

WAIKATO LAW REVIEW

TAU MAURI

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EDITOR'S INTRODUCTION

I am pleased to present the 2009 edition of the Waikato Law Review. This edition marks my first year as editor and I am proud to have been given this opportunity to continue the sterling work of the previous editor Sue Tappenden, and her predecessors Professor Barry Barton and His Honour Judge Spiller (formerly Professor Peter Spiller of Waikato School of Law).

In this seventeenth edition, I am pleased to present a diverse and interesting collection of articles, case notes and book reviews. The prestigious Harkness Henry lecture was given by the Honourable Justice Priestley, and was entitled *Chipping Away at the Judicial Arm?* Justice Priestley applauded Harkness Henry and the School of Law for establishing and maintaining this annual lecture and his Honour delivered a thought-provoking lecture that addressed a number of pertinent matters relating to the judicial arm of government in New Zealand; the lecture was well received by an appreciative audience. We would like to extend our thanks to Justice Priestley for his valuable contribution and also to Harkness Henry & Co for its continued support.

Other papers represent the research of national and international legal scholars and practitioners. Nick Curwen's article considers the thorny legal subject of conversion. Les Arthur and Brendan Cullen's timely article considers the relevance of settlement in a contemporary legal landscape. Tina Cockburn and Barbara Hamilton's article follows on from Les Arthur's contribution last year to the Review and considers solicitors' civil and professional liability in will making and estate planning. Dr Robert Joseph's article explores the challenges relating to the incorporation of tikanga Maori customary law into the Aotearoa-New Zealand legal system. Doug Tennant's article focuses on the investment obligations of trustees in relation to superannuation law in Australian and New Zealand. Professor Nan Seuffert and Thomas Gibbons provide valuable case commentary on recent legal developments. Morne Olivier and Sue Tappenden offer insightful reviews on two recent publications.

This edition of the Review has involved the efforts of many people and thanks must go to all those who acted as referees and who provided invaluable commentary and opinions. I wish to thank Janine Pickering for her tireless labours, her expertise and her patience, and to Amanda Colmer from A2Z Design for all her hard work and efficiency. Thanks must also be extended to Ingrid Leersnyder for her editing and formatting work.

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THE HARKNESS HENRY LECTURE

CHIPPING AWAY AT THE JUDICIAL ARM?

BY THE HON JUSTICE JOHN PRIESTLEY*

I applaud Harkness Henry and the University of Waikato School of Law for establishing and maintaining this annual lecture. Law is rightly seen as an academic discipline. The participants in that discipline are many and their roles diverse. Students, academics, barristers and solicitors, the judiciary, those in government, and parliamentarians, have different functions and foci.

Any dialogue between diverse groups of lawyers has great intrinsic and practical value. Since I entered a legal system class at the University of Auckland 47 years ago, I have personally put high value on interchanges of this type. The opportunity for students, academics, practitioners, and judges to listen to one another, particularly on topics which lie somewhat to the side of their normal preoccupations, is valuable and invigorating. So, long may this annual lecture and others like it continue.

I. MY THESIS

A broad description of my topic this evening is the judicial arm of government in New Zealand. I make four statements which underpin my address. They are:

- Although New Zealand is a highly developed and, in international terms, senior democracy, its citizens have little knowledge or appreciation of their constitutional arrangements.
- New Zealand's parliamentary and political structures vest enormous, almost undiluted, power in the executive.
- The judicial arm of government in New Zealand, although respected, is often sidelined or downgraded. There are constitutional risks in this phenomenon.
- As a group, the New Zealand judiciary find it difficult to explain or defend its constitutional role and its importance. Occasional champions are needed. Who better than the legal profession, legal academics, and (rarely I fear) a well-informed media.

There are inherent risks in these four statements. The judicial arm of government is independent. It administers what is loosely described as the rule of law which underpins the constitutional rights and freedoms of the citizens of a democratic state. Thus my thesis is that the judiciary needs champions to explain and defend its role.

* BA LLB (Hons) (Auckland), MA (Cambridge), SJD (Virginia). A Judge of the High Court of New Zealand. I express my gratitude to Judges' Clerks Dr Heather McKenzie, Yvanca Clarisse, and Rebecca Savage for their assistance in compiling this paper. I am grateful to the Rev Anne Priestley for some perceptive comments. My gratitude also extends to various of my judicial colleagues (whose identity I do not reveal lest attempts are made to apportion blame) for their helpful comments and advice.

II. SETTING THE SCENE

As the more acute of you will by now have thought, these are unusual, certainly delicate topics for a judge to discuss extra-curially in a public arena. So I make it clear that I shall not be saying anything sensational (indeed there is no need for me to do so). Nor is there any express or implied criticism of governments or cabinet ministers. I am not on a crusade.

I give you two examples which underscore the misconceptions and ignorance, which prevail in New Zealand about the judicial arm of government.

In March this year, the five members of the Supreme Court received death threats in advance of sitting on an appeal. This became a television news story during which a relatively senior official from the Ministry of Justice, no doubt genuinely concerned, said words to the effect that the Ministry always gave high priority to the safety of 'justice sector employees'.

In July, I was asked to present a paper at a seminar organised by a well known legal publisher. All attendees at the conference wore the obligatory name tag which depicted one's name, firm, chambers, or university. My prepared name tag read 'Justice John Priestley' from the 'Ministry of Justice'! This from an organisation in the business of legal publication.

In the public mind judges are seen as part of New Zealand's law enforcement apparatus. Several times a month television presents powerful images of criminal trials, where judges and courtrooms appear in the same stories as prison vans, police officers, Department of Corrections escorts, and lawyers. It is common knowledge that judges are lawyers. They must be selected from the pool of practitioners. They are regarded as lawyers. What these images and impressions miss is that a judge, on appointment, is no longer a member of the bar. A judge is instead part of an arm of government, independent, and performing a vital constitutional role.

Misconceptions of this type are part of a wider constitutional canvas. There have been clashes over the last 15 years in the United Kingdom. Areas of human rights, anti-terrorism legislation, detention in the immigration and refugee field, and parole, have triggered significant disputes and tension between the higher English Courts and the United Kingdom government.¹

And to a lesser extent we have seen similar clashes (but yet to produce significant law review articles) between New Zealand governments and our Chief Justice. In the wake of the Foreshore and Seabed Act 2004 testy public exchanges between the Chief Justice on the one part, and the Attorney-General and the Prime Minister of the then government on the other, employing terms such as 'judicial activism' and 'lack of understanding about judicial independence'. Then in July 2009 comments made in an address by the Chief Justice on penal policy, with suggestions of sentence reviews and even a prisoner amnesty, brought a sharp response from the Minister of Justice supported later by the Prime Minister on the parameters of government policy and the observation that Parliament made the laws whilst the judiciary interpreted them.²

Against that background I turn to trace how New Zealand's constitutional arrangements, and particularly the judicial arm of government, have evolved to an independent judiciary operating inside a Westminster model parliamentary democracy.

1 An example is the 'Belmarsh Prison' case, *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2005] 2 AC 68.

2 A review of these two clashes involving the Chief Justice has been written by Fran O'Sullivan 'Politicians are weighing in on the scales of justice' *New Zealand Herald* (Auckland, New Zealand, 18 July 2009) A19.

III. THE WESTMINSTER ROUTE TO JUDICIAL INDEPENDENCE AND PARLIAMENTARY ‘SOVEREIGNTY’

A. *History of Evolution*

Apart from the English civil war and the deposition or abdication of James II, the path to modern Westminster constitutional monarchies has been one of evolution rather than revolution. Tensions and compromises over the centuries have fuelled political and constitutional development.

The so-called ‘Glorious Revolution’ led to the Bill of Rights Act 1688 and the Act of Settlement 1701. These great statutes were the cornerstones of the Westminster model. Politically, they were driven by a determination on the part of Whig aristocracy and Protestant parliamentarians to ensure that England remained a Protestant kingdom and that the centrality of Parliament, which the civil war had secured, was not diminished.

The Act of Settlement gave judges security of tenure for so long as they behaved themselves.³ The Bill of Rights Act effectively provided that Parliament, or more accurately the Crown in Parliament, was the supreme law making authority. This perception of the supreme power of parliament was classically expressed by Dicey:⁴

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

These features of the 1688 revolution have been replicated in New Zealand’s Constitution Act 1986, sections 14 and 15 of which define Parliament as the Sovereign and the House of Representatives with ‘full power to make laws’. Sections 23 and 24 relate to the removal of High Court Judges and protection of their salaries.

B. *The Judiciary*

Essential to an understanding of this constitutional evolution is the fact that supreme or sovereign power in medieval times was concentrated solely in the hands of the monarch. The classic division of power, which Montesquieu⁵ observed in Britain, formalised in the constitution of the United States of America and which underpins many modern written constitutions, was an evolved division.

What needs to be stressed, and what is overlooked by so many New Zealanders, is that the judiciary is the judicial arm of government. It is not a creation of Parliament. It is not and cannot be a creature of the executive.

Interestingly the judicial arm became a permanent feature of royal government in England before Parliament. Parliament was summoned from time to time (with much greater dominance

³ *Quamdiu se bene gesserint*. Their salaries were to be paid from the public purse.

⁴ A V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 39-40. Dicey gives as historical examples of the ‘supreme legislative authority of Parliament’ the passage of the Act of Settlement ‘whereby the Sovereign occupies the throne under a Parliamentary title’ and the passage of the Septennial Act in 1716 whereby Parliament extended its life from 3 years to 7 years to avoid an election which might have seen a Jacobite resurgence in the Commons.

⁵ Montesquieu’s observations of 18th century Britain influenced in part his identification of the three arms of government and their need for separation. *De l’esprit des lois* (1748).

by the Lords than by the Commons) when the King was in need of money (supply). This need was particularly acute at various stages during the 100 Years War when the English monarch was attempting to expand or defend feudal domains in France.

In 1178 Henry II appointed five members of his entourage 'to hear all complaints of the realm and to do right'. Slowly over the next 200 years the common law courts evolved.⁶ Judges tended to remain members of the royal household serving on the King's Council. This could be fraught with political risk. An incentive for judges to avoid political matters occurred in 1387 when Richard II sought his judges' advice on the legality of a parliamentary commission which had assumed powers hitherto exercised by the monarch. Six judges, including the Chief Justice of the King's Bench, Tresillian CJ, advised the King the commission was invalid and traitorous. For their pains all six Judges were impeached by the 'Merciless Parliament' and condemned to death. Tresillian CJ was hanged. The other five were banished to various parts of Ireland (a 14th century fate equivalent to an Auckland judge being banished to the Chatham Islands).⁷

Judicial independence, or more accurately its subversion, was one of the drivers of the Glorious Revolution. It was vulnerable during the reigns of Charles II and James II. The former monarch dismissed 11 of his judges. The latter dismissed 12 within three years. One of the many unwise acts of James II was his intervention in an important case, *Godden v Hales*.⁸ The King had purported to dispense with the provisions of the Test Act which would otherwise have required officers in the army to take the oaths of allegiance and supremacy. The purpose of the dispensation was to allow Roman Catholics to hold army commissions. All but one of the 12 Judges who sat on *Godden v Hales* ruled in favour of the King (the King's position was legally arguable). However, James II had taken the precaution of interviewing privately all 12 Judges, being determined to secure a bench for the case's hearing which was favourable and compliant.⁹ The Bill of Rights Act 1688 put to rest forever the notion that the monarch had the power to suspend or dispense with laws.¹⁰

Nowadays, the independence of the judicial arm of government is secured not only by statute but also by convention and protective measures. Judges' salaries are an independent charge on the consolidated fund and cannot be tampered with by the executive. Judges have immunity of suit.¹¹ Judges have, as we have seen, security of tenure. And there is the strong convention (reinforced perhaps by the unhappy example of Tresillian CJ) that judges will not involve themselves in the political arena.

6 A brief but excellent summary can be found in Brooke LJ 'Judicial Independence – Its History in England and Wales' in Cunningham (ed) *Fragile Bastion; judicial independence in the nineties and beyond* (1997).

7 Brooke LJ, *ibid*.

8 (1686) 2 Show KB 477 (1686) 89 ER 1050.

9 See Bradley *Relations Between Executive, Judiciary, and Parliament: An Evolving Saga?* (2008) Public Law 470.

10 For a rare modern example of a prime minister purporting to dispense with the law see *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

11 Until recently a protection for higher court judges, but extended to the District Court Bench by the District Courts Amendment Act 2004.

C. Parliament

Yet what of the other two arms of government, Parliament and the executive?¹² The first obvious contrast with the independence of the judicial arm is that the parliamentary and executive arms are interdependent. This is in marked contrast to the position in the United States. Our cabinet ministers must sit in Parliament.¹³ A government (the executive) must retain the confidence of Parliament which is achieved by controlling it with a parliamentary majority. The development of political parties and, in Australasia, party caucuses, give to the leaders of a parliamentary government an iron grip on legislative and executive power. Executive control of Parliament can, if necessary, be reinforced by the ability of the Prime Minister or government to allocate or withdraw cabinet posts, under-secretaryships, and positions on Parliamentary committees.¹⁴

The foundations of this power, being essentially the supremacy of the Crown in Parliament, are historic. There can be no dispute about the centrality of parliamentary power. The interesting question is whether it is unlimited. What is its source?

Consider these great words penned in Philadelphia in 1776:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among those are Life, Liberty, and the pursuit of Happiness. That to secure these rights Governments instituted among men deriving their just powers from the consent of the governed....

Wonderful stuff. Easy for post-modernists and deconstructionists to snipe at the words by observing that they did not apply to slaves and women. But nonetheless, the 19th century concept that the legitimacy of government rests on the consent of the governed, underlies true republics and democracies. Yet, this is not initially what Westminster parliaments, and certainly the 1688 Parliament, had in mind. The concept of the consent of all the governed was raised by the Levellers during the English civil war and during the great debates of the Army at Putney. But the idea expounded by Colonel Rainborough was too radical for gentry, parliamentarians, and Model Army officers alike.¹⁵

Professor Martin Loughlin convincingly argues that the Convention Parliament, which followed James II's departure and which invited William and Mary to reign, 'obfuscated' the issue of sovereign power and its true source, asserting it for Parliament.¹⁶ It was only through extensions of the franchise in the 19th and 20th centuries that Westminster parliaments were able to assert, with

12 Two excellent articles trace and comment on these high constitutional matters. Joseph 'The Constitutional State' in Finn and Todd (eds) *Law, Liberty, Legislation: Essays in honour of John Burrows QC* (2008) 249; Palmer 'New Zealand Constitutional Culture' (2007) 22 *NZULR* 564. The best treatment of Parliament which asserts that it is unquestionably a sovereign body is J Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon 1999).

13 Constitution Act 1986 s 6.

14 This can properly be seen as a form of patronage although not as extensive of that practised by Whig prime ministers in the 18th Century such as Robert Walpole and the Duke of Newcastle. See Sir Lewis Namier *The Structure of Politics at the Accession of George III* (1929); *England in the Age of the American Revolution* (1930).

15 Rainborough's comment was 'for really I think that the poorest he that is in England has a life to live as the greatest he; and therefore truly, sir, I think it is clear that with every man that is to live under a government ought first by his own consent to put himself under that government' (Extract from the debates at the General Council of the Army, Putney, 29 October 1947, Clarke papers).

16 Loughlin 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Loughlin and Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 27.

some legitimacy, that since their members are elected by universal franchise, the sovereign power they wielded was with the consent of the governed. Nonetheless, from a historical and evolutionary perspective, the notion of the Crown in Parliament being the supreme sovereign power has its origin in a 17th century aristocratic and Protestant revolution rather than in a *de novo* democratic consensus. Historically, the concept of parliamentary sovereignty was created contemporaneously with the concept of an independent judiciary. The notion of parliamentary sovereignty is arguably a common law doctrine,¹⁷ although there is historical force in the suggestion that the deference shown by the courts to parliament is a political choice.¹⁸

I raise briefly, but need not develop because others have, the issue of whether there are limits on the concept or perception that parliament's sovereign powers are not only supreme but are untrammelled. Any suggestion to the contrary is almost guaranteed to provoke a firm response from parliamentarians embroidered with epithets about activist judges and the undemocratic nature of the judiciary.

Yet most commentators allow the concept of a curb on parliamentary supremacy. Professor Joseph for his part¹⁹ sees the 1688 revolution as 'the high water mark of historical myth-making and applied institutional morality'. In constitutional states such as the United States and Australia where the powers of the Supreme Court and the High Court of Australia extend to interpreting the Constitution or constraining constitutional breaches by the legislative arm, the issue does not arise.²⁰ The Constitution itself places legal limits on legislative power. It is only Westminster parliaments which resist that notion.

Rarely does the issue arise but there are clearly constraints. They may be political constraints (the accountability of a parliament in a democracy to the enfranchised voters).²¹ There are additionally respectable arguments that, either alone or in combination, the concept of the rule of law, or the underlying precepts of 1,000 years of English constitutional development, or the assumptions implicit in a democracy where power derives its legitimacy from the consent of the governed²² or even some Kelsenian concept of a *grundnorm*, must place some limits on parliamentary power.²³ The common denominator of these approaches is that the law is supreme rather than one of the organs of government. Or, as mildly suggested by Lord Cooke of Thorndon, there may be assertions by the judiciary and indeed rulings that there are implicit rights and freedoms in a democracy that limit legislative power.²⁴

17 Dame Sian Elias *Administrative Law for 'Living People'* (2009) 68 *CLJ* 47, 54. The same article correctly observes that historically the power of the executive arm of government can be found only in legislation or prerogative.

18 See Goldsworthy, above n 12, *passim*.

19 Joseph *The Constitutional State*, above n 12, 276.

20 At an early stage the United States Supreme Court asserted to itself the right to interpret the Constitution and review the constitutionality of acts of Congress. *Marbury v Madison* (1803) 5 US 137.

21 Stephen *The Science of Ethics* (1907) at 137, dealing with the Dicey postulation that in theory it would be possible for Parliament to legislate for the death of blue eyed babies stated that legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.

22 See previous references to the Declaration of Independence and Colonel Rainborough.

23 See the example given by Heath J 'Hard Cases and Bad Law' (2008) 16 *Waikato Law Review* 1, 12.

24 Rt Hon Sir Robin Cooke 'Fundamentals' [1988] *NZLJ* 158; and his further contribution as Lord Cooke of Thorndon 'The Basic Themes' (2004) 2 *NZJPIL* 113, 114.

The former Deputy Prime Minister and Attorney-General Hon Dr Michael Cullen, during the constitutional skirmishing which surrounded Parliament's enactment of the Foreshore and Seabed Act 2004, stated in an address in April 2004 to the Otago District Law Society:²⁵

In our tradition the Courts are not free to make new law. It is fundamental to our Constitution that law makers are chosen by the electorate and accountable to them for their decision. MPs are accountable. Judges are not; they are in fact independent, and that is essential to their role in society.

We need their impartial rulings on what the law says and how it applies in individual cases; but if they begin to express views on what the law should say they enter dangerous territory. It is dangerous not only for the case at hand but also because it means the public begin to perceive the judiciary are politicised.

Undoubtedly a shot across the judicial bow. A correct description of the traditional roles. But, as by now I hope you appreciate, the issues surrounding the judicial arm of government, parliamentary sovereignty and its development, and the concept of limits on parliamentary power cannot be so simply stated.

An easy riposte to any perceived flexing of judicial muscle is to comment that judges are unelected. That is indeed true. Responsibility for policy formation rests, in the democracy, with the legislators who have mandates and are regularly accountable to electors. But the underpinning rule of law and the independence of the judiciary are not policy matters. Rather they are the bedrock of a democratic state and particularly the guarantee of the individual rights and freedoms of electors.

IV. WHAT DOES THIS ALL MEAN FOR NEW ZEALAND?²⁶

I focus in this section, not on a comprehensive analysis of how New Zealand's constitution works, but on the role played by the independent judicial arm of government.

Unlike some states whose constitutional institutions are derived from the Westminster model (the United States and Australia being two conspicuous examples), New Zealand has no written constitution as such. But a written constitution is worthless if a state's major players lack the political or moral will to adhere to it. The most chilling photographic constitutional message I have ever seen was one of the Chief Justice of Zimbabwe, attired in a full bottomed wig and red robes (identical to those worn by New Zealand judges on formal occasions), swearing in Mr Mugabe as president. We have examples of failed states or near failed states in our own Pacific region whose constitutions have not kept arbitrary government or misrule at bay. The rise of the National Socialist government in Germany in the 1930s, leading to the Third Reich displacing the Weimar Republic, occurred legitimately and constitutionally in the first instance in a parliamentary democracy.²⁷ The former Soviet Union and pre-1990 republics in Eastern Europe had

25 Palmer *New Zealand Constitutional Culture*, above n 12, 584, which replicates this and similar writings of Dr Cullen. Judges in Britain have clearly stated that fundamental rights and/or human rights cannot easily be overwritten by general or ambiguous words: for example *Regina v Secretary of State for the Home Department*: Ex parte Simms and another [2000] 2 AC 115, 131 per Lord Hoffmann; *Thoburn v Sunderland City Council* [2003] QB 151, 185 per Laws LJ; Lord Cooke of Thorndon 'The Myth of Sovereignty' (2005) 3 *NZJIL* 39.

26 Much useful discussion about New Zealand's constitution and helpful assessments as to how it works and who the principal players are can be found in Palmer 'What is New Zealand's Constitution And Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *PLR* 133, Joseph 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *KCLJ* 321.

27 Bullock *Hitler: a study in tyranny* (1962) at chapters 4 and 5. Hitler was elected Chancellor. The Weimar Constitution was never formally abrogated. Constitutional rights were suspended by the legitimately promulgated Enabling Law.

exemplary constitutions. However, their parliaments and judiciary were, in the main, ciphers of the communist regimes.

I do not consider parliamentary democracy or judicial independence in New Zealand are currently at risk. But reflect on the nature and extent of the parliamentary sovereign power which the New Zealand Parliament exerts compared with other Westminster-type parliaments. Our system of government is unitary. Our legislature is unicameral. Unlike Australia, Canada, and the United States we have no federal structure.²⁸ Because we have no federal structure we have no upper house or senate representing the states.²⁹ The hereditary days of the House of Lords have passed, but it still retains its constitutional function of a second chamber, although the Blair and Brown administrations have made no haste to resolve the basis on which the House of Lords is to be elected or appointed.

Once a bill has been read three times under the relevant parliamentary orders and processes it becomes law on receiving the Governor General's assent. New Zealand had a second chamber, the Legislative Council, until its abolition in 1950. Although there have been sporadic suggestions of reintroducing a second chamber, these have never gained traction.

John Stuart Mill in his *Considerations on Representative Government* (1861) saw certain mischief in a one chamber parliament. He pointed to 'the evil effect produced upon the mind of any holder of power...by the consciousness of having only themselves to consult'.³⁰

Although constitutional purists see much benefit in a second chamber (delay, improvement, polishing, further objective consideration) the revival of the second chamber into New Zealand's Parliament is unlikely to occur. One of the popular criticisms of the MMP system, which bubbles up in letters to the editor and talk-back radio, is that 120 plus MPs is too many. There would be little popular support for increasing the numbers of parliamentarians, which the institution of a second chamber would undoubtedly do.³¹

Some commentators³² make the point that in an MMP parliament, where no single party has an absolute majority, where cross-party negotiations are needed, and where opposition parties may sometimes have majorities on standing committees, the safeguard of a second chamber is unnecessary. That observation may have force as regards limits placed on a government's legislative programme. But the majority still remain members of the one unicameral legislature who have reached a consensus.

Professor Waldron observes that the New Zealand Parliament, by Standing Order 38, has abolished the requirement for a quorum.³³ Provided the Speaker, the minister in charge of a Bill, and the Whip are present, the chamber can be empty during a debate. This current quorum provision underlines the historical importance in New Zealand of the party caucus (whether there be

28 The short interlude of New Zealand provincial governments came to an end with the abolition of the provinces in 1875.

29 The Canadian Senate is appointed. Senate seats are allocated regionally with each region's allocation being subdivided for specific provinces. S 22 Constitution Act 1867.

30 The comment of J S Mill is equally apposite here if the law maker has only himself to consult in the administration of the law. Unchecked and untrammelled power, as history demonstrates, can lead, in the wrong hands or in difficult times, very speedily to tyranny.

31 Anecdotally similar populist views are voiced in Australia where each State (with the exception of Queensland) has two State Houses of Parliament overarching which are the Federal House and Senate.

32 Palmer and Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, 1997) Ch 1.

33 Waldron 'Parliamentary Recklessness' [2008] NZLJ 417, an article which usefully looks at the pros and cons of a unicameral parliament.

a two party parliament or an MMP parliament). Parliamentary positions over legislation (other than at the select committee stage) are to a large extent determined by ministers with input from parliamentarians. The give and take of debate occurs away from public scrutiny in the caucus room. Waldron also refers to the speed at which the Electoral Finance Act 2007 passed through its second reading and Committee stages. There is perhaps an irony in the fact that this legislation, which inevitably imposed financial and public comment constraints on the November 2008 election, was regarded as flawed by both government and main opposition parties in the new Parliament and was repealed.³⁴

So how does New Zealand's constitution play out so far as an independent judiciary is concerned? In a pragmatic way, everyone muddles along. Confrontations are rare. Although history teaches us that individual freedoms and democratic values (again look at the Pacific region) can be lost in a generation, the dark clouds of tyranny do not currently loom over the New Zealand horizon.

I do not suggest the legislative and the executive arms of government are indifferent to the concept of judicial independence. The relevant conventions are clearly set out in the Cabinet Manual.³⁵ And very recently Parliament's Standing Orders have been changed requiring leave of the Speaker before a Member of Parliament can comment on a matter which is *sub judice* or mention in a parliamentary speech matters which are subject to a court's suppression order.³⁶

Pivotal to the inter-relationship between the judiciary and the other two arms of government is the Attorney-General. The current Attorney was a senior practising lawyer. Legally trained Attorneys-General will have a good understanding of their constitutional role. A vital role of Attorneys, to which anecdotally they give close non-partisan consideration and consult widely, is recommending judicial appointments, which are mentioned in cabinet but are not the subject of cabinet decisions.³⁷ Regular consultation between the Attorney-General, the Law Ministers, and the judiciary, particularly heads of bench, away from public and media scrutiny is usually productive. Particularly will this be the case where there is a measure of consultation (the final choice being the government's) with heads of bench on judicial appointments and promotions.

Professor Joseph describes the relationship between parliament and the courts as a symbiotic one founded in political realities.³⁸ In his telling criticism of Ekins' thesis,³⁹ Joseph rejects the need to choose between parliamentary supremacy or judicial supremacy. Rather he sees the inter-relationship of the judicial arm and the government arm as being a 'collaborative enterprise'.

34 The Electoral Finance Act 2007 was repealed on 1 March 2009 by s 15 of the Electoral Amendment Act 2009 with 112 votes for such repeal and only 9 against.

35 Department of Prime Minister and Cabinet *Cabinet Manual 2008* (2008) 49-50.

36 Standing Order 111 (in effect since 4 October 2008) provides that 'matters awaiting or under adjudication in any court of record may not be referred to in any motion, debate or question if it appears to the Speaker that there is a real and substantial danger of prejudice to the trial of the case.' The Privileges Committee has recently made a number of comments and recommendations in regard to standing orders 111 and 112 which it wishes to see enacted as soon as possible.

37 It is often overlooked that the Attorney-General is the titular head of New Zealand's Bar. The Members of the Bar have the unique right of access to the courts. With that right ride a number of constitutional obligations and conventions.

38 Joseph 'Collaborative Enterprise', above n 26, 322. The symbiotic analysis is largely similar to the concept advanced by Sir Stephen Sedley of bi-polar sovereignty. See Knight 'Bi-polar Sovereignty Restated' (2009) *CLJ* 361.

39 Ekins 'Judicial Supremacy and the Rule of Law' (2003) 119 *LQR* 127.

Yet Joseph does not downplay the crucial importance of the judicial arm. He cites with approval the dictum of Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd*:⁴⁰

The maintenance of the rule of law is in every way as important in a free society as a democratic franchise. In our society the rule of law rests upon twin foundations, the sovereignty of the Queen and Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

Joseph succinctly and correctly states:⁴¹

The joint functioning of the branches [of government] is key, although it is sometimes misrepresented. The trappings of judicial office may obscure the Court's contribution to public administration. The Court's are removed from national politics and do not seek any mandate from the people. They defer to the political decisions of the legislature, avoid making judgments about legislative policy, and are careful to preserve their detachment in public affairs but they are indelibly part of the *business* of government. The term 'government' comprises three elements – executive, legislative, and judicial – even if there is lacking a paper separation between them. Under the Westminster system, the executive and legislative elements collapse into one under the principle of the parliamentary ministry.... The judiciary stands apart, separate from the political branch under the principle of judicial independence. All legal systems must provide machinery for resolving claims and conflicts between individuals, and individuals and the State, according to law. An independent and impartial judiciary is indispensable to the principle of legality under the rule of law.

The above passages elegantly explain, in my view, what the rule of law is and why it is that the judicial arm of government is effectively the keeper of the flame of democratic and individual freedom.

A. *New Zealand Perceptions of the Judiciary*

So how is this judicial arm regarded? Matthew Palmer's article⁴² adopts a legal realism approach. He identifies the various statutes of the Imperial and New Zealand Parliament which comprise our constitution. He identifies the various public office holders (rightly including the Solicitor-General, the Chief Electoral Officer, the Clerk of the House of Representatives, the Clerk of the Executive Council, and others), who are involved in the workings of New Zealand's constitutional arrangements. Palmer sees the judiciary as having a 'key role' in constitutional interpretation,⁴³ being mainly in the areas of the limits of a national government, protection of citizens against government, the role and powers of the judiciary, political participation and disputes of outcome in the democratic process and the legal liability of the executive. His conclusion is that a significant part of New Zealand's constitutionalism is not judicial or legislative in nature but could be characterised as 'office-holders' constitutionalism'.

Yet in a subsequent article Palmer attempts to place New Zealand's constitution in a cultural context.⁴⁴ He is correct from a historical perspective when he asserts that New Zealanders 'expect and demand governments to exercise power, firmly, effectively, and fairly – to enable settlement, to resolve conflict, to build economic infrastructure and create the welfare state'.⁴⁵ He comments that New Zealanders respect strong individuals with initiative, the constitutional culture of New

40 [1991] 1 AC 1, 48.

41 Joseph 'Collaborative Enterprise', above n 26, 334.

42 See Palmer 'What is New Zealand's Constitution', above n 26.

43 Ibid 152.

44 Palmer 'New Zealand's Constitutional Culture', above n 12.

45 Ibid 575.

Zealand showing streaks or characteristics of authoritarianism, egalitarianism, and pragmatism.⁴⁶ Palmer further refers to ‘the great New Zealand knocking machine’ with its hostility to ‘tall poppies’ leading to a demand that those involved in government should not see themselves as superior.⁴⁷

Palmer sees the New Zealand constitutional culture as downplaying the role of the judiciary or depreciating the centrality of the judicial arm to the maintenance of the rule of law.⁴⁸ He refers to the 1985 White Paper when the then government advocated entrenching a Bill of Rights and the Treaty of Waitangi. It attracted a large number of submissions. Many of those submissions rejected entrenchment on the grounds that a constitutional Bill of Rights would elevate judicial power over the power of Parliament. He concludes:

I believe that New Zealanders were, and still are, fundamentally suspicious of judges. At that time the highest court was composed of judges who were not even New Zealanders and who sat in London (in the Privy Council). More importantly, Judges are unelected, elite, former lawyers.

Palmer adopts a 2004 UMR research poll which, on a ten point scale, rated judges seventh in a list of 18 occupations which held public respect. The judges’ rating was 6.64 behind nurses, doctors, teachers, police, dairy farmers, and sheep farmers. Lawyers rated 16th and politicians last. A 2009 Readers Digest (NZ) poll of 39 ‘Most trusted professions’ ranks judges 11th, behind police officers, (farmers have slipped to 15th) but well ahead of lawyers, journalists and politicians.

Dealing with the rule of law, Palmer writes:

Law exists independently of the lawmaker once it takes on its own written expression. Yet if the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case, then the law has no expression independent of the intention of the lawmaker. Law, in these circumstances, does not exist and cannot rule. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of, the law in a particular case.

Yet despite analysing the importance of the rule of law as the spine of any constitution, Palmer expresses some doubts about its durability or recognition in New Zealand:⁴⁹

My intuitive hesitation about the rule of law as an ultimate principle of the constitution, and the reason I put it third behind representative democracy and parliamentary sovereignty, is a concern about how well entrenched the rule of law is in popular understanding and support. To the extent that it requires valuing the role and voice of the judiciary compared to elected politicians then [the article] suggests it is not well entrenched in New Zealand constitutional culture.

Palmer, I suggest, is pointing to a constitutional weakness which echoes the concerns I voiced at the outset of this paper. Indeed he sees it as a danger point:⁵⁰

In my view the rule of law, supported by the principle of judicial independence, is and *should be* a corner stone of New Zealand’s constitution. In terms of my formulation of the notion, it is a key constitutional instrument by which the coercive powers of the State can be contained. But I sound a word of warning to

46 Ibid 576. Certainly Palmer is correct about New Zealanders’ expectation of their government. The colloquial expression ‘they should do something’ has deep historical roots in New Zealand especially when, during colonial times, the undeveloped New Zealand terrain and the elongated shape of the country made central government the only possible organ for building ports, bridges, roads, railways, and generally fixing economic and social problems.

47 Ibid 576.

48 Ibid 585-589.

49 Ibid 588-589.

50 The inter-linkage of the concept of judicial independence and the community was examined by the Rt Hon Sir Ninian Stephen in ‘Judicial Independence – A Fragile Bastion’ (1982) 13 *MULR* 334, where he observed that the ultimate protection of judicial independence is a community consensus that the independence is worth protecting (at 339).

the legal establishment. I am not confident that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norm... The rule of law is *not* reinforced by New Zealand cultural value. Neither is this surprising given its lack of academic and legal articulation. Without academic and judicial clarification of the meaning and importance of the concept of the rule of law and judicial independence, and some concrete event or debate that generates public appreciation and regard for it, I believe the rule of law is a vulnerable constitutional norm in New Zealand.

So there is the warning. There are the reservations. Is this assessment of the judicial arm of government in New Zealand the product of some cultural hostility? Is it (more likely) because people do not know and do not care? And in any event how should the judiciary respond?

V. THE JUDICIAL ARM OF GOVERNMENT IN NEW ZEALAND

I have traced and expressed the independence of the judicial arm from the other two arms of government. How does this arm operate? If Palmer is right⁵¹ it operates in the popular mind in an unknown fashion, clouded perhaps with a degree of suspicion.

In this section of the paper I suggest that the issue is not just one of perception. The perception is closely linked to systemic weaknesses which attend the judicial arm. Some of those weaknesses are internal. Many of them are the product of the judicial arm's interface with the executive.

A. *The Judges: Is There Institutional Unity?*

The New Zealand court system is hierarchical. At its apex sit five Supreme Court Judges. The Court of Appeal has nine permanent members.⁵² There are 35 High Court Judges of which 21 are stationed in Auckland, ten in Wellington and four in Christchurch. Working with the High Court Bench are eight Associate Judges. The District Court (which includes the Family Court) with its significant geographic spread comprises 137 Judges. There are a further four judges in the Employment Court, ten in the Māori Land Court and nine in the Environment Court.

So to what extent are the 217 New Zealand judges bound together institutionally as the judicial arm of government? Members of Parliament have the unifiers of party and caucus. Cabinet (with recent exceptions appearing in the cabinet manual to cater for coalition governments and MMP) have the overarching discipline of collective responsibility. Civil servants are bound together in both an employment and policy sense by their respective ministries and departments with their internal structures and responsibilities.

Judges have no such unifier. Indeed the common law tradition is that individual judges are independent even of one another. Some commentators regard the feature of a dissenting judgment as being rooted in that common law tradition of independence.⁵³ The higher courts meet annually for

51 Palmer 'New Zealand's Constitutional Culture', above n 12.

52 That number of appellate judges would clearly be insufficient to cover the Court of Appeal's workload. Every year the High Court supplies approximately 85 judge days (effectively two High Court Judges every week) to sit on criminal and civil divisions of the Court of Appeal, such divisions being presided over by a permanent member.

53 See Dame Sian Elias 'The Next Revisit: Judicial Independence 7 Years On' (2004) 10 *Canta LR* 217; Lord Goff 'The Future of the Common Law' (1997) 48 *ICLQ* 745, 755.

a two and a half day conference. The District Court usually meets once every two or three years.⁵⁴ But such conferences are never used to ventilate constitutional issues of judicial concern.

All four levels of the judicial hierarchy have their own Head of Bench. The Chief Justice remains the head of New Zealand's entire judiciary. The Head of Bench job is an unenviable one involving, of necessity, substantial amounts of administration which is not regarded as an attraction of judicial appointment. Heads of Bench, however, speak out effectively when occasion demands.⁵⁵

As with other groups involved in New Zealand's government, generalisations about judges are impossible. They share with other human beings the normal range of strengths, foibles, and personalities. They have certainly demonstrated legal ability and intellectual acumen, otherwise they are unlikely to have been appointed. They are supportive of one another and value collegiality. They all have a commitment to their task. The Chief Justice is correct when she writes:⁵⁶

The fact of the matter is that judicial office and the judicial oath are taken very seriously indeed by Judges. Judging is not the exercise of personal power according to personal preference. It is always to be justified with reasons.

Few judges are beguiled by the occasional publicity which attaches to their role. Television has joined the print media in courtrooms to report high profile trials. But I doubt whether that has affected judicial behaviour. Again I think the Chief Justice is right when she commented that '... what ... the greater accessibility of the electronic media has done, is emphasise the courts are the courts of our communities. That is a good thing.'⁵⁷

Many judges, particularly appointments over the last decade, have formidable people skills and distinct personalities. But these are rarely seen by the public. Judges who court publicity, release their judgments to the media in advance of releasing them to the parties, who arrange for letters to be written supporting their judicial promotion, or who publicly cast aspersions on the intellectual ability of their colleagues are aberrant and, fortunately, rare. Sir Ivor Richardson, a former President of the Court of Appeal, stressed the transience of judicial influence and reputation:⁵⁸

Judges are professional. They should not be concerned about their image or making their mark. It is a mistake to try to further a great vision with an ideal legal world. Lawyers who want to change the world should go into politics. The healthy reality is that the sands of time quickly wash over the great majority of appellate judgments – and that is how it should be.

54 Such conferences help promote collegiality but largely focus on matters of administration, topics which touch on the law (such as the economy, health, DNA) and continuing legal education topics. Over the past three years the High Court has had an additional one day conference which largely focuses on the increasing pressures that the Bench has faced in recent times.

55 Sometimes this is in a reflective and deliberate way in a public address or article. Excellent examples are Sir Thomas Eichelbaum's inaugural Neil Williamson Memorial Lecture; 'Judicial Independence Revisited' [1997] 6 *Canta LR* 421; Elias 'The Next Revisit', above n 53. The Chief District Court Judge this year made some stringent criticisms over security concerns in court buildings. In 2007 the Chief High Court Judge, Randerson J, went public with quick results to stress to parliamentarians the need to hasten the passage of legislation which would permit less serious Class A drug trials to be banded to the District Court in a situation where the High Court's criminal workload was close to being overloaded by the influx of methamphetamine trials. The Principal Family Court Judge and the Principal Youth Court Judge are particularly adept at defending and explaining their jurisdictions.

56 Elias 'The Next Revisit', above n 53, 227.

57 Elias 'The Next Revisit', *ibid*, 222. But in recent times arguments have been raised that extensive media publicity in high profile trials such as *Bain* and *Weatherston*, with online stream reporting, constitutes a serious risk to the perception of jury trials and their integrity. Too many people think they know all about it.

58 Sir Ivor Richardson 'Closing Remarks' (2004) 2 *NZJPL* 115, 119.

Very few judges aspire to or will become a Denning, Owen Dixon, Robin Cooke, or Oliver Wendell Holmes. A judge's case load and mix of work provide few opportunities to leap out of bed in the morning inspired to strike a blow against sovereign power or for judicial independence! Nor will judges consciously seek public attention.

This brief sketch is enough to suggest that New Zealand judiciary is institutionally unlikely to be proactive in promulgating its constitutional role. Occasional papers like this might help, but the impact or lasting effect of such judicial addresses is problematic.⁵⁹

B. Access to Justice and User Pay

One extraordinary feature of Ministry of Justice control of the financial aspects of the judicial arm is the entire system of court fees and hearing fees. In civil litigation, filing fees have to be paid for both originating applications and interlocutory applications. There are also, in the High Court, hearing fees which amount to approximately \$1,300 per half day.⁶⁰ These fees can be waived in the discretion of a Registrar, which is often the case where legal aid is involved.

The Ministry of Justice's philosophy for many years now has been that, because the judiciary is a scarce and highly qualified resource, those who resort to it need to defray the cost. Thus the fees which for the last financial year available approximate \$26,173,000.⁶¹

Think for a moment about the constitutional implications of this. In medieval times the sovereign embodied all three arms of government. Some medieval monarchs unwisely tried to sell justice. That great 1215 constitutional document, Magna Carta, provides in chapter 40 'Nulli vendemus, nulli negabimus aut differemus rectum aut iusticiam'. King John covenanted with his barons that to no one would he sell and no one would he refuse or delay right or justice.⁶²

The difficulty which King John faced with the loss of his fiefdoms in Normandy, Anjou, and Maine, as did some of his successors, was the need to finance war in France. The King embarked on the outright sale of justice, sale of writs, and fees payable for outcomes. (The Barons were the main litigants). The practice not only raised considerable revenue but also caused much disquiet. Chapter 40 resulted.

A strong argument can be made that the requirement to pay filing fees and hearing fees amounts to the sale of justice. Is there anything comparable with the other two arms of government? There is not. It would never seriously be suggested that a citizen would have to pay \$100 to consult his or her Member of Parliament, or \$5,000 for the privilege of travelling to Wellington to lobby a Minister. Why is recourse to the judicial arm of government, for the purpose of the courts' constitutional role of resolving disputes, any different?

A second access to justice issue with which you will be familiar is the funding of legal aid. Effective representation in court means engaging a lawyer.

Legal aid schemes in New Zealand and elsewhere require money. Reducing or holding the level of legal aid remuneration has two undesirable effects. It discourages able lawyers to take legal aid briefs. And it causes an increase in the numbers of litigants in person who understandably

59 Sir Thomas Eichelbaum felt the need to explain to the public the significance of the judiciary's role and independence 'to the well-being of a free and democratic community'. Eichelbaum 'Judicial Independence Revisited', above n 55, 435.

60 High Court Fees Regulations 2001, r 5(1) and Schedule.

61 Ministry of Justice, Annual Report, 1 July 2007-30 June 2008.

62 See Magna Carta 1297, Ch 29. This re-enacts chapter 40 of the 1215 Carta. See s 3(1) and Schedule 1 of the Imperial Laws Application Act 1988.

are all at sea. This consumes judicial time while judges endeavour, patiently, to explain procedural issues to self-represented litigants. The result is a departure from the perception of even handed justice if only because the judge has to spend more time with the unrepresented litigant than with the represented.

The cost and efficiency of the administration of justice are areas where the legitimate constitutional concerns of the executive and judiciary meet. The current Minister of Justice, for instance, has made clear his interest in criminal justice reform to address costs and trial delays. There can be no quarrel with this as a legitimate ministerial concern. But those same issues are legitimately matters of judicial concern. Judges abhor lengthy trial delays, unnecessary or hopeless pre-trial and bail appeals, and indifferent (a small minority) counsel on legal aid. The constitutional challenge is for both arms to pool their experience and perspectives. Because, properly, judges cannot be seen to be opposing policy initiatives in the criminal justice and penal policy areas, the judiciary's default response is to remain silent. Thus, areas of acute concern to the judicial arm's business frequently become, or are seen to be, the exclusive preserve of the executive.

The fiscal balance between the two relevant arms of government is a difficult one. Total control of the purse strings by the executive arm is problematic. The dilemma was recognised and fairly put by the former Chief Justice of Australia, Murray Gleeson, who stated:⁶³

The administration of civil justice is not merely one of a number of alternative forms of dispute resolution. It is part of government. There are, therefore, major issues involved in requiring litigants to pay for court services. The courts are not merely service providers, and governments have responsibility to make justice available to the public. Attempts to introduce user-payers justice suffer from both practical and theoretical difficulties. Yet litigants are using valuable and scarce resources, and modern judicial control of litigation should aim to reflect that fact.

C. *The Media and Criticism*

Media coverage of judicial work has decreased. The internet has threatened the economic base of the print media. World-wide the numbers and content of daily newspapers have decreased. Dedicated court reporters are now a rarity.⁶⁴ The nature of the electronic media works very much against in-depth reporting. What will be reported are controversy and conflict. In the face of economic pressures and competition from the electronic media over the past 30 years, the print media increasingly focuses on entertainment rather than information.

This inevitable selectivity of media coverage applies to the detriment of all three arms of government. A good day's work or routine outcomes are not news. Criminal trials, particularly if the alleged offending has excited public interest or outrage, inevitably and properly receive media cover. Civil work is nowadays rarely covered unless it is some high profile defamation case, or a local body, government department, minister, or sports personality is the litigant.

The public are understandably concerned about such issues as offending whilst on bail, paedophilia, gang violence, homicides, sexual offending involving young children, and terrorists.⁶⁵ It

63 Hon Murray Gleeson *Some legal scenery* (Judicial conference of Australia, Sydney, October 2007).

64 In July, during the Phillip Field trial there was no reporter in court to witness the dramatic discovery by counsel, that the accused, when being cross-examined, had information written on the palm of his hand. The *New Zealand Herald* only discovered what had occurred as a result of a leak from the Bar and had to request access to the evidence transcript. The story appeared two days later.

65 Because of public reaction to this type of offending the same topics are of interest (and legitimately so in a democracy) to politicians.

is significant that most of the very public clashes in the United Kingdom over the past 15 years between Home Secretaries (particularly Michael Howard (Conservative) and David Blunkett (Labour)) and the judiciary have involved the interface between the courts' functions of sentences and judicial review, and attempts by the executive to control the outcomes of sentences, parole, and refugee policies in refugee and immigration policy areas.⁶⁶ Thus, perceived light sentences in these areas, successful appeals against sentence which reduce prison terms, offending (particularly serious offending) committed whilst on bail, and repeated offending, will often excite strong public feelings (sometimes bordering on outrage) which lead to criticism of the courts and judges involved. The criticisms can be localised, or they can be nation-wide.

On occasions intemperate criticisms of the judges appear, sometimes supported by the media. Mr Wayne Brown, a former Auckland District Health Board Chair, in the wake of the Court of Appeal judgment⁶⁷ overturning the trial judge in the *Diagnostic Medlab* case referred to the judge as 'some dumb judge' and suggested that because he had got matters 'completely wrong' the judge 'should go'.⁶⁸ Subsequently a *New Zealand Herald* columnist opined that the judge should resign. Comments of this sort are constitutionally offensive.

Criticism of this type is impossible to counter. The Solicitor-General and the Attorney-General can rarely defend the judiciary in these instances because the Crown is usually involved as a party. And by long convention the judges themselves are gagged. They cannot enter into a vigorous debate with their critics.⁶⁹ And in a democratic society which values the freedom of expression, the criticism of the judiciary and individual decisions is legitimate. By and large criticism (coupled with the appellate structure) is a feature of judicial accountability.⁷⁰ Academics and journal contributors will frequently and legitimately comment adversely on judicial decisions which appear to be wrong, or a departure from the corpus and principles of a particular branch of the law.

The executive and Parliament too are constantly subject to criticism, much of it unfair. The tone and mindset of many reporters who interview politicians is that the interviewee is being evasive or has something to hide. But criticism of the judiciary is, because of the constitutional position of judges, essentially one-sided. Champions seldom exist.

Certainly the judiciary has taken some steps to ease the flow of information to the media. In 1997 a judicial communications officer, who is a member of the Chief Justice's staff and is Wellington based, was appointed. That officer assists all levels of the judiciary and advises Heads

66 See for example, published articles in *The Guardian* edited by Clare Dyer 'Judges reveal anger over curbs on power' and 'Judges speak out against erosion of independence by Government' *The Guardian* (London, United Kingdom, 26 April 2005) and also Bradley *Relations between Executive, Judiciary, and Parliament*, above n 9.

67 *Lab Tests Auckland Limited v Auckland District Health Board* [2009] 1 NZLR 776.

68 'Wayne Brown calls for Judge to go' *Sunday Star Times* (Auckland, New Zealand, 28 September 2008).

69 This is another important distinction between the judicial and legislative arms of government. Parliament is historically a debating chamber. A first instance decision can be upheld or reversed on appeal but debating the merits of a decision is impossible.

70 The New Zealand Parliament is accountable on a triennial basis to the electors although, with the introduction of MMP and the tendency of parties to place electorate MPs reasonably high on lists, local accountability of a MP is perhaps diluted by a MP, defeated in his or her electorate, being returned as a list MP. The traditional accountability of cabinet ministers has clearly eroded in Westminster parliaments over the last half century. The only cabinet minister in recent times to resign was the Hon Denis Marshall, the Minister of Conservation, in May 2006 because as Minister he considered he should be accountable for the Cave Creek platform disaster. Scott *The New Zealand Constitution* (1962) at 127 gives the example of the Minister of Works in the 1930s Mr Semple who declined to resign advancing the understandably pragmatic observation that although he was responsible it was not his fault!

of Bench and judges on media and communication issues. A judicial decisions website has been established. The Supreme Court regularly, and the Court of Appeal occasionally, issue press statements to accompany the release of judgments. But none of these initiatives really address the problems I have identified. The right to criticise and attack authority figures is an important right in a democracy. But the judicial arm is, for the reasons I have stated, particularly vulnerable to media-inflicted damage. One communications officer for 217 judges contrasts starkly with the media resources available to government departments and ministers. And beyond the traditional media sits cyberspace, with its blogs and sites, which are impossible to control.

VI. CHIPPING AWAY AT THE FOUNDATIONS⁷¹

In this section I highlight a few (space does not permit an exhaustive list) of the impediments faced by the judicial arm of government in New Zealand over recent years. Some of these relate to status. Some relate to legislative initiatives. Many relate to the tensions which arise out of the obligation of the Crown, through the executive arm, to fund the court system which is the institution through which the judicial arm functions.

A. *Status Indicia*

I see the official recognition of the status of judges as being merely a symptom of the regard which New Zealand culture accords the judiciary. Yet to earlier generations of judges, and particularly those holding office in the middle years of the 20th century, official status and recognition were important. Given that New Zealand, across its entire culture, is arguably an egalitarian society, individual office holders normally do not set much store on the status they are accorded. They would be chopped down to size if they did.

Most states have what is called an Order of Precedence. This sets out, usually for formal state occasions, the order in which people will process or be seated. The British Table of Precedence has to be seen to be believed and will answer all your questions on such arcane topics as whether the second son of an earl walks into dinner in front of or behind the Bishop of Bath and Wells or the High Commissioner for Australia. Nonetheless, Orders of Precedence, which are the preserve of the Executive, do say something about the importance with which people are formally ranked.

The Labour Government of Norman Kirk re-ordered the Order of Precedence, much to the anger of the judges at that time. Only the Chief Justice retains high rank, being behind cabinet ministers and former Governors-General, but ahead of ambassadors and the Leader of the Opposition. Judges of the Supreme Court, Court of Appeal and the High Court rank behind members of parliament but ahead of mayors. This is in marked contrast to the Order of Precedence for the Federal Government of the United States where Associate Justices of the Supreme Court (and indeed retired Associate Justices) rank ahead of members of the cabinet, senators, governors, former vice presidents and congressmen. Scrutiny of the Orders of Precedence of Canada, the Commonwealth of Australia, and those Canadian and Australian provinces and states which have Orders of Precedence, reveals that certain of the judges of the highest courts, and in many instances the equivalent of our High Court, rank ahead of members of the legislature.

⁷¹ Sir Thomas Eichelbaum in his 'Judicial Independence Revisited', above n 55, 422, considered the danger to judicial independence was 'an insidious weakening of the castle foundations over a period of time'.

I do no more than to suggest the downgrading of the senior judiciary in 1973 was regrettable. At a symbolic level, and for unfathomable reasons, the New Zealand judiciary is not ranked as highly as it is in comparable democracies. That said, the judiciary, particularly its senior members, are generously treated when it comes to the bestowal of Honours.

B. *The Supreme Court*

At the apex of the judicial arm sits New Zealand's Supreme Court. The restraints of judicial comity prevent me from criticising the Supreme Court. Far from wanting to criticise it I applaud it. New Zealand jurisprudence has benefited from a number of high quality and well researched judgments. What I touch on in this section are perceptions of the Supreme Court which regrettably have called into question what ought to be its leadership role of the judicial arm.

The controversy which surrounded the passage of the Supreme Court Act 2003 and the public debate which generally surrounded the political decision to replace the Judicial Committee of the Privy Council by a domestic second tier appellate court, was unhelpful and did little to enhance the status of the judiciary.

My personal view, both then and now, is that given New Zealand's historical and political development, especially since the end of the Second World War, having a court at the apex of our judicial hierarchy on the other side of the world made little sense. Yes, the calibre of the British judges was high, but what was it about New Zealand which made it difficult to follow the same route which Canada and Australia (comparable democracies and, like New Zealand, old Dominions) had taken many years previously?

There were a number of interest groups, including unfortunately some segments of the Bar, which attacked the entire idea of the Supreme Court. Judges would be of inferior calibre. The government of the day might try to stack the court with appointees who shared its political philosophy. The pool for high calibre judicial appointments was too small. One Auckland Silk submitted that High Court appointments were, in the main, second rate. Parliament divided on the passage of the relevant legislation. Ideally, in untroubled times, constitutional legislation should not be divisive.

Thus, through no fault of its own, the Supreme Court embarked on its role under a cloud. Destabilised perhaps by the strength of criticism, and doubtless wanting to give the lie to suggestions that it might be tempted to pack the Supreme Court, the government's initial appointments were uncontroversial. The four members involved were the then senior judges in the Court of Appeal.⁷²

There has been no criticism of the way the Supreme Court during the five years of its operation has carried out its responsibilities. On occasions there has been some surprise expressed by the Bar at decisions to grant or refuse leave.⁷³ Perhaps, with the advantage of hindsight it is regrettable that in the important *R v Hansen*⁷⁴ decision which threw up important constitutional issues

72 The Chief Justice is the senior Judge of the Supreme Court. The initial four appointments were Gault, Keith, Blanchard, and Tipping JJ.

73 Given the high degree of public interest and the difficult interface of administrative law and commercial law it is perhaps surprising that leave was not granted in *Diagnostic Medlab Ltd v Auckland District Health Board* (2009) 19 PRNZ 217. In the same week that leave was declined leave to appeal was granted in *Jeffries v R* SC 84/2008, 4 February 2009, a case where a litigant was disputing a costs award in the Court of Appeal of \$750. In *Dysart Timbers v Neilsen* [2009] 3NZLR 160, a case involving accord and satisfaction and whether a term should be implied, of the nine judges who considered the issue, the only two who disagreed were a minority of two on the Supreme Court.

74 [2007] 3 NZLR 1.

about the range of sections 4, 5, and 6 of the New Zealand Bill of Rights Act 1990, there was no discernible ratio and the five judgments were to differing extents inconsistent with one another. Similarly in *Brooker v Police*,⁷⁵ the Court divided and the more interesting question of whether, as a matter of policy, the freedom of expression right extended in New Zealand society to protests which breached privacy of office holders inside their homes when they were not performing public functions was unaddressed.

One of the many suggestions made to the then Attorney-General in 2003 was that it was an error to house the new Supreme Court in Wellington. It would be too close to the Court of Appeal. The judicial community in Wellington was too small to have the two highest courts in close geographic and social proximity. Alternatively the Court of Appeal could be moved to Auckland. The Attorney-General, and correctly so, took the view the judges were well-practised in exercising their judicial function and would not be influenced by proximity of that type. Although concerns are periodically expressed about the inability of the inhabitants of a small city, such as Wellington, to remain aloof from the concerns of government, Ottawa and Canberra too are small cities.⁷⁶

No doubt as the years roll on, the Supreme Court's stature will continue to grow. How it performs its leadership role in the judicial arm of government will ultimately be judged on the calibre and consistency of its judgments and the messages they send. The Court will be a strong leader of the judicial arm if its appointees have a keen sense of constitutional issues and underscore the importance of the judicial arm of government.

C. *Purse Strings and Control*

There are inevitable fiscal and functional tensions between the judicial and executive arms of government. Under our current arrangements financial control, and to some extent administration of the judicial arm, are the preserve of the Ministry of Justice.

There may be some significance in the fact that one of New Zealand's earliest judges, Justice Henry Barnes Gresson, who was appointed in 1857 shortly after his arrival in New Zealand, resigned in 1875 because of his refusal to accept that the Justice Minister had the right to order his transfer from being a resident judge in Christchurch to Nelson.⁷⁷

I do not argue that there has been a concerted attempt on the part of the executive to chip away at or diminish the independence and strength of the judicial arm of government. But the Chief Justice, in her Neil Williamson Memorial lecture address five years ago, did point to certain pinpricks.⁷⁸ These included the employment status of judges' associates and clerks being changed from Crown prerogative employees to Ministry of Justice employees, and the long-running issue of the judges not having their own computer server but being part of the Ministry of Justice's network.

The difficulty is, the judiciary has no responsibility for its own administration. It is totally dependent on the Ministry of Justice. There was, from October 1995 to 1 October 2001, a separate

75 [2007] 3 NZLR 91.

76 In legal circles the fact that all five direct appointments from the bar to the Court of Appeal have been Wellingtonians excites curiosity.

77 Gresson, Henry Barnes, from *An Encyclopaedia of New Zealand*, edited by A H McLintock (1966).

78 Elias 'The Next Revisit', above n 55.

Department for Courts.⁷⁹ That, however, was remerged into the Ministry of Justice. There remains a separate Minister for Courts. The Justice portfolios have, for some time now, been divided.⁸⁰

The ramifications of this Ministry control of judicial administration are considerable. Judges' salaries are handled by the Ministry's payroll section. The Ministry alone dictates the supply of staff and buildings, although there is consultation. Ministry personnel have overall responsibility for staffing requirements in High Court Registries and the preparation of judicial rosters.

High Court administration is the preserve of the High Court Management Committee, chaired by the Chief High Court Judge, on which some List Judges and key Ministry personnel sit. The administration of judicial libraries throughout New Zealand is the responsibility of the Judicial Libraries Management Board on which all levels of the judiciary are represented. But the purse strings are inevitably held by Ministry officials.

By and large the system works well. But hidden under the surface is the vital constitutional issue, by no means unique to New Zealand, of the cost and funding of the judicial arm of government. That funding is controlled by the Executive, determined in turn by budgetary provision from Parliament. The Ministry of Justice, like all ministries, must lobby and bid at various budget rounds in Wellington. When times are tight the flow of money reduces.

Despite the existence of a High Court Registry in Tauranga, since September 1987, clear demographic evidence of population growth in the Bay of Plenty and the inefficiency of the Tauranga Bar having to travel regularly across the Mamakus to Rotorua for short appearances, the provision of video conferencing facilities and High Court courtrooms in Tauranga (with judges sitting) have been a long time coming.

The new Manukau District Court, officially opened in December 2000, is wholly inadequate in terms of staffing and space. Until recently there was a demonstrable shortage of jury courts in the Auckland region (both High Court and District Court) and insufficient courtrooms for multi-accused trials. Court building programmes during my lifetime seem to go in fits and starts. There was a huge building programme, particularly in provincial centres, under aegis of the Hon. Ralph Hanan in the 1960s. There was another surge under the aegis of Sir Geoffrey Palmer in the 1980s and now, it would seem, there are further works in progress. Most of these building programmes have been driven by inadequate facilities rather than by future planning.

The pressure on judges and their workloads have increased dramatically, even in the nine years I have been a Judge. The complexity of rostering is such that the High Court rosters (available a year in advance) are now the sole responsibility of a National Rosterer. This system is efficient and helpful. But what it cannot accommodate, and there is less flexibility than there was, is the need to provide judges with adequate time for writing judgments and reflection.

Judges are not meant to rush to judgment. Some work is routine and can be dispatched by way of oral decision. But civil litigation has become enormously complex. High Court civil and criminal trials have changed swiftly from being of two to four days' duration to frequently over a week. Different judges have different work habits. The time needed at all levels of the judiciary both to

79 Sir Thomas Eichelbaum in his Neil Williamson memorial lecture in 1997, above n 55, saw the creation of a new Department as court governance moving off the bottom rung in a continuum of court governance models. The abolition of the Department for Courts (although Courts remains a division of Ministry of Justice) perhaps represents slipping back off the rung.

80 Under the current administration and the previous administration the portfolios of Attorney-General and Minister of Justice have been held by different Ministers. For most of the period from the 1960s to the 1980s a single cabinet minister was both the Minister of Justice and the Attorney-General.

preside over cases and to write judgments on complex reserved decisions has to be found and balanced. Most judges would tell you the balance is currently not right. The best time to reflect and write a judgment is immediately in the wake of the hearing. Sometimes judgment time is immediately available. Usually it is not. As a result judgments are delayed, litigants are kept waiting, and the Bar, with some justification, becomes critical.

Providing more judges, the immediate response, is not the answer if only because there is no room to put them. There are insufficient courtrooms for more judges. More courtrooms require more staff which requires more money which the Ministry is understandably reluctant to provide.

There are no easy answers to these problems, but they are problems which need to be addressed, and the judicial arm of government is virtually powerless to do much about it. When there is effective and harmonious relationship between the justice ministers and the Heads of Bench much can be achieved. When such a relationship does not exist there may be difficulties. The relevant Ministers alone do not have the ability to increase their budget allocations. There are other government demands and priorities, but the degree of political will to fund the judicial arm of government at an adequate level is not always high.

D. Law Commission Initiatives

Sentencing Council

In 2006 the Law Commission produced a report, *Sentencing Guidelines and Parole Reform*,⁸¹ which recommended the establishment of a Sentencing Council. A number of reasons lay behind the recommendation. One was increasing muster numbers in prisons. Another was research suggesting that the imprisonment rate for certain offences (particularly driving offences) varied from region to region. The fact that imposed sentences and their lengths impact on the money the executive needs to provide to service prisons was a policy factor.⁸² There was also a theme that sentencing policy should arguably be the preserve of Parliament, being representative of the community, rather than of judges. These recommendations led to the Sentencing Council Act 2007.⁸³

Although some judges supported the objectives of the legislation and noted that the Sentencing Council would comprise judicial members, not all shared that perception. The traditional analysis that Parliament proscribed specified activities as crimes and set out maximum sentences, leaving it for the judiciary to do justice in individual cases by exercising the sentencing discretion (subject to the Sentencing Act 2002), is not an unrespectable preference.

In the event, Parliament divided on the passage of the Act. The current Government made clear its opposition at an early stage. The proposed regime of a Sentencing Council will not proceed. Interestingly, well before the Act had cleared Parliament the Law Commission set up a Sentencing Establishment Unit which had the task of developing guidelines. Some judges served on that Unit, in effect laying the ground work for a sentencing regime which was contentious well before it passed into law. It is doubtful whether that blurring of constitutional roles can be justified.

Had the regime proceeded there would have been an undoubted diminution of judicial discretion in a constitutionally important area. Courts traditionally hold the balance between the Crown

81 New Zealand Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94 2006).

82 The Hon Grant Hammond 'Sentencing: intuitive synthesis or structured discretion?' [2007] *New Zealand Law Review* 211.

83 See, for a description of all these developments, generally sympathetic to the policy of the Act, Justice Graham Panchurst's Neil Williamson memorial lecture (2008) 14 *Canta LR* 191.

and the citizen in the criminal arena. Sentencing guidelines would undoubtedly have curbed the discretion of sentencing judges to do justice in the infinite variety of cases over which they preside. Those factors cast doubt on the assumption that sentencing policy is more properly the preserve of Parliament than the judiciary. The entire episode, in my view, points to a tendency to fetter the judicial arm.

Prerogative Writs

Another Law Commission initiative related to the prerogative writs. The Commission's issues paper *Review of Prerogative Writs* proposed amendments to the Judicature Amendment Act 1972 and the removal of extraordinary remedies which are part of the High Court's inherent jurisdiction under section 16 of the Judicature Act 1908. The Law Commission surprisingly stated it did not accept any notion of an inalienable inherent jurisdiction residing in the High Court.

A submission by Justice Fogarty trenchantly stated that New Zealand and United Kingdom parliaments had never sought to replace the common law jurisdiction of superior courts, which had developed to restrain abuse of power by the Crown, and that to do so would effect a significant change in the constitutional arrangements which had been in place since the Act of Settlement.⁸⁴ In the event the Law Commission abandoned its proposal.

Both these episodes perhaps point to the need for constant scrutiny and rigorous analysis of proposals designed to reduce or fetter the powers of the judicial arm.

E. Part Time Judges

The District Courts Amendment Act 2004⁸⁵ made provision for judges to sit on a part-time basis whilst holding standard judicial warrants. This is an interesting provision. A perusal of the parliamentary debates suggests that the provision was driven in part by a perception that part-time appointments might make the judiciary a more attractive career option for women, particularly those with children.⁸⁶ Certainly the debates contain references to the position of women and the general desirability of job sharing. In more recent times the provisions have attracted the attention of some male judges approaching retirement who are looking for a form of painless transition.⁸⁷

There are, I suggest, risks inherent in this power to appoint part-time judges. It reinforces the perception that being a judge is some form of public service 'job' which should be regulated by gender-equity considerations. The other arms of government have no such provision. We do not have a part-time Governor-General. Nor has there ever been any suggestion that Members of Parliament or cabinet ministers should job share or exercise their responsibilities on a part-time basis. The fact that an albeit uninvoked provision of this type passed into law with little adverse comment is further evidence of misconceptions about the judicial arm. An argument can be made that the very existence of the provision demeans somewhat the importance of the judicial arm of government.

84 See MacLennan 'Reviewing the Review' (31 October 2008) *NZ Lawyer* 10.

85 The provisions with which I am concerned found their form in s 5AA of the District Courts Act 1947.

86 This is a laudable objective although, in my experience, Heads of Bench and List Judges go out of their way to accommodate family responsibilities in rostering and leave.

87 To date the provision to appoint part-time judges has not been used. The provision is totally different from appointing Acting Judges under s 11A of the Judicature Act 1908.

VII. CONCLUSION

This paper has of necessity been lengthy. It is impossible, if one wants to understand the topic, to avoid historical developments and constitutional theory.

I think Matthew Palmer is right, as was Sir Thomas Eichelbaum, in concluding that the constitutional importance of the judicial arm of government and its independence are imperfectly understood and not deeply entrenched in New Zealand's culture.

There are risks in that situation. Those risks include an imperfect understanding of the judicial role, a belief that the judiciary are junior or unimportant players, and a failure to appreciate the centrality of the judicial arm in maintaining the rule of law which overarches and secures our constitutional arrangements. I have identified a number of issues and problems. The uneasy interface between the judiciary and the Ministry of Justice is an obvious area of concern.

So what is to be done? Constitutional analysis, the function of the judicial arm of government, and inherent risks to it, are not 'sexy' topics likely to capture the imagination of the public or the media. Certainly attention will be engaged if there is some hint of conflict.⁸⁸ However, a healthy democracy or constitutional state should not need conflict to alert it to its life blood and underpinnings.

I have said twice that the judicial arm of government needs champions. Easier said than done, but judges cannot do this alone. We need help from a wider constituency of well informed and alert citizens. I see law students, legal academics, and particularly the profession, who are subject to a statutory obligation under section 4 of the Lawyers and Conveyancers Act 2006 to uphold the rule of law, as natural and appropriate allies. Should there be a programme of action? I suggest there should and it should include:

- Close scrutiny by the profession and academics of the access to justice and fiscal control issues which I have highlighted.
- Active involvement with senior high school students teaching civics and explaining the three arms of government.
- Being vigilant and supportive when occasional threats to the judicial arm emerge, including unfair criticism, diminution of the status of judges, and speaking out in those difficult areas where the issues which excite public anxiety and anger (particularly in the criminal arena) are being debated. Modern European history is replete with examples where impassivity in the face of threats to unpopular sections of the community eased the road to tyranny. I do not suggest this will happen in New Zealand in the foreseeable future, but it is a stark fact that criminal law is frequently the arena for personal and human rights contests.
- Be alert and do not hesitate to speak out, or lobby, or write in situations where resources are delayed or inadequate, or where the important access rights of citizens to the courts are being inhibited for fiscal reasons.
- Appreciate and inform others how the courts, and the legal profession which has that all-important right of access to the courts, underpin democracy.
- Be fierce and proactive in ensuring that judicial and professional functions remain potent and are enhanced.

I have no fears that, like the hapless Tresillian CJ, I will be taken out by an irate government and hanged! Nor do I expect to be closeted with the Governor-General to be made more compliant.

⁸⁸ See the *New Zealand Herald* articles in March and April 2005 covering the supposed conflict between the Chief Justice Dame Sian Elias and the then Attorney-General the Rt Hon Michael Cullen.

Nor is there any risk of judges being dismissed or of Parliament becoming tyrannical. But the fact that those outcomes are currently impossible reflects a long and proud constitutional history throughout which the rule of law and the judicial arm of government have evolved to secure and underpin a democracy. Be aware. Be alert. Guard it well.

CONFUSING CONTRACT AND TORT WHEN MEASURING DAMAGES FOR A SELLER'S CONVERSION OF GOODS SOLD

BY NICHOLAS CURWEN*

I. INTRODUCTION

The rules of property law, contract law and tort law occasionally coincide on the same set of facts. This concurrence of disparate legal regimes can create conceptual difficulties. It is not always immediately apparent how to avoid a conflict between the rules or avoid one set of rules producing an undesirable result. One example is where a contract for the sale of goods transfers ownership to the buyer on credit terms. Before the price is paid and before delivery the seller wrongfully resells the goods elsewhere or, having delivered the goods to the buyer, the seller wrongfully retakes them and then sells them elsewhere. In response the buyer relies on their ownership and sues the seller in tort, usually conversion, claiming the full value of the goods. When assessing the buyer's damages the court will have one eye on the outstanding price. If the seller's conversion means that they are unable to deliver the goods then that prevents them from suing for the price.¹ In such circumstances, if the buyer were entitled to the full value of the goods in conversion they would acquire an unjustified windfall. Alternatively, if the goods were converted after delivery then the seller is entitled to raise a counterclaim for the unpaid price, but if the buyer is insolvent no more than a dividend, if any, will be payable.

These unusual situations do not seem to have been considered by the New Zealand courts but they have been considered by the courts in England and Australia. The relevant rules, whether derived from statute or common law, would appear to be the same in all three jurisdictions so conclusions drawn from the other two jurisdictions are applicable in New Zealand. When dealing with the problem outlined above the English and Australian courts have struggled to give a convincing explanation as to why the unpaid price should or should not be taken into account when assessing the buyer's damages in tort. This article will highlight the way in which those courts have failed to apply the appropriate rule when measuring the buyer's loss and it will argue in favour of a more principled basis for their decision making.

II. MEASURING DAMAGES: THE DIFFERENCE BETWEEN CONTRACT AND TORT

Calculation of the buyer's loss in contract and tort reflect the different purposes which the two regimes pursue. The main aim of awarding damages for breach of contract is to compensate the plaintiff for their lost expectations. The plaintiff alleges that the defendant failed to make them better off. Damages should therefore attempt to place the plaintiff in the position they would have

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1 See the Sale of Goods Act 1908 s 30.

been in had the contract been performed.² The court must decide what the parties ought to have done according to their contractual obligations. In our case the seller should have delivered the goods or not retaken them and the buyer should have paid the price. If the seller in fact fails to deliver then in most cases the buyer will only suffer loss if the value of the goods, usually measured by the market price, rises between the making of the contract and the seller's breach.³ The buyer will then have to spend more in order to buy similar goods elsewhere. Alternatively, if the seller wrongfully retakes goods which have already been delivered they are in breach of their warranty for quiet possession.⁴ If the contract had been performed then the buyer would have kept the goods and paid the price. The buyer's loss is therefore the difference between the value of the goods when they were retaken less the unpaid price. So in the absence of a rise in the market price the loss is usually nominal.

The courts however have become confused when trying to explain how the unpaid price should be taken into account when the buyer sues in tort. The main aim of awarding damages in tort is to reverse loss already inflicted by the defendant. The plaintiff alleges that the defendant has made them worse off. Calculation of the damages should therefore attempt to place the plaintiff in the position they would have been in had no tort been committed.⁵ This principle of restorative justice requires the court to speculate what *would* have happened, which is not the same as calculating contract damages where the court has to decide what *should* have happened. The full significance of this difference has been overlooked by the courts in all the cases on sale which we will consider. Here the relevant cases will be examined and where the judicial techniques used are found to lack either coherence or conviction, a more principled basis for the decision will be suggested by applying the principle of restorative justice. First though we need to consider the way in which damages should be measured in conversion because it is a muddled amalgam of both tort and property law.

III. DAMAGES IN CONVERSION: THE DIFFERENCE BETWEEN PROPERTY AND TORT

If the plaintiff is the unencumbered owner of goods and wants to recover those goods from a defendant who wrongfully detains them, then the claim takes the form: 'those are my goods; I am entitled to their immediate possession; return them to me.' This is a proprietary claim because it vindicates the plaintiff's ownership by requiring the return of what belongs to the plaintiff. There is no allegation of breach of duty and there is no request for damages so it is not a claim in tort. The common law has never given full effect to this proprietary claim.

The oldest surviving action for the recovery of goods is detinue. It is a claim that the defendant wrongfully detains the plaintiff's goods. The remedy at common law gives the defendant the option of returning the goods or paying their full value to the plaintiff. It is therefore the defendant and not the court who decides whether the goods should be returned to the plaintiff. In the old

2 See *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

3 See the Sale of Goods Act 1908 s 52.

4 See the Sale of Goods Act 1908 s 14(b).

5 See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

days detinue often failed to produce any remedy because the defendant could wage his law.⁶ Trover, later to be called conversion, emerged in the 16th century as a form of trespass on the case to overcome that particular procedural defect.⁷ It lay for a wide range of unlawful interferences with the plaintiff's goods including unlawful detention. However, because it was an action on the case the only remedy at common law was damages. Equity intervened by ordering the defendant who wrongfully detained the goods to deliver them to the plaintiff. This intervention was only available if the goods were unique or substitutes were not readily available.⁸ So the defendant today will be ordered to return the goods only if they cannot be replaced. Otherwise the defendant will be ordered to pay the full value of the goods.⁹

If the defendant wrongfully disposes of the plaintiff's goods, and therefore no longer detains them, then the plaintiff will require compensation for their loss. Necessarily this is a claim in tort and the obvious action in this instance is conversion. The appropriate remedy here should not necessarily be the full value of the goods. In accordance with the restorative principle it should be the plaintiff's loss. However, when trover first emerged it was designed to replace the more proprietary claim in detinue and that led to the old rule that damages in trover should reflect the plaintiff's whole interest in the goods. In doing so the difference between a proprietary claim and a claim in tort for compensation was ignored. However, the weight of modern authority recognises that the plaintiff in conversion should recover no more than their actual loss.¹⁰ This should clearly be the rule where the claim is in tort and it has been accepted by the New Zealand courts as applying to claims in conversion.¹¹ In *UDC Finance Ltd v Philip Mills Ltd*,¹² Holland J, in the context of a claim in conversion, quoted with approval the following passage from Todd (et al), *The Law of Torts in New Zealand*:¹³ 'The object of an award of damages in tort is to put the injured party into the position in which he or she would have been had the injury, with its consequent damage, not occurred. This is known as the principle of restitutio in integrum.'¹⁴

However, the New Zealand courts have not had the opportunity of applying this rule to the problem dealt with in this article, hence the emphasis on English and Australian cases. In all the cases which we will consider the defendant seller no longer possessed the goods, so the basic rules of tort for measuring damages were relevant but not always judicially appreciated. We will begin with the difficult case of *Chinery v Viall*.¹⁵

6 This involved the defendant swearing his innocence and then hiring a group of compurgators prepared to testify before the court that he spoke the truth. It enabled the defendant to avoid liability. Wager of law was abolished by s 13 of the Civil Procedure Act 1833, 3 & 4 Wm 4, c 42.

7 Wager of law was not available in actions of trespass on the case.

8 See *Pusey v Pusey* (1684) 1 Vern 273, 23 ER 465 and *North v Great Northern Railway Co* (1860) 2 Giff 64.

9 See Stephen Todd (et al), *The Law of Torts in New Zealand* (4th ed, 2005) 12.3.04 (2).

10 See *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295, 299-300; *Butler v The Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 192; *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, 870; and *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [63-86].

11 See *UDC Finance Ltd v Philip Mills Ltd*, 10 May 1991 High Court, Christchurch Holland J CP577/89 and *Campbell v Dominion Breweries Ltd* [1994] 3 NZLR 559.

12 10 May 1991 High Court, Christchurch Holland J CP577/89.

13 (1st ed, 1991) 23.2.1.

14 Ibid 11.

15 (1860) 5 H & N 288; 157 ER 1192.

IV. THE BUYER SUES IN TORT BUT IS NOT LIABLE FOR THE PRICE

In *Chinery v Viall* sheep were bought on credit. The buyer became owner straight away and was entitled to possession but found it convenient to leave the sheep with the seller until he was able to collect them. Before payment the seller wrongfully resold most of the sheep. The buyer sued him for failure to deliver the sheep in accordance with the contract and also sued in conversion for the full value of the sheep. At the trial the jury found that the buyer's loss in contract for the seller's failure to deliver was £5. On the second count in conversion a verdict was entered on behalf of the plaintiff for £118 19s; the full value of the converted sheep.

On appeal Bramwell B, speaking for the whole court, accepted the buyer's right to sue in conversion and furthermore held that a resale by the seller prevented him from suing the buyer for the price.¹⁶ However, the judge reduced the buyer's damages of £118 19s in conversion to just £5. He pointed out that it was not an absolute rule that damages in conversion were to be measured by the value of the goods. The plaintiff should be awarded no more than the real damage he sustained, which required the unpaid price to be taken into account. Bramwell B then said, 'the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction.'¹⁷

Bramwell B was equivocal about the real basis for his decision. First, he said that the buyer could recover no more than his real loss in conversion but then suggested that the buyer could recover no more in conversion than in contract. However, if the buyer's loss in conversion is to be reduced by the unpaid price why is it necessary to invoke a rule that prevents tort damages exceeding contract damages on the same facts? The suspicion is that Bramwell B could not work out exactly how the unpaid price should be used to limit the buyer's damages in tort and so, as a safety measure, introduced a somewhat arbitrary rule that cut down tort damages by asserting the supremacy of contract rules. It is no wonder that the case has been used to support two quite different propositions. On the one hand it has been cited as authority for the proposition that damages in conversion should reflect the plaintiff's actual loss.¹⁸ On the other hand it has been relied on in support of the far more dubious proposition that if the same facts give rise to an action in contract and an action in tort then the tort damages cannot exceed the contract damages.¹⁹

Concentrating on the buyer's loss in tort, *Chinery v Viall* has been explained as a case where the buyer's damages had to be reduced in order to reflect the seller's proprietary interest in the goods as an unpaid seller in possession.²⁰ This is a strange rationalisation because Bramwell B expressly rejected the notion, argued by the seller's counsel, that the seller had a proprietary interest in the goods which therefore prevented the buyer from suing him in conversion. He noted that a plaintiff in conversion needed both a right of property in the goods and a right of possession. The court accepted the buyer's right to sue in conversion so the buyer must have been regarded

16 The latter rule is now contained in s 30 of the Sale of Goods Act 1908 which requires that the seller must be ready and willing to give possession before they can sue for the price.

17 (1860) 5 H & N 288, 295; 157 ER 1192, 1195.

18 See *Hiort v London and North Western Railway Co* (1879) LR 4 Ex D 188, 199 and *Butler v The Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 192.

19 See *The Arpad* [1934] P 189, 233.

20 See *Attack v Bramwell* (1863) 3 B & S 520, 528; 122 ER 196, 199; *Johnson v Stear* (1863) 15 CB (NS) 330, 335-336; 143 ER 812, 814; *Belsize Motor Supply Co v Cox* [1914] 1 KB 244, 252; and *Healing (Sales) Pty Ltd v Inglis Electric Pty Ltd* (1968) 121 CLR 584, 603.

as having the right to immediate possession.²¹ A lien is the right of a creditor to retain possession of a debtor's goods until the debtor satisfies an outstanding debt due to the creditor. It therefore confers on its holder the right to immediate possession of the goods. As the buyer in this case had the right to immediate possession, because he had title to sue in conversion, it follows that the seller could not have had a lien over the sheep for the price. The seller had after all agreed to hold the sheep to the buyer's order and thereby had become the buyer's bailee at will. The common law did not confer a non-consensual lien on sellers who held the goods as the buyer's agent or bailee at will: such a lien was first introduced by section 41(2) of the Sale of Goods Act 1893.²² Even if the seller were regarded as having a lien his unlawful resale would have had the effect of discharging the lien.²³

When *Chinery v Viall* was heard at first instance the jury calculated the buyer's loss for breach of contract at £5. Bramwell B used that figure as the measure of the buyer's loss in conversion, so it seems that he substituted the measure of loss in contract for the measure of loss in tort. If that was the case then it was an illegitimate manoeuvre. Winfield criticised Bramwell B's judgment on the ground that plaintiffs should be free to choose whichever cause of action produced the greater award of damages.²⁴ However, in *The Arpad*²⁵ a majority in the English Court of Appeal held that where wheat was sold on cost, insurance and freight terms, and the sea carrier failed to deliver all the shipped wheat to the buyer, the latter could sue the carrier for failure to deliver under the carriage contract but could not recover greater damages by suing the carrier in conversion. Maugham LJ specifically relied on *Chinery v Viall* for that proposition. In so far as *Chinery v Viall* and *The Arpad* held that conversion damages could not exceed contract damages on the same facts, they must now be regarded as impliedly overruled in England by the House of Lords' decision in *Henderson v Merrett Syndicates Ltd*.²⁶ In that case their Lordships held that if the same facts generated both a claim for breach of contract and a claim in tort then the plaintiff must be permitted to take advantage of the remedy which was more advantageous to him. So Winfield has been vindicated. Furthermore, the Court of Appeal in New Zealand has accepted the rule in *Henderson v Merrett*.²⁷

The prevailing view that tortious liability is compatible with contractual liability on the same facts is more principled than that relied on in *Chinery v Viall* and *The Arpad*. It was simply an obfuscation for Bramwell B to talk of the 'true facts' and the 'real nature of the transaction.' The facts clearly determine the nature of the action available to the plaintiff. The same set of facts can generate both a claim in contract and a claim in tort. It is misleading to suggest that there is an independent technique for measuring such a loss; it must be measured using contract rules or tort rules. When those rules produce different measures of damages why should contract rules prevail over tort rules? By way of an answer, in *The Arpad*, Maugham LJ said 'though technically the

21 For the requirement that the plaintiff in conversion must have the right to immediate possession see: *Gordon v Harper* (1796) 7 TR 9; 101 ER 828; *Bloxam v Sanders* (1825) 4 B & C 941; 107 ER 1309; *Owen v Knight* (1837) 4 Bing (NC) 54; 132 ER 709; and *Bradley v Copely* (1845) 1 CB 685; 135 ER 711.

22 56 & 57 Vict, c 71. The equivalent provision in the New Zealand Sale of Goods Act 1908 is s 42(2).

23 See *Mulliner v Florence* (1878) 3 QBD 484.

24 See P Winfield, *The Province of the Law of Tort* (1931) 80-81.

25 [1934] P 189.

26 [1995] 2 AC 145.

27 See *Riddell v Porteous* [1999] 1 NZLR 1, 9 (CA); *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560, 582 (CA) and *Price Waterhouse v Kwan* [2000] 3 NZLR 39, 44 (CA).

facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver.²⁸ In effect Maugham LJ regarded the action for breach of contract as the ‘real’ claim and the action in conversion as a technicality. Such an approach is unprincipled and arbitrary because it overlooks the fact that contract and tort represent different types of claim which are satisfied by damages that are calculated using different techniques. In tort damages represent reparation for loss already inflicted whereas in contract damages compensate for lost expectations. Another way of putting it is to say that, ‘tort damages look back to a former, unharmed plaintiff; contract damages look forward to a future, unharmed plaintiff.’²⁹ To confuse these two approaches creates incoherence.

What seems to have concerned Bramwell B was the old rule that damages in conversion were to be measured by the full value of the goods, whether or not that reflected the buyer’s actual loss. To avoid that unwelcome result he seems to have substituted contract damages for tort damages. It would have been preferable had he concentrated on tort damages and clearly explained how they did not have to be measured by the full value of the goods. His failure to do that led to vague and unconvincing reasoning.

In the earlier case of *Gillard v Brittan*³⁰ a buyer had taken delivery of goods but not paid the full price before the seller unlawfully retook the goods. The buyer sued in trespass and was awarded damages measured by the full value of the goods. It is instructive to compare the case with *Chinery v Viall*.

V. THE BUYER SUES IN TORT AND IS LIABLE FOR THE PRICE

In *Gillard v Brittan*³¹ cloth was sold on credit and delivered to a Bristol tailor. The cloth was made into clothes which had the effect of transferring ownership to the buyer if it had not already been transferred. Having paid only part of the price the buyer secretly left his business premises and moved to Devon, taking all his stock with him. With difficulty the seller managed to trace the buyer and wrongfully took some of the clothes made from the cloth the seller had supplied. The buyer then successfully sued in trespass for the full value of the clothes retaken. The buyer could just as easily have sued in conversion but it would have made no difference to the quantification of damages because the plaintiff was the owner claiming the loss of his goods. It was assumed by the court that the seller’s unlawful conduct had not prevented him from suing for the price; he had after all delivered the goods.

The seller’s real difficulty in *Gillard v Brittan* was that a debt in one cause of action could not be set-off against damages in another cause of action, so the plaintiff’s damages in trespass could not be reduced by the unpaid price. The common law recognised a set-off in one limited situation only: the buyer’s right to set-off damages for a seller’s breach of warranty for quiet possession against the seller’s claim for the price.³² Set-offs were first introduced by section 11 of the Insol-

28 [1934] P 189, 234.

29 Stephen Todd (et al), *The Law of Torts in New Zealand* (4th ed, 2005) 22.2.03.

30 (1841) 8 M & W 575; 151 ER 1168.

31 This case was not referred to by Bramwell B in *Chinery v Viall* but it was referred to in support by the buyer’s counsel.

32 See *Mondel v Steele* (1841) 8 M & W 858; 151 ER 1288. The rule is now to be found in the Sale of Goods Act 1908 s 54(1)(a).

vent Debtors Relief Act 1729³³ and section 4 of the Debtors Relief Amendment Act 1735.³⁴ Under those statutes debts could only be set-off against other debts and in *Gillard v Brittan* the plaintiff was claiming unliquidated damages in tort rather than claiming a debt. Also at that time there was no provision for counterclaims. These were first introduced by section 24(3) of the Supreme Court of Judicature Act 1873.³⁵ All the seller could have done in this case would have been to bring a separate cross action for the unpaid price.

Denman J³⁶ could not reconcile *Gillard v Brittan* with *Chinery v Viall* and thought that the later case must be taken to have overruled *Gillard v Brittan*. McGregor disagrees, arguing that *Chinery v Viall* is distinguishable because in that case the seller could not sue for the price.³⁷ But that in itself is not enough to justify the different decisions in the two cases. In *Gillard v Brittan* the court was clear that the unpaid price could not be taken into account when measuring the buyer's damages in tort. If the seller wanted to recover the price he would have to sue for it as a breach of contract. In measuring contract damages if the buyer is liable to pay the price then they ought to pay so their liability to pay necessarily reduces the measure of the seller's liability. The same technique cannot be used when measuring tort damages because the issue here is whether the buyer *would* have paid, not whether they *should* have paid. That does not mean that the unpaid price is necessarily irrelevant when calculating loss in tort, rather it means that the buyer's liability to pay is irrelevant. The way to ensure that the buyer does not recover a windfall from the seller is to concentrate on the *restitutio in integrum* principle and apply it rigorously. It is something the courts have consistently failed to do in cases where a buyer has sued a seller in conversion.

VI. USING THE RULES OF TORT TO PREVENT WINDFALLS

An alternative way of justifying the decision in *Chinery v Viall*, which relies purely on the law of tort, can be found in the decision of the High Court of Australia in *Butler v The Egg and Egg Pulp Marketing Board*.³⁸ In that case Mr Butler was an egg producer and by statute all eggs produced by chickens owned by egg producers in Victoria belonged absolutely to the Egg and Egg Pulp Marketing Board. Egg producers had to deliver the eggs to the Board, which would then sell the eggs. In return the Board had to pay each egg producer their proportion of the net proceeds of sale. Mr Butler failed to comply with the statute and sold the eggs elsewhere. The Board sued him in conversion claiming the full value of the eggs which was Aus £4,000. If the Board had been able to sell the eggs, the sum that it would have had to pay the defendant would have been Aus £2,900. Accordingly the defendant argued that he was only liable to pay the difference of Aus £1,100 because that represented the Board's loss.

It was accepted by the court that because the defendant had failed to deliver the eggs to the Board he was prevented from suing for his proportion of the notional net proceeds. Such an entitlement was dependent on delivery of the eggs. It therefore appeared that the Board was entitled to the full value of the eggs. However, Menzies J cited *Chinery v Viall* as authority for the proposition that a plaintiff in conversion could only recover their actual loss. Taylor and Owen JJ went

33 2 Geo 2, c 22.

34 8 Geo 2, c 24.

35 36 & 37 Vict, c 66.

36 See *Johnson v Lancashire & Yorkshire Railway Co* (1878) 3 CPD 499, 507.

37 See Harvey McGregor, *McGregor on Damages* (17th ed, 2003) [33-058].

38 (1966) 114 CLR 185.

further and invoked *Livingstone v Rawyards Coal Co*,³⁹ arguing that the Board should be put in the position it would have been in if no tort had been committed. On that basis the defendant would have complied with his statutory obligation and delivered the eggs to the Board, which would have sold them and paid the defendant his share of the net proceeds. Accordingly the Board's loss was Aus £1,100 and that was the measure of the damages payable.⁴⁰

In *Chinery v Viall* the seller could not sue for the price so in modern conditions he would be unable to plead a counterclaim. Nonetheless the case can be explained by applying the reasoning adopted in *Butler's* case. Had the seller not converted the sheep it is likely that the buyer would have collected them and paid the price. The buyer's loss was therefore the difference between the contract price and the value of the sheep when they were converted by the seller, so the buyer's loss was minimal. Bramwell B reached the right decision but without identifying the correct rule.

The ratio in *Butler's* case has been criticised by Stevens⁴¹ who prefers what he calls a 'rights model' view of the law of tort as opposed to a 'loss model' view. In his opinion damages in tort should be substitutive for the defendant's violation of the plaintiff's primary right rather than reflect the plaintiff's loss. He regards both *Butler's* case and *Chinery v Viall* as cases where the plaintiff was awarded reduced damages, not as a reflection of their loss but in order to prevent their unjust enrichment. This is clearly at odds with the ratio in *Butler's* case where the court invoked a well-established rule of the law of tort to measure the plaintiff's damages by reference to their loss. This does seem preferable to Steven's interpretation.

Stevens' approach views the plaintiff as prospectively unjustly enriched. This must be because the plaintiff is regarded as initially entitled to the full value of the goods in conversion. Presumably their damages are to be treated as substitutive for the violation of their rights as owner. That enrichment is then prevented because otherwise it would be at the defendant's expense as well as being unjust. This analysis of *Chinery v Viall* requires the law of tort to uphold the buyer's entitlement to the full value of the goods even though they have suffered no loss. That is indefensible; otherwise why invoke unjust enrichment to prevent payment of the damages? It also involves convoluted reasoning which could be avoided by simply applying the *restitutio in integrum* principle. Using that rule there is no possibility of the plaintiff, even potentially, obtaining a windfall so unjust enrichment theory is redundant. The principle of Occam's razor would, in this instance, seem to favour the loss-based approach to calculating tort damages rather than the rights-based approach.

Calculating loss in tort inevitably requires the use of assumptions. The court must speculate what would have happened had no tort been committed. In the case of a sale it can usually be assumed that the buyer would have paid for the goods if the seller had complied with their own obligations. If events establish that that assumption is unfounded, then applying the *restitutio in integrum* principle cannot be used to limit the buyer's damages. In particular, if the buyer is insolvent they are unable to pay the price and so the measure of their loss cannot be reduced by the unpaid price because they would not have paid the price even if the seller had committed no tort. This situation arose in another Australian litigation involving electrical appliance manufacturers, Healing (Sales) Pty Ltd, and electrical appliance retailers, Inglis Electrix Pty Ltd.

39 Referred to in above n 5.

40 *Butler's* case was specifically approved of in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 by Lord Nicholls [66-67] speaking for the majority.

41 See Robert Stevens, *Torts and Rights* (2007) 65-66.

VII. THE INSOLVENT BUYER SUING IN TORT

Healing sold and delivered domestic electrical goods to Inglis on credit, ownership passing on delivery. During the credit period the buyer encountered financial difficulties and the bank with a floating charge over the buyer's assets lawfully appointed a receiver. The seller's response was to launch a co-ordinated raid on all the buyer's retail shops in Sydney and unlawfully repossess the goods already delivered. The goods were then resold. The buyer, at the instigation of the receiver, duly sued in conversion. The seller did not set up a counterclaim for the price, presumably because the buyer was insolvent.⁴² Nor was a set-off pleaded, presumably because a set-off required the other party to claim a debt whereas the buyer in this case claimed unliquidated damages in conversion. Instead the seller argued that the unpaid price should be taken into account when assessing the buyer's damages. At first instance⁴³ Macfarlane J held that the seller's wrongful seizure of the goods relieved the buyer of their obligation to pay the price. Applying *Chinery v Viall* and *Butler's* case, Macfarlane J held that the buyer's loss had to take into account the unpaid price. Accordingly he awarded the buyer nominal damages for their loss.⁴⁴

Macfarlane J's judgment regarding the plaintiff's loss was reversed by the New South Wales Court of Appeal⁴⁵ which held, applying *Gillard v Brittan*, that the buyer was still liable to pay the price. The buyer was therefore entitled to the full value of the goods in conversion. If the seller wanted to recover the price then they would have to sue for it. This decision was upheld by a majority in the High Court of Australia.⁴⁶ In reaching this conclusion both appellate courts understandably felt that they had to distinguish *Chinery v Viall* and *Butler's* case but they made heavy weather of it.

In the New South Wales Court of Appeal, Herron CJ distinguished *Chinery v Viall* on the ground that the buyer in that case was not liable for the price. In contract that clearly makes a difference but he failed to explain why that made a difference in tort. He distinguished *Butler's* case on the ground that it was not a case of sale and both Herron CJ and Sugarman JA distinguished the case on the ground that Mr Butler had an interest in the eggs as bailee. Quite why it mattered that in *Butler's* case there was no sale is unclear, the plaintiffs in both cases were after all suing in tort. What is clear though is that just because Mr Butler was a bailee it did not give him a proprietary interest in the eggs as against the Board. He was bound to deliver the eggs to the Board before payment and so had no lien on them. Furthermore his common law title to the eggs, based upon his possession, could not be enforced against the Board because their statutory title predated his title. Therefore Mr Butler's status as a bailee in possession cannot be considered as a distinguishing feature.

In the High Court for the first time the seller argued that their unlawful repossession of the goods amounted to breach of their warranty for quiet possession implied by section 17(2) of the Sale of Goods Act 1923-1953 (NSW).⁴⁷ Accordingly the buyer was entitled by section 54(1) of the same Act⁴⁸ to set-off the damages recoverable for this breach against any claim the seller

42 Unlike a set-off a counterclaim does not diminish the damages recoverable by an insolvent plaintiff.

43 See *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* [1968] 1 NSW 409.

44 He did however award them exemplary damages of \$3,500 for the defendant's contumelious conduct.

45 See *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 87 WN (Pt 2) (NSW) 264.

46 See *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

47 A similar provision is found in the New Zealand Sale of Goods Act 1908 s 14(b).

48 The same provision is found in s 54(1)(a) of the New Zealand Sale of Goods Act 1908.

might make for the unpaid price. It meant that the seller could not enforce payment of the price so the unpaid price ought to be taken into account when measuring the buyer's damages in conversion. This argument found favour with Barwick CJ and Menzies J but it did not impress the majority. Kitto J agreed that the seller was in breach of the warranty for quiet possession but pointed out that the seller was not suing for the price so there was no need for the buyer to rely on a set-off. Owen J agreed. Windeyer J went further and held that the seller was not in breach of the warranty. All three agreed that the unpaid price should not be deducted from the buyer's damages in conversion. In reaching that conclusion they needed to explain why, in *Chinery v Viall* and in *Butler's* case the plaintiffs were not entitled to the full value of the goods.

Kitto J followed *Gillard v Brittan*, distinguishing it from *Chinery v Viall* on the ground that in the former case there had been an actual delivery and therefore the seller could sue for the price. This point clearly made a difference if the action was for breach of contract but he failed to explain why it made a difference in tort. Furthermore he seemed to suggest that because the seller retained possession he had a lien. In Kitto J's view:

The whole point of [*Chinery v Viall*] lay in the interest which the seller had in the goods by reason of being in possession of them at the time he converted them – that is to say his interest as an unpaid seller, which had necessarily to be allowed for in valuing the loss by the buyer of *his* interest in the same goods.⁴⁹

However, as we have seen, when *Chinery v Viall* was decided the seller could not have had a non-consensual lien.⁵⁰ Now, under both Australian and English sale of goods statutes, an unpaid seller has a statutory lien.⁵¹ But even if *Chinery v Viall* were to be decided today the seller would be deemed to have lost his lien by the unlawful resale and therefore susceptible to an action in conversion by the buyer.⁵²

Kitto J distinguished *Butler's* case on the ground that, like *Chinery v Viall*, the plaintiff in that case never acquired possession of the goods. He said:

These cases illustrate one simple proposition, that the loss which a plaintiff has suffered by a conversion of goods which were not in his possession, and for which he would have had to pay the defendant a sum of money if he were to obtain possession of them, is a loss of no more than the difference between the value of the goods and the sum he would have had to pay; and therefore in any form of action in respect of the conversion he cannot recover as compensatory damages more than the amount of that difference.⁵³

This proposition seems to conflate the methods for calculating loss in contract and in tort. It explains why the buyer's liability to pay the price is relevant in contract but it does not explain its relevance in tort. It confuses what ought to be done with what was likely to have happened. Furthermore, Kitto J suggested that it did not matter what the cause of action was; whether the action was in contract or in tort the damages had to be calculated in the same way. This approach has now been rejected in both Australia⁵⁴ and New Zealand.⁵⁵ Contract and tort perform different functions and neither should be permitted to suppress the other.

49 (1968) 121 CLR 584, 603.

50 This point was made by Sutton in 'Damages for Conversion of Goods Sold' (1969) 43 *Australian Law Journal* 95.

51 The equivalent provision in the New Zealand Sale of Goods Act 1908 is s 42(2).

52 See *Mulliner v Florence* (1878) 3 QBD 484.

53 (1968) 121 CLR 584, 602.

54 See: *Hawkins v Clayton* (1988) 164 CLR 539 (HCA); *Bryan v Maloney* (1995) 182 CLR 609 (HCA); and *Astley v Austrust Ltd* (1999) 197 CLR 1 (HCA).

55 See the cases referred to in above n 27.

Windeyer J also seemed to distinguish *Butler's* case on the ground that the plaintiff in that case was not liable to pay for the eggs. He agreed with Taylor and Owen JJ who had said in *Butler's* case that to award the Board the full value of the eggs would have placed them in a better financial position than if the defendant had complied with his obligation to deliver the eggs to them.⁵⁶ According to Windeyer J that was sufficient to distinguish the two cases. It is certainly a distinction on the facts but it does not help us understand the *legal* distinction. It does not explain why the basic rule for measuring loss in tort, as explained in *Butler's* case, is irrelevant when the plaintiff is liable to pay the price.

In *Healing v Inglis* none of the judges in the appellate courts gave a convincing explanation as to how *Chinery v Viall* and *Butler's* case could be distinguished from the case before them. They all failed to see the relevance of the basic rule for measuring loss in tort as enunciated in *Butler's* case. Those oversights lead them to make erroneous distinctions or to state factual distinctions without adequately explaining why those distinctions made a legal difference.

In order to distinguish the cases properly we need to concentrate on the assumptions that underpinned the reasoning in *Butler's* case. Applying those assumptions to *Chinery v Viall* we are able to say that but for the seller's wrongful resale the buyer would have collected his sheep and paid for them. The buyer's loss was therefore the difference between the contract price and the market value of the sheep at the time of the seller's conversion. If the evidence establishes that those assumptions are unfounded, then the rule cannot be used to limit the buyer's damages. In particular, if it transpires that the buyer cannot pay because they are insolvent, as in *Healing v Inglis*, then *Butler's* case cannot be used to limit the buyer's loss. By contrast if the buyer were to sue in contract their insolvency would be irrelevant in measuring their loss because the buyer ought to pay, it is not a matter of calculating whether the buyer would have paid. As the goods had already been delivered, if the buyer sued in contract they would have to allege breach of the seller's warranty for quiet possession. Putting the parties in the position they would have been in had they performed their contractual obligations means that the buyer would have kept the goods and paid for them. The loss would therefore be the value of the goods when the seller unlawfully retook them less the unpaid price, so the loss was likely to be minimal. This clearly illustrates the point that calculation of loss in contract and tort on the same facts does not always produce the same measure of damages. In *Healing v Inglis* the appellate courts reached the right decision but failed to apply the correct rule. They concentrated on whether the plaintiff was liable to pay for the goods instead of whether they would have paid for them. In doing so the courts confused the rule for measuring loss for breach of contract with the rule for measuring loss in tort.

Having failed to set-off the unpaid price against the buyer's damages in conversion, *Healing* then had to rely on their claim in contract for the price, a claim that would abate with the claims of all the insolvent buyer's other unsecured creditors. It is only fair that the unpaid price should not have been deducted from the damages payable by the seller because otherwise the seller would have achieved an undeserved priority over the buyer's other creditors.⁵⁷ It would have meant that the seller would have profited from their own wrong, thereby encouraging creditors to take the

56 The same point had been made by Bramwell B in *Chinery v Viall*: see (1860) 5 H & N 288, 294; 144 ER 113, 119.

57 In support of the decision in *Healing v Inglis* this point is made by K C Sutton in the article referred to in n 50 above and by J R Pedden, 'Measure of Damages in Conversion and Detinue' (1970) 44 *Australian Law Journal* 65. However, neither author notices any conflict between *Healing v Inglis* and *Butler's* case.

law into their own hands.⁵⁸ The obvious way for Healing to have avoided this pitfall would have been to reserve title until the price was paid.

VIII. A RECONSIDERATION OF *GILLARD V BRITTAN*

This reassessment of the justification for the decisions in *Chinery v Viall* and *Healing v Inglis* requires a reconsideration of *Gillard v Brittan*. Applying the rule in *Butler's* case to *Gillard v Brittan* we need to be able to say what the buyer in that case would have done had the seller not unlawfully taken the clothes. The buyer's behaviour in avoiding his creditors strongly suggests that he was insolvent. If that be the case then even if the seller had not recovered the clothes the price would not have been paid. It therefore justifies the court's decision to award the buyer the full value of the clothes. By keeping the clothes the buyer was not repudiating the contract so the seller could not treat the contract as terminated. In any event by changing the nature of the goods the buyer had prevented restoration of the *status quo ante*, so that also prevented the contract from being regarded as terminated. On the same facts today the seller could then counterclaim for the price in the same proceedings but if the buyer were insolvent only a dividend would be payable. This outcome is justified in order to prevent the seller from benefiting from his unlawful conduct and thereby stealing a march on the buyer's other creditors.

If the evidence had suggested that the buyer would have paid the balance of the price then his loss would have been the value of the clothes when they were unlawfully taken less the unpaid price. If the case were heard today and the seller counterclaimed for the unpaid price the buyer could raise a set-off for the seller's breach of the warranty for quiet possession. The measure of that set-off claim would be the unpaid price so the two claims would cancel each other.

IX. CONCLUSION

Where the seller is no longer in possession of the buyer's goods but the seller's prior conversion or trespass has caused loss to the buyer, then the buyer will require compensation for that loss. The buyer can claim in tort and the ordinary rules for measuring loss in tort should apply to such a claim. The model for this approach is the principle of *restitutio in integrum*. It requires that the plaintiff should be placed in the position they would have been in had no tort been committed. We need to concentrate on what the buyer would have done rather than what they ought to have done. It means that the buyer's liability to pay the price is irrelevant in measuring loss in tort. Instead, in most cases, the real issue will be whether the buyer is insolvent.

The principle of *restitutio in integrum* has been recognised in most common law jurisdictions as the main rule for measuring loss in the tort of conversion. However, in the cases on sales which we have considered, the courts have failed to appreciate the full relevance of this rule.⁵⁹ That oversight has driven the courts to rely on inapplicable property rules by inventing non-existent liens. It has also persuaded the courts to allow contract rules to subvert tort rules when measuring damages. The courts should have no choice as to whether to apply the rules of contract law or tort law when measuring the plaintiff's loss. Each regime pursues different purposes and uses different

⁵⁸ This point was made by Willes J in *Edmondson v Nuttall* (1864) 17 CB (NS) 280, 295; 144 ER 113, 119.

⁵⁹ Exceptionally the court in *Butler's* case did appreciate the significance of the rule but it was not a case concerned with a sale.

techniques to achieve those purposes. To compensate the buyer for loss of ownership in conversion by awarding damages for non-delivery in contract is confused and incoherent.

One reason for this confusion seems to have been the courts' inability to see how they could use the law of tort to avoid the old rule that the measure of damages in conversion was the full value of the goods. That rule works injustice where the buyer is not liable for the price but the buyer can be denied a windfall without subverting the rules of tort. First, we must recognise that where the defendant no longer possesses the goods an action in conversion is an action in tort; it is not a proprietary action in disguise. We must then apply the fundamental rule of tort for measuring the plaintiff's loss, that is, the buyer should be placed in the position they would have been in had no tort been committed. In a case like *Chinery v Vial*, where the buyer is not liable for the price, it ensures that the buyer does not reap a windfall. By contrast, in a case like *Healing v Inglis*, where the buyer is insolvent, it ensures that the seller does not profit from their own wrong.

SETTLEMENT AND REFORM OF THE CIVIL JUSTICE SYSTEM: HOW SETTLEMENT IS CHANGING THE PRACTICE OF LAW

BY LES ARTHUR* AND BRENDAN CULLEN*

I. SUMMARY

The central feature of reforms to civil justice in common law jurisdictions is the shift away from adjudication towards settlement.¹ Settlement is now commonly regarded as the primary objective of the civil justice system to the extent that the term ‘vanishing trials’² has been used to describe the dramatic decline in litigation following the introduction of the Woolf Reforms to civil justice in England and Wales.³

This article argues that settlement must now be regarded as a form of civil justice in its own right and is also indispensable to improving access to adjudication, which is correctly regarded as a public good. Adjudication which develops precedent can also enhance settlement to the extent that parties frequently bargain ‘in the shadow of the law’.⁴ Although settlement and adjudication are distinct processes it is arguable that the relationship between settlement and adjudication is complementary rather than competitive.

The importance of settlement in the new legal landscape raises questions about the anatomy of settlement. Such questions include whether settlement is appropriate, and if so the timing of settlement and which settlement process is most likely to satisfy the parties interests and needs. Finally, it will be argued that conventional adversarial advocacy is not well matched to the explicit institutional emphasis on settlement; the developing role of lawyers as conflict resolution advocates will be explored within the context of recent New Zealand legislation which emphasises the primary role of settlement in resolving civil disputes.⁵

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1 See, Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996) which led to what are known as the Woolf reforms to civil justice, introduced in England and Wales on 26 April 1999 and referred to as the Civil Procedure Rules (CPR). Ministry of Justice (UK) *Civil Procedure Rules: Practice Direction Protocols* available at <http://www.justice.gov.uk> at 15 August 2009. The reforms implemented in the Australian State of Victoria, Victorian Law Reform Commission *Civil Justice Review: Report* (2008) available at <<http://www.lawreform.vic.gov.au>> at 15 August 2009, and the new District Court process in New Zealand, which comes into force on the 1st of November 2009.

2 Professor Julie Macfarlane, ‘The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law’ (2008) 1 *Journal of Dispute Resolution* 61, citing Mark Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *Journal of Empirical Legal Studies* 459.

3 Woolf, above n 1.

4 A phrase originally used by R H Mnookin and L Kornhauser ‘Bargaining in the Shadow of the Law: The Case of Divorce’, (1979) 88 *Yale Law Review* 950.

5 District Court Rules 2008.

II. THE EXPANDED MEANING OF CIVIL JUSTICE; SETTLEMENT AS CIVIL JUSTICE

The phrase civil justice is traditionally used to describe all stages of court based adjudication to resolve civil disputes between citizens, including the issue of proceedings, pre trial proceedings, settlement, trial and post trial appeals. Modern reforms to the civil justice system have expanded the meaning of civil justice by explicit institutional recognition that settlement is now the primary objective of the civil justice system both before the commencement of proceedings by the extensive use of pre-proceedings protocols⁶ and after proceedings have been issued by court encouragement of Alternative Dispute Resolution (ADR) processes, including court annexed private mediation and Judicial Settlement Conferences (JSCs).

While reforms of the civil justice system, designed to promote access to justice, have also focused on the conventional meaning of civil justice by seeking to reduce the cost, delay and uncertainty of court based adjudication, with judicial rather than party control of proceedings,⁷ there is no doubt that settlement is the primary objective.

Clearly in the context of settlement the phrase 'just resolution of disputes' must be construed differently from the test applied to evaluate the outcome of adjudication. If the dispute is resolved by adjudication the quality of the outcome is ultimately judged by the impartial application of the correct law to the judicially determined facts. This outcome might be referred to as judicial justice and is synonymous with the conventional concept of justice invoked by the term the rule of law.

Improved access to judicial justice has prompted reforms to civil procedure described above and simultaneously promoted settlement as a parallel expanded form of justice. Justice in the context of settlement may be based on a neutral evaluation of the parties' legal entitlements which will often include considerations of cost, delay and uncertainty which are inescapable features of even a refurbished system of civil justice. Conversely, the impetus for settlement may be based on a broader analysis of the dispute, taking into account the non legal needs and interests of the parties which cannot be satisfied by the 'limited remedial imagination of the law'.⁸

Settlement, unlike adjudication is based on the parties reaching their own agreement to resolve the disputed issues. The sometimes acrimonious dialogue between adherents of judicial justice and consensual notions of justice is captured by the view expressed by Dame Hazel Genn that consensual processes represent an approach to civil justice which is anti adjudication and are just concerned with settlement rather than just settlement.⁹ An expanded notion of civil justice which

6 Ministry of Justice (UK), above n 1. Rule 4.1 'the court will expect the parties, in accordance with the overriding objective ... to act reasonably in exchanging information ... and generally in trying to avoid the necessity for the start of proceedings;' and Rule 4.2 'the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.' See also Victorian Law Reform Commission above n 1, Chapter 6 'Getting to the Truth Earlier and Easier.'

7 Lord Woolf, Access to Justice: *Interim report to the Lord Chancellor on the civil justice system in England and Wales* (1995), Chapter 5 'The Need for Case Management by the Courts'. See also, Adrian Zuckerman, 'Court Adjudication of Civil Disputes: A Public Service to be Delivered with Proportionate Resources, Within a Reasonable Time and at Reasonable Cost' (2006) *Australasian Institute of Judicial Administration* available at <<http://www.aija.org.au/ac06/Zuckerman.pdf>> at 15 August 2009.

8 Phrase used by Carrie Menkel-Meadow 'The Trouble with the Adversary System in a Multicultural World' (1967) 38 *William & Mary Law Review* 5, 25.

9 Dame Hazel Genn *Judging Civil Justice* (2009) (forthcoming) on the case against settlement. See also Owen Fiss 'Against Settlement' (1984) 93 *Yale Law Journal* 1073. For an opposing view which generally condemns adjudication as a dispute resolution process see Ken Cloke 'What's Better than the Rule of Law' in *Mediating Dangerously: The Frontiers of Conflict Resolution* (2001).

accepts the conceptual legitimacy of settlement acknowledges the reality that the vast majority of cases settle¹⁰ and for this reason the explicit shift to settlement promoted by modern reforms to civil procedure appears to be a pragmatic and at least partial solution to the problems of cost, delay and uncertainty which typically motivate reform of the civil justice system.

Early settlement mitigates unnecessary waste of judicial and party resources but, importantly, unless settlement meets the needs and interests of the parties, which may include reference to the party's perceived legal entitlement, settlement is correctly characterised as an inferior form of justice. In other words, settlement should not be entirely determined by reference to party or judicial resources and it is important that the civil justice system be adequately resourced. However, even if the objective of reforms to judicial justice are achieved adjudication will generally be a more expensive and uncertain process than settlement and in any event narrow legal remedies may not satisfy party interests.

For these reasons the shift to settlement which characterises modern reforms to civil justice is sensible and pragmatic. In this context, it would appear more useful to analyse the interdependent relationship between settlement and adjudication rather than simply extol the virtues of one process and vilify the other. A more nuanced approach to the relationship between settlement and adjudication also invites the development of a more refined analysis of the appropriateness of settlement or adjudication for the resolution of a particular dispute. If settlement is appropriate which settlement process would best fit the party's needs and interests and what factors contribute to the early (and late) settlement of disputes?

III. THE CO-EXISTENCE OF SETTLEMENT AND ADJUDICATION

As has been noted above, settlement, together with judicial oversight of pre-trial procedures, are the main features of reforms to civil justice which strive to enhance access to justice. Although adjudication is obviously distinct from consensual dispute resolution processes, in many respects the relationship between settlement and adjudication is complementary rather than antagonistic or competitive. Indeed it is arguable that the extra judicial resources required to implement judicial control of the litigation process seem to depend at least to some degree on the early settlement of disputes.¹¹

It is also true that settlement negotiations often take place in the shadow of the law and that the threat of adjudication often provides the impetus for settlement. Further court based adjudication can, to a limited extent interrogate the fairness of the settlement reached by the parties.¹² For these reasons, which are discussed in more detail below, it is important that court based adjudication is well resourced and reasonably accessible. More broadly, the mitigation of adversarial litigation culture and the encouragement of a co-operative ethic particularly in relation to the comprehen-

10 In England the total number of cases issued in 1997 was 2,208,878 in 2003 four years after the introduction of the CPR rules the number of cases issued had dropped to 1,571,976. Around 60% to 80% of cases issued settled prior to trial. John Peysner and Mary Seneviratne, *The Management of Civil Cases: the courts and the post-Woolf landscape* DCA Research Series (2005) 8 and 35.

11 *Ibid.*

12 *Hildred v Strong* [2008] 2 NZLR 629. Issues of mediator liability are beyond the scope of this paper, however for discussion on this issue see generally mediator liability and immunity in Laurence Boule, Virginia Goldblatt and Phillip Green, *Mediation: principles, process, practice* (2nd ed, 2008).

sive early disclosure of information underpin pre and post issue settlement negotiations and is also a feature of the reformed litigation process.¹³

IV. JUDICIAL JUSTICE AS A PUBLIC GOOD; SETTLING IN THE SHADOW OF THE LAW

The phrase ‘bargaining in the shadow of the law’ refers to the influence of a party’s perceived legal entitlements in reaching an agreement. An important function of the civil law is to map out the boundaries of acceptable social and economic behaviour. Modern consumer legislation, for example, seeks to adjust the rights and responsibilities of consumers and traders in accordance with contemporary notions of fairness and the party’s legitimate expectations.¹⁴ Fair trading arrangements between traders and consumers and traders are encouraged by a statutory framework which outlines rights and responsibilities which are enforceable by the court.

In most circumstances the mere existence of statutory provisions is sufficient protection of legal rights and recourse to the civil justice system is unnecessary. If a dispute does arise, the guidance of statutory provisions and case law, together with the open and early exchange of information between the parties, enhances the possibility of settlement in accordance with perceived legal entitlements. In some circumstances the rights and duties established by legislation need to be interpreted and given practical shape by the courts and in this respect adjudication not only helps to define the rights which citizens possess but also develops the case law which is then available to parties seeking to achieve settlement based on their legal entitlement.

More broadly, the development of precedent through adjudication constantly refines social and economic norms which are then available to provide guidance for parties seeking to settle their dispute according to contemporary legal standards. It is not merely the credible threat of enforcement which promotes settlement. Rather the public service function of adjudication is also to expand the legal framework in which settlement in the shadow of the law can be achieved. In some circumstances the party’s interests may not be satisfied by the application of contemporary legal norms but this fact does not undermine the importance of the complementary relationship between settlement and adjudication.

In some cases the parties will require the impartial application of legal rules to determine disputed liability and damages and in these limited cases the parties should not be forced into a settlement which does not reflect their legal entitlement. Such a situation is intolerable as it does not satisfy either judicial or consensual concepts of justice. Indeed settlement which does not satisfy judicial or consensual forms of justice is aptly described as agreement which is just about settlement rather than just settlement. For these reasons it seems correct to describe settlement without

13 CPR, above n 4 Rule 1.4(2)(a) ‘encouraging the parties to cooperate with each other in the conduct of the proceedings’ and VLCR, above n 4, Chapter 3 ‘Improving the Standards of Conduct of Participants in Civil Litigation’ 149. Rule 1.1 ‘overriding obligation imposed on participants’, with the purpose of creating a model litigant, to mitigate the adversarial culture and ‘emphasising co-operation, candidness and respect for the truth.’ Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (4th ed, 2005) [13.16] cited in VLCR, above n 4, 151.

14 Fair Trading Act 1986 s 9.

reasonably accessible court based adjudication as the ‘sound of one hand clapping’¹⁵ and accordingly it is imperative that access to judicial justice be cost effective, timely and proportionate.

V. THE LIMITED APPLICATION OF JUDICIAL JUSTICE TO POST SETTLEMENT AGREEMENT

It has been argued that the concept of judicial justice sometimes informs settlement negotiations to the extent that parties seek settlement based on reasonably anticipated legal entitlements. The application of legal rules to challenge settlement, however, brings into sharp focus the fundamental distinction between judicial justice and the consensual notion of justice achieved by various ADR processes. Clearly if agreements could be set aside simply on the basis that the settlement did not reflect the party’s legal entitlement a fundamental feature of ADR would be defeated. A fundamental feature of ADR is the ability of the parties to craft an agreement which satisfies their non legal interests. Such interests might include, preserving an ongoing commercial relationship, to put the dispute behind them, avoid the cost and uncertainty of litigation or to adopt a solution which is beyond the limited remedial imagination of the law.

The essence of the distinction between judicial and consensual justice is pithily summarised by the New Zealand Court of Appeal in *Hildred v Strong*¹⁶ ‘[m]ediation is not a Court proceeding in mufti’¹⁷ and subject to rare exceptions the parties ought to be bound to the agreement reached and a dissatisfied party should not be able ‘to get a second bite at the cherry’.¹⁸ An obvious exception to the general proposition that a party ought not to be able to resile from an agreement reached by an ADR process is the situation where the agreement contravenes the statutory rights of a third party eg the interests of the child.

As was made clear by the court in *Hildred* it is not, in most circumstances, for the court to interrogate what motivated the parties to reach agreement when the parties have decided to invoke a consensual process to settle their dispute.¹⁹ This view illustrates the basic point that settlement is a legitimate form of civil justice but perhaps more importantly provokes fundamental questions about whether or not parties should settle their dispute and if so the factors and processes which encourage early and just settlement.

VI. THE ANATOMY OF SETTLEMENT: THE FACTORS AND PROCESSES WHICH CONTRIBUTE TO EARLY SETTLEMENT; IMPEDIMENTS TO SETTLEMENT.

Lord Woolf’s prescription to remedy the ills of the civil justice system was to divert the mass of cases away from court by encouraging early settlement, subjecting those that remain to robust judicial oversight. The dramatic decline in cases issued since the introduction of the CPR in 1999²⁰

15 A phrase used by Dame Hazel Genn in her forthcoming (November 2009) Hamblin Lecture based on a sculpture by Lloyd Whannel, *The Sound of One Hand Clapping* ‘From a Zen koan, a paradoxical statement or question, which is intended to let each viewer discover their own answer.’ Available at <http://www.fubiz.net/galleries/set/lake-oswego/photo/2759180938/> at 27 October 2009.

16 [2008] 2 NZLR 629.

17 *Ibid* [16].

18 *Ibid* [46] [65].

19 *Ibid* [46].

20 Peysner and Seneviratne, above n 10, 8.

indicates the success of pre-action protocols. Clearly quantitative statistics which measure the decline in cases issued say nothing about the quality of the settlement reached.

In this context empirical research indicting parties satisfaction with the agreement reached, which might be based on a match with perceived legal entitlement or broader needs and interests would be useful. What can be said with a degree of certainty is that bargaining and reaching agreement in the shadow of the law is greatly enhanced by pre-action protocols which mandate and control the early exchange of documents and information about the nature of the dispute.²¹ As observed by one District Judge:

the legal profession generally are looking much earlier at the files ...before issuing proceedings, [and] direct[ing] their minds to all those aspects that formerly they tended to leave way on into the case, and very often close to the end of it.²²

As has been noted by Justice Heath, adjudication is usually a fairly straightforward application of the law after the facts have been determined.²³ Aside from the relatively few disputes which raise novel points of law or one of the parties requires the binding force of precedent, the early exchange of information together with competent legal advice seems to enable the early and just settlement of most disputes. Critics of pre-action protocols point out that the early and extensive preparation required for compliance of the protocols results in the front-loading of costs. Professor Zander complains that:

the effect [of the protocols] is to front-load costs unnecessarily if the case would have settled without it. It is possible that in some of those cases the settlement will come earlier or be more soundly based by virtue of more information. But that is mere speculation.²⁴

It seems realistic to assume that the significant drop in number of cases issued, and therefore saving judicial and party resources, since the introduction of the CPR is linked to the introduction of pre-trial protocols, the anecdotal evidence of solicitors appears to support this view.²⁵ One might ask on what basis cases settled without the benefit of exchanging information?

Best practice requires the accumulation of information to reach an informed decision about settlement. The forced co-operative environment produced by the protocols mitigates the adversarial approach to the exchange of information which added unnecessarily to the cost and delay of reaching settlement. The reforms to civil justice recommended by the Victoria Law Commission also emphasise the importance of the disclosure of information and cooperation before proceedings are commenced. What is novel about the Victorian Reforms is the extension of legal duties and obligations which impose standards of 'cooperation candidness and respect for the truth'²⁶ on all participants involved in the civil justice system. In this way recalcitrant clients are also subject to legal duties and obligations which seek to promote sensible conduct and encourage early settlement.

21 Ibid 9.

22 Ibid 11-12.

23 Justice Paul Heath, 'Hard Cases and Bad Law' (2008) 16 *Waikato Law Review*, 12.

24 Michael Zander, *The State of Justice* (2000) 41.

25 Peysner and Seneviratne, above n 10, 13.

26 Ross, above n 13.

VII. THE PROBLEM OF POST ISSUE LATE SETTLEMENT

‘This [late settlement] is always a problem. And there will always be a problem. But the truth of the matter is that there are some clients who won’t face up to reality until they are actually at the door of the court.’²⁷ As settlement is often the fundamental objective of reforms to civil justice unnecessary impediments to settlement, it ought not to be accepted simply as a matter of human nature. An understanding of the probable causes of late settlement, which is problematic in terms of judicial and party resources, offers possible solutions to help mitigate the problem.

The severity of the late settlement issue obviously needs to be considered in the context of its diminishing importance given the dramatic decline in proceedings issued since the introduction of the CPR rules.²⁸ One estimate is that the post issue settlement rate is between 60 and 80 per cent²⁹ and although it is not clear how many cases settle at the court room door, the authors acknowledge that ‘late settlement is considered an enormous problem’.³⁰

A significant contribution to the problem of late settlement is that, in some cases, only the imminence of a hearing is enough to offset the psychological factors associated with the investment in costs incurred in preparing the case for hearing,³¹ particularly in a cost shifting regime which transfers a significant proportion of costs to the loser. As noted earlier, few cases which proceed to adjudication are particularly difficult to resolve once the facts have been determined. It is possible that more extensive use of judicial pre-trial reviews attended by the parties could highlight the risks and costs inherent in adjudication and may also point out the broader advantages of settlement as a dispute resolution process.

Peysner and Seneviratne state that ‘[s]ome courts did bring in the parties before the trial date to encourage settlement, and this had resulted in a high number settling at this pre-trial review.’³² Pre-trial reviews (settlement conferences) clearly have party and judicial resource implications³³ and also raise issues relating to the role of the judiciary in conducting such conferences. Parties are likely to be less than candid in disclosing sensitive information or making concessions if it is possible that the judge will eventually hear the case if it does not settle. Also judges who might hear a case will feel constrained from giving firm indications about the strength of the case at a pre-trial conference for fear of not appearing impartial.

While these difficulties might be overcome by straight forward administrative measures the more difficult question relates to the role of judges at ‘judicial settlement conferences’ (JSCs) and more broadly how judicial attempts to settle cases fits with the range of ADR processes which are typically encouraged by civil justice reforms pre and post action of proceedings.

27 Peysner and Seneviratne, above n 10, 43.

28 Ibid 8.

29 Ibid 35.

30 Ibid 43.

31 Robert Mnookin, Scott Peppet and Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000).

32 Peysner and Seneviratne, above n 10, 42.

33 Ibid 41 ‘in many cases the case management is done by telephone.’

VIII. ADR AND SETTLEMENT

The term ADR, although strongly associated with mediation, refers to a wide variety of processes, including mandatory judicial settlement conferences, court annexed and private mediation, industry based Ombudsman schemes and collaborative law³⁴ which encourage parties to resolve their dispute without the formality of court based adjudication. Given the emphasis of justice reforms on diverting cases away from litigation the central role of ADR is unsurprising. What is perhaps a little surprising is the extent to which pre-action settlement in England and Wales is being achieved by lawyers without the intervention of third parties.

It is particularly noteworthy that mediation, which is normally the process most heavily associated with ADR, appears to have played a minor role in the dramatic decline in the issue of proceedings following the introduction of the CPR rules in England and Wales.

The large increase in the numbers of cases settled has not been matched by a corresponding increase in the use of ADR. ... Most Judges thought that there was little out of court mediation, little use of ADR and that there was either 'real resistance' or 'no enthusiasm' for it. Most Judges had little experience of its use.³⁵

In many cases settlement is the result of solicitor negotiations and is assisted by rules which require the early disclosure of information and encouragement to negotiate co-operatively. Anecdotal evidence indicates that settlement is primarily based on the parties' perceived legal entitlement and interest based bargaining does not appear to be a feature of pre-action settlements achieved by solicitor negotiations. This tentative conclusion does not fully support Professor Macfarlane's contention that exclusively rights based strategies will rarely bring about optimal settlement.³⁶ Although it is of course possible that interest-based bargaining might increase the number of settlements and produce settlements that are more closely aligned with client interests.

The broader question in this context is the extent to which solicitor negotiations should stray into an area more traditionally the domain of facilitative mediation. The conceptual and practical problems associated with solicitors adding interest based bargaining to their repertoire of skills is considered below, but on the strength of the empirical research conducted by Peysner and Seneviratne it is possible to conclude that pre-action protocols are, in any event, very successful in diverting cases away from litigation.

The role of mediation appears to play a minor role in promoting settlement when proceedings have been issued.³⁷ Various reasons for this failure are given by judges and solicitors including lack of court annexed mediation³⁸ and the reluctance of English courts to endorse mandatory mediation. The conceptual debate concerning the effectiveness of compulsory court annexed or private mediation turns on the apparent incongruity of forcing parties to engage in a process which

34 Victoria Law Commission Report, above n 1, 212. Chapter 4 'Improving Alternative Dispute Resolution', which explicitly refers to the need to expand the range of ADR options to assist the court to efficiently manage diverse types of disputes; collaborative law refers to the process where lawyers and clients sign a contract to negotiate in good faith to resolve a dispute without going to court. If the dispute is unable to be resolved by negotiation the lawyers acting for the parties withdraw and new lawyers must be instructed in litigation proceedings.

35 Peysner and Seneviratne, above n 10, 43.

36 Macfarlane, above n 2, 61.

37 Ministry of Justice (UK), above n 4. Rule 1.4(2)(c). Active case management includes 'encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate and facilitating their use of such a procedure.'

38 *Ibid.*

relies on good faith bargaining, a feature which would appear to be firmly grounded in voluntary entry into the process.

In the English court of Appeal Decision in *Halsey v Milton Keynes General NHS Trust*³⁹ the court stated the standard objections to compulsory mediation:

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.⁴⁰

The Court also opined that ‘it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court, and, therefore, a violation of Article 6.’⁴¹ While these arguments have clear merit, they are not compelling. Mediation does restrain access to court based adjudication in the sense that parties are entitled to proceed to adjudication if agreement cannot be reached. The possibility of mediation increasing party costs is clearly an important factor given that the objective of civil reform is to promote access to justice by delivering a process which is cost effective.

Rather than abandon compulsory ADR because of the real possibility of bad faith bargaining and/or the futile expenditure of costs on a case which is unlikely to settle at mediation, party resources might more usefully be applied to an ADR process which better suits the parties objectives. If properly informed parties require an impartial assessment of the risks associated with litigation, a process presided over by an authoritative expert such as a JSC, or a less formal process such as evaluative mediation might be appropriate. The effectiveness of JSCs will obviously turn largely on the settlement skills of judges. It also appears to be crucial that the parties attend settlement conferences.⁴²

Settlement before a trial minimises the problem of overlisting, reduces the costs associated with the trial and reduces the inherent uncertainty of adjudication. If parties require a process which is interest rather than rights based then referral to facilitative mediation would be appropriate, although this step would only seem necessary to the extent that the parties’ lawyers were unable or unwilling to engage in interest based negotiations.

IX. SETTLEMENT AND THE CHANGING PRACTICE OF LAW

In her book,⁴³ Professor Macfarlane claims that justice reforms that favour mandatory and voluntary settlement processes, have promoted the emergence of a more collaborative and holistic approach to legal practice. Conflict Resolution Advocacy (CRA) is the phrase used to describe the new bundle of skills required by lawyers to work successfully in the new settlement environment.

While conceding that an understanding of rights based strategies is a unique, crucial and continuing aspect of legal practice, her contention is that effective negotiation and settlement skills which move beyond partisan posturing and exclusive reliance on legal issues are becoming in-

³⁹ *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920. See also the Australian decision in *Australian Competition & Consumer Commission v Lux Pty Ltd* [2001] FCA 600.

⁴⁰ *Ibid* [10].

⁴¹ *Ibid* [9] referring to the European Convention on Human Rights.

⁴² Peysner and Seneviratne, above n 10, 42, report that ‘some courts did bring in the parties two or three weeks before the date of the trial to encourage settlement, and that this had resulted in a high number settling at this pre-trial review.’

⁴³ Professor Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008).

creasingly central to the practice of law. Professor Macfarlane's central assumption is that rarely will legal analysis of the facts accumulated to provide a legal remedy be an adequate basis for optimal resolution of the conflict. For example, the importance of business or personal relationship issues cannot be repaired or enhanced by the application of legal remedies, quite apart from the financial cost and uncertainty of adjudication.

Client interests cannot always be reduced to legal entitlements. As has been emphasised in this paper, adjudication is a public good and rights based strategies within the context of a reformed civil justice system are essential to develop precedent and to address imbalances in power which might result in consensual injustice. Indeed the purpose of the Woolf Reforms is to promote access to judicial justice by mitigating zealous adversarial pre trial strategies. Analysis of the effectiveness of such reforms to reduce the complexity and cost of adjudication is outside the scope of this paper, but it is clear that the explicit policy of settlement is responsible for the recent trend in vanishing trials. These observations are not antithetical to Professor Macfarlane's thesis: supported by supposedly empirical evidence gathered in Canada that the prospects of achieving an optimal settlement are sometimes unproved when non legal issues and solutions are blended with rights arguments. Ultimately the composition of the blend must be determined by properly informed clients and will depend on the client's objectives (and resources).

On a practical level the communication skills required by lawyers to engage in conflict advocacy are formidable. The new lawyer's repertoire of skills must embrace the central premise of principled bargaining that often the clients best interests can only be achieved if the interests of the other part are taken into account.⁴⁴

The discussion above refers to reforms which have been implemented in recent times in England and Wales and recommended in Australia. New Zealand has also been looking at these issues and as a result changes to the District Court rules relating to settlement will be implemented as of 1 November 2009. The following section provides an insight from the perspective of a legal practitioner as to what the implications of these rule changes may be.

X. SETTLEMENT AND THE NEW NEW ZEALAND DISTRICT COURT RULES: A PRACTITIONERS PERSPECTIVE

The philosophy and objectives of the rules were clearly set out and described in the recent New Zealand Law Society seminar⁴⁵ and are timetabled to come into force on 1 November 2009. As noted in the Law Society seminar at their heart lies a philosophical sea change to the litigation process which has no New Zealand precedent and no clear parallel in the common law world. Some of the changes are fundamental, because fundamental change is needed. The core philosophy of the new rules puts access to justice ahead of competing considerations. As a result, the defended witness trial is no longer the focal point of the process and has been relegated from its position of primacy to become simply one of several possible outcomes. The reason for that is straightforward. The assumption underlying existing common law civil procedure is that all cases will go to hearing as a witness action. That assumption is such an obvious myth that the pretence can no longer be maintained.

⁴⁴ See Mnookin above n 31.

⁴⁵ Judge Colin Doherty et al 'The New District Court Process – A Radical Change' paper presented at the New Zealand Law Society Seminar August 2009, Hamilton.

In all common law jurisdictions around the world, only a very small percentage of cases actually reach trial. In the District Court of New Zealand the figures across the registries rarely reach three per cent and in some registries the figure is one per cent or less. Most cases settle, either because they should or because both parties have to. The new rules take settlement as the basic objective, the process being designed to enhance the prospects of settlement at an early stage.

The full scale witness action trial, with its attendant expense and delay, has been procedurally relegated to its economically justifiable place, namely the very last resort. It is anticipated that full scale trials will all but disappear. Summary judgment will only be available by judicial direction following a settlement conference, reducing the relative expense in cases involving smaller monetary claims. In between early settlement and full scale witness action trial, shorter and cheaper forms of trial will be available.

The parties will be free to appoint a private mediator at any time and will be encouraged to do so. They will have plenty of time to appoint a private mediator before the judicial settlement conference is allocated and will be encouraged to do so at the JSC if it seems that course of action is desirable.⁴⁶ The object of the new rules is to secure the just, speedy and inexpensive determination of proceedings.⁴⁷

Explicit objectives include equal treatment of parties, saving expense, recognition of the need for proportionality in connection with the importance of the case, the complexity of the case, the amount of money involved and the financial positions of the parties, all the while recognising that there are limits to the court's resources. A significant objective of the rules is to make the process user friendly and accessible to laymen e.g. by the process of online forms.

XI. THE CONTRAST BETWEEN THE RULES AND THE WOOLF REFORMS IN ENGLAND AND WALES

The purpose of the Woolf Reforms in England and Wales was to improve access to justice by reducing complexity cost and delay in litigation, which was to be achieved by a three tier approach:

- (a) Diverting cases away from court by the use of protocols requiring the exchange of comprehensive information and details about the case in a co-operative manner before proceedings are issued.
- (b) Pro-active case management if cases are not settled pre-issue. The case management strategies include a fast track for minor claims, limited discovery, multi tracks for more complicated cases and judicial settlement conferences. Proportionality is encouraged.
- (c) The promotion of ADR both at the pre-issue and post issue stages.

Clearly the rules regime in New Zealand addresses two of the three tiers of the Woolf Reforms, namely the promotion of ADR and the case management regime after the issue of proceedings with a focus on encouraging settlement, limiting/reducing the traditional adversarial witness action trial process; and recognising the concept of proportionality.

A key difference between the Woolf Reforms and the District Court Rules is that the New Zealand regime does not include pre-issue protocols.⁴⁸ It is and has been the case in New Zealand for many years that some lawyers have pro-actively adopted the conflict resolution advocacy ap-

⁴⁶ Draft rule 1.7.

⁴⁷ Draft rule 1.3.

⁴⁸ That is the rules requiring the exchange/disclosure of documents and information and a co-operative approach before proceedings are issued.

proach described by Professor Macfarlane as distinct from the traditional adversarial advocacy approach. In New Zealand, however, the conflict resolution advocacy approach has never been proscribed in the sense of mandatory procedural rules requiring disclosure of information and co-operation before court proceedings are issued. The client care rules, which came into force on 1 August 2008 as part of the Lawyer's & Conveyancer's Act 2006, contain a provision⁴⁹ requiring lawyers to assist clients with the resolution of a dispute by keeping clients advised of alternatives to litigation that are reasonably available to enable the client to make informed decisions about the resolution of a dispute. Although rule 13.4 of the client care rules does contain a positive obligation on lawyers to advise their own client about ADR options, it does not and was not, intended to be a procedural code requiring co-operation and disclosure of information between parties before or after the issue of court proceedings.

Based on the research carried out in England and Wales into the Woolf Reforms which have now been in force for about 10 years, it appears that the pre-issue disclosure of information and co-operation protocols, together with competent legal advice, have significantly contributed to the mitigation of the adversarial approach to litigation and dramatically reduced the number of court proceedings issued.⁵⁰ Mediation appears to have played a minor role in the dramatic decline in the number of court proceedings issued following the introduction of the Woolf Reforms. In many cases settlement comes about as a result of lawyer negotiations assisted by the pre-issue disclosure and cooperation rules. Anecdotal evidence indicates that settlement is primarily based on the parties' perceived legal entitlement and interest based bargaining does not appear to be a significant feature of the pre-issue settlements achieved.

Although it needs to be appreciated that the above research is tentative and further research needs to be carried out into the role played by interest based bargaining in achieving settlement. I suggest that many New Zealand lawyers practising in ADR and court litigation would be surprised by the results of the UK research to date. New Zealand lawyers will not necessarily be surprised that lawyer competence is a contributing factor to the levels of settlement achieved before the issue of court proceedings as many ADR/litigation lawyers have an unshakeable confidence in their own ability. What will be more surprising however is the number of cases that are being resolved by settlement before the issue of court proceedings and the apparently minor role played by mediation in the dramatic decline in the number of court proceedings issued.

The experience of many New Zealand ADR/litigation lawyers⁵¹ is that it is difficult to persuade the client to move into 'settlement mode' before proceedings are issued or defended. At that point in the chronology of the dispute the clients are more likely to have a bullish and often overly optimistic view of the litigation process and their prospects of success. The experience of many New Zealand lawyers is that meaningful settlement negotiations are more likely to occur after proceedings have been issued or defended, often after discovery has been completed and commonly at or following a private mediation or JSC.

The issue/defence of court proceedings and the mediation/JSC process tends to have a sobering effect on many clients and provides a classic 'reality check on a number of fronts'. Firstly, the cost of litigation is very significant. A client involved in court litigation will be receiving invoices of significant value from their lawyers for litigation related advice and services with the prospect

49 Paragraph 13.4.

50 See Peysner and Seneviratne, above n 10.

51 Brendan Cullen, author, included.

that the quantum of the invoices will significantly increase during the trial preparation and trial attendance phases of the process. The direct cost of legal fees and disbursements will often cause clients to consider an out of court settlement.

Secondly, there are very significant indirect cost to clients who are involved in the litigation process including the distraction factor of court litigation, lost business opportunities and an inability to enjoy life while the litigation juggernaut rolls on. Clients will often come to realise during the litigation process that there is a real value to settling disputes so that they can put the matter behind them and get on with more positive aspects of their life and work.

Thirdly, the inherent uncertainty of outcome if the dispute goes to trial is another significant factor which acts as a reality check for clients. Competent lawyers will advise their clients about the uncertainties of outcome at trial (both as to liability and quantum) and also the possibility of appeals which will result in a further round or rounds of cost delay and uncertainty. The recent relationship property case of *Rose v Rose*⁵² is a classic example. It started in the Family Court and ended up in the Supreme Court with different outcomes at all four levels of the court system.

The reality checks set out above are usually highlighted and reinforced at a mediation or JSC which in turn contribute to the likelihood that the client will explore the options for an out of court settlement rather than taking their chances at trial. Based on the apparent success in the UK of the pre-issue protocols in reducing the number of court proceedings issued, the following questions arise in New Zealand:

- Were pre-issue protocols considered for inclusion in the new District Court Rules?
- If not, why not?
- If they were, what were the factors the rules committee took into account in deciding not to include pre-issue protocols?

If pre-issue protocols are incorporated as procedural rules would the same trends occur in New Zealand as have occurred in England and Wales namely a dramatic reduction in the number of court proceedings issued?

These questions require further research, however irrespective of the outcome of any debate about pre-issue protocols, it is clear the new rules will have significant consequences for lawyers in New Zealand practising in the ADR/court litigation field. The authors of the recent New Zealand Law Society seminar booklet commented as follows:

The skill set required to make the most of the new rules has some significant differences from the skill set required under the existing rules. Identification and articulation of the factual and legal issues are presently, and will always be, core competencies. But interlocutory warfare will cease. Only those interlocutories which are genuinely necessary will be permitted and the skills necessary to successfully conclude settlement negotiations, whether privately, by means of ADR, or in the JSC, will come to achieve a prominence hitherto unseen. *Chamberlain v Lai* 2005 NZSC 32 will see to that.⁵³

As described by Professor Macfarlane, an essential skill to successfully conclude settlement negotiations is acknowledgement of the interests of the other party and to persuade the other party to settle on the best possible terms for your client. It remains to be seen how New Zealand lawyers will respond to the challenges presented by the new settlement environment.

52 *Rose v Rose* [2009] 3 NZLR 1.

53 Doherty, above n 45, 11.

XII. CONCLUSION

In his book⁵⁴ John Van Winkle refers to the process of court based adjudication as a 'litigation train'.⁵⁵ The dispute arises, lawyers are consulted, entrenched positions are taken, and after ritual posturing, proceedings are filed. The track to adjudication then follows a predetermined path which consumes party and judicial resources in preparation for a hearing which statistically is unlikely to take place. Even if the dispute is determined by a judge the win/lose nature of adjudication may not match even the winners interests.

Civil justice reforms have attempted to derail the litigation train by explicitly encouraging early settlement, based on the indisputable fact that settlement is the usual end point of legal proceedings. Just settlements promote access to justice because in most cases early settlement is cost effective and may produce better outcomes for the parties than the zero sum result assured by adjudication. Judicial resources should be preserved for the cases which require impartial assessment of the litigation risk and for the fewer cases which require the adjudication skills of experienced judges. Adjudication is a public good which extends the shadow of the law by developing precedent and allows for the public articulation of values. For the reasons outlined settlements based on legal rights are enhanced to the extent that precedent is developed. Pre-issue settlement also allows judicial resources to focus on the cases which require access to adjudication.

The increased institutional emphasis on settlement raises complex issues about the relationship between ADR processes and settlement and the scope of the role of lawyers in promoting settlement. In England and Wales, ADR and mediation in particular, appears to have played quite a minor role in the settlement culture encouraged by the civil justice reforms. Clearly mediation is not the only way forward for disputing parties and no doubt the attitude of lawyers and judges to mediation, together with the resources available for mediation, contribute to the minor role of mediation in settling civil disputes. It is also possible that ADR has been unnecessarily limited to mediation. This point has been emphasised by the reforms recommended by the Victorian Law Commission. There is more chance that the process will match the parties' needs if a wide range of ADR procedures are available.

Professor Macfarlane's thesis that settlement is changing the practice of law is correct to the extent that the Woolf Reforms and the reforms proposed by the Victorian Law Commission seek to promote settlement by mitigating a adversarial litigation culture. While forced cooperation in terms of pre-issue protocols is promoting settlement in England and Wales, it is not clear if lawyers are engaging in creative problem solving skills to craft settlements which, in appropriate circumstances, take into account clients' non legal interests. Reforms which promote cooperation and settlement do not necessarily result in the development of skills which enhance conflict resolution advocacy. Professor Macfarlane's arguments that conflict resolution advocacy can improve access to justice and optimal settlements are persuasive. Her recognition that knowledge, legal rights and rights based strategies remain an essential aspect of the new lawyer's repertoire of skills supports the contention that settlement and adjudication are complementary processes for achieving accessible consensual and judicial justice.

54 John van Winkle, *Mediation: A Path Back for the Lost Lawyer* (2001).

55 Ibid 1.

CIVIL AND PROFESSIONAL LIABILITY FOR WILL MAKING AND ESTATE PLANNING — A NEW STANDARD FOR AUSTRALIAN SOLICITORS?

BY TINA COCKBURN* AND BARBARA HAMILTON♣

I. INTRODUCTION

Like other specialist practitioners, it is clear that succession and elder law solicitors must remain ever mindful of their professional obligations and duties to their clients when engaging in will making and estate planning work or face the risk of disciplinary action.

In addition, those who do not meet the requisite standard of professional practice may be exposed to civil claims for monetary compensation. In Australia there are various traditional sources of civil liability: in tort for negligence, in contract for breach of express or implied retainer, and as a result of breach of statutory obligations contained in (State) Fair Trading Acts or the Trade Practices Act 1974 (Cth). A recent example of how such claims are traditionally pleaded is the recent decision of the New South Wales Court of Appeal in *Hendriks v McGeogh* ('*McGeoch*').¹ In that case, an elderly widow sought estate planning advice from the family solicitor, with a view to effecting inter vivos transfers of her properties to her sons. A family meeting was held in the solicitor's presence and it was decided to transfer one property to each son. The sons were not separately represented and although the transfer to one son was carried into effect, the transfer to the other son was not and the subject property passed to others under the widow's will. The disappointed son successfully sued the family solicitor for failing to adequately protect his interests with respect to the property transfer. Liability was founded in tort for negligence, contract for breach of retainer and statute for misleading and deceptive conduct. Damages were assessed on the basis of loss of chance.

Given that the solicitor/client relationship is fiduciary in nature, there is also potential for civil claims against lawyers engaged in will making and estate planning for equitable compensation for breach of fiduciary duty in cases where a conflict of duty and duty or conflict of duty and interest is established.²

In *Bolton v The Law Society*³ Sir Thomas Bingham MR considered the policy reasons for the need to regulate and control the professional activities of lawyers in the public interest and for the protection of the public. In disciplinary proceedings, in addition to the imposition of a penalty,

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1 [2008] NSWCA 53 on appeal from *McGeoch v Hendriks* [2007] NSWSC 311 (affirming decision as to liability but damages assessed on the basis of loss of chance calculated at 80% of the damages awarded at trial).

2 *Rigg v Sheridan* [2008] NSWCA 79.

3 [1993] EWCA Civ 32.

which has a punitive element to punish the solicitor for what he or she has done and to deter others who may be tempted to behave in the same way, a regulatory body may also impose a striking off order or a period of suspension from practice with a view to preventing the offender from having the opportunity to repeat the offence or encouraging the offender to be more meticulous in his or her future compliance with the required standards as the severity of the infraction requires.⁴ Sir Thomas noted that ‘most fundamental of all’ is the rationale ‘to maintain the reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. ... Otherwise, the whole profession, and the public as a whole, is injured. A profession’s most valuable asset is its collective reputation and the confidence which that inspires ... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.’⁵

Furthermore, a lawyer who acts without the competence and diligence required of a reasonably competent lawyer faces the prospect of disciplinary action for breach of ethical and professional duties which may render him or her liable to penalty, costs and even compensation to an aggrieved party. This is particularly so when a family solicitor is dealing with various family members in the course of estate planning and will making advice, unless the extent of the retainer is carefully documented, it is clear who is the solicitor’s client and all family members understand this as well as the need to access independent advice as necessary.

In *Legal Services Commissioner v Ford* (*Ford*),⁶ a recent Queensland disciplinary proceeding, the solicitor was found to be in breach of his ethical professional duties because he had failed to act competently in assessing whether his client had capacity to make an enduring power of attorney (EPA). A penalty was imposed by way of public reprimand and the practitioner was ordered to pay the costs of the applicant Legal Services Commissioner. The outcome of these disciplinary proceedings may be indicative of a trend towards an increasingly higher standard of professional care being required of solicitors who engage in estate planning and will making work. The lawyer in question was found to have not met the requisite standard expected of a reasonably competent lawyer by his failure to question the client about specific matters related to an EPA (as set out in section 41 Powers of Attorney Act 1998 (Qld)) and by failing to use an open-ended questioning technique in doing so in order to assess his client’s capacity.

After an overview of the circumstances in which liability may arise in tort in the will making and estate planning process and how professional standards and disciplinary proceedings may influence the development of a higher standard of care in professional liability cases in this context, this article will focus on a consideration of the extent to which civil liability may arise in equity. Finally the circumstances in which disciplinary action may arise following breach of equitable obligations will be considered.

II. LIABILITY IN NEGLIGENCE ARISING OUT OF WILL MAKING

There are numerous reported cases where solicitors have been held to owe a duty to take reasonable care when acting for clients in the preparation of wills which have resulted in findings of civil liability to disappointed third party beneficiaries.⁷

4 Ibid [15].

5 Ibid [15]-[16].

6 [2008] Qld LPT, 12.

7 *Hawkins v Clayton* (1987-1988) 164 CLR 539.

In *Hill v Van Erp*⁸ the majority of the High Court of Australia agreed that in order to establish a duty of care the plaintiff must establish foreseeability of loss to a beneficiary in the event of a lawyer negligently performing his/her duty to the client in drafting the will.

As to what else is required, in addition to foreseeability, Dawson and Toohey JJ focused on assumption of responsibility:

Whilst there will usually be no specific reliance by an intended beneficiary upon a solicitor retained to attend to the will, the intended beneficiary's interests are totally and unavoidably dependent upon the proper performance of a function within the sole province of the solicitor. And, it might be added, in that situation the solicitor knows of the beneficiary's dependence and in that respect may be regarded as having assumed responsibility towards the intended beneficiary.⁹

However, Brennan CJ, Gaudron, McHugh and Gummow JJ rejected assumption of responsibility as the basis of the duty. Brennan CJ found that the duty of a lawyer to an intended but disappointed beneficiary is in the performance of the work in which the lawyer owes a corresponding duty, albeit contractually, to the testator.¹⁰ Gaudron and Gummow JJ held that in the absence of an assumption of responsibility, the duty of care arose because the lawyer is in a position of control over the interests of the beneficiary.¹¹

Various policy rationales have been identified as to why a duty of care should be found in disappointed beneficiary cases including the following:¹²

- Unless the duty is recognised, the only persons with a valid claim have suffered no loss (namely the testator and the estate) whereas the only persons who have suffered loss have no claim (the disappointed beneficiary);¹³
- As the public relies on lawyers to prepare effective wills, it would be a failure of the legal system not to impose some practical responsibility.¹⁴ The existence of a duty of care promotes professional competence in dealing with wills¹⁵ and enhances the lawyer client relationship;¹⁶
- The existence of a duty of care highlights the importance of legacies in a society that recognises the rights of citizens to freely dispose of their assets;¹⁷ and
- Those who cause loss to others should be held responsible.¹⁸

8 *Hill v Van Erp* (1995-1997) 188 CLR 159.

9 *Ibid* 186.

10 *Ibid* 170-171.

11 *Ibid* 198-199 per Gaudron J; at 231-232 per Gummow J.

12 For a discussion see G E Dal Pont *Lawyer's Professional Responsibility* (3rd ed, 2006) 476-477.

13 *Ross v Caunters* [1980] Ch 297, 303 per Megarry VC.

14 *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 43 per Cooke J; *Van Erp v Hill* (1995) Aust Torts Reports 81-317, 62065 per Fitzgerald P.

15 *Hill v Van Erp* (1997) 188 CLR 159, 195 per Gaudron J, 234 per Gummow J.

16 *Gartside v Sheffield Young & Ellis* [1983] NZLR 37, 51 per Richardson J; *Connell v Odium* [1993] 2 NZLR 257, 271 per Thomas J.

17 *White v Jones* [1995] 2 AC 207, 260 per Lord Goff.

18 'It is that in all justice one who is responsible for causing damage to another by his negligence ought generally to pay for it ... It is altogether reasonable that those who because of their occupation and the skill, experience and expertise associated with it are engaged to perform a service which if properly performed, will benefit an identifiable person should make good the loss which the latter may suffer from the former's negligence.' *Gartside v Sheffield Young & Ellis* [1983] NZLR 37, 54; see also *Van Erp v Hill* (1995) Aust Torts Reports 81-317, 62065 per Fitzgerald P.

Indeed, in *Hill v Van Erp*¹⁹ it was held that in the disappointed beneficiary cases the policy considerations which usually prompt concern about duties to third parties do not apply, for the following reasons:

- There is no indeterminate liability as the intended beneficiary under a will is a specific, identifiable individual rather than a member of an unascertained class and liability is fixed by the size of the intended bequest;²⁰
- The recognition of a duty would not supplant remedies available in other areas nor disturb any general body of rules constituting a coherent body of law;²¹ and
- There are no conflicting duties of care as the interests of the client and the beneficiary are coincident.²²

When a duty of care is established, the scope of the duty will be determined by the contract of retainer²³ and the standard of care, and whether it has been breached in the circumstances, is determined according to the provisions of the (State) Civil Liability Acts.²⁴

Situations in which liability has been held to arise²⁵ include failure to take reasonable care to:

- prepare a will in a timely fashion;²⁶
- ensure that the will gives legal effect to the testator's instructions;²⁷

19 (1995-1997) 188 CLR 159.

20 Ibid per Brennan J 170-171, per Dawson J 186.

21 Ibid per Dawson J 180.

22 Ibid per Brennan CJ 170-171, per Dawson J 186.

23 *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642; *Summerville v Walsh* [1998] NSWSC 52.

24 New South Wales: s 50 Civil Liability Act 2002 (NSW); Queensland: s 22 Civil Liability Act 2003 (Qld); South Australia: s 41 Civil Liability Act 1936 (SA); Tasmania s 22 Civil Liability Act 2002 (Tas); Victoria: s 59 Wrongs Act 1958 (Vic); Western Australia: s 5PB Civil Liability Act 2002 (WA); Australian Capital Territory: Civil Law (Wrongs) Act 2002 (ACT) (no equivalent section); Northern Territory: Personal Injuries (Liabilities and Damages) Act 2003 (NT) (no equivalent section).

25 For a discussion see Reid Mortensen, 'Solicitors' Will-Making Duties' [2002] MULR 4, available online at <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2002/4.html?query=%5cmortensen>> accessed 31 August 2009.

26 *White v Jones* [1993] 3 All E R 481 (liability in negligence for having failed to act on instructions by letter to prepare a new will providing legacies to previously disinherited daughters – written instructions given mid-July, memorandum dictated by legal executive mid-August, but still no will when testator died mid-September – liability in negligence for the legacies intended for the daughters); *Strange v Redmond* (2001) QDC 356 (liability in negligence following death of client four days after giving instructions by telephone - client was elderly and had a long history of ill-health, though no sense of urgency was conveyed in the instructions - evidence established that a competent solicitor would have prepared a new will within a day or two of receipt of instructions); cf. *Queensland Art Gallery Trustees v Henderson Trout* [2000] QCA 93 (No liability for failure to prepare new will to give client's art collection to the Queensland Art Gallery before she died – evidence was that testatrix had requested amendment on the basis that the Gallery would confirm whether there were sufficient resources to exhibit her collection to her liking – Gallery failed to do so, thus no breach of any duty to Gallery as finding that client had not made a definite decision to benefit the Gallery).

27 See *Carr Glynn v Frearsons* [1998] 4 All E R 225 (solicitor liable for failure to sever joint tenancy in circumstances where the willed gift passed to joint tenant rather than the beneficiary under the will) cf. *Miller v Cooney* [2004] NSWCA 380 (no liability as solicitor did not know the property was held as a joint tenant and had no reason to believe that it was – solicitor's instructions were merely to change some of beneficiaries in a will prepared by another solicitor – held duty limited by retainer).

- ensure that a will is validly executed and attested;²⁸
- advise against accidental revocation;²⁹ and
- discharge custodial duties.³⁰

A. *Duty to Ensure the Testator has Testamentary Capacity and is not Unduly Influenced by any Beneficiary?*

In cases where a solicitor is involved in the preparation of a will which is subsequently set aside on the basis of lack of testamentary capacity or the probate doctrine of undue influence, for policy reasons the courts have traditionally been reluctant to impose a duty of care on the solicitor, other than to the extent of liability to the estate for the costs of the application to set aside the will.

In *Worby v Rosser*³¹ the beneficiaries under an earlier will claimed against a solicitor for failure to take reasonable care to ensure that the testator had capacity to make a will and was not unduly influenced by a beneficiary under it. They claimed the costs of propounding the earlier will and resisting probate of the later will. It was held that appropriate remedies already existed by way of costs, which could be recovered from the estate. The estate could recover costs paid to the beneficiary from the solicitor at fault, so there was no need for direct action by the beneficiaries against the solicitor and therefore no reason to impose a duty to a beneficiary under an earlier will as an alternative remedy was available.³² As noted by Chadwick LJ:

If the solicitor's breach of duty under his retainer has given rise to the need for expensive probate proceedings, resulting in unrecovered costs, then, prima facie, those costs fall to be borne by the estate ... If the estate bears the costs thereby and suffers loss then, if there is to be a remedy against the solicitor, it should be the estate's remedy for the loss to the estate. There is no need to fashion an independent remedy for a beneficiary who has been engaged in the probate proceedings. His or her costs, if properly incurred in obtaining probate of the true will, can be provided for out of the estate ... (including the costs to which the beneficiary is entitled out of the estate).³³

28 Liability has arisen for failure to observe the interested witness rule: See *Hill v Van Erp* (1997) 188 CLR 159 and for failure to ensure a will is properly 'signed': *Summerville v Walsh* (1998) NSWSC 52. It should be noted in most Australian jurisdictions the interested beneficiary rule is no longer absolute: an application can be made to the court to validate the gift if the court is satisfied the testator knew and approved of the gift and it was made freely and voluntarily: see for example s 11(3)(c) Succession Act 1981(Qld). Likewise if the failure relates to improper execution, an application may be made to the court to validate the will under the testamentary jurisdiction (see for example s 18 Succession Act (Qld)). However if through a solicitor's negligence such application needs to be made, then the costs of the application are likely to be payable by the solicitor.

29 In the past solicitors have been held liable for failing to advise that a will could be made in contemplation of marriage to a particular person. Accidental revocations by marriage will occur less frequently under new amendments operative in most Australian jurisdictions. A will can be made in contemplation of marriage generally (see for example s 14(3)(a) Succession Act 1981 (Qld)) and a disposition to a person to whom the testator is married at the time of death is not revoked (see for example s 14(2)(a) Succession Act (Qld)).

30 *Hawkins v Clayton* (1988) 164 CLR 539 (solicitors failed to notify the executor of the will or its contents until six years after the death of the deceased. The house, the main asset of estate, remained vacant and fell into disrepair. The solicitors were held liable for deterioration of the house and loss of rent).

31 [2000] PNLR 140.

32 *Ibid* per Chadwick LJ [25], per Peter Gibson [29].

33 *Ibid* per Chadwick LJ [25].

This approach was adopted in *Graham v Bonnycastle*,³⁴ where the court made clear that imposing such a duty could give rise to conflicts between duties to beneficiaries of different wills. McFadyen JA said:

The imposition of a duty to beneficiaries under a previous will would create inevitable conflicts of interest. A solicitor cannot have a duty to follow the instructions of his client to prepare a new will and, at the same time, have a duty to beneficiaries under previous wills whose interests are likely to be affected by the new will. The interests of a beneficiary under a previous will are inevitably in conflict with the interests of the testator who wishes to change the will by revoking or reducing a bequest to that beneficiary.³⁵

There was a further policy reason for the non-imposition of such duty - the fear of being sued by beneficiaries under prior wills could make solicitors reluctant to act for elderly testators who wished to alter their wills:

A solicitor must be free to act in the best interests of her client when discharging her duties to make enquiries regarding the client's testamentary capacity without concerns about the interests of others. The decision as to testamentary capacity, which is a difficult one for the solicitor, should not be made more difficult by the unnecessary extension of duties to others. Concerns about lawsuits brought by beneficiaries under prior wills could create the danger that solicitors would decide against the testator's interest in determining capacity, where any doubt arose as to testamentary capacity and previous wills existed. Solicitors may be reluctant to act for elderly testators who wish to change provisions of their will, if they may also be liable for damages to beneficiaries under previous wills.³⁶

This approach accords with the approach taken in the New Zealand case *Public Trustee v Till*³⁷ which suggests that, ordinarily, a solicitor is only required to consider and advise on testamentary capacity where the circumstances are such as to raise doubt in the mind of an ordinarily competent solicitor.³⁸ The Queensland disciplinary case, *Ford*, clearly sets out some of the triggers that should raise doubt as to capacity in the mind of a solicitor, such as very old age, residency in nursing home, advice from carers as to lack of cognitive capacity and difficulty of immediate recall. It was a lack of awareness of these obvious triggers of incapacity and his failure to adopt an appropriate interviewing technique when seeking his client's instructions that led to Ford's disciplinary penalty for breach of professional duty.

In *Ford* the legal practitioner was requested to prepare a will and enduring power of attorney (EPA) for an elderly client who resided in a nursing home. The will was to disinherit her family (a change from her previous will) and benefit a friend who facilitated the arrangement for the will and EPA in her favour. Shortly prior to this the practitioner was told that the client had cognitive impairment and memory loss by a nurse. A few months previously the practitioner was asked to register (though this was actually not a legal necessity) the existing EPA in her favour as the client had dementia and was unable to manage her own affairs. When asked to prepare the new will and enduring power of attorney, the solicitor did not revoke the existing EPA nor give notice to the prior attorney.³⁹ All of the above factors should have been triggers for lack of capacity.

When the practitioner brought the EPA to the nursing home for signature, the EPA form was left largely incomplete, thus indicating that the practitioner had not gone through the specific mat-

34 (2004) 243 DLR (4th) 61.

35 Ibid [29] per McFadyen JA.

36 Ibid [30] per McFadyen JA.

37 [2001] 2 NZLR 508.

38 *Public Trustee v Till* [2001] 2 NZLR 508 per Randerson J [25]-[26].

39 S 46 PAA Act 1998 (Qld).

ters required by section 41(2) Powers of Attorney Act 1998 (Qld) (PAA)⁴⁰. The witness (usually the practitioner) must certify that principal has capacity to make the EPA.⁴¹ It was in respect of this certification that the practitioner was considered to have not met the appropriate standard of professional conduct. Justice Fryberg found that the solicitor Mr Ford had not adequately ensured that his client had capacity by his failure to address the matters set out in section 41(2) PAA. Justice Fryberg considered that ‘the most striking example of that lack of care and attention is to be found in the form of Power of Attorney which he took with him. That document had been prepared by Mr Ford’s secretary and she had left the paragraphs dealing with the actual appointment of the attorney incomplete.’⁴² In particular, various boxes dealing with the details of the appointment of the attorney were not ticked, and boxes which related to whether the client understood the specific matters listed were also left unticked. As Fryberg J said:

When that was drawn to Mr Ford’s attention, it is fair to say he candidly admitted the omissions created in his mind doubts about whether he had, in fact, gone through each of the matters in the power of attorney with Mrs Adams.⁴³

The Tribunal noted that the Office of Adult Guardian has prepared guidelines for persons who act as witnesses to enduring powers of attorney⁴⁴ which draw specific attention to the matters noted above and to the importance of the interview process, and in particular describe the questioning technique which should be used as a matter of good practice, ie the use of open-ended questions rather than close-ended questions.⁴⁵ In *Ford* it was found that the practitioner was unaware of the difference between open-ended and close-ended questions and had failed to keep a record of all steps taken in assessing his client’s competence as contemplated by the guidelines. In all the circumstances the Tribunal found that his ‘conduct in relation to execution of the documents fell short of a standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent Australian legal practitioner.’⁴⁶

40 S 41 Powers of Attorney Act 1998 (Qld), available at <http://www.austlii.edu.au/au/legis/qld/consol_act/poaa1998240/> viewed 31 August 2009, provides as follows: ‘41 Principal’s capacity to make an enduring power of attorney

- (1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters; that the principal may limit the power of attorney; when the power begins; once the power begins the attorney has full control over exercise of the power given; the principal may revoke the EPA at any time he or she has capacity to make an EPA and if the principal lacks such capacity he or she cannot oversee the use of the power; the power given to the attorney continues if the principal has impaired capacity.’

41 *Powers of Attorney Act 1998 (Qld)* s 44.

42 *Legal Services Commissioner v Ford* [2008] LPT 12 p 17 [30]-[40].

43 *Legal Services Commissioner v Ford* [2008] LPT 12 p 18 [10].

44 The QLS has adopted the Office of the Adult Guardian Capacity Guidelines for witnesses of enduring powers of attorney, June 2005, available at <<http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf>> viewed 1 September 2009.

45 *Ibid* 20. It is suggested that practitioners refer to the *Office of Adult Guardian capacity guidelines for witnesses of enduring powers of attorney* which refer to how an interview should be conducted, which can be accessed on the QLS website, under Resources for Practitioners. The recent QLS Succession Law Conference October 2008 featured a session by specialist geriatrician, Dr Peteris Darzins, on how to assess capacity and the appropriate questioning technique, ‘Professional Skills – the 6-Step Capacity Workshop with Dr Peteris Darzins’.

46 *Legal Services Commissioner v Ford* [2008] LPT 12, 23[1].

The *Ford* decision indicates that a legal practitioner who is alert to triggers of possible incapacity (such as an elderly client being resident in a nursing home; radical changes proposed to an existing will; appointment and/or instructions facilitated by a proposed beneficiary; and notice of impaired decision-making capacity or dementia from carers), and who acts appropriately where such triggers arise by adopting an appropriate questioning technique (open rather than closed questioning), seeks the advice of the patient's GP or specialist advice in appropriate cases (particularly in contentious situations where the estate is large) and carefully documents what he or she has done in this regard, will generally have no reason for concern in respect of disciplinary proceedings for breach of professional duty and it follows likewise that there would be no grounds for concern in regard to civil liability for breach of duty in contract or tort.

The *Ford* decision makes it clear that the important and relevant consideration for these purposes is that the practitioner follows the correct process for obtaining instructions, especially where instructions are taken from elderly clients and there is a possibility of incapacity, as opposed to focusing on whether an error of judgment is made in the determination of capacity. Where the correct process is followed there can be no grounds for concern as to civil liability arising. It is clear that making capacity assessments is not always easy for legal practitioners, especially for those acting for older clients, and that the ultimate determination of capacity in cases where a will is challenged on the grounds of incapacity will involve detailed analysis by a court of expert medical evidence.

The case of *Sharp v Adam*⁴⁷ illustrates the difficulties which solicitors often face when taking instructions for wills in circumstances where the physical and mental health of the client is deteriorating. It is also a good illustration of a solicitor who followed the appropriate process of ascertaining capacity as well as any reasonable lawyer in the circumstances could, but ultimately whose decision her client had testamentary capacity was not upheld by the court. The lawyer was considered to have taken a 'golden rule' approach to determining capacity and accordingly no civil liability arose in the circumstances.

In *Sharp v Adam* the testator died aged 70, with severe symptoms of multiple sclerosis. In the last years of his life he lost speech and his eyesight was severely affected. He could only communicate by movement of his head and eyes. He communicated with his solicitor for a number of years via a spelling board, but in later years could only communicate by blinking. His earlier wills left some legacies to close employees (he was a veterinary surgeon who ran a successful horse stud) and divided his large residuary estate between his two daughters. His last will, made about one year before his death, left the residue of his estate to two employees after some small pecuniary legacies. His daughters were entirely excluded from the last will. The employees sought to uphold the last will and the daughters contested it. There was no suggestion on the facts of any undue influence on the part of the employees and all the evidence was that they were deserving. The evidence that there had been no change in the relationship with the daughters which explained their exclusion from the last will was largely uncontested (with some small contest in cross-examination). It was ultimately held that the will could not be upheld as it was made with a lack of capacity resulting from mental deterioration caused by the multiple sclerosis.

The solicitor, who had acted for the testator for many years, adopted what might be described as a 'golden rule' approach in the face of such difficult instructions from a client with clearly impaired capacity. She involved another lawyer from her firm and the testator's GP and questioned

47 [2006] EWCA Civ 449.

her client stringently about the change in the will and the hurt it would cause the daughters. She maintained extensive diary notes of all dealings. On one occasion when her client was to execute the will in the presence of the other lawyer and GP, they decided not to proceed because of a feeling capacity might be dubious at that time. Eventually the will was executed and the solicitor, the other lawyer, and GP testified that despite the testator's impairments they all believed he had at the time the requisite capacity to make a will.

In *Sharp v Adam* the outcome eventually depended on expert medical witnesses; a professor in neuropsychiatry for the daughters and a consultant neurologist for the employees. The professor was of the view there was no capacity because of cognitive impairment. Ultimately the trial judge found the will was made with a lack of capacity at the relevant time. In coming to this decision, which was upheld by the Court of Appeal, the trial judge was particularly persuaded by the evidence of the neurologist for the employees, who conceded that a lack of rational explanation for the change in the will was an important factor in deciding whether judgment was impaired. Lord Justice May concluded his judgment in the Court of Appeal by citing Lord Cranworth's famous dictum from *Boyse v Rossborough*:⁴⁸ 'There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine.'

The fine line here between rational judgment and impaired judgment was indeed as hard to determine as the line between twilight and darkness. In this most challenging situation for a solicitor, as well as family members and employees, the solicitor was described effectively as having taken a textbook approach.⁴⁹ There was no suggestion of adverse costs implications for the solicitor, despite the will not being upheld, as she had done all that was reasonable in her power to ensure there was sufficient capacity to proceed and to follow her client's instructions.⁵⁰ The solicitor had followed a correct process and having done so could not be responsible for any error of judgment. It can be seen from *Sharp v Adam* that given the challenges which not infrequently present to solicitors in practice when taking instructions and making capacity assessments, civil liability should not be lightly imposed in cases where a will is overturned because a testator is subsequently found to not have capacity, particularly as the imposition of such liability may well impede a solicitor's ability to appropriately and freely act on a client's instructions.

1. A higher standard of care in civil professional liability cases following Ford?

A question which arises following the *Ford* disciplinary decision is whether a higher standard of care will now be imposed in civil liability cases founded in negligence, following the statements in *Ford* as to what is currently required of a reasonably competent practitioner, particularly in relation to the expectation that practitioners have notice of, and abide by published guidelines of authoritative bodies such as the Queensland Law Society. In this context the question for consideration is whether a practitioner ought to know of the existence of the *Office of Adult Guardian* capacity guidelines⁵¹ which relate to the witnessing enduring powers of attorney, and furthermore whether a competent practitioner ought to follow these guidelines.

48 *Sharp v Adam* [200] EWCA Civ 449, [96] citing Lord Cranworth (1857), 6 HLC 3, 45; see paper by Richard Neale, 'Testamentary Capacity – An English Perspective' QLS Succession Law Conference, October 2007, Brisbane.

49 [2006] EWCA Civ 446, [27].

50 *Ibid.*

51 Office of the Adult Guardian Capacity Guidelines for witnesses of enduring powers of attorney, June 2005, available at <<http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf>> viewed 1 September 2009. These guidelines have been re-published on the Queensland Law Society website.

In particular, the guidelines refer to using an open-ended questioning technique rather than the use of close-ended questions. Open-ended questions tend to enable the client to explain and affirm his or her choices, while close-ended questions frequently lead nowhere as the client simply answers yes or no. As the question of capacity is task, time and place specific – it depends what the client wants to do, for example, make a will, EPA or a contract. The aim of dialogue should be to ensure the client can understand the nature of the act, understand the available choices and appreciate the consequences of his or her choice. Eliciting that the client has this understanding is more likely to follow from the use of open-ended questions. The technique is helpful because sometimes a client who presents with capacity issues can affirm his or her choices and understanding of the consequences in a way that leaves the practitioner in no doubt that the client has capacity to do the required act.

The guidelines also set out a list of factors which may indicate impaired capacity, such as where a client is forgetful of recent events, more likely to repeat themselves, easily influenced by others about their decision making, or particularly anxious about having to make decisions.

It is clear from the disciplinary proceedings that the practitioner Ford did not know the difference between open-ended and closed-ended questions, and indeed it may be that this may have been so for many will and estate planning practitioners at the relevant time. Another question which arises out of the circumstances in *Ford* is whether the mere publication of guidelines, without more, requires that practitioners have knowledge of these guidelines and are required to amend their practice according to these standards? Does the mere failure to follow published guidelines, without more, amount to failure to engage in competent practice? What if the published guidelines are not considered to reflect best practice and not generally adopted by practitioners as standard practice? For example, a recent memorandum to Queensland solicitors from the practitioners' indemnity insurer suggested that practitioners who hold wills in safe custody must search daily newspapers to check death notices and notify executors that they hold the will (without apparent limitation as to the extent or range of such searches – international, national or local). Anecdotal evidence is such that most estate practitioners regard this memorandum as imposing too onerous a duty on practitioners, which is not supported by the leading Australian case on holding wills in safe custody.⁵²

For the purposes of determining the standard of care in professional negligence cases, it is clear that this is assessed by reference to established practice at the time of the alleged breach of duty⁵³ and not improvements or changes to best practice which have been subsequently adopted by the profession – the defendant cannot take advantage of the benefit of hindsight to impose a higher standard of care.⁵⁴ This common law approach has been largely affirmed following the enactment of the various Civil Liability Acts. For example, Civil Liability Act 2003 (Qld) section 22 and the Civil Liability Act 2002 (NSW) section 50 set out a standard of care for professionals in essentially the same terms. These sections provide that a professional does not breach a duty in providing a professional service if it is established that the professional acted in a way that (at the

52 *Hawkins v Clayton* (1988) 164 CLR 539 (solicitors held liable in negligence where they had been notified of the deceased client's death and the likelihood the executor might not know of this but failed to inform the executor for six years in which time the estate deteriorated in value).

53 *Roe v Minister of Health* [1954] 2 QB 66.

54 *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000 (no finding of civil liability in medical negligence case as warning of risk of AIDS transmission through anti-haemophilic therapy not standard medical practice at time of alleged negligence).

time the service was provided) was widely accepted by peer professional opinion by a number of respected practitioners in the field as competent professional practice. There is an exception if the court considers the peer professional opinion to be contrary to law or irrational. Peer professional opinion does not have to be universally accepted to be considered widely accepted and the fact that there are differing peer professional opinions does not prevent one or more opinions being relied on.

The recent unanimous decision of the New South Wales Court of Appeal in *Dobler v Kenneth Halverson and Ors; Dobler v Kurt Halverson (by his tutor)*,⁵⁵ which involved a claim brought against a general practitioner after a young man suffered cardiac arrest and hypoxic brain damage, has clarified the effect of the legislative provisions concerning the standard of care in professional negligence cases. The decision suggests the following framework for analysis to determine the standard of care for professionals:

- First, apply the common law test in *Rogers v Whitaker*⁵⁶ – in particular, that while evidence of acceptable practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care;⁵⁷
- Second, determine whether the defendant has established the statutory defence available from section 50 Civil Liability Act 2002 (NSW) and its equivalent provisions⁵⁸ (that the professional acted in a manner that – at the time the service was provided – was widely accepted in Australia by peer professional opinion as competent professional practice); and
- Third, if the statutory defence is available, determine whether the defence should be refused by reference to the irrationality (or similar) exception available in section 50(2).⁵⁹

The section 50 defence was recently applied, though the defence was held to have not been made out on the facts, in the context of the professional liability of solicitors in *Permanent Custodians Limited and Anor v King and Ors*.⁶⁰ In that case Schmidt AJ accepted that the solicitor did not act ‘in a manner that (at the time the service was provided) was widely accepted by peer professional opinion as competent professional practice.’ He noted it was common practice to meet separately with an elderly father in a situation such as this to ascertain he had understanding of his son’s business and the true risk he was taking on as mortgagor of increased borrowings. Therefore in the

55 [2007] NSWCA 335, Giles JA (Ipp JA and Basten JA agreeing), delivered 26 November 2007 (*Dobler v Halverson*). The appeal was from the NSW Supreme Court decision of McClellan CJ (Common Law) in *Halverson & Ors v Dobler; Halverson (by his tutor) v Dobler* [2006] NSWSC 1307.

56 [1992] HCA 58; (1992) 175 CLR 479 (*Rogers v Whitaker*).

57 At 487 per Mason CJ, Dawson, Brennan, Toohey and McHugh JJ. See also *Naxadis v Western General Hospital* (1999) 197 CLR 269, 275-276 per Gaudron J; *Rosenberg v Percival* (2001) 205 CLR 434, 439 per Gleeson J.

58 For comparative legislation see: Queensland: s 22 Civil Liability Act 2003 (Qld); South Australia: s 41 Civil Liability Act 1936 (SA); Tasmania s 22 Civil Liability Act 2002 (Tas); Victoria: s 59 Wrongs Act 1958 (Vic); Western Australia: s 5PB Civil Liability Act 2002 (WA); Australian Capital Territory: Civil Law (Wrongs) Act 2002 (ACT) (no equivalent section); Northern Territory: Personal Injuries (Liabilities and Damages) Act 2003 (NT) (no equivalent section).

59 For a discussion see B Madden & T Cockburn ‘Three dimensions of the standard of care in professional negligence cases’ (2008) 4 (8) *Australian Civil Liability Bulletin (ACLB)* 95; republished B Madden & T Cockburn ‘Three dimensions of the standard of care in professional negligence cases’ (2008) 16 (6) *Australian Health Law Bulletin (AHLB)* 88; and P King ‘Faint Heart Wins Fair Battle: Court of Appeal Uphold Trial decision in *Halverson v Dobler*’ (2008) 16 (4) *Health Law Bulletin* 50. Given that the various provisions are not uniform across Australia, a different approach to construction to that applied in New South Wales may arise in other jurisdictions: see M Williams, *Proving medical negligence across Australia* 2009 (May) *Health Law Bulletin*.

60 [2009] NSWSC 600.

circumstances the solicitor needed to advise the elderly father that it was in his interests to obtain independent legal and financial advice.⁶¹

Ultimately therefore, the question as to whether a practitioner will be found liable in negligence for failure to comply with any published guidelines as to will and estate planning practice will be determined by an assessment on the available evidence as to whether the defence of meeting the standard of 'widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice' is made out.

This 'reasonable solicitor' approach to the determination of the appropriate standard of care in tort can be contrasted with the 'reasonable consumer test' which has been applied in assessing the liability of suppliers of goods and focuses on the reasonable expectations of the consumer as the determinant as to whether goods supplied meet an acceptable standard.⁶² Such a test is not appropriate for the determination of the relevant standard of care for professional services given the information imbalance which exists between the professional and client; consumers may not be in a position to make an accurate assessment as to what is a reasonable standard of professional service. As noted by Sir Thomas Bingham MR in *Bolton v The Law Society*,⁶³ it is therefore in the public interest that the professional activities of lawyers be regulated and controlled more so than any other profession or vocation.⁶⁴

2. Duty to ensure the doctrine of suspicious circumstances is avoided?

Under the doctrine of suspicious circumstances, where a beneficiary or other person in a position to exercise undue influence is involved in the preparation of a will, that person bears the onus to establish that the will was made with the testator's knowledge and approval. In cases where it is alleged that the solicitor's action or inaction has resulted in the will being put to proof under the doctrine of suspicious circumstances, in the event of a finding of negligence there may be adverse costs consequences against the solicitor even if the will is upheld.⁶⁵

It was strongly argued in *Dore (as executor of the will of WH Chenhall (dec'd) (Dore)*⁶⁶ that the solicitor, Dore, who prepared a will for a client under which he was to take a substantial benefit in the absence of independent legal advice and/or the fully informed consent of the client, should not be entitled to his costs of proving the will as his irregular practice, apparently in conflict of duty to a client had caused the need for expensive proceedings to resist probate of the will. However in that case the will was ultimately upheld and the solicitor Dore was held entitled to be entitled his costs⁶⁷ (the issue of costs being abandoned in oral argument in Court of Appeal proceedings).⁶⁸

61 Ibid [38]-[41].

62 See for example s 7 Consumer Guarantees Act 1993 (New Zealand) .

63 [1993] EWCA Civ 32 [15]-[16].

64 For a discussion of professional responsibility more broadly see E Dal Pont, *Lawyers Professional Responsibility* (3rd ed, 2006).

65 *Nock v Austin* (1918) 120 CLR 519, 525 per Barton J, Gavan Duffy J.

66 [2006] QCA 494.

67 [2006] QSC 140.

68 [2006] QSC 494, [57].

III. CIVIL LIABILITY ARISING OUT OF BREACH OF EQUITABLE OBLIGATIONS?

In addition to the prospect of civil liability arising out of will and estate planning advice on the traditional grounds of negligence, contract and statute, and the possibility of a higher standard of care being imposed on practitioners following the *Ford* decision, recent cases indicate that there may also be an increased prospect of civil liability arising out of breach of equitable obligations, particularly in the context of abuse of a special relationship of influence and fiduciary duties.

A. *Civil Liability Arising Out of the Application of a Wider Concept of Undue Influence in Will Cases?*

Because of difficulties in successfully raising the probate doctrine of undue influence to set aside a will due to the necessity to prove coercion, cases involving in a 'real sense' undue influence are often argued on the basis of the doctrine of suspicious circumstances and/or lack of capacity.⁶⁹ For example, given the absence of relevant evidence of coercion, the *Dore* case was argued on these two grounds, albeit without success. In *Dore* McMurdo J pointed out, that in order to make out an allegation of undue influence in the probate jurisdiction as a challenge to a will, there must be proof 'that the testator was coerced into making [the] will, and on no view of the facts was that case open.'⁷⁰ However, His Honour went on to state '... there was no argument that the equitable doctrine of undue influence should now extend to a will.'⁷¹ A reasonable inference from Justice McMurdo's comment is that he would have liked to hear argument along these lines. A number of commentators (both academic⁷² and judicial⁷³) have raised the possibility of applying the equitable doctrine of undue influence to wills, mostly because the difficulty of proving coercion as required by the estate doctrine which makes it a practically unenforceable remedy.⁷⁴

This very issue was raised recently in a New South Wales Court of Appeal decision, *Trustee for the Salvation Army (NSW) Property Trust v Becker*⁷⁵ where there was strong evidence of coercion, but ultimately insufficient evidence to overturn the will. In that case Ipp JA⁷⁶ said 'I would note that the equitable doctrine of undue influence does not apply to testamentary gifts.'⁷⁷ His Honour later continued 'the nub of the criticism is that the law does not provide adequate protection to those affected by a vulnerable testator who is coerced or tricked into making a will.'⁷⁸

Another recent decision, *Burnside v Mulgrew*,⁷⁹ illustrates the difficulty of proceeding with an allegation of undue influence in the making of a will. In that case a will was made properly by a solicitor for an elderly lady and independently witnessed. The beneficiaries were a 50 year old

69 Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *UNSWLJ* 145 at 159, 163; Pauline Ridge 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617, 622.

70 [2006] QCA 494, [56].

71 *Ibid* [56].

72 Kerridge, 'Wills made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59 *CLJ* 310; Ridge 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617; Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *UNSWLJ* 145.

73 *Bridgewater v Leahy* (1998) 194 CLR 457, 474-475.

74 Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617, 622.

75 [2007] NSWCA 136.

76 Mason P and McColl JA concurring.

77 *Ibid* [62].

78 *Ibid* [70].

79 *Burnside v Mulgrew; Re the estate of Doris Grabovaz* [2007] NSWSC 550.

friend and niece. Six months later a will-kit will was purportedly executed in favour of a community service carer who attended on the testator. The estate was worth two and a half million dollars. Ultimately the court was not satisfied that the signature on the will was that of the testator. In addition, one witness denied that she had attested the will, her evidence being that she was asked to sign the carer's will. Probate of the will in favour of the carer was refused. The court noted that an allegation of undue influence was not pressed in submissions,⁸⁰ presumably due to the practical difficulty of raising the probate doctrine, although the facts would seem to patently raise the issue of undue influence.

Fiona Burns has argued persuasively that it is more appropriate to apply a modified doctrine of undue influence to testamentary gifts, rather than applying the equitable doctrine applicable to inter vivos transactions which triggers a rebuttable presumption of undue influence when certain facts or relationships exist.⁸¹ She suggests that a three tiered approach should be adopted, which involves a reformulation of:

- The definition of undue influence;
- The evidence that can be relied on to prove undue influence; and
- The standard of proof.⁸²

There is much to be said in favour of this approach, which more carefully considers the different approach taken to testamentary cases rather than inter vivos cases, to which the rebuttable presumptions in equity apply. Its attraction is that it does not seek to apply the equitable rules to wills 'holus bolus', without a consideration of the differing rationales for their approaches.

While a reformulation of the doctrine of undue influence as it applies to wills may enable more applicants to successfully overturn wills in appropriate cases on the grounds of a undue influence, given the existing case law and policy considerations identified and discussed in A above, it is unlikely that the courts would shift from their traditional reluctance to impose a duty of care on the solicitor in such cases, other than to the extent of liability to the estate for the costs of the application to set aside the will.⁸³

The position might be different if it could be shown that the solicitor has benefited from the will or estate planning advice such that civil liability could be imposed as a third party to undue influence on the basis of agency⁸⁴ or notice.⁸⁵

Furthermore, under the related, but distinct, doctrine of unconscionable bargains, if it is established that the client is labouring under a special disability and there has been an unconscientious taking of advantage of that special disability by a solicitor, there is a prospect that where a solicitor takes a benefit under the will or estate planning transaction, even if this benefit is limited to professional fees, he or she may be susceptible to civil liability in the form of equitable remedies such as equitable compensation payable to the estate or such other equitable remedy as is necessary to do practical justice in the circumstances of the case.⁸⁶

80 Ibid [62].

81 Fiona Burns, 'Reforming Testamentary Undue Influence in Canadian and English Law' (2006) 29 *Dalhousie Law Journal* 455.

82 Ibid 481.

83 *Worby v Rosser* [2000] PNLR 140.

84 *Cf Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747.

85 *Bank of New South Wales v Rogers* (1941) 65 CR 42 *Barclays Bank plc v O'Brien* [1994] 1 AC 180.

86 *Commonwealth Bank v Amadio* (1982-1983) 151 CLR 447; *Bridgewater v Leahy* (1998) 194 CLR 457.

B. *Civil Liability Following Breach of Fiduciary Duty in Will Making and Estate Planning Advice?*

Although the possibility of conflicting duties to his or her client/testator and beneficiaries who may have taken under previous wills was regarded as a policy reason against the imposition of civil liability in negligence in *Worby v Rosser*⁸⁷ and *Graham v Bonnycastle*,⁸⁸ there is no reason why a solicitor who places himself or herself in a position of possible conflict of duty and duty in the course of giving will and estate planning advice should be protected from civil liability. Recent cases⁸⁹ indicate that actions against solicitors for breach of fiduciary duty, in addition to suits in negligence or for breach of contractual retainer or statutory obligation, are becoming more common.⁹⁰ In the context of will making and estate planning advice, those who act as the family solicitor and do not carefully specify and document the extent of the retainer, and in particular who the client is, are particularly susceptible to civil claims for breach of equitable obligations.

For example, in *Hendriks v McGeoch*⁹¹ the defendant family solicitor gave will and estate planning advice. The majority agreed that a contractual relationship existed – an express or at least implied retainer⁹² with the plaintiff (in addition to another client, the plaintiff’s mother).

In addition, Basten JA⁹³ held that ‘a solicitor may have a duty of care “even in situations where a contractual relationship cannot be established”.’⁹⁴ Factors which indicated the existence of a duty of care in this case were: Hendriks’ statements to the effect that he was ‘looking after’ the respondent’s interests and that the respondent had an ‘entitlement’ to Mollymook; his assurances as to the contents of Mrs McGeoch’s will and her intentions in that respect; his insistence that the respondent remained liable for half of the costs incurred by the solicitors; and the risk to the respondent of reasonably foreseeable loss if the duty were not fulfilled.⁹⁵ His Honour then concluded that although no duty of care will be owed to a third party ‘where performance of the duty would or could conflict with the solicitor’s obligations to a client ... where performance of the duty involves carrying out the client’s instructions, no such potential for conflict arises.’⁹⁶ Although the solicitors argued that no duty was owed to the respondent as any such duty would have conflicted with their duties to Mrs McGeoch, this argument failed as it was not supported by the facts: ‘at least between December 1995 and March 1996, protection of the respondent’s interests would not only have been in accordance with Mrs McGeoch’s instructions, but reasonably necessary in order to carry them into effect.

The solicitors were found to be in breach of duty on the grounds that a) they should have taken steps to make the agreement of December 1995 legally enforceable or if their instructions were to

87 [2000] PNL 140.

88 (2004) 243 DLR (4th) 617.

89 Such as *Milatos v Clayton Utz* [2007] NTSC 44; *Ibrahim v Pham* [2007] NSWCA 215.

90 For a discussion of the conceptual basis of liability in contract and tort and the distinction between new duties of care and fiduciary duties see *Mothew v Bristol and West Building Society* [1996] EWCA Civ 533.

91 [2008] NSWCA 53. On appeal from *McGeoch v Hendriks* [2007] NSWSC 311.

92 Per Spigelman CJ at [3]-[5]; Giles JA at [16]-[17]; cf. Basten JA dissenting at [64]-[66].

93 Spigelman CJ agreeing, Giles JA not deciding.

94 *Ibid* [69] citing *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [47]-[48] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

95 *Ibid* [71].

96 *Ibid* [72] citing *Hawkins v Clayton* (1987-1988) 164 CLR 539 (custodial duty) and *Hill v Van Erp* (1997) 188 CLR 159 (witnessing by beneficiary’s husband).

the contrary, to advise both brothers that this would not be done; and b) in failing to render agreement enforceable on part of Jon, whilst at same time assuring him that his interests were being looked after, Hendriks breached his duty to Jon.⁹⁷ Damages were assessed by reference to loss of chance calculated at 80 per cent of the loss suffered.⁹⁸

Accordingly, where a solicitor assumes responsibility for advising others, in addition to his or her client, civil liability in negligence may arise if the interests of all are not protected. Although not argued as a basis of liability in *Hendriks v McGeoch*,⁹⁹ given the possibility of a conflict of duty and duty arising in cases where a solicitor acts for several parties in the one transaction, the potential for a claim for breach of fiduciary duty arises, giving rise to claims for equitable compensation. Such a claim may have also been successful in *Hendriks* had it been raised.

The *Dore*¹⁰⁰ decision also raises the issue of the potential for claims for breach of fiduciary duties against solicitors who prepare wills. In that case a solicitor, Christopher Dore, drew a will for a client and friend, and took a substantial benefit under it (shares in a company worth approximately \$1 million).¹⁰¹ The client was not independently advised. After finding that the bequest in favour of the solicitor should be upheld, Justice McMurdo noted that there was no 'argument that there should be some impact upon the bequest to Mr Dore in consequence of the law relating to fiduciary duties.'¹⁰² The inference was the court would have liked to hear argument on this point. Given that there was an obvious conflict of personal interest and duty to the client it would seem that such an argument was not without some merit.

Solicitors have been held liable for breach of fiduciary duty in other contexts in a number of recent cases. For example, in *Milatos v Clayton Utz*,¹⁰³ the solicitors were held liable in damages for breach of fiduciary duty for intentionally failing to disclose that previous advice given was incorrect, and that the client should seek independent legal advice. When the relevant partner realised that easements affecting the client's property were inconsistent with building on the land, he failed to disclose this and advise the client to seek independent advice. In failing to disclose the firm's negligence, there was a conflict between the solicitor and client's interests. To avoid a breach of fiduciary duty, the onus was on the solicitor to show there was full and comprehensive disclosure of the conflict of interest, which he failed to satisfy.¹⁰⁴

In the earlier case of *Maguire v Makaronis*,¹⁰⁵ the Victorian professional conduct rules forbade a solicitor acting for both borrower and lender without the written consent of the parties. Written consent was obtained in the appropriate form, but the solicitors did not disclose that they were in fact the lenders. The court held that the solicitors had breached the fiduciary duty to avoid a conflicting engagement, such as arose where the solicitors were the lender and the client the bor-

97 Ibid [81] per Basten JA, Spigelman CJ agreeing, Giles JA not deciding.

98 Ibid [88]-[90] Per Basten JA, Spigelman CJ and Giles JA agreeing. This approach to causation is not without controversy. In the context of a medical negligence claim, on 4 September 2009, the High Court of Australia recently granted leave to appeal in a loss of chance case, *Gett v Tabet* [2009] NSWCA 76 which overturned *Rufo v Hosking* [2004] 61 NSWLR 678 and abolished loss of a chance claims in New South Wales.

99 [2008] NSWCA 53. On appeal from *McGeogh v Hendriks* [2007] NSWSC 311.

100 *Dore (as executor of the will of WHB Chenhall dec'd)* [2006] QCA 494.

101 Dore could have taken \$20 million under the will as residuary beneficiary in the event of the widow predeceasing her husband (which was quite likely as the widow herself was very ill), which did not eventuate.

102 *Dore*, above n 100 [56].

103 *Milatos v Clayton Utz* [2007] NTSC 44.

104 Ibid [446].

105 (1997) 188 CLR 449.

rower. To negative any such breach of duty, it was for the solicitors to show informed consent to their acting with a divided loyalty. In the circumstances of *Maguire v Makaronis* fully informed consent meant consent in light of having received independent and skilled advice from a third party. This did not occur and the mortgage was rescinded subject to terms for repayment of the loan.

It would seem that there is no reason in principle why a solicitor who takes it upon himself or herself to act for several parties in will and estate planning cases should not face civil liability consequences for equitable compensation where a loss is subsequently suffered. Indeed, breach of fiduciary duty was raised, albeit unsuccessfully on the facts, in litigation arising out of estate planning advice in the decision of the New South Wales Court of Appeal in *Rigg v Sheridan*.¹⁰⁶ In that case a solicitor was instructed by a widow, her son, and nephew to implement an agreed family arrangement. This comprised a deed of transfer, a deed of residency, and transfers of certain real estate. The widow transferred real estate and other assets she had recently inherited under the will of her late husband to her nephew (the appellant) and her son. Under the transaction the appellant and her son assumed liability for the substantial business debts of her late husband, and they agreed to allow the widow to reside rent free in the homestead on one of the properties. They also agreed to pay all outgoings and keep the homestead in good repair. The solicitor implemented the transaction, acting for all three parties. Some years later the businesses failed and the bank moved to obtain possession of the former matrimonial home where the widow had been living as contractual licensee of her nephew. The widow brought proceedings to have the family arrangement set aside for undue influence or as an unconscionable transaction, and sued the solicitor for negligence. The nephew brought a cross claim against the solicitor for negligence and breach of fiduciary duty.

The widow's case completely failed as much of her evidence was unreliable and she had forgotten a lot of what had happened in the interval before the transaction was implemented.¹⁰⁷ The cross claim was also dismissed as there was found to be no breach of fiduciary duty and no negligence.¹⁰⁸

The cross claimant appealed claiming as damages or equitable compensation the costs he had incurred in the long trial which he was unable to recover from the impecunious widow. The appellant argued that the solicitor, in acting for all parties in transaction was in a situation of potential conflict between duties he owed widow and appellant. It was alleged that it was his duty to advise the nephew to instruct another solicitor and that this would have ensured that widow had independent legal advice and eliminated the risk that she would later attempt to have the transaction set aside.

The appeal was dismissed with costs. It was held that by acting for all parties in implementing an agreed transaction which the widow fully understood, the solicitor was not in a situation of conflict between incompatible duties. In this case there was no real sensible possibility of conflict at the outset, and nothing happened before the transaction was implemented which created a conflict or a real sensible possibility of conflict. As to the sufficiency of disclosure for the purposes of obtaining fully informed consent, it was held that the supposed reduction in risk of a challenge by the widow which would have resulted if the nephew had instructed a separate solicitor was not a material fact which the solicitor was bound to disclose to the nephew. The relevant fact for this

106 [2008] NSWCA 79.

107 Ibid [12].

108 For a discussion of the findings of the trial judge see [24]-[29].

purpose was that solicitor was acting for all parties, however, as the nephew was aware of that fact there was no breach of duty. Handley JA¹⁰⁹ therefore concluded that the claim that there was a breach of fiduciary duty failed for the following reasons:¹¹⁰

The judge's findings establish that there was no real sensible possibility of conflict in this case. There was no evidence, expert or otherwise, of any occasion when Mr Sheridan had to choose between two or more ways in which the transaction could be framed or implemented where the interests of the appellant and those of the widow might have diverged. There was also no evidence that any fact relating to the merits or wisdom of the transaction came to the knowledge of Mr Sheridan before it was implemented that should have been disclosed to the appellant or the widow or both and was not.

Mr Parker submitted that Mr Sheridan should have disclosed to the appellant, as a relevant material fact, the benefit he would obtain by instructing another solicitor. This was that the transaction would be less open to challenge, and less likely to be challenged, because the widow would have had independent legal advice.

The Court was not referred to any authority that extends a solicitor's fiduciary duty of disclosure to a fact of this nature. The earlier cases involved material facts relating to the merits or wisdom of the transaction. The facts were such that knowledge of them was likely to cause the principal to reconsider the proposed transaction and either withdraw from it, or seek to renegotiate its terms.

The material fact relied on here does not relate to the merits or wisdom of the transaction itself. Knowledge of that fact would not have caused the appellant to reconsider his approach to the transaction by withdrawing from it, or attempting to renegotiate its terms. In my judgment the fact was not relevantly material and Mr Sheridan's fiduciary duty to the appellant did not require him to disclose it.

The appellant also knew that Mr Sheridan was acting for the widow when he instructed him. The reasoning of Millett LJ suggests that it is only the existence of a duty to another principal that must be disclosed unless there is already something more than a theoretical possibility of a conflict.

There was no finding and no evidence in the present case that Mr Sheridan did anything 'with the intention of furthering the interests of [one client] to the prejudice of ... the other', or that he intentionally allowed the performance of his obligations to one to be influenced by his relationship with the other. There was also no evidence that an actual conflict of duty ever arose which prevented him fulfilling his duty to the appellant because of a conflicting duty to the widow.¹¹¹

In any event, even if a breach of fiduciary duty was established, it was held that this alleged breach was not a cause of the appellant's loss as the suggested disclosure would not have induced him to instruct another solicitor and would not have prevented the widow challenging the transaction. Accordingly the claim for breach of fiduciary duty also failed on causation grounds.¹¹² His Honour found that the trial judge's finding that the widow would have still brought proceedings even if the appellant had found another solicitor could not be disturbed¹¹³ for the following reasons: the disclosure contended for would not have led the appellant to instruct another solicitor;¹¹⁴ there was no reason for the appellant to foresee or be concerned about the risk of a legal challenge by

109 Beazley JA and Giles JA agreeing.

110 Ibid [49].

111 Ibid [42]-[45]; citing Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 CA per Millett LJ at 19.

112 Ibid [57] citing *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 [444], [447], [449]; cf. *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 PC.

113 Ibid [55].

114 Ibid [49].

the widow;¹¹⁵ the appellant's retainer of a separate solicitor would not have prevented the widow bringing the proceedings;¹¹⁶ and the widow's case failed, not because her instructions did not support valid equitable claims, but because they were not substantially true.¹¹⁷

It is clear from *Rigg v Sheridan* that in appropriate fact circumstances a solicitor acting for more than one party in an estate planning matter may be found liable to pay equitable compensation for breach of fiduciary duty.¹¹⁸

To avoid the possibility of such liability arising the solicitor should carefully document the scope of his or her retainer. For example, in *Ibrahim v Pham*¹¹⁹ the Court of Appeal held that a solicitor was not in breach of any tortious or fiduciary duty for having failed to insist the client obtain legal and investment advice on a related contract, not the subject of her retainer. The solicitor advised the client to obtain such advice, who emphatically rejected this suggestion. In that case it was found to be material that the solicitor's retainer was only to advise on a loan and mortgage, not the investment contract in question.

IV. PROFESSIONAL LIABILITY FOR BREACH OF PROFESSIONAL OR ETHICAL DUTIES FOLLOWING BREACH OF EQUITABLE OBLIGATIONS

A solicitor's professional duty to avoid conflicts of interest may also render him or her subject to complaint to a Legal Services Commission, and subject to disciplinary consequences including a penalty or suspension from practice.

Most Australian jurisdictions have now introduced rules worded in substantially the same terms as the Law Council of Australia Model Rules of Professional Conduct. These rules reinforce the fiduciary nature of the solicitor/client relationship and work in tandem with the law of fiduciary duties and tort, albeit breach of professional rules does not give rise to any private cause of action,¹²⁰ unless the behaviour amounts to fraud. In particular professional rules which require a solicitor to act honestly and fairly, with competence and diligence, and with reasonable promptness in the service of the client¹²¹ and professional rules that relate to solicitor/client conflicts¹²² may render a solicitor who acts negligently, or inadequately in light of good practice or in conflict with self and client or client and client interest liable to disciplinary consequences on complaint to the Legal Services Commission.

There is a specific rule in most Australian jurisdictions that relates to a solicitor receiving a gift under a client's will:¹²³

115 Ibid [50].

116 Ibid [51]-[52].

117 Ibid [54].

118 Recently in *Permanent Custodians Limited and Anor v King and Ors* [2009] NSWSC 600 a solicitor was held liable for breach of fiduciary obligation in circumstances where the trial judge was 'well satisfied that a conflict existed and that Mr Vertzayas failed in his duty to Mr Charles King to advise him of its existence and to deal with that conflict' (per Schmidt AJ, 99) *Rigg v Sheridan* was distinguished on the facts: see [98]-[100].

119 *Ibrahim v Pham* [2007] NSWCA 215.

120 *Harrison v Lederman* [1978] VLR 590, 594 per Gillard J; G E Dal Pont, *Lawyer's Professional Responsibility* (3rd edition, 2006) 19.

121 See for example, rule 2 *Legal Profession (Solicitors) Rule 2007* (Qld).

122 See for example, rules 8 and 9 *Legal Profession (Solicitors) Rule 2007* (Qld).

123 Law Council of Australia Rule 10.2.

A practitioner who receives instructions to draw a will under which the practitioner will, or may receive a substantial benefit must:

- Decline to act on those instructions and
- Offer to refer the person to another practitioner who is not an associate of the practitioner.

Unless

- The person instructing the practitioner is a member of the practitioner's immediate family or a practitioner who is a partner, employer, or employee, of the practitioner.
- 'Substantial benefit' means a benefit which has substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

Queensland has only recently adopted a similar rule, as of 1 July 2007,¹²⁴ perhaps as a result of the findings in *Dore*. Prior to this the Queensland rule did not explicitly deal with the situation of a solicitor receiving a substantial benefit under the will of a client and it would certainly be more difficult to pursue *Dore* for breach of the previous Queensland professional rule. The previous Queensland rule was a broad obligation to avoid a conflict of duty and personal interest, which was worded in terms of ensuring fidelity to the client's interest unaffected by any interest of the practitioner, and where such interest is adverse, declining to act or withdrawing from representation unless the client is fully informed and voluntarily assents to the practitioner acting.¹²⁵

It is an open question whether a complaint will be made to the Legal Services Commission for potential breach of the relevant professional rules in respect of the *Dore* matter.¹²⁶

Professional rules also regulate the extent to which a solicitor can act for more than one party in a transaction such that a conflict of duty and duty may arise. For example, in Queensland, Rule 8 provides:

Acting for more than one party

8.2A solicitor must avoid any conflict of interest between two or more clients of the solicitor or the solicitor's law practice.

8.3A solicitor who or whose law practice intends to act for a party to any matter where the solicitor or the solicitor's law practice is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting a retainer to act, that each party is aware that the solicitor is intending to act for the others and consents to the solicitor so acting in the knowledge that the solicitor:

8.3.1 may be, thereby, prevented from:

- (a) disclosing to each party all information relevant to the matter within the solicitor's knowledge; or
- (b) giving advice to one party which is contrary to the interests of another; and

8.3.2 will cease to act for all parties if the solicitor would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them¹²⁷

124 *Legal Profession (Solicitors) Rule 2007* (Qld), rule 10.

125 Superseded Qld Solicitors Handbook rule 9.

126 *Dore* has already appeared before the Legal Services Tribunal in relation to improperly charging a commission for acting in the administration of a deceased estate. There was a finding of unprofessional conduct, but not professional misconduct. The sanction was a fine of \$10 000 and costs and a public reprimand: *Legal Services Commission v Christopher Patrick Dore* [2006] LPT 009 (15/12/06).

127 See for example *Legal Profession (Solicitors) Rule 2007* (Qld), rule 8.

On the facts in *Hendriks v McGeoch*, the solicitor who put himself in the position of acting in estate work for a mother and two sons, one of whom ultimately had a conflicting interest to that of his the mother, also potentially rendered himself liable to complaint to the relevant State professional disciplinary tribunal for acting for more than one party in the absence of the fully informed consent of each party. By contrast, as the solicitor in *Rigg v Sheridan* was found to have been acting for both parties with consent, the prospect of disciplinary proceedings was unlikely to arise.

V. CONCLUSION

Solicitors who engage in estate planning and will making work, like all professionals, will be held civilly liable to compensate those who suffer loss due to their action or inaction in cases where they fail to meet the appropriate standard of professional competence in advising their clients. It may be that a higher standard of care will be imposed for the future in relation to the process which a competent solicitor ought to follow in matters where there may be questions as to whether a client has capacity following the findings in the *Ford* disciplinary proceedings. Traditionally civil liability has been founded in tort, contract and pursuant to legislation such as the (State) Fair Trading Acts and the Trade Practices Act (Cth), as was recently illustrated by *Hendriks v McGeoch*.

In appropriate cases it may also be that civil liability may be found to arise for breach of equitable obligation, such as breach of fiduciary duties to avoid conflicts of duty and duty and conflicts of duty and interest or as a consequence of breach of other equitable obligations such as the abuse of a special relationship of influence, as was suggested in *Dore* and argued in *Rigg v Sheridan*. Recently the spectre of breach of professional duty and disciplinary proceedings has arisen particularly in relation to the duty of due diligence and the duty to avoid conflicts of interest.

While it is acknowledged that solicitors who act in will and estate planning matters will be often face difficult judgement calls, for example as to whether a client has capacity and/or whether to act for more than one party in a transaction, as indicated by the outcome in *Sharp v Adam*, provided that the correct process is followed, there will generally be no liability in negligence arising out of an error in judgement, particularly in capacity assessment cases. To avoid civil liability and/or disciplinary proceedings where a solicitor has acted in estate planning and will making matters in cases where there are various family members involved, or in circumstances where the solicitor may take a benefit from the will or transaction, prudence dictates that a range of risk minimisation strategies should be adopted.

In particular, the practitioner needs to keep up to date with developments not only in the relevant law, but also the professional practice and procedures to be followed when acting in particular matters. S/he needs to carefully document the scope and limits of her retainer, to consider whether potential conflicts of interest arise and whether it is appropriate for the client or other family members to be advised to take independent legal advice. It is important to exercise extreme vigilance in taking instructions and maintain careful notes of instruction. Ideally the solicitor should meet with the client on his own or at least provide an opportunity for private instructions. In some cases it may be wise to consider having an additional witness to the giving and taking of instructions. Recent cases (particularly *Ford*) have indicated the importance of using an open-ended questioning technique in all dialogue with clients and being particularly diligent in cases where there are triggers or possible incapacity, such as where there is a radical change in instructions (compared to previous wills or EPAs), where the client is resident in a nursing home, where carers have pointed

out the possibility of impaired decision making capacity, and where the appointment to receive instructions is facilitated by someone other than the client, in particular a party who may have a financial interest in the relevant matter.

Failure to adopt appropriate risk management strategies may mean that wills and estate planning practitioners face the sceptre of civil liability and disciplinary proceedings.

RE-CREATING LEGAL SPACE FOR THE FIRST LAW OF AOTEAROA-NEW ZEALAND

BY DR ROBERT JOSEPH*

The British Government seems to colonize in a very empirical way: there is no investigation of the laws, usages, and customs of the natives - no attempt made to suit any laws to their particular conditions: how they can expect to succeed is to me marvelous. — Octavius Hadfield, 1847.¹

I. INTRODUCTION

Prior to signing the Treaty of Waitangi in 1840, law and order operated within the legal system of Aotearoa through tikanga Māori with Māori world views, values and customary laws and institutions prevailing. In this respect, Māori customary law or tikanga Māori is correctly referred to as the ‘first law’ of Aotearoa-New Zealand.² Following the Treaty, the legal system continued to acknowledge and accommodate for Māori customary laws and institutions in quite significant ways. Early statutory and case law examples acknowledged Māori customary laws and institutions in pragmatic ways so that there appears to have been some genuine attempts to reconcile two different world views and laws within the same geo-political space.

This article will discuss some of the historic and contemporary statutory and case law examples of a hybrid Māori-British common law legal system in Aotearoa-New Zealand that significantly acknowledges the first law – tikanga Māori customary law.³ The article teases out how the current legal system is encouraging the integration and reconciliation of Māori customary and English common law highlighting some of the significant challenges of this hybrid polyphyletic jurisprudence. The article highlights the importance of customary law generally and tikanga Māori customary law specifically then discusses some of the significant personal, professional and institutional challenges of incorporating tikanga Māori customary law into the legal system. The author concludes with a proposed pragmatic solution to assist the Judiciary when deciding on cases involving tikanga Māori customary law.

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1 Hadfield MSS, Hadfield/Vennh, 18 May 1847. Cited in K Sinclair, *The Origin of the Māori Wars* (1957) 107.

2 Ani Mikaere referred to tikanga Māori as the ‘First Law’ of Aotearoa/New Zealand in A Mikaere ‘The Treaty of Waitangi and Recognition of Tikanga Māori’ in M Belgrave, M Kawharu and D Williams, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 330.

3 The phrases Māori customary laws and institutions, tikanga Māori, tikanga Māori customary law, Māori values, Māori usages, and a Māori world view are used interchangeably throughout this article.

II. HISTORIC LEGAL AUTHORITY FOR RECOGNISING MĀORI CUSTOMARY LAW

A. *Doctrine of Aboriginal Rights*

One of the non-Māori legal authorities for acknowledging tikanga Māori customary law within the legal system of Aotearoa-New Zealand is the common law doctrine of Aboriginal rights. English common law presumes and recognises some continuity of the local Aboriginal law subsequent to British annexation.⁴ The elements of Aboriginal rights maintained were those that were not repugnant to common law and which did not interfere with or challenge the new sovereign.⁵ Specific rules of Aboriginal title under the ambit of Aboriginal rights provide for the continuity of tribal property rights which are common law rules establishing a type of legal pluralism.⁶ The continuity of tribal title is defined by Māori customary laws thereby acknowledging that Māori Rangatira (leaders) retained a certain amount of legally recognised de jure power.

De facto, such authority was exercised by the Rangatira after British sovereignty until the Crown was practically able to exercise what it had claimed as a matter of law.⁷ The situation meant that some, if not most Māori communities, remained subject to their traditional values, customary laws, usages, norms and institutions after the Treaty. The notion that some tribes should have remained subject to their de jure customary laws and institutions however, was firmly rejected following the 1860s New Zealand War period. De facto, many Māori continued to live within their tribal rohe (regions) where the Queen's writ remained marginal and tikanga Māori continued to apply unabated perhaps even as late as World War II.

Given that the doctrine of Aboriginal rights is defined by customary laws, it would appear that the 'Indigenisation' of the Aotearoa-New Zealand legal system to some extent can occur and has occurred triggered by the judiciary. Still, the New Zealand judiciary has not always reacted favourably to Māori and the extent to which Māori custom can be recognised remains to be argued.⁸

4 *The Case of Tanistry* (1608) Davies 28 (K B); *Memorandum* (1722) 2 P Wms 75 (P.C); *Campbell v Hall* (1774) 1 Cowp 204 (K.B).

5 P McHugh, 'The Aboriginal Rights of the New Zealand Māori at Common Law' (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987), 150.

6 *Ibid* 51.

7 The first Attorney-General William Swainson tried to argue that the Crown did not have sovereignty over those tribes who had not signed the Treaty of Waitangi or had done so with the imperfect knowledge of its consequences. Swainson / Shortland, 27 December 1842, CO 209/16: 487; *Opinion* of 13 July 1843, enclosure in Shortland / Stanley (No. 2), 13 July 1843, CO 209/22: 245, 285-93.

8 The judiciary later rejected claims to common law Aboriginal title and the Treaty of Waitangi in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur. (N.S) S.C 79. The Court upheld the *Wi Parata* finding in *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, which policy shifted in 1986 when the judiciary consented to recognise claims to common law Aboriginal title such as tribal mana (authority) over sea fisheries according to their customary laws in *Te Weehi v Regional Officer* (1986) 6 NZAR 114 (H.C).

B. Treaty of Waitangi 1840

In 1840, the Crown developed a Charter⁹ for the Colony of New Zealand with accompanying Royal Instructions¹⁰ that reiterated the main features of the Charter and included direction that no law passed by the Legislative Council should diminish the prerogative powers of the Crown.¹¹ Governor Hobson was instructed not to propose or assent to any Ordinance that would result in Māori being treated less favourably than Europeans. McHugh noted that the promise of *te tino rangatiratanga* (self-governance) in Article II of the Treaty of Waitangi included the continued viability of customary law where Māori ‘offenders’ were concerned.¹² ‘The chiefs thought simply that they were to retain their customary authority over and amongst their own people,’ he added.¹³

The Treaty of Waitangi moreover, affirmed Māori customary law as the first law of Aotearoa-New Zealand in the terms of Article II: ‘... *te tino Rangatiratanga ... o ratou taonga katoa*’ [emphasis added]. The English text translates this term as ‘the full exclusive and undisturbed possession of their *other properties*’¹⁴ [emphasis added]. In 1860, Governor Gore Brown defined *taonga* as ‘all other possessions.’¹⁵ However in 1986, the Waitangi Tribunal defined *taonga katoa* more broadly to include ‘all [Māori] valued customs and possessions.’¹⁶ The Tribunal added that *taonga* in a metaphorical sense covers a variety of possibilities rather than itemised specifics consistent with the Māori language,¹⁷ and as more than objects of tangible value that regulated daily life.¹⁸

Under these juristic definitions and applying a *eiusdem generis* approach, *taonga katoa* in the Treaty should be construed to include the first law, Māori customary law. Māori custom was treasured by the ancestors, and was an intangible object of immense value. It still is for many Māori today. Jackson confirmed that the undertaking to preserve ‘other properties’ (*taonga katoa*) in Article II included ‘all things highly prized as their own *customs* and culture’¹⁹ [emphasis added]. William Colenso also described an incident prior to signing the Treaty where Governor Hobson agreed to protect Māori custom in the alleged fourth Article of the Treaty (albeit an oral article).²⁰ To avert suspicion of the Treaty then, Governor Hobson issued a circular to the Rangatira (Chiefs)

9 Charter for Erecting the Colony of New Zealand, and for Creating and Establishing a Legislative Council and an Executive Council, and for Granting Certain Powers and Authorities to the Governor for the time being of the said Colony, *G.B.P.P.* (I.U.P. Shannon, Ireland) [1835-1842] Vol 3, 153.

10 *Royal Instructions* 5 Dec. 1840, *G.B.P.P.* (I.U.P. Shannon, Ireland) [1835-1842] Vol 3, 156.

11 *Ibid* 156, 158, [13].

12 P McHugh, *The Māori Magna Carta* (1991) 287.

13 *Ibid*.

14 I H Kawharu, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) 317.

15 *Māori Messenger* (10 July and 26 July, 1860).

16 Waitangi Tribunal *Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori* (Wai-11, Wellington, 29 April 1986) [4.2.4] [4.2.8] [4.2.3] 20.

17 Waitangi Tribunal, *Report Findings and Recommendations of the Waitangi Tribunal ... in Relation to Fishing Grounds in the Waitara District* (Te Atiawa Report) (Wai-6, Wellington, 1983) [10.2a].

18 Above n 16 (Waitangi Tribunal) [4.2.4] [4.2.8].

19 M Jackson, *He Whaipanga Hou - A New Perspective - Māori and the Criminal Justice System* (Dept. of Justice, Wellington, 1988), 49. See also the proto-compendium discussion of *taonga* page 94.

20 W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1890) 31-32. The alleged fourth Article orally stated: ‘*E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki e tiakina ngatahitia e ia* – The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori *custom* shall alike be protected by him.’ Refer to C Orange, *The Treaty of Waitangi* (1987) 53.

assuring them that ‘their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals.’²¹ Furthermore, when subsequently asked about the significance of the Treaty of Waitangi in the House of Commons in 1848, Lord Gladstone replied: ‘As far as this country was concerned, there was not a more strictly and rigorously binding Treaty in existence.’²²

In summary, the common law doctrine of Aboriginal rights and the partnership provisions and inclusion of taonga katoa within the Treaty of Waitangi affirm that first law, Māori customary law, was not only to be officially recognised within the legal system of Aotearoa-New Zealand, but to be preserved and protected by the Imperial, Colonial and subsequent Governments of Aotearoa-New Zealand. Māori customary laws and institutions should have been entrenched in the legal system following the Treaty. The Treaty and Māori custom carried with them an acknowledgment of the laws and institutions that had developed over the centuries to maintain law and order in Māori society. The Treaty sought to encourage the integration and reconciliation of Māori customary and English common law.

C. Early Statutory Examples Recognising Māori Custom as Law

It is not surprising then that in 1840 Governor Hobson issued orders to Shortland, police magistrate of Kororareka, that ‘a rigid application of British law to the Māori should be avoided in favour of some sort of compromise.’²³ Official instructions were forwarded from London directing the Governor to respect and uphold Māori customary law within the legal system. In 1842, Lord Stanley suggested that certain Māori institutions such as tapu (restriction laws)²⁴ be incorporated into the legal system.²⁵ Stanley also directed that legislation be framed in some measure to meet Māori practices including punishment for desecrating wāhi tapu (sacred places).²⁶ One statutory example was the Native Exemption Ordinance 1844²⁷ which provided that in crimes between Māori, non-Māori interference depended on Māori request. In ‘mixed culture’ cases, Māori convicted of theft could pay up to four times the value of goods stolen in lieu of other punishment

21 GBPP, 1844, 556, Appendix, 349. Some exceptions were mentioned by Lord Russell who distinguished those Māori customs that should be eliminated such as human sacrifice, polygamy and infanticide. Russell / Hobson, 9 Dec 1840, C.O. 209/8:480, 486-7.

22 *Hansard* (UK), Vol 86 (1848), 327-342. Governor Grey asked the same question earlier to Lord Stanley in the Colonial Office in 1845. Stanley replied: ‘In the name of the Queen ... you will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.’ Stanley/Grey, 12 March 1845, C.O No. 1, G.1, 13. Cited in W D McIntyre & W J Gardiner, (eds) *Speeches and Documents on New Zealand History* (1971), 120.

23 Cited in P Adams, *Fatal Necessity: British Intervention in New Zealand 1830 - 1847* (1977), 211, 286.

24 Tapu is a condition affecting persons, places and things and entitles that person, place or thing to be treated with respect. It can also be described as a prohibition, but essentially its function is that of a protective device. Waddy defined tapu as a ‘Code of Law’ far above and transcending all human laws, forming a Table of Māori Commandments, owing its authority partly to superstition and partly to fear, but based primarily upon political motives and common sense. Early Māori was ruled by the law of tapu. See P Waddy, ‘Tapu: A Code of Law: Criticism of Sir James Fraser’s Views’ in P Waddy, ‘Early Law and Customs of the Maoris’ (MA Thesis, University of Victoria, Wellington, 1927).

25 Lord Stanley, Secretary of State for the Colonies, *Memorandum*, 23 August 1842.

26 Stanley Minute, 23 August 1842, Colonial Office Records 209/14, 202.

27 ‘An Ordinance to exempt in certain cases the Aboriginal Native Population of the Colony from the ordinary process and operation of the law.’ Legislative Council, Ordinances, Session III, No. XVIII, 16 July 1844.

which could be used to compensate the victim of theft and was an obvious adaptation of the Māori customary institution of muru.²⁸

Perhaps arguably the most important yet overlooked constitutional provision that acknowledged Māori customary laws and institutions was section 71 of the New Zealand Constitution Act 1852 which stated:

71. And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

The section provided for the establishment of native districts where the first law, tikanga Māori customary law, would prevail between Māori inter se. Section 71 was neglected and later forgotten however, and was not repealed until the Constitution Act 1986.

A further early statutory example acknowledging the first law of Aotearoa was the Resident Magistrates Courts Ordinance 1846. The Resident Magistrates Courts Ordinance provided that with disputes involving only Māori, a Resident Magistrate was to sit with two Māori rangatira (chiefs) appointed as Native Assessors and the case was determined according to equity and good conscience without being constrained by 'strictly legal evidence' pursuant to sections 7, 10, 13, 19 and 20. The decision in each case was to be made by the two Assessors with intervention by the Magistrate only in cases of disagreement. According to section 22, no judgment was to be carried into effect unless all three members of the Court unanimously agreed. Māori rangatira were to control their own people delivering to the European magistrate those individuals guilty of serious offences against settlers and to report regularly on the state of their districts. Payment of the Assessors was conditional on the successful execution of the judgment pursuant to section 24 of the Ordinance.

For its time, the Resident Magistrates system with Māori Assessors was perceived as a successful initiative. The critical factor contributing its success was direct involvement of local Māori leadership, adequate consultation with the local people about what laws would apply, and what role the chiefs should play in their enforcement.

In summary, the Treaty of Waitangi 1840, Official Charters, Royal Instructions, the Resident Magistrates Courts Ordinance 1846, and section 71 of the New Zealand Constitution Act 1852 all envisaged a polyphyletic system of hybrid laws for the new Colony whereby the settlers would govern settlers and Māori would govern themselves according to their customary laws and institu-

28 *Ordinances of New Zealand*, sess. III, no. XVII. Muru was a ritualised compensatory institution where an offended party was allowed to take possessions owned by the offender party. The institution was an effective method for avoiding violent confrontations. See *Te Karere o Niu Tirenī* (Auckland, 1 February, 1842), 6; 'A Taranaki Veteran, The Great Muru' in *Journal of the Polynesian Society* (Vol 28, 1919), 97-102; 'Ko te Muru Whakanui (Stripping to Exalt)' in *Te Manukura-Māori Recorder* (Auckland, February 1917), 13-14; and Rora, 'Te Utu Hara' in *Te Ao Hou* (No 16, October 1956), 22.

tions. The explicit establishment of geo-political and bi-jural space was envisaged within the new legal system of Aotearoa-New Zealand regulated according to Māori customary laws for Māori.²⁹

D. Māori Translation of British Law – Simplified Approach to a Complex Reality

The difficulty Māori had in comprehending and accepting an externally sourced and imposed monocultural code of laws foreign to their world view, values and customary laws was undoubtedly a source of future trouble.³⁰ From the signing of the Treaty of Waitangi in 1840, there was ambiguity on how far English Law could apply in Aotearoa-New Zealand. Governor Gore Browne commented:

...to this may be added causes of dissatisfaction beyond our control, consequent upon the operation of laws suited to European civilisation, but not comprehended by a people who expect and desire an equitable and summary award.³¹

The Colonial Government believed that ensuring the Māori knew what the British law was would assist the problem of Māori acquiescing to British law. To assist the process, Chief Justice Martin wrote *Ko Nga Tikanga A Te Pākehā*³² which was published by the Church Mission Press in 1845. This is more a philosophical piece about the basic approaches of English Law rather than a digest of laws. Martin described it as a ‘Letter to you to explain the Rules of the Pākehā for the administration of justice in various cases, and for several other things.’³³ These were ‘good rules for the people who desire to live quietly.’³⁴ When Martin returned to England due to ill health, the document was republished in *The Māori Messenger* in March 1856. A review of British law was subsequently translated into the Māori language in 1858.³⁵ That year, Governor Gore Browne noted:

To confirm the reliance of the Natives on the wisdom and justice of our institutions it is important that the principles and to some extent the details also of our civil and criminal law should be made known amongst them in a familiar shape. With this view I have directed the compilation in the Native language of a summary of English law.³⁶

At the same time the Government published in a number of Māori newspapers brief accounts of the British mode of administering justice in the Courts of law and on the conduct of proceedings to assist Māori to understand and grasp the new system.³⁷ However, these initiatives were inadequate measures for dealing with a complex area. Translating English law into Māori and writing a brief summary of the legal system would not solve Māori juvenile delinquency for example, anymore

29 New Zealand Constitution Act 1986, Long Title and s 26(1)(a). It has been a challenge for the researcher to locate historic de jure examples where s 71 was applied successfully. There were plenty of de facto examples by Māori. For an analysis of the development and demise of s 71 of the Constitution Act 1852, see R Joseph, *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852*, (2002).

30 GBPP 1860, 194. Gore Browne / Labouchere, 15 April 1856.

31 Ibid.

32 *Ko Nga Tikanga A Te Pakeha*, (Church Mission Press, Auckland, 1845). For a version of this, see *The Māori Messenger* (March 31, 1856), 4-10.

33 Ibid.

34 Ibid.

35 *The Laws of England; compiled and translated into the Māori Language* (By direction of His Excellency Colonel Thomas Gore Browne, CB Governor of New Zealand, Auckland, 1858).

36 NZPD 1856-1858, 372.

37 ‘Nga Ture Pākehā’ in *Te Karere o Poneke*, (Vol 1, No 10, 26 November 1857); and ‘The English System’ in *Te Manuhiri and Maori Intelligencer*, (15 July 1861).

than giving a lecture on the legal system and handing out the Crimes Act 1961 to burglars would prevent burglaries!

E. Judicial Denial of Māori Custom

After the Constitution Act 1852, the learned Judges evaded the obligation to continue the application of Māori customary law and usage until customary title was extinguished. In *Re The Landon and Whitaker Claims Act 1871*³⁸ the Court of Appeal reasserted that ‘the Crown was bound, both by the common law of England and by its solemn engagements (the Treaty of Waitangi), to a full recognition of native proprietary right.’³⁹ The Court stated ‘whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.’⁴⁰ This was the strongest judicial recognition of Māori Aboriginal or customary title at the time. In contrast, in the 1877 case of *Wi Parata v Bishop of Wellington*,⁴¹ Prendergast CJ held that Māori custom and usage did not exist. The Chief Justice reasoned:

Had any body or custom, capable of being understood and administered by the Courts of a civilized country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. ...

Whatever may be meant by the phrase “the persons or property, whatever real or personal, of the Māori people,” the next following words, “and touching the title,” can only signify that the Court is enabled and required to entertain and determine questions of native title. The [Native rights Act 1865] speaks further on of the “Ancient Custom and Usage of the Māori people” as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. ...

... If therefore, the contention of the plaintiff in the present case be correct, the Native Land Acts, guided only by “The Ancient Custom and Usage of the Māori people, so far as the same can be ascertained,” is constituted the sole and unappealable judge of the validity of every title in the country.

Fortunately we are bound to affirm so startling a conclusion. The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when native title has been duly extinguished.⁴²

Interestingly, Chief Justice Prendergast reinforced this finding in *Rira Peti v Ngaraihi Te Paku*⁴³ when he held that native districts where Māori custom was the law, pursuant to section 10 of the New Zealand Government Act 1846,⁴⁴ were never appointed because Māori were British subjects governed by the laws of the land and not by their customary usages.⁴⁵

38 (1871) 2 NZ (CA) 41.

39 Ibid.

40 *Re The Landon and Whitaker Claims Act 1871* (1871) 2 NZ (CA) 41, 49.

41 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur. (N.S) S.C 79.

42 Ibid 77-78 and 79, 80.

43 (1889) 7 NZLR 235.

44 The New Zealand Government Act 1846 was the forerunner to the New Zealand Constitution Act 1852. Governor Grey managed to have the former Act suspended and subsequently over-ridden by the latter. S 10 was the equivalent to s 71 native districts in the former statute.

45 *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.

The Law Commission commented on a number of factors that combined to ensure that the second legal system of introduced laws and settler policies were geared towards the eclipse of the first legal system, Māori customary law, which included:

- a) The belief that English institutions and culture were innately superior, and it was in the best interests of Māori to assimilate;
- b) The desire to create an ideal English society in New Zealand;
- c) The introduction of English laws and internalizing colonial values; and
- d) The settlers desire for land resulting in land alienation from Māori.⁴⁶

Māori rights under the Treaty of Waitangi and many of their values, customary laws and institutions were marginalised and lay legally dormant following *Wi Parata* until the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal – almost 100 years! The Tribunal resurrected the first law, Māori customary law, significantly within the legal system of Aotearoa-New Zealand.

III. CONTEMPORARY LEGAL AUTHORITY FOR RECOGNISING MĀORI CUSTOMARY LAW

Two relevant truisms in British law are that Acts of Parliament are a source of law as is the common law as declared by the Courts. The common law of a country is a source of law. The common law in New Zealand however, is not the same as British common law because of differing local circumstances. Although some would argue the common law does not go far enough, it does still acknowledge Māori values and customary laws in some contexts which make it different to other British common law jurisdictions. The unique legal system of Aotearoa-New Zealand has to acknowledge its history. This includes Māori customary laws and usages which have been recognised more recently by both Parliament and the Courts. By Parliament in section 18 of the Oaths and Declarations Act 1957 which states:

18 Judicial Oath

I swear that I will well and truly serve Her Majesty, Her heirs and successors, according to law, in the office of; and I will do right to all manner of people after the *laws and usages* of New Zealand without fear or favour, affection or ill will. So help me God [emphasis added].⁴⁷

The oath requires a Judge to do right to all people ‘after the laws and usages of New Zealand.’ It is inherent in the oath that the Judge will treat Māori, Pākehā and other ethnic groups equally, applying both laws and ‘usages’ of New Zealand. Māori customary laws and usages are the first law of Aotearoa-New Zealand law.

Similarly, section 3 of the Supreme Court Act 2003 states:

3 Purpose

The purpose of this Act is—

(a) to establish within New Zealand a new court of final appeal comprising New Zealand Judges—

- (i) to recognise that New Zealand is an independent nation with its own *history and traditions*; and

46 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001), 22 [97].

47 The Judicial Oath, in this form, was first taken in New Zealand in 1873 in accordance with s 4 of the Promissory Oaths Act 1873.

- (ii) to enable important legal matters, including legal matters relating to the *Treaty of Waitangi*, to be resolved with an understanding of New Zealand conditions, *history, and traditions*; and
- (iii) to improve access to justice ... [emphasis added].

When one reads these sections together, both sections refer to New Zealand common law acknowledging New Zealand history and traditions, the Treaty of Waitangi, and New Zealand laws and usages, which infer recognition, inter alia, of Māori customary laws and ‘usages’.

Chief Justice Elias reaffirmed this proposition in the 2003 case of *Attorney-General v Ngāti Apa*.⁴⁸ more commonly referred to as the ‘Foreshore and Seabed case’, ‘But from the beginning of the common law of New Zealand as applied in the Courts, differed from the common law of England because it reflected local circumstances.’⁴⁹

Chief Justice Elias continued:

Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.⁵⁰

The above legal authorities confirm that the common law of Aotearoa-New Zealand is not the same as the common law of England or Australia or Canada, because it reflects local circumstances. One such local circumstance that makes the Aotearoa-New Zealand legal system distinct is the acknowledgement of its first law, Māori customary laws and usages.

In determining whether it is permissible to apply Māori custom in any given setting, the Judges must consider whether it is a ‘usage’ properly to be applied as part of the law of Aotearoa/ New Zealand. It is also important to try to understand the Māori world view that provides the foundation for Māori customary laws, usages and institutions.

IV. FIRST AND SECOND LAW CONTRAST

In terms of contrasting British newcomer law and Māori customary law, Durie highlighted the former as being rules-based Western law (literate) while the latter is governed by values to which the community generally subscribed (non-literate and performative).⁵¹ While Western culture tends to make a clear separation between morality and the law, the Māori legal system sees values, practices and rules as being very much interrelated. Metge noted however, that ‘Western laws are also values-based, the values concerned being interpreted by the law makers.’⁵² Mulgan added:

All law, Pākehā as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pākehā law is not the courts or statutes but the social values reflected by Parliament in statutes and by Judges in their decisions.⁵³

48 [2003] 3 NZLR 577.

49 Ibid 652, [17].

50 Ibid 660, [49].

51 E Durie, ‘Māori Custom Law’ (Unpublished Paper, Wellington, 1994), 3.

52 J Metge, ‘Commentary on Judge Durie’s Custom Law’ (Unpublished Custom Law Guidelines Project Paper, 1997), 5.

53 R Mulgan, ‘Commentary on Chief Judge Durie’s Custom Law Paper from the Perspective of a Pakeha Political Scientist’ (Unpublished Paper, Law Commission, 1997), 2.

Metge concluded that the main difference between Western law and Māori customary law or tikanga Māori originates in their respective sources and in the contrast between oral and written modes of communication:

Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.⁵⁴

Although Māori values, customs and norms were largely idealised, they were ‘law’ in a jurisprudence context and they constituted a legal system, given that the application or neglect of customs and norms would have provoked a predictable response. Most anthropologists nowadays accept that all human societies have law, whether or not they have formal laws and law courts. Metge commented:

Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies codified into a system courts and Judges. Small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.⁵⁵

In some circles the study of customary law has been described as legal anthropology⁵⁶ which Rouland points out is the study of law in society.⁵⁷ It begins from the premise that all societies have law. Rouland identified that there are over 10,000 distinct known legal systems operating in the world today. A study of those systems indicates the following generalisations can be made:

- Law emerges with the beginning of social existence;
- The complexity of law in a society will depend on the complexity or simplicity of that society; e.g. How many stratas in that society, the nature of its economy etc;
- All societies possess political power that relies to some degree on the coercive power of law, while the modern state is only present in some of these societies;
- Where the state exists, customs and ritual may have been codified or reduced to judgment by the instruments of the state e.g. the common law imported into New Zealand from Britain in 1840;
- In all societies law represents certain values and fulfils certain functions; however, the common principles of law are:
 - the search for justice; and
 - the preservation of social order and collective security;
- Law is obeyed in different societies because individuals are socialised to obey, they believe in the just nature of the law, they seek the protection of the law, or they fear sanctions associated with non-observance.⁵⁸

54 Metge, above n 52, 5.

55 Ibid 2.

56 C Wickliffe, K Maranui & P Meredith, ‘Access to Customary Law’ (Visible Justice: Evolving Access to Law, Wellington, 12 September 1999), 1-2.

57 See generally N Rouland, *Legal Anthropology* (1994) and the discussion by Boast in R Boast, ‘Maori Customary Law and Land Tenure’ in R Boast, A Eructi, D McPhail and N Smith, *Maori Land Law* (1999), 2.

58 Ibid.

On this approach, laws are nothing more than societal rules which have to be practically sanctioned in the here-and-now. Legal anthropology sets itself the objective of understanding these rules of human behavior,⁵⁹ which must be designed to address wrongdoing and, inter-alia, be capable of being socially and practically enforced in the interests of the community. Only then will they be considered part of the legal domain of a society.⁶⁰

V. GENERAL CUSTOMARY LAW

A definition of ‘customary law’ is defined as ‘both a body of rules backed by sanctions and a set of dispute resolution mechanisms.’⁶¹ At a more informal level it was also a ‘series of accepted behaviours which allowed daily social life to proceed; the stuff of interpersonal relationships, the self-regulating patterns of interaction.’⁶² In terms of Māori law and a Māori legal system being based on custom, the *Oxford English Dictionary* records two distinct meanings of ‘Custom’:

1. A habitual or usual practice; common way of acting; usage, fashion, habit, (either of an individual or of a community); and
2. Law. An established usage which by long continuance has acquired the force of a law or right.⁶³

The distinction needs to be made between custom that is mere habit (or fashion) – usual but nevertheless optional – and custom that gives rise to obligation and right. The 1608 *Case of Tanistry* affirmed the potency of custom as a source of law in this way:

... custom, in the understanding of the law, is such usage as has acquired the force of law and is respected as a binding law in a particular place ... Because when the people find any rule to be good and beneficial, suitable and agreeable to their nature and disposition, they use and practice it from time to time; and it happens through frequent repetition and multiplication of the rule, Custom is created: and having been followed for as long as people can remember, acquires the force of law.... In brief, custom is a reasonable rule, followed consistently and continuously by the people from time immemorial.⁶⁴

Sir John Salmond makes a similar distinction between mere habit and customary law when, in setting out the requirements for the reception of custom as law, he includes the following:

The third requisite of the operation of a custom as a source of law is that it must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom... A legal custom must be the embodiment in inveterate practice of the conviction of the community as to the rights and obligations of its members towards one another.⁶⁵

59 Ibid.

60 Above n 56 (Wickliffe et al), 2.

61 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols, Canberra, Australia, 1986) [37], Vol 1.

62 Ibid.

63 *The Oxford English Dictionary*, 2nd ed (Vol IV, 1989). This section draws heavily from the work of the Te Mātāhauariki Research Institute, School of Law, at the University of Waikato. The author draws from a number of Te Mātāhauariki references the most relevant being ‘Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law: Proto-Compendium’ (Unpublished, Te Mātāhauariki Institute, University of Waikato, June 2007 Draft Version), 3-8. The author was a Senior Research Fellow for Te Mātāhauariki.

64 *Case of Tanistry*, 80 Eng. Rep. 516 (1608), quoted in E K Braybrooke, ‘Custom as a Source of English Law’ in *Michigan Law Review* (Vol 50, 1951) 71, 73. For more detailed discussion, see A Frame, *Grey and Iwikau: A Journey into Custom*, (2002), 29.

65 Sir John Salmond, *Jurisprudence*, (7th ed) (1924), 219.

But what will suffice to add the ‘obligatory’ aspect, which turns custom into ‘customary law’? Will organised and systematic social pressure, in the absence of formally constituted judicial and enforcing authorities, allow us to find ‘customary law’? The American theorist, Hoebel, asserted:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege of so acting.⁶⁶

Hoebel’s definition is considerably wider than that of the school of Western jurisprudence, which saw the predominant characteristic of ‘law properly so-called’ as a ‘command’ within a unitary political system, backed by force. The American jurist Lon Fuller has criticised this tendency to assume ‘that law must be regarded as a one-way projection of authority, instead of being conceived as a collaborative enterprise.’⁶⁷ Whatever may have been the contemporary political reasons for the adoption of such a restrictive view by British theorists such as Hobbes, Bentham and Austin, the criticism of Sir Carleton Allen in his Introduction to Sir Henry Maine’s *Ancient Law* seems well aimed:

Its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states.⁶⁸

Although Hoebel’s definition is open to objection for clinging to a central position for ‘force’ as the identifier of ‘law’,⁶⁹ the definition is helpful, given that collective social recognition and reinforcement of ‘supernatural’ consequences constitutes a degree of social pressure, which is functionally equivalent to more direct applications of physical force. Fuller had raised, but left unanswered, this very question in relation to Hoebel’s definition:

Just what is meant by force when it is taken as the identifying mark of law? If in a theocratic society the threat of hell-fire suffices to secure obedience to its law, is this ‘a threat of force’? ⁷⁰

Fuller preferred to state simply that:

A legal system, to be properly called such, has to achieve some minimum efficacy in practical affairs, whatever the basis of that efficacy – a proposition both unobjectionable and quite unexciting.⁷¹

The approach which discounts centrally administered force as the defining characteristic of ‘law’ has antecedents in the work of writers such as von Gierke, Ehrlich, Weber and Pospisil who deny that there is any practical reason to confine the meaning of ‘law’ to situations in which coercion is guaranteed by the political authority.⁷² Max Weber has pointed out that:

Law, convention, and custom belong to the same continuum with imperceptible transitions leading from one to the other ... It is entirely a question of terminology and convenience at which point of this continuum we shall assume the existence of the subjective conception of a ‘legal obligation.’⁷³

66 E A Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics*, (1954), 28.

67 L Fuller, *The Morality of Law*, (first published in 1964, revised edition 1969), 227.

68 Sir Henry Maine, *Ancient Law*, (first published 1861, with Introduction by Sir Carleton Allen, The World’s Classics, 1959), xiii.

69 Fuller, for example, states that ‘the notion that its authorization to use physical force can serve to identify law... has done great harm to clarity of thought about the functions performed by law,’ above n 67 (Fuller), 108.

70 Above n 67 (Fuller), 109.

71 Ibid, 109-110. Interestingly, the Māori and Polynesian concept of mana is often explained as requiring, among other things, effectiveness in social affairs.

72 See L Pospisil, ‘Legal Levels and Multiplicity of Legal Systems in Human Societies,’ *The Journal of Conflict Resolution*, (Vol XI, No.1, March 1967), 2-26.

73 M Weber, *Economy and Society: An Outline of Interpretive Sociology*, (ed G Roth and C Wittich, transl. E Fischoff, Vol 1, (1978), 319-321.

We must be conscious also of drawing too firm a distinction between ‘obligatory’ and ‘persuasive’ norms, a point recently made by Professor Bruno Saura in Tahiti:

The very idea of distinguishing between obligatory customs, because they are of a legal nature, and customs which are more or less arbitrary stems from a Western perspective in which Judges – rather than priests, sorcerers or divine forces – are in charge of issuing punishments for breaches of matters that the community deems crucial to respect.⁷⁴

Malinowski, in his introduction to Hogbin’s *Law and Order in Polynesia*, made some pertinent observations on the ‘law-not-law’ debate concerning custom:

Those rules, the working of which are essential for the maintenance of such primitive institutions as the family, the village community, forms of organized economic co-operation, chieftainship or religious institutions, are entirely compatible with our rules of law. They are really obligatory, they are enforced.

Our own law is nothing but intrinsically valid custom, custom safeguarding the smooth working of our institutions, custom obeyed not so much through the fear of penalties but for much deeper reasons which the sociologist and psychologist have to discover.

Co-operation always implies a body of people united by some fundamental constitution, that is, body of rules, which regulates their mutual behaviour.⁷⁵

Custom then has historically been a basis of law for all people. The common law reflects society’s common customs and values as Fitzgerald noted in *Salmond on Jurisprudence*:

It was long the received theory of English law that whatever was not the product of legislation had its sources in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded. ... Even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance.⁷⁶

The co-operative and reciprocal elements in customary law systems seem to require explicit recognition in any definition which aims to comprehend the social foundation of law. Hence, the following adaptation of Hoebel’s definition of Indigenous customary law:

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of force or the imposition of serious social disadvantage by an individual, group, or agency possessing the socially recognized privilege of so acting.⁷⁷

The idea that social norms found in traditional performance cultures were either not law at all or, at best, only ‘primitive law’ has been a persistent error in European jurisprudence. It is often found coupled with analyses that propose an ‘evolutionary scale’ for law in which fully-fledged law only emerges as societies struggle into the light of written law, administered in a centralised way by specialist Courts. Maclaurin provided a contribution to the ‘evolutionary scale’ view of legal development in which some Indigenous systems were termed ‘primitive.’⁷⁸ It would seem to be neither a necessary nor a desirable step to derive from such analysis any classificatory or definitional ‘scale’ of law as more or less ‘primitive.’ Concepts, institutions and procedures may be

74 B Saura, ‘Chapter 4,’ in P de Deckker and J-Y Faberon, (eds), *Custom and the Law*, (2001), 81.

75 B Malinowski, ‘Introduction’ in H I Hogbin, *Law and Order in Polynesia*, (first published 1934) (1972). The three quoted excerpts are from pages xxix, xxx and xxxii of the Introduction.

76 P Fitzgerald, *Salmond on Jurisprudence* (12th ed) (1966), 189-190.

77 E A Hoebel, *The Law of Primitive Man: A Study of Comparative Legal Dynamics*, (1954), 28.

78 R C Maclaurin, ‘Title to Realty’ in R C Maclaurin, *On the Nature and Evidence of Title to Realty*, (1901), 3-5.

judged to work, or not, in a particular social context but that does not seem to provide a basis for describing law as ‘primitive’ or ‘advanced,’ any more than a particular language could intelligibly be characterised in that way. The author agrees with the view expressed by Professor Rouland of the University of Aix in this regard:

We believe, following Levi-Strauss, that there is not a *pensee des sauvages* (thinking of the savages) and a *pensee des civilises* (thinking of the civilised). Rather the *pensee sauvage* and the *pensee civilise* exist, in different degrees, in all forms of humanity – rationality is not our privileged domain, any more than custom belongs exclusively to exotic societies, it can be as ‘modern’ as the law.⁷⁹

The traditional legal system and first law of Aotearoa-New Zealand was *tikanga* Māori customary law.

A. *Tikanga Māori Customary Law*

The traditional Māori legal system was not primitive but was based on *tikanga* Māori customary law and *kawa* (rituals) which were generated by performative social practice and acceptance as distinct from ‘institutional law’, which is generated from the organs of a super-ordinate authority.⁸⁰ The principles of *tikanga* Māori customary law provided the jural order which embodies core values and principles that reflect doing what is right, correct or appropriate. *Tikanga* Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. People were taught from a young age what was *tika* (right, correct) and they, in effect, governed and regulated themselves.

The Māori legal system based on *tikanga* Māori customary law was used to make decisions regarding, *inter alia*:

- leadership and governance concerning all matters including Māori land;⁸¹
- intra and inter-relationships with *whānau* (extended families) *hapū* (sub-tribes), *iwi* (tribes/nations);⁸²
- relationships with Europeans;⁸³
- determining rights to land based on *take tupuna* (discovery), *take tukua* (gift), *take raupatu* (confiscation) and *ahi kaa* (occupation);⁸⁴
- the exercise of *kaitiakitanga* (stewardship) practises including the imposition of *rahui* (bans on the taking of resources or the entering into zones within a territory) and other similar customs;⁸⁵
- regulating use rights for hunting, fishing and gathering and sanctioning those who transgressed Māori *tikanga* or Māori rights (or both) in land and other resources;⁸⁶

79 R Norbert, ‘Chapter 1,’ in P de Deckker and J-Y Faberon, (eds) *Custom and the Law* (2001), 14.

80 Above n 51 (Durie), 4.

81 Above n 56 (Wickliffe et al) and above n 57 (Boast et al), 30-37.

82 Ibid (Boast et al), 33-37, 38-41.

83 Ibid 28-30.

84 A Erueti, ‘Maori Customary Law and Land Tenure’ in *ibid*, 42-45; G Asher & D Naulls, *Maori Land* (New Zealand Planning Council, Wellington, 1987), 5-6; and H Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (1977), 55-56.

85 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, Government Printer, Wellington, 1988), 181.

86 Ibid 58-61.

- regulating Māori citizenship rights to land and resources.⁸⁷

Specific Māori customary laws and values which seemed to underpin the totality of tikanga Māori customary law include:

- Whānaungatanga – kin relationships between people and the rights and obligations that follow from the individuals place in the collective group;
- Wairuatanga – spirituality, acknowledging the metaphysical world;
- Mana – encompasses political influence as well as intrinsic authority, honour, status, control, and prestige of an individual and group;
- Tapu – generally seen as part of a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places and objects and traditional values; restriction laws;
- Noa – free from tapu or any other restriction;
- Utu – concept of reciprocity in order to maintain balanced relationships between people and the Gods;
- Rangatiratanga – effective leadership; and
- Manaakitanga – sharing, hospitality to the fullest extent that honour could require;
- Aroha – charity, generosity;
- Kaitiakitanga – stewardship and protection, often used in relation to natural resources.

There are many tikanga Māori values and customs, as described above, but no complete list has been agreed. Associated with these values are certain other characteristics. For example, custom tends to favour community autonomy, rather than some large, centralised control, and puts group rights ahead of those of the individual. Furthermore, each iwi (tribe) and hapū (sub-tribe) had its own variation of the values and customs listed – some will have slightly different ideas as to the values which inform the first law of Aotearoa-New Zealand.

Leaving aside ritual, the main regulators of conduct appear to be these broad tikanga values and customs above rather than prescriptive rules. For example, the Māori value ‘whānaungatanga’ describes an aspiration of supporting the family, clan or relatives to the fullest extent that honour could require. Some specific practices provide sound or compelling advice on what constitutes good conduct in this respect, but as in most Māori values, the focus is on the best that a person might strive for rather than the minimum required to comply. That definition invites reference to the values, principles and norms accepted by the Māori communities as establishing standards for appropriate conduct and to processes acceptable to those communities for determining the appropriate course of action in a particular case.

Durie noted an important difference between tikanga and kawa:

Tikanga described Māori law, and kawa described ritual and procedure ... ritual and ceremony themselves were described by kawa ... [which] referred also to process and procedure of which ‘karakia’ (the rites of incantation) formed part.⁸⁸

Karetu added a number of the significant traditional kawa or performative rituals and their perpetuation within the Māori legal system:

87 Above n 84 (Kawharu) 39, above n 84 (Erueti), 33-35, above n 84 (Asher and Naulls), 7; and above n 51 (Durie), 5.

88 Above n 51 (Durie), 3. For a further good and recent reference on tikanga Māori customary law, see N Tomas, ‘Key Concepts of Tikanga Māori (Māori Custom Law) in Tai Tokerau: Past and Present’ (PhD Thesis Dissertation, University of Auckland, New Zealand, 2006).

Before the coming of the Pākehā [European] to New Zealand... all literature in Māori was oral. Its transmission to succeeding generations was also oral and a great body of literature, which includes haka [dance], waiata [song], tauparapara [chant], karanga [chant], poroporoaki [farewell], paki waitara [stories], whakapapa [genealogy], whakatauki [proverbs] and pepeha [tribal sayings], was retained and learnt by each new generation.⁸⁹

Given the differences in legal systems, tikanga Māori customary law is not easily reconciled within the existing legal framework of New Zealand. The former comprises a plethora of norms which enables participants to call upon those which best fit the moment while the latter centers upon single rules which are of general application and are more fluid.

B. *Contemporary Scope and Use of Tikanga within the Legal System*

Despite the major societal transformation Māori communities have undergone, Bennion believes the changes to tikanga Māori customary law rarely produced changes to the 'fundamental value system.'⁹⁰ Although tikanga Māori customary law may be considered as unofficial rules not subject to legal sanctions in the current legal system, they are still regularly adhered to by many Māori. Tikanga Māori customary law can be seen in its most overt form on the various Marae (Māori meeting houses). Māori communities do not always expect detailed legal rules such as trust orders made by the Māori Land Court to be followed closely⁹¹ because legal rules are more referred to as guidelines.⁹² Māori communities may however, apply Māori custom, consciously or unconsciously, in the everyday management of community and family affairs. Today, they may also apply custom consciously, for example, as a result of provisions they have made for the resolution of disputes in the charters of Māori governance entities that they have established for the administration of their tribe's affairs.⁹³ To this end, tikanga Māori customary references can be found in the constitutional documents of a number of Māori legal entities such as Te Kauhanganui o Waikato,⁹⁴ Te Rūnanga a Iwi o Ngāpuhi,⁹⁵ and Wakatu Incorporation.⁹⁶

New Zealand's positivist legal system tends to ignore the first law of Aotearoa-New Zealand unless they have been captured in legislation or in the common law. There are now a number

89 T Karetu, 'Language and Protocol of the Marae', in M King, (ed) *Te Ao Hurihuri: The World Moves On* (3rd ed) (1981).

90 T Bennion, *The Māori Law Review* (March 2001), available at <http://www.bennion.co.nz/mlr/2001/mar.html> (last accessed September 2009).

91 For a comprehensive discussion on Māori custom on the Marae, see H Tauroa and P Tauroa, *Te Marae: A Guide to Customs and Protocol* (The New Zealand Museum, Wellington, 1986). For a comprehensive discussion of the Marae, its origin, functions and protocol, see A Salmond, *Hui: A Study of Māori Ceremonial Gatherings* (Reed Publishers, Auckland, 1975).

92 J Williams, 'The Māori Land Court – a Separate Legal System?' (Paper presented at the Victoria University of Wellington Public Law Seminar Series Address, Victoria University of Wellington Law School, Wellington, 10 July 2001).

93 Above n 51 (Durie), 7.

94 Te Kauhanganui o Waikato-Tainui Inc, Rule 3 Objects include supporting the Kiingitanga and fostering the principles of whakaiti (humility), rangimaarie (peacefulness) and kia tuupato (being careful).

95 Clauses 3.2 (a) (c) and (e), *Te Rūnanga-Ā-Iwi-O-Ngāpuhi Charitable Trust Deed* (Ratified 10 September 2005) state that Te Rūnanga-Ā-Iwi-O-Ngāpuhi Trust shall 'pursue the vision Kia tū tika ai Te Whare Tapu o Ngāpuhi (stand firm on the sanctity of Ngāpuhi); kaitiakitanga (stewardship) and ahi kā (occupation); and will make decisions consistent with the tikanga of Ngāpuhi.'

96 'A business of land and sea – he taonga tuku iho – for profit, social and cultural growth through professionalism, honesty and diligence and embracing our tikanga.' Available at <http://www.wakatu.org.nz> (Last accessed July 2009).

of civil law statutes that recognise tikanga Māori custom including the Treaty of Waitangi Act 1975,⁹⁷ the Resource Management Act 1991,⁹⁸ Te Ture Whenua Māori Act 1993,⁹⁹ the Māori Fisheries Act 2004¹⁰⁰ and the Foreshore and Seabed Act 2004¹⁰¹ to name just five. Then there are an array of statutes that refer to the Treaty of Waitangi.¹⁰² These statutes by implication include tikanga Māori customary law.

In terms of criminal law, there are a number of processes based on Māori custom which do not pose a threat to the adversarial criminal justice system. The ability to address the Court in te reo Māori (the Māori language),¹⁰³ of Kaumātua (Elders) to address the Court in a pre-trial proceeding,¹⁰⁴ and the wider acceptance of Māori protocol in Court proceedings have no substantive impact on the adversarial contest. The availability of Māori focused restorative justice programmes demonstrates an acknowledgement of Māori custom in the legal system. Section 10 of the Sentencing Act 2002 provides a direct legislative pathway for the Māori customary institution of muru (ritualised compensation ceremony) and the Samoan institution of ifoga (formal apology ceremony) to be accorded judicial recognition by permitting the Court to take offers of amends into account at sentencing.

Furthermore, the Māori Community Development Act 1962 permits Māori committees to impose penalties on Māori for certain conduct falling within the Summary Offences Act 1981. The Children Young Persons and Their Families Act 1989 provides for family group conferences to address youth offending which can be held at Marae (Māori meeting houses) with Māori facilitators and Kaumātua (Elders) present.¹⁰⁵

Although the Courts apply Māori custom where statutes so allow, the Judges have been prepared more recently to apply Māori custom even without a statutory reference where custom is a relevant fact or the Treaty of Waitangi is a relevant consideration.¹⁰⁶ In addition, Māori customary law can provide the basis for title in land,¹⁰⁷ forms the basis for fishing rights,¹⁰⁸ and can assist in the definition of a statutory concept.¹⁰⁹

97 Treaty of Waitangi Act 1975, Schedule 1.

98 Resource Management Act 1991, ss 2, 14, 39, 42, 146, 199 and 269.

99 Te Ture Whenua Māori Act 1993, ss 4, 7, 26, 32, 36, 61, 62, 106, 114, 129, 132, 150 and 338.

100 Māori Fisheries Act 2004, ss 4, 44, 88, 101, and Schedule 7.

101 Foreshore and Seabed Act 2004, ss 5, 35, 50, 53, 64, 65 and Schedule 1.

102 For example, the Treaty of Waitangi Act 1975, ss 1 and 2; Resource Management Act 1991, ss 8, 45 and 141B; Te Ture Whenua Māori Act 1993, ss 7, 18 and 339; the Māori Fisheries Act 2004, ss 4, 5, 19, 15, 31, 32, 34, 45, and 188-211; Foreshore and Seabed Act 2004, ss 10, 34, 49, 73 and 101; the Waikato-Tainui Raupatu Claims Settlement Act 1995, ss 6, 8, 10, 14, 26, 30, 38 and Schedule 1; the Ngāi Tahu Claims Settlement Act 1998, ss 10, 34, 35, 48, 103, 274, 304 and 305; Te Rūnanga o Ngāti Awa Act 2005, ss 3 and 11; and the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 3.

103 S 4, Maori Language Act 1987.

104 *Police v Taurua* [2002] DCR 306 (DC).

105 P Heath, 'One law for All – Problems in Applying Maori Custom Law in a Unitary State' in (Te Mātāhauriki Research Institute, Tuhonohono Symposium: Custom & State, Hopuhopu 22-24 June 2007), 12.

106 For example, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

107 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

108 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

109 For example, the meaning of kaitiakitanga (stewardship) under s 7, Resource Management Act 1991.

VI. SCOPE FOR MĀORI CUSTOM IN COURT

In seeking to determine ‘the Māori law’ on a matter, early Judges do not appear to have appreciated that Māori did not determine law in the same way as they did. Māori gave more weight to mediated outcomes or they sought the justice of the case according to the whole context and without a comparable search for a single governing rule.

Moreover, the distinction between custom as understood by Māori, and custom as recognised by the Courts, is important because of the extraordinary modification of custom law for example, customary land tenure from the 1800s following decisions of the Native Land Court that purported to apply Māori custom to determine the ownership and devolution of interests in Māori land. This process was acknowledged as problematic by Chief Judge Robert Stout in a newspaper in 1905:

What his Honour presumed the Native Land Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to the Native Land Court Judges to declare what they think Native custom is.¹¹⁰

To some extent the same problem has surfaced more recently in the adoption of processes based on tikanga Māori custom by other Courts.

A. Institutional Challenges to Māori Custom

Institutional acceptance of tikanga Māori custom law does have its limits. While the Courts have been willing to treat a concluded hui (meeting) at which a full apology was proffered¹¹¹ and an accepted ifoga¹¹² as a mitigating factor at sentencing, they have rejected both as representing a complete punishment. Furthermore, various tikanga Māori customary laws have been debated in Court in terms of meaning and scope which has, with respect, perplexed the Judges.

Māori custom is generally not recognised as a freestanding source of law in its own right. A critical challenge facing the Judiciary in applying substantive Māori customary law then lies in their lack of understanding of te reo Māori (language), mātauranga Māori (world views, knowledge base) and general tikanga Māori customary law. One facet of this misunderstanding is the fact that Judges do not understand the relevant concept in its philosophical and cultural base and world view to maintain its integrity.¹¹³

In determining whether it is permissible to apply Māori custom in any given setting, the Judges must consider whether it is a custom or ‘usage’ properly to be applied as part of the law of New Zealand. In determining this question, it is important to remember that there is as much a ‘Māori law’ as there is a ‘Māori language.’¹¹⁴ It is also important to try to understand the Māori world view that provides the platform for Māori customary laws, usages and institutions.

As a result, questions of custom fall to be determined as questions of fact, leaving the Court heavily reliant on the expert witnesses produced by the parties. A thorough knowledge of tikanga Māori, te reo Māori (the Māori language) and Māori culture provide the basis against which to

110 ‘On Maori Customs Being Codified’ in *New Zealand Times* (30 August 1905), 6.

111 *R v P* (HC Auckland CRI 2005-063-1213 9 August 2006 Priestly J).

112 *R v Maposua* (CA 131/04 3 September 2004); and *R v Talataina* (1991) 7 CRNZ 33 (CA).

113 Above n 105 (Heath), 18-19. A recent controversial example is the High Court case of *Clarke v Takamore* (HC Christchurch CIV 2007-409-001971, July 2009 Fogarty J).

114 E Durie, ‘Will the Settlers Settle? Cultural Conciliation and Law’ in *Otago Law Review* (1996) 449, 451.

test the evidence of those who purport to be experts in a particular Māori customary law. This is particularly so where there are two competing accounts of tikanga Māori customary law.

The use of Māori words and tikanga concepts in a statute or other official texts increases the possibility of ambiguity, which can be deliberately exploited in the Courts. Key examples of this include the ‘iwi’ (tribe)¹¹⁵ and ‘wāhi tapu’ (sacred places)¹¹⁶ debates in Court. An example of the latter was the Court of Appeal’s approach in *Watercare Services v Minhinnick*¹¹⁷ where the lower Court was asked what is a wāhi tapu and to support the notion that, when considering whether the piping of sewerage over wāhi tapu was ‘offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment,’ the appropriate test was what the ordinary Māori person would find objectionable. The Court of Appeal rejected that view finding that the relevant test was that of the community at large – presumably no matter how ignorant that community might be of Māori values and customs, or, more importantly, its own hidden assumptions and prejudices.

As a result of these and other cases, it is often considered critical to the maintenance of tikanga Māori custom, that the applicable custom should be determined by persons with the necessary customary knowledge and skills. The critical question then is not ‘what is the custom?’ but ‘who decides, in what context, and by what process?’ In terms of deciding questions of tikanga Māori customary law, the High Court is neither the appropriate forum nor is litigation the appropriate process for making such decisions.

B. Testing the Evidence – Te Matapunenga Project

When trying to define tikanga Māori customary law, Metge wisely cautioned on this point:

To come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different.¹¹⁸

Hence those qualified to articulate the values and practices inherent in tikanga Māori are Māori schooled in tikanga Māori through a life experience of tikanga, especially respected Kaumātua (Elders). But what happens when Kaumātua slightly or even diametrically disagree over what constitutes ‘authentic’ tikanga or the details and scope of a group’s tikanga and customary laws? Judges have resorted to dictionaries and documentary sources to prove or disprove the existence,

115 The word ‘iwi’ is included in the Treaty of Waitangi (Fisheries Settlement) Act 1992, s 3; and the Māori Fisheries Act 1989, s 6, and was subsequently exploited through High Court and Privy Council litigation in, among other cases, *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC & CA); and *Manukau Urban Authority v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC).

116 For an analysis of the use of the tikanga Māori custom ‘wāhi tapu’ (sacred places) in a Resource Management Act 1991 context, see R Joseph, and T Bennion, ‘Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward’ in *Yearbook of New Zealand Jurisprudence* (Vol 6, No.1, 2002-2003), 9. A number of key cases litigating wāhi tapu include, inter alia, *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113; *Te Runanga o Ati Awa ki Whakarongotai Inc & Takamore Trustees v New Zealand Historic Places Trust* (W23/2002, 4 July 2002, Wellington); and *Winstone Aggregates Ltd & Heartbeat Charitable Trust v Franklin District Council* (A80/02, 17 April 2002, Auckland, HC).

117 [1998] NZRMA 113.

118 Above n 52 (Metge), 3.

extent and scope of tikanga Māori customary law in a particular area which tends towards the academic and away from the determinative Māori spiritual and cultural context.¹¹⁹

The work of Te Mātāhauariki Research Institute in the School of Law at the University of Waikato may be of some assistance here.¹²⁰ One of the key projects of Te Mātāhauariki was the assembling of a collection of references to the concepts and institutions of Māori customary law to explore ways in which the legal system of Aotearoa-New Zealand could better reflect the best of the values and principles of both major component cultures. The first Director of the Institute, Judge Michael Brown, in consultation with the Institute's Advisory Panel, accordingly initiated 'Te Matapunenga'¹²¹ which is an attempt to traverse the existing historical materials with a view to bringing together such references to tikanga Māori customary concepts and institutions as appeared to come from an influential or authoritative source and to exhibit explanatory insight.

A commentary on tikanga Māori custom, such as Te Matapunenga, could be incredibly valuable because it explains the roots and values of a custom, and shows how it has been applied and adapted over time. Tikanga Māori customary law concepts can only be properly ascertained and applied by considering their historical context and evolution within a particular hapū (sub-tribe) or iwi (tribe) from ancient times through to the present. The challenge is to uncover and demonstrate that evolution. Accordingly, the researchers did not set out to determine what is or is not 'true custom', or authentic tikanga Māori customary law but rather to record what has at various times and in various circumstances been claimed to be tikanga Māori customary laws and institutions.

Te Mātāhauariki researchers started with a list of tikanga Māori terms, concepts, and institutions found to be in use in historical and contemporary Māori discourse selected with the assistance of Kaumātua (Elders). The researchers searched a wide range of records for entries which are listed in chronological order under each title. Each entry consists of a sourced statement or explanation relevant to a particular title together with an explanatory preface intended to supply a context for the statement or explanation. The purpose of the context is to enable the reader to understand the circumstances in which the statement or explanation arose, and to judge its credibility and authority as highlighted by the late Lord Cooke of Thorndon: 'In law, context is everything.'¹²² To this end, the brief Te Matapunenga entry on 'taonga' discussed earlier looks like this:

Taonga:

A socially or culturally valuable technique, object, phenomenon or idea. In the phrase *taonga tuku iho*, taonga generally denotes tangible and, especially, intangible valuables (such as values, traditions and customs) handed down from antiquity. From Proto-Polynesian *taonga*, 'treasured possession, especially a garment'. The application of the term to intangibles seems to have developed in Eastern Polynesia; for example, in Hawaiian the cognate word *kaona* denotes a hidden meaning, or an ambiguous word or phrase containing a concealed reference to a person or thing and whose use may have either a good or bad effect.

The Ngāti Porou lament 'He Tangi Mo Taneuarangi' contains a reference to 'Te Kura a Mahina', and Sir Apirana Ngata's collection 'Nga Moteatea' explains the allusion, showing one way in which rights to taonga could be lost and gained, in this way:

119 Above n 116 cases.

120 See the Te Mātāhauariki Institute website available at <http://www.lianz.waikato.ac.nz> at November 2009.

121 R Benton, A Frame and P Meredith, 'Te Matapunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law' (Unpublished CD Version, Te Mātāhauariki Research Institute, University of Waikato, 2007). It is anticipated that an updated version of Te Matapunenga will be published in 2010.

122 *McGuire v Hastings District Council* [2001] NZRMA 557, 1 November 2001, per Lord Cooke, 561.

Te Kura a Mahina – nō te ūnga mai o te Arawa i Hawaiki ka tac ki Ratanui, kei te takiwā o Tikirau, ka kitea atu te puāwai o te rata i uta, ka makaia ngá kura ki te moana; nga kura nei ko Tuhaepo, ko Tuhaeao. Ka pahemo te waka, ka kitea e Mahina i muri. Koia te whakataukī mō te mea kite: ‘He kura pae nā Mahina kāore e hoki atu tō taonga ki a koe’. [Translation in original source] The Plume of Mahina – On arrival from Hawaiki of the Arawa canoe at Ratanui, in the vicinity of Tikirau, the bloom of the Rata on shore was observed by the crew, and they thereupon threw their head plumes into the sea; the plumes were named Tuhaepo and Tuhaeao. After the canoes had moved on the plumes were discovered by Mahina. This gave rise to the proverbial saying about articles of value that are found: ‘A plume washed ashore for Mahina is a treasured thing which will not be returned to you’. Ngata & Jones 2004, pp 144-5, fn 19.

John White’s 1887 five-volume study of Māori traditions related the account of Tainui’s crew throwing away their kura, or red ornaments, when they saw the plentiful red blossoms of the rata as they approached New Zealand. An important proverb, in effect the Māori version of ‘finders keepers, losers weepers’, derives from this tradition:

When the crew landed, Taininihi went to obtain some of the rata-blossom to wear as a head-dress in place of the kura he had brought from Hawaiki...He put the rata-blossoms as a plume on his head; but he had not thus worn them long when they began to fade. Then he was sorry for his Hawaiki kura which he had thrown into the sea, and he went in search of it along the sea-beach, but did not find it, as Mahia (or Mahina) had been there before him and found and taken it. When he heard that Mahia had found his kura he went to him to obtain it, but Mahia would not part with it. Taininihi asked again for it. Mahia answered, ‘I will not give the kura to you, as it is a kura which has been floating in the sea, and was cast on the beach and found by me’. This is now a custom in regard to anything found, such as greenstone or any other thing. Translation in original. John White, *The Ancient History of the Māori*, (Government Printer, Wellington, 1887, Vol IV) p 32.

The missionary, Thomas Buddle came to New Zealand in May 1840. He was first stationed at Whaingaroa (Raglan). He was later directed to open a new mission on the Waipa River. Buddle recorded in his diary a journey through the Waipa district and his interest in the area around Kakepuku as a suitable site for a mission station. Buddle noted that the local Māori were anxious to have a missionary. He explained:

But we have reason to suppose that their anxiety for a mission arises more from a desire to get trade or as they term it ‘taonga’. ‘Buddle, Thomas 1812-1883, Transcript of Diary, (13 Jun-ca 29 Dec 1840’, Entry for 30 October 1840. ATL Ref.MS-0343).

Professor Bruce Biggs has taken a language-oriented approach in his discussion of the meaning of taonga and other indigenous words used in the Māori text of the Treaty of Waitangi.

The basic meaning of the Māori word taonga is ‘valuable material possession’. Its Polynesian cognates tend to confine their meanings to specific types of highly valued woven garments, and a recent article [Weiner] has suggested that basically the Māori word referred to ‘inalienable’ wealth, such as weapons and ornaments of greenstone and fine woven cloaks, which, even though they passed from one person to another, remained, in some sense, the property of the original owner. However that may be, the word taonga was used to refer to a wide range of valuable possessions and attributes, concrete or abstract...I have drawn thirty or so examples from early nineteenth century scriptural texts and found as referents to taonga, in addition to greenstone and woven articles, such other material assets as weapons and pieces of land; social and cultural features such as carving, dance, and (interestingly) warfare; personal attributes such as attractive eyebrows. ... There can be no doubt that ‘o ratou taonga katoa’ can be taken, in strict accordance with language usage, to include all material and cultural possessions; the phrase in fact includes everything subsumed under the English ‘forests fisheries and other properties’ and more.’ ‘Humpty Dumpty and the Treaty of Waitangi’ in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*, I Hugh Kawharu (ed), (Oxford University Press, Auckland, 1989) p 308.

Annette B. Weiner shows how politically compelling inalienable possessions are, summarizing the underlying principles as follows:

Whatever the local cultural circumstances, constructing, guarding, altering and expanding social identities into forms of rank and hierarchy are dependent upon the success of institutionalizing difference through exchanges that demonstrate one's ability to keep-while-giving. The ahistoric essentialism behind the traditional concept of the norm of reciprocity conceals the particular cultural configurations in and through which inalienable possessions are empowered to act as the source of difference and hierarchy.

She then turns to Māori texts, following three main threads:

First, by pursuing Mauss's interest in the hau, I trace the way the hau is embedded in a special class of valuables called *taonga* that are ranked according to their historical and cosmological antecedents. Second, by reinterpreting classic Māori ethnographic texts on the semantic meanings and spatial and historical movements of taonga, I expose the economic and political significance of flax and feather cloaks that, historically, are the oldest kinds of taonga...Third, since women are the producers of these cloaks, my ethnographic analysis of the hau and taonga brings women's production as well as human and cultural reproduction into prominence. *Inalienable Possessions: The Paradox of Keeping-While-Giving*, (University of California Press, Berkeley, 1992) pp 47-49.

Annette B Weiner has stimulated anthropologists to take an interest in a reinterpretation of the ethnographic data used in support of the norm of reciprocity by introducing the paradox of 'keeping-while-giving' as a framework of analysis, thereby adding another dimension to the researchers' understanding of hau, taonga and other important concepts:

Finally to return to the hau, we see that Ranapiri's text is not enigmatic, nor is Mauss's interpretation of the hau mystical. The hau as a life force embedded in the person is transmitted to the person's possessions. The ethnography shows that the hau must be given following birth and is lost through antisocial means or at death. The hau is permeable in that it must be replaced in people and things, instilling people with a creative force that creates a bond between them. However, the taonga and the hau are not identical because a taonga, as an inalienable possession carries the force of history and tradition. The hau of each owner enters the taonga, but the taonga's value is based much less on personal identity than on the cumulative social and cosmological identities of past owners. Therefore, although the taonga is the vehicle of both the hau and history, these meanings are separable...The taonga given to someone should return because it is inalienable, but the hau can be detached from an object so that another taonga may carry the original 'semblance' of the person. When Ranapiri explains that when a taonga is given to another person, it will be repaid with another taonga, this is a replacement for the original. But when an exceptionally fine taonga is given, there is no replacement possible. Each high-ranking cloak or nephrite possession subjectively defines an exclusive set of social and cosmological relationships. To give away a taonga to someone else is to make that person an intimate part of these relationships. To claim another person's taonga is more than a personal victory; it is to assume another's rank, name, and history.' *Inalienable Possessions: The Paradox of Keeping-While-Giving*, (Berkeley, University of California Press, 1992) pp 64-65.

VII. SOME FORMATIVE CONCLUSIONS

Given the regrettable fact that Māori represent a significant proportion of those involved in the criminal justice system, the case for greater Māori input into the legal system is compelling. This article has highlighted a number of considerable advantages with acknowledging legal processes based on the first law of Aotearoa-New Zealand. It would give Māori a legal system with which they are more likely to identify, accords with the Treaty principles of participation and partnership, complies with Articles II and IV of the Māori version of the Treaty, and contributes to a

genuine sense of cultural identity and social inclusion.¹²³ The Treaty sought to encourage the integration and appropriate reconciliation of Māori and English law, hence the partnership and the fiduciary duty established by the Treaty were and continue to be the lynch pins for constructing a polyphyletic future in the controversial relationship between affinity and difference in which both Māori and Pākehā have parity of respect within the legal system of Aotearoa-New Zealand.

While tikanga Māori customary law has now re-entered the legal system, there is evidence that the system may not yet have the tools, capacity, or to have developed a sufficiently informed approach to dealing appropriately with those customary laws. This article has briefly highlighted some of the complexities that the Courts are facing when attempting to incorporate tikanga Māori customary law and to define the extent and scope of tikanga from legislation through case law.

A number of possibilities are available to Judges when deciding on the scope and extent of tikanga Māori customary law including embracing te reo Māori (language), mātauranga Māori (world view, knowledge base) and tikanga Māori themselves; the appropriate use of Kaumātua (Elders) as expert witnesses, and referring to authoritative and well audited works such as Te Matapunenga – a compendium of references to the concepts and institutions of Māori customary law, which provides vital context to te reo Māori, mātauranga Māori and tikanga Māori. There still appears to be a potential for the values and laws of the dominant society to be regularly applied in the assessment of proposals without a thought as to their origin but tikanga Māori customary law is now restored as a part of the fabric of the legal system of Aotearoa-New Zealand.

The future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country, Māori and British, as well as ‘others’ where appropriate. The existing legal framework must be modified thereby permitting the first law of this country, tikanga Māori customary law, to operate effectively. Inaction is an expensive mistake. Education on the part of Māori and Pākehā, as well as institutional flexibility, are key allies in the challenge to apply tikanga Māori customary law. Greater understanding is likely to breed confidence. With education, understanding, competence in both worlds, and confidence on the part of all participants, it may be possible to re-create and re-locate a significant space for the first law of Aotearoa-New Zealand within the legal system. But it will be a significant challenge to do so. Notwithstanding the challenge, Māori, Pākehā and the legal system can rise to the occasion if political will, confidence and competence from all involved exists.

Te rongonui o te taniko kei roto i te whiriwhiri noa māu tonu tōna ātaahua

– The beauty of taniko (the embroidered border of a fine woven cloak) is that there is more than one pattern.

123 Law Commission, *Justice: The Experiences of Maori Women* (NZLC R53, Wellington, 1999), 8.

ACRONYMS

AJHR	Appendices to the Journals of the House of Representatives, New Zealand.
APS	Aborigines Protection Society.
BPP	British Parliamentary Papers.
CN/O	Church Missionary Society, Letters and Journals.
CO	Colonial Office Papers, Public Record Office, London.
Col. Sec.	Colonial Secretary in New Zealand, Secretary of State for the Colonies in England.
GBPD	Great Britain Parliamentary Debates (Hansard, Third Series).
GBPP	Great Britain Parliamentary Papers.
JPS	Journal of the Polynesian Society.
MA	Archives of the Māori Affairs Department.
NO	Native Office, correspondence of the Native Department.
NZLJ	New Zealand Law Journal.
NZLR	New Zealand Law Reports.
NZPD	New Zealand Parliamentary Debates.

GLOSSARY

Hapū	Descent group with local base on a Marae, section of a tribe.
Hui	Meeting.
Iwi	Tribe or people.
Karakia	Rights of incantation, prayer ritual.
Kaumātua	Respected elder.
Kawa	The protocol of the marae, rituals.
Kuia	Elderly woman.
Mana	Ascribed and achieved authority, prestige, spiritually endowed and maintained.
Marae	Meeting place, village courtyard, spiritual symbolic centre of Māori community affairs.
Muru	To take compensation in a formalised raid; to forgive.
Pākehā	New Zealander of non-Māori descent.
Rāhui	Customary embargo, restriction placed on resources often for conservation purposes.
Rangatira	Chief – male and female, effective leader.
Rangatiratanga	Chieftainship, authority.
Taniko	Embroidered border, braid, tapestry of a precious cloak.
Taonga katoa	All treasured possessions – precious objects, cultural norms, customs, values, institutions.
Tapu	Sacred, forbidden, under spiritual or ceremonial restriction.
Tikanga	‘Right ways’, custom, from tika (adj.) straight, right, correct, fair, just.
Tohunga	Expert.
Ture	Law, authorised by Government, passed by formal legislature.
Utu	Reciprocity, compensation, balance.
Wāhi tapu	Sacred places.
Whānau	Extended family, usually four generations.

ETHICAL INVESTMENT IN SUPERANNUATION FUNDS; CAN IT OCCUR WITHOUT BREACHING TRADITIONAL TRUST PRINCIPLES?

BY DOUG TENNENT*

Ethical investing in commercial activities is a topic which has received considerable attention of late. This has occurred in the areas of company law at all levels, with the concerns of consumers in relation to the production of products, and also in trust law, in particular superannuation trusts. Superannuation Trusts are of particular significance as they have become significant institutional investors in a number of substantial commercial activities. Ethical investment which requires the trustees to take account of issues other than financial when investing is seen to run counter to traditional trust law principles. Relevant issues relating to ethical investing include: human rights and labour concerns, environmental and moral issues such as investing in the alcohol and tobacco industries. This paper focusing upon superannuation law in the Australian and New Zealand jurisdictions considers the investment obligations of trustees in superannuation trusts. Such obligations closely resemble what may be referred to as traditional or core obligations of trustees. It acknowledges that difficulties arise when attempting to include ethical considerations in investment decisions with trust property. Having acknowledged this, the paper in upholding the place of ethical investing in the current environment proceeds to outline a means by which ethical investing can be adopted without compromising the position of trustees in any manner and which still focuses upon the best financial interests of the beneficiaries.

I. TRUST LAW

It is commonly stated that the trustee is the legal owner of the trust property while the beneficiary is the equitable owner. This arrangement establishes the basis of a fiduciary relationship between the trustee and the beneficiary. Fiduciaries are required to act in the best interests of their beneficiaries.¹ They must not allow personal interest and duty to conflict.² Self interest must be set aside for the interests of the beneficiaries. The basis of this relationship is that the fiduciary by virtue (in the present case the trustee) of being given the discretionary power to manage property on behalf of the beneficiary, is in a position of power.³ The power comes about by virtue of the discretion held by a trustee to manage the property of behalf of the beneficiary. The trustee may through investment and other decisions manage the property in a manner which either advances

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1 Rt Hon Justice E Thomas, 'The Conscience of the Law', (2000) 8 *Waikato Law Review*, 9.

2 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL).

3 Rt Hon Justice E Thomas, 'The Conscience of the Law', (2000) 8 *Waikato Law Review*, 9.

the interests of the beneficiary or undermines them. Equity requires that trustees act in a manner which advances their interests.⁴

A beneficiary is a volunteer to a trust. This means that a beneficiary has provided no consideration for the trust entitlement.⁵ The equitable maxim that equity will not assist a volunteer is well established and acknowledged.⁶ However once a trust is established,⁷ it is also acknowledged that a beneficiary has a proprietary interest in the trust property and can as such enforce that interest against the trustee.⁸ As Lord Millet noted in *Armitage v Nurse*⁹ the fact that there is an irreducible core of obligations owed by the trustees to the beneficiaries makes it central to trust law that such obligations are enforceable.¹⁰ This right of enforcement has received statutory codification in different jurisdictions.¹¹ However there are differing degrees of interest that a beneficiary holds in a trust. These range from a beneficiary with a fixed interest in a trust to a beneficiary of a discretionary trust where trustees are given the discretion to select beneficiaries from selected groups of people.¹² The beneficiary with a fixed interest has a propriety interest in the trust which can be enforced.¹³ The discretionary beneficiary does not enjoy a propriety interest and the only power of enforcement is to ensure that trustees exercise their discretion fairly, or reasonably or properly.¹⁴ The extent of the beneficial interest and the associated right of enforcement is significant when one comes to consider superannuation trusts. While in general trusts the beneficiary is a volunteer to the trust, this technically is not the situation with beneficiaries of contributory superannuation scheme. As noted by Warner J in *Mettroy Pension Trustees v Evans*¹⁵ beneficiaries under a pension scheme where contributions are made are not volunteers. The contributions are totally derived from their work as an employee.¹⁶ Warner J proceeds to note:

The rights of beneficiaries of a pension scheme have contractual and commercial origins. They have been derived from contracts of employment of the members. The benefits under the scheme have been earned by the service of the members under those contracts.¹⁷

The acknowledgement of a contractual relationship within the pension/superannuation trust relationship coming about through the regular financial contribution on the part of the beneficiary is significant and could be said to give a superannuation trust a special status. Here it is important to note an observation of Richardson J from the New Zealand jurisdiction in *Re UEB Industries Ltd Pension Plan*:

4 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) 203.

5 This represents one of the key differences between a contractual relationship and a trust relationship. In contract law consideration is perhaps the most essential ingredient of a contractual relationship.

6 As stated in *Pennington v Waine* [2002] 4 ALL ER 215, 227.

7 It often becomes the role of the court to determine whether or not a trust relationship exists.

8 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961, 988.

9 *Armitage v Nurse* [1997] 2 All ER 705.

10 Ibid.

11 For example in New Zealand Trustees Act 1956 s 66 allows any person with a beneficial interest in the property who is aggrieved by an act or omission of the trustee to apply to the court to review the act or omission.

12 Perhaps the most famous example of this is *McPhail v Doulton (In re Baden's Deed Trusts)* [1971] AC 424.

13 Andrew Butler *Equity and Trusts in New Zealand*, (2003), 56.

14 *Gartside v IRC* [1968] 1 All ER 121, 134.

15 *Mettroy Pension Trustees v Evans* [1990] 1 WLR 1587, 1610.

16 David Hayton *Pension Trusts and Traditional Trusts; Drastically Different Species of Trust* [2005] 69 Conv, 229, 230.

17 *Mettroy Pension Trustees v Evans* [1990] 1 WLR 1587, 1610.

Pension plans are different in nature from traditional trusts. There is an interrelationship of contract law and trust law in any pension scheme.... In commercial terms a pension plan of this kind is fundamentally a contract entered into by an employer to fund the payment of defined benefits to members of the plan and their dependants.¹⁸

The existence of a trust gives rise to a fiduciary obligation of the part of the trustee to act in the best interest of the beneficiaries. A contract gives rise to rights and obligations as defined by the terms and conditions of the contract. In a superannuation fund a beneficiary provides consideration through his/her contribution to the scheme through part of his/her wages.¹⁹ The deferment of wages through the contribution to the scheme could also be said to be another manner in which the beneficiary is providing consideration.²⁰ The provision of consideration establishes on the part of the beneficiary a legitimate expectation that contractual rights will be fulfilled. A fiduciary obligation coupled with a contractual obligation on the part of the trustees establishes, it is submitted, significant rights and expectations on the part of the beneficiaries, rights which exceed those of other beneficiaries of a traditional trust. This point is emphasized as it has important relevance in terms of the investing powers and obligations on the part of the trustees. The requirement to invest in the best interests of the beneficiaries is clearly of significant relevance when issues of ethical investment are raised with regards to the investment of superannuation funds.

II. TRUST LAW AND INVESTMENT

The investment obligations on the part of the trustees was considered in some depth in the now seminal case of *Cowan and Others v Scargill and Others*.²¹ This case concerned the investment of trust funds of the Mineworkers' Pension Scheme. The funds totalled some £300 million, with some £200 million available for investment every year.²² The Committee of Management which had wide powers of investment had ten trustees. Five were appointed by the Board and five were appointed by the National Union of Mineworkers. The trustees adopted a formal investment plan which included investments in oil, overseas investment, and the acquisition of land overseas. Such plans were strongly objected to by the Union representatives on the basis that they were in direct conflict with Union policy.²³ It was concluded by the Judge, Sir Robert Megarry that the Union trustees were mainly, if not solely activated by a desire to pursue union policy.²⁴ The opposition and censuring of the proposed investment strategy resulted in deadlocked board. As there was no casting vote, the matter came before the courts.²⁵ The non union trustees were concerned that such censuring meant that they were unable to diversify the fund so as to maximize the return for beneficiaries by investing domestically and abroad.²⁶

18 *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294, 298.

19 *Imperial Group Pension v Imperial Tobacco* [1991] 2 All ER 597.

20 This is sometimes referred to as executory consideration. This is where a person makes a payment for a benefit that can be expected to be received in the future.

21 *Cowan and Others v Scargill and Others* [1985] 1 Ch 270.

22 *Ibid.*

23 *Ibid* 279.

24 *Ibid* 294.

25 Justice Margaret Stone, 'The Superannuation Trustee: are Fiduciary Obligations and Standards Appropriate?' (2007) 1, *Journal of Equity*, 167.

26 *Ibid* 286.

In considering the situation Sir Robert Megarry reemphasized some of the basic principles of trust law. That is that the paramount duty of the trustees is to represent and promote the best interests of the beneficiaries.²⁷ Such a requirement is only qualified by a requirement to comply with the laws of the jurisdiction.²⁸ The beneficiaries' best interests usually means their best financial interests.²⁹ This requires an investment strategy which considers the risk of particular investments against the acquisition of income and capital appreciation of the assets of the trust.³⁰ This requires the trustees to put aside their own personal interests and views including strongly held social or political views.³¹ This would include during the apartheid era an opposition to apartheid; opposition to the manufacturing of armaments and to the production of tobacco and alcohol.³² Therefore, when exercising their powers and duties as trustees, if such investments would yield returns and long term capital appreciation to an extent that was greater than other investments, then there was an obligation to undertake such investments. In this manner we are seeing the fiduciary obligation being imposed in a slightly different way. The obligation not to allow duty to conflict with interest usually refers to the self interests of a fiduciary seeking to advance his/her own financial or business interests. However self interest in this context refers to a fiduciary's moral, social and political views. Such views must not conflict with the obligation to act in the best interests of the beneficiaries of the trust. This establishes an interesting new dimension to the fiduciary obligation reflecting the flexibility and adaptability of its application.

As noted in advancing their position, the Union trustees were focused upon advancing and implementing union policy rather than promoting the best interests of the beneficiaries. Sir Robert did acknowledge that if all of the beneficiaries of a superannuation trust held strong views about alcohol, armaments or certain types of entertainment, then it would not be in their best interests to invest in enterprises involved in such activities. He proceeded to observe however, that such situations where there would be consensus *ad idem* amongst all of the beneficiaries on ethical or moral issues would be very rare.³³ He also acknowledged that a strong case could be mounted to argue that the outflow of significant funds from the country through overseas investment is detrimental to the domestic economy.³⁴ However for such a position to be justified careful articulation and linkage to the pension scheme in particular was required. How would the clear selection of domestic rather than foreign investment benefit the local economy and in turn the beneficiaries of the trust? It was noted that although the scheme was large it had not been shown how such investment restrictions could influence the national economy in a positive manner.³⁵ Further the restriction was excluding a very significant area of potential investments and was not conducive to the requirement to diversify investments.³⁶

As noted the focus of the beneficiaries was to promote the Union policy. Sir Robert Megarry having considered Arthur Scargill's submissions concluded that there was no explanation as to

27 *Ibid* 287.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

33 *Ibid* 288.

34 *Ibid* 295.

35 *Ibid* 296.

36 *Ibid* diversification of investment is a central priority for a trustee when investing in trust property.

how or why it was in the best interests of the beneficiaries to put union policy into force through imposing the investment prohibitions.³⁷

While Sir Robert Megarry is clear in his views about the focus of investment in the beneficiaries financial interests, the decision does contain an acknowledgement of the possibility of the promotion of arguments that:

- investing in a country with repressive policies might in fact be investing in a fragile economy and therefore not in the long term best interests of the beneficiaries; and
- that overseas investment might not be beneficial to the national economy which the pension scheme operates under.³⁸

However for such argument to be upheld, clear and careful articulation would be required to highlight how such investment decisions would provide specific benefits to the superannuation scheme under consideration. Such articulation effectively linking benefits to a specific scheme through a particular 'ethical investment strategy' is clearly difficult given the size of an economy such as the United Kingdom.

This raises the question: is it possible to apply principles of ethical investment to superannuation trusts in the absence of specific statutory codification requiring that such investment be undertaken? This will be the focus of the next part of the paper. It is firstly necessary to consider the investment obligations in more detail. Then the principles of ethical investment will then be discussed and critiqued. This will lead to the development of an argument that there can be some form of marriage between commercial prudent investment on the part of the trustees while at the same time complying with stated ethical standards. Such a marriage must be carefully articulated.

III. INVESTMENT STRATEGIES

As noted, trustees are required to adopt an investment strategy which is in the best interests of the beneficiaries. The best interests, unless a trust deed would suggest otherwise, means the best financial interests of the beneficiaries or members of a superannuation or pension scheme. Such obligations have been codified into different pieces of legislation. In Australia, section 52 the Superannuation Industry (Supervision) Act 1993³⁹ sets out covenants which are to be included in the governing rules of Superannuation entities. The two which are of particular relevance to investment are:

(2)(b) which sets out the requirement to exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property for another for whom the person felt morally bound to provide;⁴⁰

(2)(f) this sets out the requirement to formulate and give effect to an investment strategy having regard to the circumstances of the entity as a whole. Regard needs to be given to;

- the risks relating to certain investments;
- the composition of the entity's investments as a whole taking into account the adequacy of diversification;

37 Ibid.

38 Ibid 295.

39 This is the legislation which provides the legislative regime to regulate superannuation schemes.

40 Superannuation Industry (Supervision) Act 1993 (Cth) s 52(2)(b).

- the liquidity of the entity's investments.⁴¹ In terms of the investment strategy, provision is made for a specified beneficiary(s) to give direction to the trustees with regards to particular assets of the fund.⁴²

Further section 62(1)(a)(i) of the same legislation requires that a superannuation fund must be maintained solely for one or more of the following purposes... *the provision of benefits for each member of the fund on or after the members retirement*. This is a particularly practical and focused purpose. In promoting this purpose the trustees are focusing upon the best financial interests of the beneficiaries which in the context of superannuation law is the provision of a adequate income for the beneficiaries upon retirement. Consequently it has been argued by Sir Robert Meggry in *Cowan* that taking account of moral factors other than maximization of return and capital appreciation is not acting in the beneficiaries best interests.⁴³ This is a view which found support some ten years later from Lord Nicholls of Birkenhead.⁴⁴

The consideration of risk, expected return and the required diversification to manage this which is central to an investment strategy has been codified in section 52 of the Superannuation Industry (Supervision) Act. In taking account of this trustees are required to adopt the position of the ordinary prudent person. It needs to be noted that the phase that has been adopted is 'prudent person' and not 'prudent business person'.⁴⁵ As Lord Nicholls notes the ordinary prudent person is a creation of equity and has his/her counterpart with the reasonable person in common law.⁴⁶ While Lord Nicholls might argue the ordinary prudent person threshold only requires the adoption of minimal standards and allows for certain errors,⁴⁷ such comments need to be considered in the context of the other Covenant obligations set out in section 52 of the Superannuation Industry (Supervision) Act 1993. These include the minimal standards with regards to an investment strategy,⁴⁸ to act honestly,⁴⁹ in the best interests of the beneficiaries,⁵⁰ and to allow a beneficiary access to any prescribed information or any prescribed documents.⁵¹ The different obligations taken together create significant legal expectations on the part of trustees including in particular the adoption of appropriate and effective investment strategies.

It seems to be accepted today that the appropriate means of giving effect to the prudent investor rule is through what is known as modern portfolio theory.⁵² This theory enables trustees to determine both expected returns of an asset together with the volatility of or risk attached to that

41 Superannuation Industry (Supervision) Act 1993 (Cth) s 52(2)(f).

42 Superannuation Industry (Supervision) Act 1993 (Cth) s 52(4).

43 *Cowan and Others v Scargill and Others* [1985] 1 Ch 270, 287.

44 Lord Nicholls of Birkenhead, 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge', *The Australian Law Journal*, Vol 70, March 1996, 205, 211.

45 Such a phase has been adopted in other jurisdictions. See for example New Zealand Trustee Act 1956 s 13(D).

46 Lord Nicholls of Birkenhead, 'Trustees and Their Broader Community: Where Morality and Ethics Converge', *Australian Law Journal*, March 1996 Vol 8 205, 210.

47 *Ibid.*

48 Superannuation Industry (Supervision) Act 1993 (Cth) s 52(1)(f).

49 *Ibid* s 52(1)(a).

50 *Ibid* s 52(2)(c).

51 *Ibid* s 52(2)(h).

52 Paul U Ali and Gold M *An Appraisal of Socially Responsible Investment for Trustees and Other Investment Fiduciaries*, (Research Paper, Centre for Corporate Law and Securities Regulation) June 2002.

particular asset.⁵³ This is done by considering the different possible outcomes for an investment and the degree of variation of such outcomes.⁵⁴ Trustees when investing, invest in a number of different activities. The combination of these different investments is known as an investment portfolio.⁵⁵ A balanced and well considered portfolio allows for a balance of the minimization of risk while at the same time achieving the maximization of return. A spread of assets allows for the minimization of risk.⁵⁶ As Lord Nicholls notes, risk is managed across a balanced portfolio, incorporating a prudent mixture of low and higher risk assets.⁵⁷ In this regard the degree of risk of the combined assets when considering the investment portfolio as a whole should be less than the degree of risk of individual investments.⁵⁸ In other words the investment in stable low risk activities should effectively counter balance any investment risk in higher risk or volatile activities.

If the duty of investment in this regard is to realise the beneficiaries' financial interests through providing an adequate retirement income, then careful considerations of variance of risk or return when considered in the light of the totality of investments does not leave a great deal of room for account to be given to ethical considerations. Further as noted by Lord Nicholls:

If the trust was created to confer financial benefits on individuals, a decision not to maximize those financial benefits but to promote moral objectives on which widely differing views are held is, by definition, not to advance the purposes of the trust and, hence is not in the best interests of the beneficiaries under that trust.⁵⁹

The learned Judge proceeds to note that if moral objectives become a material consideration in investment strategies, this amounts to a significant shift from benefiting the named beneficiaries of the trust specifically to the benefiting of the community as a whole to which the beneficiary belongs.⁶⁰ This, as Sir Robert Megarry would agree is not ad idem with the purposes of traditional trust law. Adopting the approach of Sir Robert Megarry in *Cowan* the only way that such an approach could be in accord with traditional trust law would be for trustees to show that the benefits conveyed to the community through the ethical investments could be translated into positive investment outcomes for the beneficiaries.⁶¹ However it would appear that from a completely economic perspective any restriction of investment based on ethical or other grounds will have some detrimental impact upon investment returns through limitation of investment choice.⁶² While this

53 Rosy Thornton, 'Ethical Investments: A Case of Disjointed Thinking', *Cambridge Law Journal* 67 (2) July 2008, 396, 399.

54 Ibid.

55 Ibid 400.

56 Ibid.

57 Lord Nicholls of Birkenhead, 'Trustees and Their Broader Community: Where Morality and Ethics Converge', (1995) 9(3) *Trust Law International*, 71, 76.

58 Rosy Thornton, 'Ethical Investment: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67(2) July 2008, 396, 400. As Thornton notes: 'Some combinations of assets will be more effective than others in reducing the overall risk of the portfolio. For example if two assets are likely to perform well under opposite market conditions or at different times, then dividing the fund between these two should substantially reduce the degree of risk.'

59 Lord Nicholls of Birkenhead, 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge', *The Australian Law Journal*, March 1996 Vol 70 205, 211.

60 Ibid.

61 *Cowan and Others v Scargill and Others* [1985] 1 Ch 270, 295-296.

62 Rosy Thornton, 'Ethical Investments: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67 (2) July 2008, 396, 409.

position is certainly not adopted by all commentators⁶³ in the field, trustees are prima facie placing themselves in a very vulnerable position if they are to take account of ethical decisions without being given some mandate to do so by for example the trust deed.

The issue becomes therefore: how does one take account of ethical considerations in superannuation trust investment in a manner which does not compromise the financial interests of the beneficiaries and increase the risk of legal liability upon the trustees?

IV. THE BASIS FOR ETHICAL INVESTMENT AND THE UNDERLYING REASONING FOR SUPERANNUATION FUNDS TO TAKE ACCOUNT OF SUCH CONSIDERATIONS

According to Donnan J ethical investing from its broadest perspective is the commitment to an alignment of a person's personal values and social concerns with investment practices.⁶⁴ Rosy Thornton differentiates between a socially dictated policy and a socially sensitive policy in terms of investment.⁶⁵ A socially dictated policy is one which uses predetermined ethical considerations to limit or determine the selection of investment assets, *such considerations taking precedence over commercial factors*.⁶⁶ A socially sensitive policy allows ethical considerations to come into play when choosing between investments which appear equivalently attractive according to normal financial criteria.⁶⁷ It would appear that the socially dictated policy would offend against the requirement of the trustees to act in the beneficiaries financial interests. The socially sensitive strategy however seems to be somewhat limited in its effectiveness in promoting ethical investment. Under this strategy should an investment in an entity involved in armaments production provide a more attractive rate of return, then the investment in the armaments supportive enterprise would prevail. Donnan's approach of aligning personal values and social concerns with investment practices, while allowing for a certain amount of flexibility, aligns itself most closely with the socially dictated policy approach. The Donnan approach could still lead to potential conflict between the traditional obligations of a trustee and the requirement to invest ethically. Given this clear potential for conflict, if the requirement to ethically invest is to be justified, solid arguments need to be advanced to support such justification. Two such arguments are now advanced.

A. *The Growing Focus on Environmental and Social Issues*

It can be said that there is an increasing consciousness of and concern over environmental, social and human rights issues when considering corporate behaviour.⁶⁸ This concern is reflected in a number of ways. It is useful, indeed important to offer two examples.

63 For example M Scott Donald and Nicholas Taylor, 'Does "Sustainable" Investing Compromise the Obligations Owed by Superannuation Trustees?' (2008) 36 *ABLR* 47, 53. They argue that empirical evidence suggests that shares in companies pursuing sustainable business practices are unlikely to generate returns statistically different from any other shares when account is taken of different operational risks, different industries, capital structure and so on.

64 Donnan J 'Regulating Ethical Investment: Disclosure Under the Financial Services Reform Act' (2002) 13 *JBFLP* 155, 156.

65 Rosy Thornton, 'Ethical Investments: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67(2) July 2008, 396, 401.

66 Emphasis added by author.

67 Rosy Thornton, 'Ethical Investments: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67 (2) July 2008, 396, 402.

68 Paul U Ali 'Ethical Finance: Can Ethical Objectives be Achieved Through Financial Investments?' (2008) 26 *C&SLJ*, 127.

The first is the fact that there has over recent years been a shift in the position of the consuming community towards expecting company's to adopt ethical standards in decision making with regards to the appropriate priorities set by the company boards in their decision making. This is evidenced through a number of studies. For example a 1995 study carried out on behalf of a Canadian Labour Union indicated that over 92 per cent of Canadians would choose to buy products made ethically if given the choice between 'ethical' and regular products. 89 per cent said that they would pay more for clothing produced under ethical conditions and over two thirds would be more likely to shop in a store selling ethical products.⁶⁹ The importance of ethical standards through promoting sustainability has also been acknowledged by some of the larger transnational companies. For example Shell in its 2002 report on Sustainable Development emphasized the importance of adopting the 'good neighbourhood principle' with those communities with which it operates.⁷⁰ The adoption of acceptable environmental standards in its activities is now an important part of Shell's overall programme.⁷¹

The second can be evidenced in the requirement to act socially responsibly now being codified into legislation. This is seen in the recently enacted Companies Act 2006 in the United Kingdom. Section 173 of the legislation which is contained in the part of directors' obligations focuses upon the success of the company. When promoting the best interests of the company, directors are required to take account of amongst other things; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of a company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct.⁷² The requirement to take account of such factors is mandatory.⁷³ A company's success therefore is determined not just by having regard to its financial accounts and shareholder dividends but also to the relationship that it develops with its stakeholders. The explanatory notes accompanying the legislation sees this provision as giving effect to what is known as enlightened shareholder theory.⁷⁴ Enlightened shareholder theory recognizes that acting in a manner which is socially responsible can have long term benefits for a company.⁷⁵ It recognizes that shareholder and stakeholder interests are not mutually exclusive and can be 'relational and interdependent'.⁷⁶

69 Ibid 25.

70 Shell Oil Report 2002, *People Planet and Profits*. Here it is interesting to note that Shell adopted such a position in response to the negative international publicity that it received as a result of its joint venture with the Nigerian Government. Protests against environmental degradation as a result of oil extraction were responded to aggressively by the Nigerian Government. This aggressive response included human rights abuses. The fact that Shell was part of a joint venture linked indirectly if not directly to such abuses.

71 Ibid.

72 United Kingdom Companies Act 2006 s 173 (1).

73 As evidenced in the wording of the section 'have regard to'.

74 Available at <http://www.apsi.gov.uk/acts/acts_2006/ukpga20060046> accessed 28 June 2009.

75 Horrihan, 'Directors' Duties: Anglo-Australian Reform of Corporate Social Responsibility', (2005/2006) 87 *Reform* 17, 20.

76 Ibid.

These developments are significant.⁷⁷ Traditionally, companies and other corporate or commercial entities have as a practice attempted to externalize the negative aspects of their activities.⁷⁸ In this context there is a term known as externalities. An externality is where a person/company/entity imposes costs/damage on another person or third party through its actions without compensating them for such loss or damage.⁷⁹ Therefore the negative action and its detrimental impact is displaced onto the community or society at large. An example of this can be seen in a decision by a company to close an operation or plant which it has operated in a particular community for a number of years. Such a local operation may have contributed to the overall success of the company. Closure for the local community will mean job losses and closure of various businesses due to the overall local economic downturn. This is what is meant by displacing the consequences of a negative action on the community at large. The recent developments requiring companies to see themselves within the social matrix in which they operate has seen a growing expectation on the part of companies to internalize these externalities.⁸⁰ Sometimes this occurs through regulation for example with regards to environmental practices. At other times it comes about through social pressure with the community at large making it clear that they expect the adoption by commercial activities of ethical practices.⁸¹ In this regard there are varying degrees of pressure or enforcement to internalize negative impacts of the commercial activity. Such developments, it can be appreciated are significant. This leads to the second issue with regards to the possibility of ethical investment being incorporated into investment strategies of superannuation trusts. That is the influence that the superannuation trusts can exhibit as institutional investors.

B. The Impact of the Superannuation Trust as an Institutional Investor

The significance that superannuation trusts as institutional investors can have on the corporate governance and commercial direction is seen in the extent of their investor power. When commenting on the United Kingdom experience it was noted that superannuation funds, insurance companies and other large institutions own one half or more of the shares of all listed companies in the United Kingdom, the United States and Japan.⁸² In Australia as of March 2007, the superannuation fund industry held approximately A\$425.6 billion in the Australian equity market (approximately 28 per cent of the local market).⁸³ Ali notes that superannuation funds reunite ownership and control in commercial activities. These funds pool the collective wealth of Australians

77 In acknowledging the significance of such developments it also needs to be noted that while the UK legislation makes it mandatory for account to be taken of the interests of named stakeholders, the named stakeholders are not provided through the legislation any means of enforcing such a requirement.

78 Thomas Clark *International Corporate Governance, a Comparative Approach*, (2007) 68.

79 Paul U Ali 'Ethical Finance: Can Ethical Objectives be Achieved Through Financial Investments?' (2008) 26 *C&SLJ* 127, 132.

80 *Ibid* 133.

81 There are various studies to support this. For example in 1995 a study carried out on behalf of a Canadian Union indicated that over 92% of Canadians would choose to buy products made ethically if given the choice between 'ethical' and 'regular' products. (Christopher L Avery, Business and Human Rights in a Time of Change, *Amnesty International UK*, 24).

82 Lord Nicholls of Birkenhead, 'Trustees and their Broader Community: Where Duty, Morality and Ethics Converge'. *The Australian Law Journal* Vol 70 March (1996) 205, 206.

83 Australian Bureau of Statistics. *Managed Funds* (Cat No 5655) (1st March 2007), 1.

and then invest on their behalf through acquiring equity in Australian Corporations.⁸⁴ This in turn provides them with significant shareholder power meaning that they can have considerable influence over the corporate behaviour hence the linkage of ownership and control.⁸⁵ In this way they can promote social and environment objectives.⁸⁶

It is suggested that there are two ways that superannuation schemes as institutional investors can promote ethical behavior through ethical investments. The first is through investing in targeted companies. This can be done to either encourage or acknowledge ethical practices. The second is through constricting finance or deliberately choosing not to invest in particular enterprises.⁸⁷ Given the amount of finance that the Australian Superannuation fund has to invest, a clear decision to selectively avoid investing in companies whose practices contravene acceptable environmental or socially acceptable standards is going to exclude such excluded companies from a significant pool of finance.

The targeted financing of companies means that the institutional shareholders acquire a significant shareholding in the company and can influence corporate behavior through voting and other rights of a shareholder. This is sometimes known as 'shareholder engagement'.⁸⁸ Engagement goes further than voting and involves active dialogue with the company about the adoption of appropriate ethical standards and practices. The ability to undertake such engagement arises directly out of being a shareholder. However for this to be effective there would need to be a clearly stated objective for the superannuation funds to use their voting power to promote ethical practices. At the moment many funds are investing funds of a very large number of people for whom there is a considerable variance of political, social and moral views.⁸⁹ To achieve ethical investment guidelines which would be in accord with such divergent views would be very difficult if not impossible.

Therefore, while there are solid reasons for justifying ethical investment, the possible and sometimes clear conflict between ethical investment and traditional investment obligations remains. There is a need to either reconcile or manage this conflict. One method which is suggested by Rosy Thornton which makes a good deal of sense is to include the provision for ethical investment in the trust instrument.⁹⁰ This prima facie would enable the trustees to implement an ethical policy without legal or practical difficulty.⁹¹ There is however one qualification to this. That is that the terms are defined with sufficient clarity.⁹² The guidelines would need to be articulated in a manner which enabled the trustees to feel comfortable when making their investment choices. The difficulty however with private schemes at least is to ensure that beneficiaries support such guidelines which as just noted is very difficult. This leads Rosy Thornton to raise the question

84 Paul U Ali 'Ethical Finance: Can Ethical Objectives be Achieved Through Financial Investments?' (2008) 26 *C&SLJ* 127, 130.

85 *Ibid.*

86 *Ibid.*

87 *Ibid* 133.

88 Rosy Thornton, 'Ethical Investments: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67 (2) July 2008, 396, 402.

89 This was a point noted in *Cowan and Others v Scargill and Others* [1985] 1 Ch 270, 288.

90 Rosy Thornton, 'Ethical Investments: a Case of Disjointed Thinking', *Cambridge Law Journal*, 67(2) July 2008, 296, 421.

91 *Ibid.*

92 *Ibid.*

about the appropriateness of superannuation trusts through ethical investment being used as vehicles to promote environmentally and socially responsible behavior.⁹³ This is a relevant question and it highlights the challenges of incorporating ethic principles into investment decisions regarding superannuation trusts. While noting these challenges, it is the position of this paper that given the investment influence of superannuation funds and the fact that society generally seems to be requiring commercial entities to adopt ethical practices and internalize externalities, it is appropriate for superannuation schemes to be involved in and promoting the use of ethical investment. The challenge is how to reconcile the different concerns and priorities. The New Zealand Government controlled superannuation fund to ensure provision of a base provision of superannuation payments for all of the population over 65, provides, it is submitted an example and model of how this can be achieved.

V. NEW ZEALAND SUPERANNUATION FUND

As a part of its commitment to the concept of a welfare state, New Zealand provides a flat rate of universal superannuation to people who are over 65.⁹⁴ Given the ageing population, it was decided to establish a government operated superannuation fund which had sufficient resources to meet the present and future costs of New Zealand superannuation.⁹⁵ This came about as the result of a reasonable amount of political consensus between the major parties.⁹⁶ The body responsible for managing the fund is a Crown Entity which is a corporate body with perpetual succession⁹⁷ known as the Guardians. This body is responsible for the investing of the fund and they are required to invest the Fund on a prudent, commercial basis and are required to administer the Fund in a manner which is consistent with:

- Best practice portfolio management; and
- Maximizing return without undue risk to the Fund as a whole; and
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.⁹⁸

Section 61 requires that there be a statement of investment policies, standards, and procedures. These standards, policies and procedures are required to cover amongst other things:

- ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community;⁹⁹
- the retention, exercise, or delegation of voting rights acquired through investments;¹⁰⁰ and
- the balance between risk and return in the overall Fund portfolio.¹⁰¹

What is significant in these provisions is that the commitment to ethical investment arises out of the need to uphold New Zealand's reputation as a responsible citizen. The requirements of

93 Ibid 422.

94 Currently the rate for a person living alone is \$347.77 per week. (Taken from the first Schedule of the New Zealand Superannuation Act 2001).

95 New Zealand Superannuation Act 2001.

96 The political co operation and consensus was seen in 1994 when it was necessary to gradually increase the eligibility age for superannuation from 60-65. It was cost which necessitated such a move.

97 New Zealand Superannuation Act 2001 s 48.

98 Ibid s 58.

99 Ibid s 61(d).

100 Ibid s 61(i).

101 Ibid s 61(e).

responsible citizenship are articulated in different documents such as the codified international instruments drafted and enacted by the United Nations General Assembly.¹⁰² Importance is given to voting rights to ensure that the Guardians can have maximum influence on the bodies in which it invests.¹⁰³ The requirement to find an appropriate balance between risk and return in the overall fund portfolio shows the commitment to standard practices of investment.¹⁰⁴ What the legislation through its developed policies attempts to do here is to balance the requirement for prudent best practice investment with the need for ethical investment. In terms of ethical investment, the Guardians are guided by the United Nations Principles for Responsible Investment which they are signatories to and the United Nations Global Compact.¹⁰⁵ The principles for responsible investment place emphasis on the long term interests of beneficiaries. They acknowledge that environmental, social and corporate governance issues can affect the performance of investment portfolios.¹⁰⁶ They also acknowledge that the adoption of such principles better aligns the companies to the broader objectives of society.¹⁰⁷ The United Nations Global Compact which again the New Zealand Superannuation Fund has committed itself to encourages listed companies around the world to adopt international standards on human rights, working conditions, the environment and anti corruption.¹⁰⁸ The Guardians give effect to ethical investment through voting, engagement and divestment.¹⁰⁹

The effect of the voting rights within the context of ethical investment has already been canvassed. Institutional investors with significant shareholding can have a definite impact on the direction of the company in terms of affirmatively advocating socially responsible and policies through appropriate exercise of their voting rights. The impact can be even greater when a number of institutional investors reach an agreement to support the same policies in terms of responsible/ethical investment. This is especially the case where the institutional investors combined shareholding exceeds 50 per cent of the total share holding making the group majority shareholders thereby being able to determine policy. To ensure consistency in its voting behavior, the New Zealand Superannuation Fund has developed and committed itself to a set of voting guidelines.¹¹⁰ These guidelines emphasise the importance of good and transparent corporate governance and provide guidance on such matters as the appointment and removal of directors and the determination of appropriate remuneration.¹¹¹ The importance of transparency is contained in all of the guidelines. These guidelines acknowledge that the adoption of good corporate governance practic-

102 Such instruments have established and articulated reasonably clear international human rights standards.

103 NZ Superannuation Fund: Responsible Investment in Practise Reports available at <<http://www.nzsuperfund.co.nz/Index.asp>> accessed 28 June 2009.

104 Other traditional trust investment practices are included in s 61, New Zealand Superannuation Act 2001.

105 Available at <<http://www.nzsuperfund.co.nz/index.asp>> accessed 28 June 2009.

106 Available at <<http://www.unpri.org>> The New Zealand Superannuation fund is not the fund who is a signatory to these Principles. Other New Zealand investors which are signatories include; Accident Compensation Corporation, New Zealand Fire Service Superannuation Scheme; Canterbury Community Trust; Trust Waikato; DNZ Property Group Limited and Trust Waikato.

107 Ibid.

108 Available at <<http://www.nzsuperfund.co.nz/index.asp>> Responsible Investment Updates. Accessed 28 June 2009.

109 NZ Superannuation Fund: Responsible Investment in Practice Reports available at <<http://www.nzsuperfund.co.nz/Index.asp>> accessed 28 June 2009.

110 ISSNZ 2006 Guidelines pdf. Available at <<http://www.nzsuperfund.co.nz/index.asp>> Responsible Investment - Responsible Investment Reports. Accessed 28 June 2009.

111 Ibid.

es goes hand in hand with a commitment to upholding core standards of human rights and labour conditions as well as being responsible in terms of environmental standards.

Engagement focuses upon investor dialogue with the Company board and executive management to encourage ongoing evaluation of their policies and practices so as to determine whether their operations may directly or indirectly support human rights abuses or poor environment practices. This is a practice which the New Zealand Superannuation Fund Guardians are very much committed to.¹¹² The aim of such engagement is to encourage companies operating in situations where human rights violations are a clear possibility if not a reality, to adopt strong human rights policies.¹¹³ Recent engagement has occurred through concern over human rights and environmental practices in the global steel industry. For example concern was expressed from different sectors over some of the practices of Freeport McMoran Copper and Gold (Freeport). This led to the request by the Guardians for further information with regards to their human rights and environment practices. There has also been communication with other shareholders about these issues.¹¹⁴ In this way engagement is not just occurring with the Board but also the other shareholders. This clearly strengthens the impact of engagement. One clear focus with regards to engagement on human rights issues is the adoption of acceptable labour standards. An example of such a concern arose in 2006 with regards to the labour conditions experienced by Brazilian charcoal producers. Charcoal is a product which is an element of the steel production chain.¹¹⁵ Concern was expressed that the steel industry and large steel users, such as car manufacturers, were potentially identified with these practices through using materials which had been produced in circumstances where inappropriate labour standards were being practiced.¹¹⁶ This led the Guardians and other concerned investors to meet with companies whose reputation, and potentially that of their brands, could be negatively affected due to sourcing from the Brazilian pig-iron industry.¹¹⁷ The response was varied with some companies being prepared to give appropriate consideration to the dilemmas while other companies were not.¹¹⁸ Such an example is significant as it reflects concern being shown about indirect as well as direct association with human rights violations.

The engagement process encourages companies to take such issues concerning human rights and environmental standards seriously and to consider how they can be appropriately addressed. The fact that engagement occurs not just with the Company Board but also with other shareholders is significant and strengthens the effectiveness of engagement. This is especially the case when other shareholders have also committed themselves to the United Nations Principles for Responsible Develop and the United Nations Global Compact. This means that the concerned shareholders have a common focus.

Divestment has occurred in a number of situations. For example, in 2006 the Guardians approved divestment of Singapore Technologies Engineering Ltd, Aliant Techsystems Inc, General Dynamic Corp, and Textron Systems Corp from the Funds portfolios due to the involvement of

112 Ibid.

113 Ibid.

114 NZ Superannuation Fund: Responsible Investment in Practice Reports. Available at <<http://www.nzsuperfund.co.nz/index.asp>> accessed 28 June 2009.

115 Available at <<http://www.nzsuperfund.co.nz/index.asp>> Investment Strategy/Responsible Investment/ Responsible Investment in Practise Reports accessed 28 June 2009.

116 Ibid.

117 Ibid.

118 Ibid.

these companies in personal mines.¹¹⁹ They also excluded Maruha Group Inc due to its involvement in the processing of whale meat.¹²⁰ The fund managers have also been directed to exclude the securities of eleven companies involved in the manufacture of cluster munitions from the fund.¹²¹ Further recent divestment has also occurred with companies involved in the tobacco industry.¹²² Engagement was considered but was not considered to be an effective approach in such circumstances.¹²³ This being said the UN Principles for Responsible Investment favour the process of engagement if at all possible as this promotes change in a co operative and positive manner.¹²⁴ Because the New Zealand Superannuation fund's single investment in a particular company would not be of a magnitude so as to impact on the company through divestment, it could be suggested that divestment essentially occurs where the guardians consider that certain practices such as the manufacturing of cluster bombs are so contrary to international law that complete distancing is required by New Zealand. Divestment achieves the appropriate distancing. It also amounts to a clear statement about New Zealand's position on particular issues. Such examples could be said to be indicative of the fund adopting a socially dictated policy of investment. The foundation for this socially dictated policy lies in the legislation.¹²⁵

The Guardians are clearly using the mechanisms identified earlier in the paper to promote ethical investing. However, the New Zealand Superannuation Fund is a fully government operated fund established by statute to administer and manage a fund to ensure the provision of superannuation payments to all members of the population who have reached 65 years. Given these circumstances it is understandable that the Government wishes to maintain its reputation as a responsible member of the world community. This is a very different situation from a large private superannuation fund, responsible for investing employee and employer contributions for a large number of members with differing political, social and moral views. The members invest in order to obtain a guaranteed income during retirement. Trustees entrusted with the investment of these funds are required under traditional trust law to act in the beneficiaries best financial interests.

Perhaps a means of dealing with this clear conflict can be found in a former superannuation scheme which was introduced into New Zealand in 1973 but being repealed in 1976 was very short lived. This scheme was contained in the New Zealand Superannuation Corporation Act 1973. This scheme required compulsory contribution by the employees and self employed people.¹²⁶ The contributions were placed into the New Zealand Superannuation Fund¹²⁷ and managed by a Board who were Government appointed.¹²⁸ Certain senior Government officials were also a part of this Board, which was responsible for the investment of the funds.¹²⁹ Contribution to superannuation was compulsory. However, it was possible for people to gain approval to invest in

119 Ibid.

120 Ibid.

121 NZ Superannuation Fund: Responsible Investment Updates available at <<http://www.nzsuperfund.co.nz/index.asp>> accessed 28 June 2009.

122 Ibid.

123 Ibid.

124 Ibid.

125 New Zealand Superannuation Act 2001 s 61(d).

126 S 35 New Zealand Superannuation Corporation Act 1973.

127 Ibid s 20.

128 Ibid s 21.

129 Ibid s 27.

alternative schemes which were approved by the Government.¹³⁰ It needs to be emphasized that such schemes required statutory approval. Such a statutory scheme, it could be argued provides a justifiable basis to require superannuation schemes to adopt ethical investing practices when investing the funds. A government established scheme would expect investment practices to be adopted which were in accord with the country being a responsible global citizen. Approved alternative schemes would be expected to adopt the same standards. Such standards would be codified in respective legislation. The justification for this is:

- i. The size of the superannuation investments which gives them a significant influence in the global economy. Such influence can be either positive or negative in terms of human rights or environmental matters;
- ii. The fact that basic standards of human rights and environmental protection have been well articulated and justified, the implementation of such practices should be encouraged in every possible manner.¹³¹ States wishing to be good corporate citizens should be particular in ensuring that no direct or indirect actions coming from within its jurisdiction support human rights breaches or inappropriate environmental practices;
- iii. Corporate bodies should be encouraged to internalize their externalities.

A government operated contributory superannuation scheme requiring other approved private schemes to adopt the same standards of ethical investing would ensure consistency thereby providing equity among all members of all schemes. On this basis it would be a logical step to require private superannuation schemes governed and regulated by legislation such as the Australian Superannuation Industry (Supervision) Act 1993 to contain the same requirements for ethical investment. Such a requirement could be incorporated into the covenants in section 52 of the legislation which have been discussed earlier in the paper. Other amendments would also be required with regards to reporting requirements, monitoring and supervision. In this manner it is the government who is the embodiment of the people which establishes the parameters for ethical investment. Such parameters would be based upon the United Nations Principles for Responsible Development and other relevant international documents which jurisdictions such as Australia and New Zealand have committed themselves to. This addresses the issue relating to diverging views of beneficiaries on social and political matters in different private funds. The restrictive parameters that a State adopts, is to uphold its international reputation and to contribute to the advancement of internationally accepted standards. The adoption of such an approach would require further regulation on the part of the Australian and New Zealand legislatures.

VI. CONCLUSION

Superannuation schemes exist to ensure adequate retirement income to those who contribute to such schemes. The trustees of such schemes must manage the fund in the best interests of the beneficiaries. This means their financial interests which in turn justifies a narrow investment focus using traditional investment strategies. However given the magnitude that superannuation investments have achieved over recent years, considerable influence can be exerted by these schemes on the commercial entities that they chose to invest in. Given such influence and the growing commitment to responsible investment practices, it is only appropriate that ethical investment

¹³⁰ *Ibid* s 75.

¹³¹ Louis Henkin, 'International Law: Politics, Values and Functions', contained in: 216 *Collected Courses of The Hague Academy of International Law*, 13 (Vol IV) (1989) 251.

practices are adopted to ensure that the funds contribute to the advancement of universal human rights and labour practices standards and the exercising of responsible practices in environmental matters. To avoid placing trustees in an unfair conflict situation between traditional and ethical investment obligations, it is important to incorporate the requirement of responsible ethical investment through legislation and regulation. Such regulation must also still require a well managed investment portfolio which spreads risk as the New Zealand Superannuation Act 2001 does. The trustees and Guardians must still act in the best interests of the beneficiaries and this means their financial interests. However they are restricted in their investment decisions and practices through the appropriate legislation requiring the adoption of ethical practice which they must comply with. As Sir Robert Megarry noted in *Cowan*, trustees must act in the best interests of beneficiaries but in a manner which does not break the law.¹³²

132 *Cowan and Others v Scargill and Others* [1985] 1 Ch 270, 287.

CASE COMMENT: ‘MICHAEL’ V REGISTRAR-GENERAL OF BIRTHS, DEATHS AND MARRIAGES

BY PROFESSOR NAN SEUFFERT*

The New Zealand Family Court case of *‘Michael’ v Registrar-General of Births, Deaths and Marriages* (Michael)¹ and the recent release of an appeal of two decisions of the Gender Reassignment Board of Western Australia² provide an opportunity to review the issue of the criteria for legal declarations of changes of sex in New Zealand under the Births, Deaths, Marriages and Relationships Registration Act 1995 (BDMRRA).³

In recent years a number of studies of issues facing transgender people,⁴ including issues surrounding legal declarations of ‘sex’ have been undertaken.⁵ In New Zealand section 28(3) of the BDMRRA includes provisions for trans people to apply for changes of the ‘sex’ indicator on their birth certificates.⁶ Section 28 provides for a Court to issue a declaration of sex to be shown on a birth certificate where the Court finds that the person is ‘not a person of the nominated sex’ but (in relevant part):

28(3)(b)(i) Has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and

(c) Either—

(i) It is satisfied, on the basis of expert medical evidence, that the applicant—

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1 (2008) 27 FRNZ 58.

2 *AB, AH v Gender Reassignment Board of Western Australia* [2009] WASAT 152; *AH v Gender Reassignment Board of Western Australia* [2009] WASAT 153.

3 The Births, Deaths and Marriages Registration Act 1995 was renamed the ‘Births, Deaths, Marriages, and Relationships Registration Act 1995’, as from 24 January 2009, by s 5(1) Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48). The former title was in effect when *Michael* was decided. The current title will be used here.

4 For a discussion of the term ‘transgender’ see below footnotes 21 and 22 and accompanying text.

5 Joy Liddicoat, *To Be Who I am: Report of the Inquiry into Discrimination Experienced by Transgender People, He Purongo mo te Uiuitanga mo Aukatitanga e Pangia ana e nga Tangata Whakawhitira*, (2008) Wellington: Human Rights Commission; Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (March 2009) Sydney: Human Rights and Equal Opportunity Commission; Amnesty International, *Stonewalled-still demanding respect!: Police abuses against lesbian, gay, bisexual and transgender people in the USA* (2006) Oxford: the Alden Press, available at <<http://www.amnesty.org>> at 27 May 2009; Stephen Whittle, Lewis Turner and Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (2007) Wetherby: Communities and Local Government publications; Transgender Law Center, *State of Transgender California: Economic Health of Transgender Californians* (March 2009) available at <<http://www.transgenderlawcenter.org>> at 25 May 2009.

6 Minor amendments to Section 28(1), (2) and (3)(a) by s 16(1), (2) and (3) of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48) became effective on 24 January 2009.

- (A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and
- (B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
- (C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.

The New Zealand Human Rights Commission Report ‘To Be Who I am: Report of the Inquiry into Discrimination Experienced by Transgender People, He Purongo mo te Uiuitanga mo Au-katitanga e Pangia ana e nga Tangata Whakawhitiira’ (HRC Report)⁷ found that many trans people have the impression that subsection 28(3)(c)(i)(B) requires full gender reassignment surgery before a declaration of sex will be made.⁸ The HRC Report notes that some people were given this advice by the Department of Internal Affairs (DIA) or their local family court; many of the Family Court cases considering the section are unreported, and it is therefore difficult to obtain certainty on the issue.⁹ The DIA reported to the Human Rights Commission inquiry that a court might determine that a declaration should be issued when ‘substantive, but not complete, surgery has taken place.’¹⁰ However, the DIA noted that family courts often interpret the section contrary to this interpretation and consistent with the interpretation of many trans people, ‘our understanding is that the Family Court to date has often interpreted this [subsection (3)(c)(i)(B)] to mean that full gender reassignment surgery is required.’¹¹ Nevertheless, some trans men who have not had full gender reassignment surgery reported that they have had declarations from the Family Court enabling them to change their birth certificates.¹² At the time of the HRC Report the position was therefore unclear.

The decision in *Michael* was explicitly intended to respond to this lack of clarity. The Court noted that the Registrar-General ‘believes this application raises important and novel issues of public interest not previously considered by the Family Court and seeks a decision that will give guidance as to how the section should be interpreted and applied in future,’ and explicitly stated its intention to provide such guidance.¹³

The facts of the case provide a particularly sympathetic picture. Michael was born with a female body, but identified as male from an early age, and dressed in male clothing from the age of 9.¹⁴ He was aware of a sexual attraction to women at the age of 12, thought of himself as gay, and had several relationships with women.¹⁵ He completed his first university degree at the early age of 19; while at university he became aware of the category of ‘transgender’, and decided that he was transgender rather than gay. He then moved to a city with a large transgender population and lived there as a male for a year.¹⁶

7 Liddicoat, above n 5.

8 Liddicoat, above n 5, 68-70, 72-74.

9 Liddicoat, above n 5, 69.

10 Liddicoat, above n 5, 73.

11 Liddicoat, above n 5, 73.

12 Liddicoat, above n 5, 73-74.

13 27 FRNZ 58, 60.

14 27 FRNZ 58, 60.

15 27 FRNZ 58, 60.

16 27 FRNZ 58, 60.

Michael commenced the process of changing sex in 2003 by consulting a sexual health physician and changing his name by deed poll.¹⁷ In early 2004 he consulted a psychiatrist experienced in dealing with gender identity issues, commenced hormone treatment, and had a bilateral mastectomy as part of his gender reassignment programme.¹⁸ The psychiatrist diagnosed Michael with gender dysphoria according to international guidelines, and the approach taken for his treatment was consistent with the relevant international guidelines, which reflect international professional consensus.¹⁹ Michael's father deposed that both he and the family believe that Michael is in his correct gender.²⁰

The Court discussed transsexualism and gender dysphoria, noting that the latter is 'the enduring, pervasive, compelling desire to be a person of the opposite sex.'²¹ Transsexuals 'are born with the anatomy of a person of one sex but with an unshakable belief or feeling that they are persons of the opposite sex.'²² Gender dysphoria, or gender identity disorder, are the names given to the psychiatric disorder represented by transsexualism.²³ The HRC Report used the term transsexual for those people who have changed, or are in the process of changing, their physical sex to conform to their gender identity; 'trans person' and 'transgender' are used more broadly to include those who may not be able to, or may not want to change their physical sex, as well as others such as cross-dressers, who wear clothing that is considered to correspond to the opposite gender.²⁴

This issue for the Court was the extent of 'medical treatment' necessary to meet the statutory test of 'usually regarded by medical experts as desirable' to 'acquire a physical conformation that accords with the gender identity of a person of the nominated sex.'²⁵ As discussed, the HRC Report noted that many trans people, and perhaps some family courts and employees of the DIA, regarded full gender reassignment surgery as necessary to meet the test. Full gender reassignment surgery, including genital surgery, may not be available to many, may be very costly and may present significant health risks to some people. Many trans people will choose not to have full surgery, or even any surgery, for various reasons, including cultural and religious ones.²⁶ This participant in the HRC research reflects both the understanding of many trans people regarding the requirements at the time of the HRC inquiry, and the difficulty with meeting the requirements as understood, particularly for a female to male trans person:

I can't change [my birth certificate] legally until I have had all surgeries deemed necessary, which for transguys is no mean feat if that includes 'lower' surgery. We can't get that done in New Zealand, most of us don't have the \$50-\$100K needed to do it overseas, it can involve as many as five risky operations with a very variable outcome, and many of us will never choose to have it.²⁷

17 27 FRNZ 58, 61.

18 27 FRNZ 58, 61.

19 27 FRNZ 58, 61-62.

20 27 FRNZ 58, 62.

21 27 FRNZ 58, 62.

22 27 FRNZ 58, 63.

23 27 FRNZ 58, 63; the HRC Report states that some trans people reject the implication that they have a mental illness. Liddicoat, above n 5, 53.

24 Liddicoat, above n 5, 13. It has been noted that many people have complex gender identities, sometimes moving from one 'trans' category to another; in the UK one study found that 44% of cross-dressers intended to live permanently in their preferred gender at some point in the future. Whittle (2007) 14.

25 BDMRRA 1995, s 28(3)(c)(i)(B); 27 FRNZ 58, 68, 70.

26 Liddicoat, above n 5, 20, 69, 96.

27 Liddicoat, above n 5, 69.

Some trans people believe it is inappropriate for the medical profession to make determinations regarding their gender identity.²⁸

In deciding whether Michael met the statutory test for a declaration the Court considered the legislative history of section 28, stating that the changes between the original Bill²⁹ and the section in its enacted form revealed a 'significant relaxation' of the extent of medical treatment necessary for a declaration.³⁰ In particular, the Court noted the change in language from 'all medical procedures usually regarded by medical experts a *necessary*', to '*all* medical treatment usually regarded by medical experts as *desirable*' to the current requirement of '*such* medical treatment usually regarded by medical experts as desirable.'³¹ The Court concluded that Parliament did not intend that all available surgical procedures, including full genital surgery, should be necessary to satisfy the test, but stated that the extent of treatment required to obtain a physical conformation that accords with the nominated sex was not clear.³² In particular, it was not clear whether an applicant had to undergo surgery to alter their genitals in order to satisfy the test, and if so, the extent of such surgery necessary to give the genitals the physical conformation of the nominated sex.³³ Michael had not had any genital surgery.

Interpreting the section, the Court pointed out that the interpretation of 'medical' included both psychological and surgical,³⁴ and therefore medical treatment meant both surgical and non-surgical treatment, including hormonal therapy.³⁵ The Court noted that the requirement of 'a' physical conformation that accords with the nominated sex rather than 'the' physical conformation suggests that complete conformity with the nominated sex is not necessary.³⁶ Importantly, the Court stated that the 'applicant's degree of comfort with, or physical conformity to their nominated gender identity is the proper focus of treatment decisions' and stated that what was intended was a case by case assessment of whether the steps taken satisfied the test.³⁷ The Court concluded that it is not necessary in all cases for an applicant to have undergone full gender reassignment surgery to receive a declaration.³⁸ However, section 28(3)(c)(i)(C) requires that the applicant '[w]ill, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex', and the Court held that this means that the medical treatment itself must have the effect of maintaining a particular gender identity.³⁹

The Court noted that Michael's psychiatrist believed that Michael:

has assumed the gender identity of a male, has undergone such medical treatment as is desirable to enable him to acquire the physical conformation of a male, and such medical treatment will allow him to maintain that gender identity.... A hysterectomy, ovariectomy or reconstructive surgery are not essential and

28 Liddicoat, above n 5, 39, 91-92, 93-94.

29 The Births, Deaths and Marriages Registration Bill No 193-1, 5/11/89. cl 29.

30 27 FRNZ 58, 68.

31 27 FRNZ 58, 67-68.

32 27 FRNZ 58, 68.

33 27 FRNZ 58, 70.

34 BDMRRA s 2.

35 27 FRNZ 58, 70.

36 27 FRNZ 58, 70.

37 27 FRNZ 58, 70, 68, 71.

38 27 FRNZ 58, 71.

39 BDMRRA s 28(3)(c)(i)(C); 27 FRNZ 58, 71.

he would not recommend such surgery for Michael at this stage ... [the basic premise is] 'all unnecessary surgery should be avoided'.⁴⁰

Therefore, in applying subsection 28(3)(c)(i)(B) the Court stated that 'the combination of the ongoing testosterone hormone therapy, and the surgery, mean that Michael will never exhibit the secondary sexual characteristics of breasts in future, and therefore will continue to physically conform in that respect to the nominated gender.'⁴¹ The psychiatrist's view that these medical treatments were sufficient for Michael was formed with reference to internationally recognised standards of care, and therefore met the test of 'usually regarded by medical experts as desirable' in that subsection.⁴² To some extent the effects of the hormone therapy are irreversible, and there was evidence that Michael would, as a result of his treatment, maintain a gender identity of male as required by subsection 28(3)(c)(i)(C), and the Court so held.⁴³

This decision is well reasoned, and generally sympathetic to trans people. It accepts and responds to the uncertainty identified in the HRC Report, and clarifies that full gender reassignment surgery is not a requirement in all cases. It also provides guidance as to the considerations that a court may take into account in deciding the extent of surgery necessary. Importantly, it clarifies that female-to-male transsexuals will not, in all cases, have to undergo full gender reassignment surgery in order to obtain a declaration. However, the fact that the determination will be made on a case by case basis still leaves some uncertainty for trans people.

In part in response to the uncertainty prior to the *Michael* case, the HRC Report recommended amending section 28(3)(c)(i)(B) and (C) of the BDMRRA to replace the requirement of medical evidence of physical conformity with the nominated sex with a test requiring medical evidence that the applicant has 'taken decisive steps to live fully and permanently in the gender identity of the nominated sex' and will, as a result of the 'those decisive steps' (rather than 'as a result of the medical treatment undertaken') maintain that gender identity.⁴⁴ It noted that while medical evidence of physical conformity was problematic for many trans people, the proposed amendment retained the objective standard of medical evidence, and aligned it with a broader range of possible medical steps that can be taken to live in a nominated sex.⁴⁵

The Court in *Michael* noted that the approach suggested by the HRC Report recommendation was consistent with observations made by overseas Courts and with the information presented by medical experts in the case, stating that 'the law needs to keep pace with medical research and be applied in a manner that achieves justice for those concerned.'⁴⁶ Indeed, some in the transgender community continue to advocate for implementation of the HRC Report recommendation after the *Michael* decision.⁴⁷ Another option would be to enact legislation such as the Gender Registration

40 27 FRNZ 58, 61.

41 27 FRNZ 58, 72.

42 27 FRNZ 58, 73.

43 27 FRNZ 58, 73.

44 Liddicoat, above n 5, 97-98.

45 Liddicoat, above n 5, 98.

46 28 FRNZ 58, 76.

47 See GayNZ.com Daily News staff, (27 August 2009) 'MPs from across the main political parties are pledging their support for changes to legislation to improve the legal status of transgender people' 27 August 2009 available at <http://www.gaynz.com/articles/publish/2/printer_7828.php> at 28 August 2009, reporting that National MP Nikki Kaye and ACT leader Rodney Hide are supportive, that Green MP Kevin Hague has confirmed support of all nine Green MPs, that Justice Minister Simon Power is 'understood to be supportive' and that the Labour party 'looks favourably on such changes'.

Act 2004 (UK), which provides for recognition of the appropriate gender for people who have, or have had, gender dysphoria, have been living in their acquired gender for two years, and intend to continue living in that gender indefinitely.⁴⁸

Michael was recently cited in Western Australia, where two decisions of the Gender Reassignment Board of Western Australia (GRB), with similar facts to *Michael*, were appealed to the State Administrative Tribunal (Tribunal).⁴⁹ In both instances the female-to-male trans applicants had undergone bilateral mastectomies, and received hormone treatment resulting in extensive physical changes consistent with being male. The GRB refused to issue gender reassignment certificates on the basis that the applicants did not have the gender characteristics of a male, as required, because having a female reproductive system was inconsistent with being male.⁵⁰ The Tribunal considered *Michael* along with a number of Australian cases, noting that *Michael* was of interest because of its similar facts; none of the Australian cases considered a female-to-male transgendered person who had not undergone a hysterectomy.⁵¹ The Tribunal's decision included a list of the changes for each applicant resulting from testosterone treatment and the statement that Parliament did not consider surgery a necessary step in acquiring a specific set of gender characteristics.⁵² It held that the applicants met requirements for a gender recognition certificate, as to refuse certificates on the basis that the applicants retained a uterus would give primacy to 'that anatomical feature to the exclusion of the totality of the male gender characteristics of each applicant.'⁵³ The Attorney-General of Western Australia intervened in the Tribunal review on behalf of the State, arguing that the alterations to the gender characteristics of the applicants were not sufficient for them to be identified as male.⁵⁴ The Attorney-General has reportedly appealed the decision.⁵⁵

Michael sets the standard for interpretation of the present statutory test for a declaration of sex under the BDMRRA, and has provided an example of an appropriate approach to these issues for Australia. It remains for Parliament to consider statutory changes to align the requirements for changes to sex with those in the HRC Report, which reflect international standards.

48 Gender Recognition Act 2004 (UK) s 1, 2; see PRH Webb, 'Case Note: Getting a new birth certificate' (2008) 6 *New Zealand Family Law Journal* 110, 115 (stating that Parliament would do well to enact such legislation).

49 *AB, AH v Gender Reassignment Board of Western Australia* [2009] WASAT 152; *AH v Gender Reassignment Board of Western Australia*. Review by the State Administrative Tribunal of Western Australia is de novo; the Tribunal heard the applications together as the facts in each raised the same issues and the applicants were represented by the same solicitors and counsel. [2009] WASAT 152, 5.

50 Gender Reassignment Act 2000 (WA) s 15(1)(b)(ii); [2009] WASAT 152, 4, 7-9, the GRB does not publish any decisions.

51 [2009] WASAT 152, 21, 24.

52 [2009] WASAT 152, 11-14, 25.

53 [2009] WASAT 152, 30.

54 [2009] WASAT 152, 5, 18-19.

55 Roy Gibson, 'AG bid to bend gender ruling' *The Western Australian*, 16 Sept 2009, available at <<http://aunews.yahoo.com/thewest/a/-/newshome/6037667/ag-bid-to-bend-gender-ruling>> at 16 September 2009.

CASE NOTE: WINTHER V HOUSING NEW ZEALAND CORPORATION

BY THOMAS GIBBONS*

I. INTRODUCTION

Few law students express the aim of specialising in residential tenancies for their careers. Those seeking riches may pursue jobs in corporate law, financing, or commercial property – even commercial leases. Those with a political bent might focus on public law, and those holding themselves out as having more of a conscience may focus their interests on environmental, family, or human rights law. But residential tenancies are generally tucked away as part of a general course on property law, and are not, it might be said, the ‘field of dreams’ of anyone.¹

Nevertheless, residential tenancies cases can give rise to some fascinating legal issues. The key issue in *Winther v Housing New Zealand Corporation*² was: if Housing New Zealand terminated a residential tenancy for an unlawful reason, did that invalidate the notice of termination? In answering this question, the Court traversed a range of public and private law issues, from the application of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1986; through statutory interpretation; and into the jurisdictional detail of the Residential Tenancies Act 1986. This note examines these issues, touching on both the ‘public’ and ‘private’ elements of the decision.

II. FACTS

Each of Winther, Tamaka and Taylor was the tenant of a residence in Pomare, Lower Hutt. On 3 March, Housing New Zealand gave each 90 days’ notice terminating the tenancy.³ Attached to each notice was an internal memorandum indicating the reasons for termination. These stated that each tenant had breached the Residential Tenancies Act 1986 (the ‘Act’) by interfering with the reasonable peace, comfort or privacy of other persons in the neighbourhood.⁴ In one case, the reasons also referred to a warrant having been executed against an appellant’s partner for police intimidation, and that this partner’s actions were a serious breach of the tenancy agreement. On 20 May, each appellant applied to the Tenancy Tribunal for an order that the eviction notice was unlawful. HNZ responded by seeking a possession order under section 64 of the Act. As at the hearing date of 7 October, each tenant remained in residence.

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1 That said, most students are entirely familiar with residential tenancies themselves, as many students live in rented accommodations.

2 High Court, Wellington, CIV-2009-485-001954, Wild J, 9 October 2009. Hereinafter, ‘*Winther*’.

3 Pursuant to the Residential Tenancies Act, s 51(1)(d).

4 See Residential Tenancies Act, s 40(2)(c).

III. CASE HISTORY

The matter was initially heard by the Tenancy Tribunal. A range of issues were raised: most notably, that HNZ's termination of the tenancies had breached sections 17 and 19 of the New Zealand Bill of Rights Act 1990.⁵

The first argument made was that HNZ had chosen to discriminate, and had then tried to 'sanitise' this unlawful act by its 90 days' notice; and that HNZ had no obligation to give reasons for its 90 days' termination, but if reasons existed, these should be examined for lawfulness. On this point, the Tribunal held that there was no requirement for a landlord terminating a residential tenancy on 90 days' notice to give reasons, and further held that since there was no legal requirement to give reasons, a disaffected party could not attack a termination notice that did provide reasons. It was also noted that there was nothing in the Act to enable the Tribunal to examine reasons.⁶ The second argument was that HNZ was to be treated differently from other landlords because it was subject to the New Zealand Bill of Rights Act 1990, and through that the Human Rights Act 1993. On this point, the Tribunal reasoned that the Residential Tenancies Act governed all landlords, and all landlords were subject to the anti-discrimination provisions of the Human Rights Act, whether or not the New Zealand Bill of Rights Act applied to HNZ. HNZ was 'in no different position to any other landlord'.⁷ In the Tribunal's view, the tenants' remedies were in damages;⁸ in addition, a tenant complaining of discrimination could apply to the Tribunal or make a complaint to the Human Rights Commissioner, but not both.⁹ The Tribunal granted the relevant possession order to HNZ.

The appellants took the matter to the District Court, where the issue was whether the termination notice was effective, entitling HNZ to the possession order. Essentially following the path laid down by the Tribunal, the District Court held that there was no jurisdiction to examine any reasons given for the issue of a termination notice, nor to exercise any discretion as to whether a possession order would be made. The tenants' remedy was limited to exemplary damages, and not any declaratory or injunctive relief.¹⁰ The District Court also agreed that HNZ was in the same position as a private landlord. Despite being a Crown Entity – and so having a public function, being subject to the New Zealand Bill of Rights Act, and potentially judicial review – HNZ was subject to the universal application of the Residential Tenancies Act, which did not create any special considerations for HNZ or any other public landlord.¹¹

IV. APPEAL

The tenants appealed to the High Court,¹² arguing that HNZ had breached sections 17 and 19 of the New Zealand Bill of Rights Act, and that the Tenancy Tribunal had misunderstood their powers in respect of such a breach: section 109 of the Residential Tenancies Act provided that exem-

5 S 17 guarantees the democratic and civil right of association. S 19 provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993.

6 *Winther*, [11], citing the Tenancy Tribunal decision.

7 *Winther*, [12], citing the Tenancy Tribunal decision.

8 See Residential Tenancies Act 1986, ss 12, 77(2)(n) and 109.

9 Residential Tenancies Act 1986, s 12A.

10 *Winther*, [16], citing the District Court decision.

11 *Winther*, [17] citing the District Court decision.

12 On a question of law, pursuant to Residential Tenancies Act, s 119.

plary damages could be in addition to compensation in respect of an unlawful act. At the least, it was argued, there should be power to enquire into a power of termination being exercised in a discriminatory way, to prevent an eviction effected by unlawful discrimination, and to declare a termination notice unlawful. That is, termination was subject to the Tribunal's jurisdiction under section 77, allowing an order under section 78.

A. *Reasons*

The High Court started by noting that the Residential Tenancies Act did not require a landlord to give a reason for termination of a tenancy on 90 days notice. Therefore, the lawfulness of any reason could not be a legitimate concern when considering whether a notice under section 51(1)(d) was effective. To add this requirement would be to add words to the statute that were not present, and there was no 'gap' in the Act requiring this.¹³ The reasons were not considered unlawful or otherwise: they were not to be considered at all.

B. *Structure of Residential Tenancies Act*

The Court also held that sections 77 and 78 (relating to the jurisdiction and orders of the Tribunal) did not override section 51, but in terms of the structure of the Act, were designed to enable the Tribunal to give effect to the 'nuts and bolts' provisions – particularly as the jurisdiction under section 77 was to be exercised 'in accordance with the Act'.¹⁴

C. *Public Law Remedies (?)*

It then followed that as long as it complied with the Act, a landlord could act contrary to the New Zealand Bill of Rights Act or the Human Rights Act and still obtain a possession order.¹⁵ Furthermore, as the tenants had pursued remedies under the Human Rights Act, section 12A(1)(b) precluded them from seeking the monetary remedies that would otherwise have been available under the Act.¹⁶

If – *if* – any unlawful discrimination or breach of the New Zealand Bill of Rights Act had occurred, section 12 would apply. The notion that the courts could do nothing about an eviction actuated by unlawful discrimination was 'patently wrong': the remedies under the Act would have been available to the tenants if they had chosen the procedure under section 12A(1)(a) of the Act (invoking the procedures under the Act, rather than making a complaint under the Human Rights Act). The remedies under the Act were however monetary only, as if an unlawful act could invalidate an otherwise valid termination notice, 'great uncertainty' would arise, as neither landlord nor tenant would know where they stood, with the landlord being unable to re-let. The issue could drag on for months (as this one had); one of the key aims of the Act was to allow certainty and simplicity in the law of residential tenancies.¹⁷

13 Cf. *Northern Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530, 538, per Cooke J, cited in *Winther*, [22].

14 *Winther*, [23]-[24].

15 *Winther*, [27].

16 *Winther*, [28].

17 *Winther*, [32]-[37]. It was also noted at [38] that s 54 permitted a termination notice to be declared invalid if retaliatory, but no other grounds for invalidity were provided for.

The District Court had referred to the possible availability of judicial review of an unlawful decision of HNZ. While counsel for the tenants argued this was beyond their means, if this was the case, it was ‘a submission that the law is not serving the New Zealand public’ to be ‘more properly directed to this country’s lawmakers than to this Court’.¹⁸ In any event, there was no jurisdiction on the part of the Tribunal ‘review’ the lawfulness of a termination notice.¹⁹ The argument was also made that section 92I of the Human Rights Act would permit the Human Rights Review Tribunal to invalidate a termination notice. The Court noted that this was an issue removed from the matters on appeal, with no comment made as complaints to the Human Rights Commission were pending.²⁰

D. Findings

The Court found no error of law in the decisions of the Tenancy Tribunal or District Court, and the appeal was dismissed, with the possession order in favour of HNZ to stand. As a final point, it was noted that this was a test case with significant implications for the country’s largest landlord, HNZ. HNZ was therefore to meet the appellants’ costs on a 2B basis.

V. COMMENT

In a notable essay, Andrew Butler has commented that ‘the broad conclusion can be drawn, and needs to be appreciated, that a “public law” case can arise in settings far removed from those traditionally thought of as “public law” ones’.²¹ Interestingly for these purposes, Butler noted that (generally) ‘governmental institutions are regarded differently from private persons ... the standards of propriety and accountability which are demanded of government are often much higher than those demanded of private persons.’²² This case provides an exception to Butler’s proposition, as it concerned a ‘public’ entity (Housing New Zealand) that was ‘in the same position as any other landlord’, and to be treated no differently to any private person for the purposes of the Residential Tenancies Act.

Is *Winther* then a public law case or a private law case? It is submitted here that it is both. HNZ was treated the same as a private landlord for the purposes of the validity of the termination notice, but public law issues are woven throughout the quilt of the decision. At various points, the Court touched on:

- The application of the New Zealand Bill of Rights Act.
- The application of the Human Rights Act.
- The need for a particular body to give reasons for a decision.
- Whether certain actions constituted unlawful discrimination.
- Whether the Court should fill a ‘gap’ in the statute (finding that no gap existed).
- The availability of a remedy by way of a complaint to the Human Rights Commission.
- Parliamentary material as a guide to interpretation.
- Matters more properly to be dealt with by Parliament than the Courts.

18 *Winther*, [39]-[40].

19 *Winther*, [41].

20 *Winther*, [42].

21 Andrew Butler, ‘Is this a Public Law Case?’ (2000) 31 *Victoria University of Wellington Law Review* 747 [online version, available at <<http://www.austlii.edu.au/nz/journals/VUWLRRev/2000/38.html>> section IV].

22 *Ibid* s I.

- That the Courts should not make law (not being ‘this country’s lawmakers’).
- The jurisdiction of the Human Rights Review Tribunal.
- The decision being a ‘test case’, with application beyond the parties at hand.

It is worth asking again: is this a public law case? Clearly it is, when the above matters are considered. But it also shows that public law rights and remedies can be limited, and can be subject to private law considerations. The tenants had public law remedies, but ultimately, the Court ruled that HNZ was to be treated like any other landlord: a ‘private’ outcome, with broadly public implications.²³

23 An approach that might well find some support: see Carlow Harlow: ‘Public’ and ‘Private’ Law: Definition without Distinction’ (1980) 43 *The Modern Law Review* 241, 242 and generally.

BOOK REVIEW

THE TREATY OF WAITANGI IN NEW ZEALAND'S LAW AND CONSTITUTION, by Matthew Palmer (Author), Victoria University Press, 2008, 477 pp, recommended retail price NZ\$50 (paperback).

The Treaty of Waitangi occupies an unsettled place in New Zealand's constitution, law and life. Although there is almost universal agreement that it is a foundation document, this is not reflected in the legal status of the Treaty, or necessarily in its treatment by government. The Treaty engenders strong emotions on both sides of the political divide. Many New Zealanders are ambivalent about it. For some, it is a private issue; for others, it is very public, and very political. Both the legal and constitutional status of the Treaty is uncertain and unsettled, and so is the question of who exercises public power in relation to it. Harris has described the Treaty as one ingredient of a 'cauldron of quietly simmering constitutional issues'.¹ In this well-researched book, Matthew Palmer confronts these issues head on, and argues his vision for settling the legal and constitutional position of the Treaty.

As co-author with Sir Geoffrey Palmer of *Bridled Power*, and author of several articles on the Treaty of Waitangi and related matters, Matthew Palmer is well-known and highly regarded. Palmer was awarded the New Zealand Law Foundation International Research Fellowship Award to write this book, which was published at the end of 2008. The book is the recipient of the Legal Research Foundation's J F Northey Book Award for the best legal book published in 2008.

The book cover is attractively laid out in earthy colours with the name of the book and the author clearly visible in large font. The cover picture of a pathway through a bush, as the author explains in the preface, is significant because it evokes New Zealand's constitutional landscape and the place of the Treaty of Waitangi in it. As Palmer observes, 'the Treaty is foundational, partly obscured, but salient'.² It is also perhaps symbolic of the journey the reflecting reader may make from general knowledge of the Treaty to an understanding of the legal and constitutional complexities of the Treaty, and ultimately perhaps, for support of the author's view of the Treaty's place in New Zealand generally, and the law and constitution particularly.

The content of the book is well-presented. The typesetting, text layout and font size aid in making the text easy to read. Chapters are numbered, but sections and paragraphs are not numbered. I suspect that this was done to improve the flow of the book, and to make it more accessible to the general reader. Although this is not necessarily a shortcoming, it could potentially be a minor annoyance, particularly for the more academic reader; it makes it a bit more challenging to get a holistic sense of the book. The use of endnotes, rather than footnotes, also simplifies reading, but again, for the more academic reader, constantly turning to the back of the book to access the endnotes may become cumbersome. The index uses page references because of the absence of paragraph numbering.

The book is conveniently divided into 3 main parts: past, present, & future. Each part has its own chapters. The division is simple, but not simplistic. It creates in the mind of the reader a reali-

1 BV Harris, 'The Treaty of Waitangi and the Constitutional Future of New Zealand' (2005) *NZ Law Review* 189.

2 Palmer 5.

sation and understanding of the importance of the past and present status and place of the Treaty as a pointer for the Treaty's future, and explains three distinct yet complementary developmental stages. There is also a preface, introduction and summary, which provide a useful abridgement of Palmer's views and recommendations.

Part 1: Past deals with the place of the Treaty of Waitangi in the law and the constitution in 1840. Palmer explores the Treaty's role in founding and legitimizing the New Zealand state. He provides a comprehensive overview of the historical events that led to the signing of the Treaty and then proceeds to discuss what he believes relevant parties understood the Treaty to mean at the time. He concludes that the Treaty resulted in public power being shared between the British Crown and Māori, although the terms of the power sharing were unspecified both in the Treaty and in reality.

Unsurprisingly, the greatest part of the book is devoted to **Part II: Present**. The author attempts to answer the following questions: what has the treaty been reinterpreted to mean in New Zealand today? What is its current legal status and force? What is its current place in New Zealand's constitution? The author provides a description and analysis of the status quo, which should be of great assistance to anybody needing an accessible, convenient and accurate exposition of Treaty of Waitangi law as it currently stands. His assessment of the present is damning, but accurate. There is a contradiction between the law and the constitution in how the Treaty is interpreted and enforced. The constitutional importance of the Treaty is not reflected in its current legal status, but more damning still, there is uncertainty not only about the meaning of the Treaty in relation to certain specific issues, but also about whose role it is to address these uncertainties. Palmer rightly describes the Treaty as being half in and half out of the law; one of the most unsatisfactory aspects of the current system is the inconsistency with which the Treaty has been incorporated into New Zealand legislation.

Palmer favours a relational approach to Treaty matters; relationships therefore lie at the heart of the Treaty, in particular, the relationship between the troika of Crown, Māori and other New Zealanders. The emphasis is on process, but without losing sight of the substance of rights and expectations. He concludes that the uncertainty about content and inconsistency in application is harming the Treaty and the nature and quality of relations between this troika.

It is a fact that the Treaty affects the lives of all in New Zealand. Its content, constitutional place and legal standing are contested political issues that tend to polarise. Palmer takes the view correctly that certainty of the Treaty's place and standing would benefit all, and would improve the health of the troika's inter-relationships.

Palmer also deals with the standing of the Treaty in international law. He concludes that the Treaty is a valid and binding treaty at international law. He predicts how the Supreme Court could potentially rule on this, suggesting that the Court would likely find that the Treaty will not be enforceable as part of New Zealand law unless it is expressly incorporated into the law. However, he additionally opines that the Court is likely to hold that even though it is not enforceable in law, the Treaty is binding on the honour of the Crown.

Another interesting discussion centres around the issue of administrative decision-making, particularly regarding the doctrine of legitimate expectations. Palmer contends that there is a good argument to be made in favour of a legitimate expectation existing on the part of Māori that the Treaty will be a factor in administrative decision making by the Crown. In particular, he muses about whether the Supreme Court would develop a general legal obligation on the part of the Crown, based on a legitimate expectation to act consistently with the Treaty. Palmer's views on

the role of the courts in the interpretation and enforcement of the Treaty, and its principles make interesting reading. He reflects not only on the past and present treatment of the Treaty by the courts, but also muses on how the Supreme Court is likely to deal with it in the future. His musings are speculative at best but exhibit insight into how Palmer views the role of courts generally in society, particularly in relation to the balance of authority between the courts and Parliament. He seems to consider that the courts have not been as proactive as they could have been in making the Treaty more effectively binding on the executive branch, and points to a judicial reticence that is based on a perception on the judiciary's part that New Zealand's constitutional culture does not view them as the appropriate exercisers of public power in this regard. He refers to the 'deep and enduring tension' between the Treaty and New Zealand's majoritarian constitutional culture, which has Parliament as the primary driver of law and constitutional reform.³ He opines that '[w]hether the courts will give force to the Treaty independent of Parliament ... will depend on whether the judges of the Supreme Court wish to do so. This will be influenced by those judges' perception of the justice of the dispute before them, their expectation of the likelihood that injustices will be remedied by the executive or by Parliament, and the extent to which the courts consider they enjoy public legitimacy in their exercise of judicial power.'⁴ I think that he somewhat overestimates the ability of the courts in giving general effect to the Treaty. Perhaps Parliament is better suited to address these issues, rather than the courts; although, having said that, I think that the courts have a vital role to play in constitutional dialogue, particularly with regard to the Treaty of Waitangi. The pertinent question is the extent to which the courts can and should take the initiative in engaging the executive and legislature in such dialogue. In his discussion on the theory of constitutional dialogue, Palmer observes that new Supreme Court, composed of New Zealanders based in New Zealand, is 'likely to find its own distinctive New Zealand accent in constitutional dialogue with Parliament'.⁵ The Supreme Court Act 2003 places emphasis on the Treaty of Waitangi,⁶ and coupled with the statements made by the Chief Justice at the first sitting of the Supreme Court, it would appear that the court is conscious of its important role in this regard:

What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours. The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice.⁷

Part III: Future requires the author to don his soothsayer's garb to determine what the future holds for the Treaty. This is not an easy task. At the one end of the scale is the continuation of the status quo; this would clearly be an unacceptable option. At the other end of the scale lies the incorporation of the Treaty into the common law of New Zealand. Palmer's solution appears to lie somewhere in the middle.

Palmer's tone is conciliatory rather than alienating. His vision shifts the focus away from the technical aspects of the Treaty and its present treatment, to the benefits of stability and certainty about Treaty matters. He reiterates his thesis that relationships are at the heart of the Treaty, and

3 Palmer 26.

4 Palmer 232-233.

5 Palmer 242.

6 S 3(1)(a)(ii).

7 Dame Sian Elias, Speech on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 available at <<http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting>> at 12 October 2009.

that the basis for success in Treaty matters is building and maintaining good relationships between the troika of Crown, Māori and other New Zealanders.

He considers various options to achieve this end, including the maintenance of the status quo. Although he concedes that the analysis in his book is consistent with reform that would afford the Treaty the status of superior law – which would give the judiciary the ability to essentially over-rule the legislature and executive branches – he does not regard this option as feasible presently. In his words, ‘I just cannot see that the current state of New Zealand’s collective constitutional culture would tolerate it’.⁸ His preferred option, which he terms the ‘realistic option’ is to make the Treaty of Waitangi a binding part of New Zealand law, with a Treaty of Waitangi Court having the responsibility to interpret and apply it. The Court would be composed of selected High Court judges and Waitangi Tribunal members, who are given warrants to sit in this Court in panels of two. An appeal will lie to the Court of Appeal and Supreme Court from this Court. The benefit of Palmer’s solution is that it will provide certainty at least about who will exercise the power of interpretation, and will hopefully bring more clarity and certainty to the interpretation of the Treaty and its application. Such a court would also be likely to be less reticent in substantively enforcing the Treaty, and the principles which underlie it. He sees a new role for the Waitangi Tribunal, that of advisor to Parliament on the meaning of the Treaty in legislation, whilst continuing to report on historical claims.

The reasoning underlying the call for a separate court has merit. Palmer correctly records concern about the legitimacy of the courts of general jurisdiction to deal with Treaty matters in the eyes of Māori. To my mind, this can to some extent be addressed by increasing the number of Māori judges, or judges with knowledge of tikanga Māori and kaupapa Māori, on the superior courts’ bench, but this would require a firm commitment from the executive to increase judicial diversity. Perhaps a similar outcome to that proposed by Palmer could be achieved by creating a Treaty of Waitangi chamber within the High Court which would be staffed by judges of the High Court with knowledge and understanding of Treaty matters. Rather than creating a separate court, a chamber that is part of the courts of general jurisdiction could go a long way to mainstreaming the Treaty and its interpretation. But for this to work, judicial legitimacy issues need to be addressed first.

Palmer’s plea for the inclusion of the Treaty as a binding part of New Zealand for general purposes has substantial merit. Presently, it is generally only in instances where legislation stipulates that regard should be had to the Treaty that the courts use it as an aid to interpretation. The Waitangi Tribunal can interpret and apply the Treaty but without general binding effect. Palmer’s suggestion would allow the Treaty to be used as a general aid to interpretation. This would call for Parliament to enact a statute that would give the general meaning of the Treaty of Waitangi the force of law in the same way as any other piece of legislation.

The fear with a book of this length is that it runs the risk that the text may become tedious, especially as it is sole authored. Although there is a measure of repetition, Palmer holds the attention of the reader with interesting content and an unpretentious, forthright writing style. The key is that the author adopts a practical approach to these complex issues without discarding their theoretical underpinnings. Palmer is a proponent of constitutional realism, and tells it like it is. There can be no doubt on which side of the fence Palmer sits. He pulls no punches and states his opinion, but he does so in an honest and reasonable way that affirms his bona fides and is unlikely to alienate

8 Palmer 339.

readers who do not share his views. His pragmatic approach is refreshing and one of the distinguishing attributes of the book. His vision is ambitious, yet realistic. He acknowledges though that not everyone would agree with him, but the benefit of Palmer's thesis is that it provides a basis for discussion.

The inclusion of material taken from the cabinet files on the Treaty of Waitangi adds substantial value to the book, and provides interesting insight into the way that successive governments have viewed the Treaty and its place in New Zealand's legal and constitutional landscape. Appendix B to the book contains selected extracts from these files.

The present unsettled place of the Treaty is wholly untenable and needs to be resolved. The appropriate path needs to be carefully chosen after debate and reflection as it will no doubt impact on our relations with one another, and with the way we see and regard ourselves as individuals and a nation. The discussion around the place of the Treaty is a vital component of any dialogue on New Zealand's constitutional arrangements. Palmer touches upon the significance of a culture of 'pragmatic evolution' regarding the constitutional arrangements, which is tied in with an 'instinct for ad hocery'.⁹ Is this still the way to go, or there is a need for a greater sense of purpose and direction with regard to the complex issues that relate to the Treaty? Whatever the chosen path, it should be one that binds rather than divides; the whole community should have confidence in the outcome of the dialogue. The discussion may be a long and difficult one, but it is one that is vital to the interests of all communities in New Zealand. As put by Harris, '[u]ltimately that place [in New Zealand's future constitutional structure] is likely to be determined by a compromise between the values underpinning the Treaty and justifying particular recognition in the law of Māori interests, and the liberal ideal of all citizens and their interests being treated in largely the same way.'¹⁰ Finding this balance is the challenge. Palmer expresses the hope that the book 'will provoke new, constructive conversations about where we are and where we want to be going in relation to the Treaty of Waitangi.' The book is a good start to such a conversation, and to addressing this challenge.

Overall, the book is a tour de force that makes an invaluable contribution to learning in the area. I have no doubt that it will become the *locus classicus* on the subject. It should appeal to a broad range of readers. Although the primary readers are likely to be academics, politicians and others who deal with the Treaty in a professional capacity, the ordinary reader should also benefit from this book. It is always challenging to strike an appropriate balance between academic scholarship and popular non-fiction, but I think that the book succeeds on this score. The publicity pamphlet is indeed right in calling the book both 'academically robust and accessible'. It should be essential reading for anyone involved in law, and would be a welcome addition to any other serious reader's bookshelf.

Morné Olivier*

9 Palmer 17.

10 Harris, above n 1, 215-216.

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BOOK REVIEW

IN THE FOOTSTEPS OF ETHEL BENJAMIN NEW ZEALAND'S FIRST WOMAN LAWYER by Janet November (Author), Victoria University Press for The Law Foundation, 2009. Recommended retail price \$54.99.

This biography of Ethel Benjamin is very aptly titled. From the first page the reader is transported to Dunedin in the nineteenth century to walk in the footsteps of Ethel Benjamin beginning with 1875, the year of her birth. Throughout the book the author paints a vivid picture of Dunedin and Otago during the latter half of the nineteenth century and it is against this backdrop that she draws in the picture of the girl who was destined to break social barriers and become New Zealand's first woman lawyer.

Until I read this book my impressions of Dunedin had been formed by my own memories of the 1970s, living at the top of one of the steepest hills in the world, fighting the biting wind and building coal fires hot enough to melt the snow on the roof. Now, when I think of Dunedin, I have in mind the bustling, growing city where Ethel Benjamin went to school and later to university and where she broke through the male bastion of legal practice and went on to set up her own law firm. Janet November conveys to the readers the problems of a city in its early days, of the strain put on inadequate sewerage systems, of horse-drawn trams struggling to navigate dirt roads that were dust heaps in summer and muddy quagmires in winter. She describes Ethel's early life so well that one can imagine Ethel as a girl going off to school, doing her homework, and visiting family and friends. Ethel's mother is clearly seen in the background with her large brood of children, carrying on the day to day life of a matriarch in a prosperous family.

Janet November has taken the facts that she has about Ethel and her family and carefully woven them into the larger story of the rapid development of the city of Dunedin during the exciting time of expansion and growth after the goldrush of the 1860s. The University of Otago had been established four years before Ethel's birth but at that time university education for women was unheard of. Women were entering certain professions in the 1860s but were restricted to being teachers and nurses or else setting up in business as milliners, dressmakers and suchlike. One huge stride forward was taken when the Otago Girls' High School was established in 1871. This achievement was the result of the vigorous advocacy of Miss Dalrymple who was supported by influential men. At that time, however, the aim was to produce intelligent wives rather than candidates for professions like law and medicine. Ethel began her studies at the Girls' High School when she was eight years old and thus began on her extraordinary path.

One common theme in Janet November's narrative is the way that Ethel Benjamin's achievements were supported and even made possible by the efforts of influential people, many of them men, who were prominent in Otago society at the time. For example Sir John Richardson and Robert Stout who stood by Miss Dalrymple in her efforts to secure education for women. I could not help but compare Ethel Benjamin's situation with the plight of women in England. Admission for women to Oxford University was opened up in 1878 with the establishment of female-only academic halls, but women were not entitled to be awarded University degrees until 1920. For Ethel at university, the attainment of the degree was not easy. Teaching was minimal and students had to study largely by themselves, also the male students were not all wholly in favour of the

admission of females, especially as the first two female law students proved to be so much better at passing the examinations than the males.

Ethel Benjamin's story is well told but I was left wanting to know more about Ethel herself. In the Foreword by Dorothy Page it is acknowledged that there was scant material available to give us much in the way of personal commentary. We have some letters and a few snippets, for example from an interview in 1897 when she referred to her early decision to become a lawyer and described the support she gained from her parents for the venture. These comments in no way suggest recognition of any difficulties that might be put in her way, despite the fact that an Act of Parliament would have to be passed before she could be allowed to practise law. However from her later dealings with the Otago District Law Society we can see that she was fiercely determined to be accepted as a full member of the legal profession and enjoy every aspect of her status, not relegated to some second rank of women lawyers. It may be that Ethel understated her awareness of the significance of her decision to be a lawyer. On the other hand she may have detected that the circumstances at that time were in her favour and have taken advantage of them. We simply cannot tell. Ethel married and eventually went to England in about 1910. It would appear that she intended to stay for a visit but World War I changed their plans and she and her husband settled in England, Ethel becoming England's first woman to hold a bank manager's position. Her success at being admitted to legal practice in New Zealand in 1897 was a factor used by the English suffragette's to campaign for the right of women in England to enter legal practice, but there is no evidence of Ethel taking any active role in that campaign.

I enjoyed Janet November's account of Ethel Benjamin very much. It is well written and obviously the product of careful research. The achievement of Ethel Benjamin was considerable, there is no doubt, but I now want to know more about the people who contributed to her achievement and to explore why attitudes towards the education and emancipation of women were so enlightened in Dunedin at that time compared to England. Above all the book has given me a different view of Dunedin and next time I am there I shall look for the landmarks that Ethel Benjamin would have known.

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