976] QB 752.

withholding it,¹⁶¹ the Court of Appeal in effect declined to extend this principle to breach of confidence. Its judgment is, however, consistent with the Official Information Act itself. Under that statute, “good reason” for refusing to make official information available exists where the information was subject to an obligation of confidence or was supplied by statutory compulsion, if making the information available would prejudice the supply of such source, or would be likely otherwise to damage the public interest.¹⁶² This is consistent with an intention that government information be treated no differently, in breach of confidence actions, from other information.

2. *Credible narrative, or balance of probabilities?*

Will the defence be valid only if the defendant can prove the allegations of impropriety were true? Or does the defendant merely have to show that the allegations were well founded, perhaps made in an honest belief on reasonable grounds?

The usual requirement in Australia has been a prima facie case, or reasonable grounds for believing that there is serious wrongdoing.¹⁶³ In England, similarly, the House of Lords required, in the *Spycatcher* case, at least a prima facie case that the allegations had substance.¹⁶⁴ Cooke P summarised that their Lordships required at least “a credible allegation from an apparently reliable source”,¹⁶⁵ and, with such attempts at verification as is reasonably possible, “such appearance of truth as it would be reasonable in all the circumstances to expect”.¹⁶⁶ This foundation can then be built on by using interrogatories or discovery to obtain (further) evidence of the fraud or other iniquity.¹⁶⁷

¹⁶¹ Official Information Act 1982, s 5. This principle is based, it has been suggested, on the “public interest in good government”: Jack Hodder, delivering oral presentation at seminar on Official Information Act, Auckland, February 1997.

¹⁶² Section 9(2)(ba). I submit that the latter requirement is a qualification that applies more to information supplied by statutory compulsion than to information subject to an obligation of confidence.

¹⁶³ *A v Hayden* (1984) 156 CLR 532, 546-547.

¹⁶⁴ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, 644 (HL), discussed in Dal Pont and Chalmers, supra note 9, at 103.

¹⁶⁵ *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 170 (CA).

¹⁶⁶ *Ibid.*

¹⁶⁷ *A v Hayden* (1984) 156 CLR 532 (HCA), from *Gartside v Outram* (1856) 26 LJ Ch 113 and other authorities.

In New Zealand, the court upheld an order for discovery of information about certain companies and their relationship. That information impinged on the specific allegation of impropriety, and the plaintiffs were likely to produce, at trial, documentation to rebut the inference or imputations claimed by the defendants.¹⁶⁸ This seems consistent with the established principles. Similarly, a “prima facie case” was expressly mentioned in *M v R*.¹⁶⁹

Yet, by encompassing the plaintiffs’ likely response, the reasoning in *European Pacific v TVNZ* implies that the test is the balance of probabilities, rather than a prima facie case. This approach also raises the question of whether a breach of confidence is justifiable on public interest grounds if the defendant only *subsequently* obtains (through discovery) enough evidence to prove those public interest grounds. Should the defendant not already have such evidence, before breaching the confidence?

The plaintiff in the New Zealand “Spycatcher” case wished, on security grounds, to avoid giving evidence, and therefore waived the need for the defendant to prove the allegations made. Noting the alternative mechanisms available for protecting security, and therefore that the plaintiff had not been denied justice, the Court of Appeal acted on the alleged matters of fact in the book as if they had been proved.¹⁷⁰

Moreover, Cooke J’s treatment of disclosure that is “true and in the public interest”¹⁷¹ as a full justification supports the need for proof on the balance of probabilities.

3. Conclusion

The onus of proof is on the defendant. The allegations require some foundation, but it is not clear whether a credible narrative will suffice, or whether the defendant must prove truth on the balance of probabilities.

¹⁶⁸ *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43, 47 (CA), approving Henry J’s observations in *European Pacific Banking Corporation v Fourth Estate Publication Ltd* [1993] 1 NZLR 559.

¹⁶⁹ *M v R*, unreported, High Court, Auckland, 24 April 1998 (CP 590/97).

¹⁷⁰ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 171-172 (CA). The accepted truth of the disclosures was a significant difference between the New Zealand case and its British equivalent.

¹⁷¹ See discussion below.

It is clear from the Court of Appeal's judgment in the "Spycatcher" case that, if a plaintiff waives the need for the defendant to prove the allegations, the court will treat the allegations as having been true.

VI. CONSEQUENCES OF DISCLOSURE

If on balance the public interest favours disclosure, is the public interest defence then a full justification? If so, the defendant will be able not only to resist an injunction, but also to retain any profits derived from the disclosure. Or is the public interest only a defence against an injunction, but not against damages or an account of profits?¹⁷²

1. Full justification?

New Zealand has emphasised justification. In particular, Cooke P rejected Davison CJ's apparent treatment of the public interest defence as going only to relief:

If that was his meaning I have to say, with great respect, that at least against a third party in the position of *The Dominion* the defence should go to the whole cause of action. I am unwilling to accept that in this class of case, when the publication by it is both true and in the public interest, a newspaper should have to pay damages or account for any profits.¹⁷³

Although this statement refers specifically to third parties, Cooke P also reaffirmed, in the appeal sequel, that "a public interest (or "iniquity") defence or justification is available in appropriate cases".¹⁷⁴

Hammond J has also referred to the "public interest justification" for a breach of confidence.¹⁷⁵

2. Good faith but untrue?

Cooke P's statement suggests that a full justification is warranted where disclosure is true and in the public interest. This may in turn imply that good-faith disclosure that was, in the end, not true might indeed be subject to

¹⁷² Pizer, *supra* note 150, at 90-98.

¹⁷³ *Attorney-General for United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 177 (CA), per Cooke P (emphasis added).

¹⁷⁴ *Attorney-General for United Kingdom v Wellington Newspapers Ltd (No. 2)* [1988] 1 NZLR 180, 182 (CA) (emphasis added).

¹⁷⁵ *Tabley Estates Ltd v Hamilton City Council* [1996] 1 NZLR 159, 164.

damages, or at least an account of profits. New Zealand has no breach of confidence ruling on such facts: the “winebox” cases, if brought to substantive hearings, might yet provide this answer.

VII. CONCLUSION

From the above review of the cases, I draw out the following principles:

First, in assessing claims that a breach of confidence is in the public interest, New Zealand courts have drawn on principles established by English and Australian authorities, but have altered their application.

Secondly, wrongdoing by a plaintiff will not in itself justify a breach of confidence: *disclosure* of the wrongdoing must be in the public interest. The nature of the public interest will influence whether disclosure to the public, rather than merely to enforcement authorities, is justified.

Thirdly, a serious breach of confidence will be justified only by a compelling public interest; a lesser breach may be justified also by a less significant public interest. This is more to do with the harm to be averted, or the nature of the confidential relationship, than with whether the information as such was commercial, governmental, or personal, or even the conduct of the parties. While talking equity, the courts appear to view consequences more seriously than conscience.

Fourthly, unlike in England and Australia, in New Zealand a breach of confidence involving governmental information is approached no differently than a breach involving other confidential information. Other aspects of New Zealand law may also draw the public interest defence away from English and Australian precedent, in the disclosure of civil wrongs, and in a stronger weighting for individual privacy.

Fifthly, it is unclear exactly what standard of proof is required of the truth of what is disclosed. It is however clear that, in New Zealand, whatever standard is required must be met by the defendant.

Sixthly, it appears most likely that disclosure in the public interest constitutes a complete justification, allowing a defendant not only to avoid an injunction or damages, but also to retain any profits.

Finally, New Zealand is clearly developing its own public interest defence to breach of confidence. In doing so, the courts are drawing on other areas of

New Zealand law, while remaining also attuned to English and Australian authorities.



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THE MCCAW LEWIS CHAPMAN ADVOCACY CONTEST

SUBMISSIONS OF COUNSEL FOR TOWER CORPORATION IN RUSSELL MCVEAGH MCKENZIE BARTLEET v TOWER CORPORATION

BY ANTONIA DI MAIO*

The issue at stake here is whether Russell McVeagh McKenzie Bartleet (“Russell McVeagh”) must be disqualified from acting for Guinness Peat Group (“GPG”). This proceeding arises out of the concurrent retainers of Tower Corporation (“Tower”) and GPG by Russell McVeagh. Tower’s retainer concerned a dispute with the Inland Revenue Dept, regarding the 1990 tax year. GPG required Russell McVeagh’s assistance in preparing a hostile takeover strategy against Tower. Russell McVeagh did not inform Tower of its proposal to act for GPG. It did not gain Tower’s consent to do so. It continued to act for GPG for a period of 18 months, without putting in place any effective safeguards against the disclosure of confidential information.

May it please your honours, the submissions for Tower are as follows:

1. The court may, as an incident of its inherent jurisdiction, disqualify a practitioner from representing a client.
2. Russell McVeagh must be disqualified in order to:
 - 2.1 Prevent a continuing breach of fiduciary duty; and
 - 2.2 Protect confidential information relating to Tower:
 - 2.2.1 Russell McVeagh holds confidential information relevant to GPG’s retainer.
 - 2.2.2 There is a risk that this information will be disclosed to the detriment of Tower.
3. The balance of public interest weighs in favour of disqualification.

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Submission 1: The court has the power, as an incident of its inherent jurisdiction, to disqualify a practitioner from representing a client.

Lord Morris in *R v Connelly* recognised that courts endowed with a particular jurisdiction have the powers necessary to enable them to act effectively within that jurisdiction.¹ These include a power to disqualify a practitioner from representing a client. This power must be exercised where it is necessary to protect the parties, and where it is demanded by the wider interests of justice.² This power is not dependent on the *Rules of Professional Conduct for Barristers and Solicitors*. It is not in any way diminished by the fact that a practitioner might be subject to disciplinary proceedings by the relevant professional body.³

Submission 2:

2.1: Russell-McVeagh must be disqualified to prevent a continuing breach of fiduciary duty.

The contract of retainer between Tower and Russell McVeagh created a fiduciary relationship. Rule 1.01 of the *Rules of Professional Conduct for Barristers and Solicitors* states that “the relationship between practitioner and client is one of confidence and trust which must never be abused”.⁴ This rule is stated in absolute terms, it is unequivocal. As an incident of this fiduciary duty, lawyers must avoid conflicts of interest. They must avoid divided loyalties. The commentary to Rule 1.01 states that “the professional judgment of a practitioner should at all times be exercised within the bounds of the law solely for the benefit of the client and free of compromising influences and loyalties”.⁵ Where a conflict of interests develops, nonetheless, the lawyer must disclose it to the client. In *McKaskell v Benseman*, Jeffries J recognised that “[a] primary obligation of the fiduciary is to reveal all material information that comes into his [or her] possession concerned with [a] client's affairs”.⁶ Only material information, not trifling or insignificant detail, must be passed on.

Russell McVeagh allowed a conflict of interest to arise when it accepted the concurrent retainers of both Tower and GPG. Russell McVeagh owed Tower a duty of loyalty. It undertook to owe the same duty of loyalty to a company

¹ [1964] AC 1254, 1301.

² *Black v Taylor* [1993] 3 NZLR 403, 412.

³ At 418.

⁴ Rule 1.01, *Rules of Professional Conduct for Barristers and Solicitors* (5th ed, 1998).

⁵ *Ibid.*

⁶ [1989] 3 NZLR 75, 87.

which planned a hostile takeover of Tower. GPG's interests, which Russell McVeagh undertook to further, were a direct threat to Tower's structure and management. Russell McVeagh allowed its loyalties to be divided, when a solicitor's loyalty to his or her client must never be divided.⁷

Russell McVeagh then breached its duty to disclose this conflict of interest. It was obliged to inform Tower that it intended to accept instructions from GPG. This was material information. While not directly related to the tax dispute, it would clearly affect Tower's decision on whether or not to continue the retainer. By not disclosing this information Russell McVeagh effectively denied Tower the right to make an informed choice about its representation. The duty of loyalty was owed to Tower, and its view of the materiality of this information cannot be disregarded. Tower did not consider Russell McVeagh's intention to act for a company intending a hostile takeover, to be "trifling" or "insignificant" detail. Russell McVeagh breached its fiduciary duty when it accepted GPG's retainer, and did not disclose that it had.

The fiduciary duty to Tower remains operative. This is for two reasons. First, Russell McVeagh's duty of loyalty to Tower was not extinguished when it stopped acting for Tower in the tax dispute. As established in the Australian case *Wan v McDonald*, "... a solicitor's duty of loyalty ... cannot be treated as extinguished by the mere termination of the period of his [or her] retainer".⁸ Secondly, a duty of loyalty is still owed because Russell McVeagh continues to represent Tower in a number of other matters. Therefore, for as long as Russell McVeagh continues to represent GPG, it is breaching its fiduciary duty to Tower.

The relationship between practitioner and client is one of confidence and trust which must never be abused. It must be free of compromising loyalties. For Russell McVeagh's fiduciary duty to Tower to be fulfilled, its loyalties must be undivided. For as long as Russell McVeagh continues to represent GPG, they will be in breach of this duty.

2.2: Russell McVeagh must be disqualified in order to protect confidential information relating to Tower.

The court must disqualify Russell McVeagh if it is satisfied that relevant confidential information is held, and that there is a risk that it could be disclosed.

⁷ *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90.

⁸ (1992) 105 ALR 473, 494.

This test is less stringent than that adopted by the English Court of Appeal in *Rakusen v Ellis, Munday & Clarke*.⁹ Here the court demanded a probability of mischief before disqualification was justified. However, recent cases have recognised that this strict test is unsuitable in modern conditions.¹⁰ The law privileges confidential information from disclosure in order to encourage free and frank communication between solicitors and their clients. It would be inconsistent for it readily to allow a solicitor to act in circumstances which could create a perception that confidences might not be kept.¹¹ Such a circumstance is where a solicitor acts for a new client in matters adverse to a current client's interests.

2.2.1: Russell McVeagh holds confidential information relevant to GPG's retainer.

While representing Tower, Russell McVeagh gained a general knowledge of its management culture, negotiating style and method of operation. This may not be confidential information in a strict sense, as it was not gained from express verbal or written communications. However, it must be recognised as confidential information because it was derived from the professional relationship between Tower and Russell McVeagh.¹² In addition, Russell McVeagh was entrusted with more specific information and documentation, relating to Tower's financial and taxation position.

This information is relevant to GPG's attempt to acquire Tower. The general information could aid GPG and its advisors in developing a takeover strategy. It would also give GPG an advantage, real or perceived, in any future litigation. The specific information is undeniably relevant to a company intending a takeover. It could provide indications of Tower's present true worth, its investment management, and its operating expenses. It could also be used to criticise current management, so as to influence Tower's members.

⁹ [1912] 1 Ch 831.

¹⁰ *National Mutual Holding Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229-30; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46, 49; *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112, 118; *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737.

¹¹ *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112, 118.

¹² The court in *Black v Taylor*, supra note 2, at 418 considered such information to be "confidential".

2.2.2: *There is a risk that this information will be disclosed to the detriment of Tower.*

It cannot conclusively be said that confidential information has not already been disclosed. For 18 months, no effective steps were taken to protect Tower's information from disclosure. More importantly, however, it cannot conclusively be said that there will be no future disclosure.

The "Chinese wall" erected by Russell McVeagh has not removed the risk of disclosure. This device is considered to offer little in resolving conflict of interest situations.¹³ The English Court of Appeal has declared that only in very special circumstances would a Chinese wall "... provide an impregnable barrier against the leakage of confidential information".¹⁴ The risk is that confidential information will be inadvertently disclosed. This arises because of the necessarily close relationships between partners in a firm.¹⁵ This risk is not decreased because the representatives of Tower and GPG worked in separate offices. Mobility of labour and modern communication techniques mean that distance is no bar to communication.

Furthermore, a Chinese wall is especially inappropriate in this case. It is submitted that it is only appropriate for use in successive conflicts. There, a lawyer's duties to a current client conflict with those owed to a former client. The only concern is the confidentiality of the former client's information. However, in concurrent conflicts, the issue of loyalty looms large. Even if it were accepted that Chinese walls adequately prevent disclosure of information, they do not cure divided loyalties. Therefore, their use must be restricted to successive conflicts.

The risk of disclosure is not lessened because different partners dealt with the Tower and GPG retainers. Knowledge of the individual lawyer can be imputed to the firm.¹⁶ Furthermore, the honour and integrity of the professionals involved does not reduce this risk. Courts no longer imbue professionals with an implicit trust.¹⁷ The court should have regard to the considered assessment of experienced lawyers. However if it is clear, as it is here, that they have misjudged the situation, the court must intervene.

¹³ *Equiticorp Holdings v Hawkins* [1993] 2 NZLR 737, 741.

¹⁴ *Re a Firm of Solicitors* [1992] 1 All ER 353, 354.

¹⁵ *Equiticorp Holdings v Hawkins*, supra note 13, at 740.

¹⁶ *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 375.

¹⁷ For an example of this trust, see *Rakusen v Ellis Munday & Clarke*, supra note 9, at 838.

Russell McVeagh holds confidential information relevant to GPG's retainer. There is a risk that this confidential information could be disclosed. If it were, this could be, or could be perceived to be, to Tower's detriment. The court must prevent this by disqualifying Russell McVeagh.

Submission 3: The balance of public interest weighs in favour of disqualification.

In deciding whether to disqualify a practitioner, competing interests must be balanced, to determine where the overall public interest lies. A fundamental consideration is the appearance of justice.¹⁸ This must be maintained to preserve the integrity of the legal system. Allowing Russell McVeagh to continue to represent GPG will only create the perception that lawyers can readily change sides. This subverts the appearance of justice.¹⁹ I acknowledge Russell McVeagh's duty to be available to the public, as contained in Rule 1.02 of the *Rules of Professional Conduct*.²⁰ However, this duty is not absolute. A qualification is contained within the rule itself. A solicitor may refuse to represent a client if he or she has good cause to do so. A potential conflict of interest is good cause. The last consideration is the right of GPG to be represented by the solicitor of their choice. The court in *Black v Taylor* recognised that this right is not absolute.²¹ Therefore the appearance of justice should take precedence. It is imperative that justice be seen to be done.

In summary, the submissions for Tower are as follows:

1. The court must use its inherent jurisdiction to disqualify Russell McVeagh from further representing GPG.
2. This is necessary to prevent a continuing breach of their fiduciary duty to Tower, and to protect confidential information relating to Tower.
3. Disqualification is in the public interest.

Any lesser sanction risks condoning departures from the high standards of professional responsibility expected of practitioners. The court must not allow its rules to be broken with impunity.

¹⁸ Eg *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 123; *Mallesons Stephen Jaques v KPMG Peat Marwick*, supra note 16; *Thavenaz v Thavenaz* (1986) FLC 91, 98; *McDonald Estate v Martin* (1991) 77 DLR (4th) 249, 267.

¹⁹ *D & J Constructions Pty Ltd v Head*, supra note 18, at 124.

²⁰ Supra note 4.

²¹ Supra note 2, at 408.