The New Zealand Bill of Rights, Rishworth et al, Oxford University Press, Wellington (2003)

Rights jurisprudence is relatively new in New Zealand and is, in part, driven by an international trend towards recognition of civil, political and criminal rights.[1] The New Zealand Bill of Rights Act 1990[2] is, internationally, one of the more recent statutes to address rights, both civil and criminal. Despite its relative infancy, New Zealand rights jurisprudence is developing at a steady pace. This book represents the most comprehensive consolidation of those developments to date.[3]

The book is organised into 29 chapters usefully set out to mirror the various provisions of the Act. Included are chapters on the application and interpretation of the Act, discussions about rights, both 'human' and 'criminal procedure' based, and on remedies for a breach of the Act.

The first table of contents lists the chapter heading and the author. The second table breaks down the contents of each chapter. There is, of course, the standard 'table of cases' and a comprehensive index. There is no excuse for not being able to locate relevant material in this book. The organisation of the book is excellent, especially given the volume of material contained therein.

Inside each chapter, the relevant sections of the Act under consideration are reproduced prior to the commentary. The commentary sets out a general overview of the particular area before moving on to a detailed analysis of the relevant right. This detailed analysis is broken up by relevant headings and subheadings into easily comprehensible and digestible segments.

The footnoting of material in the chapters I reviewed is extremely comprehensive, and is conveniently located throughout the chapter rather than at the end. Readers will find the footnotes an essential and invaluable tool in clarifying the ideas presented by the authors and facilitating a greater appreciation of the subject by students and practitioners alike.

The book is well researched and may be considered an extremely thorough analysis of criminal procedure. In providing a commentary of the Act, the authors make numerous detailed references to jurisdictions that have a longer history of rights jurisprudence, notably the United States of America and Canada.

Most importantly, and to the credit of the authors, the book is readable and useable. It is pitched both at the person coming to grips with the Act for the first time and the person who wants to drill down to the finer detail and consider some of the more controversial points about rights jurisprudence that have come to light to date.

---

1 For a more detailed description of the relevant international covenants forming the background of the Act see Rishworth et al, *The New Zealand Bill of Rights* (2003), 11.

2 Hereafter "the Act".

3 The book itself is huge, as is evident from the sheer volume of material included in its 852 pages, and the fact that the authors felt compelled to insert two tables of contents.

Because of the size of the book this review has been limited to the chapters focused on criminal procedure and specifically those authored by Scott Optican.[4] Optican authored four chapters, namely search and seizure, other rights of persons arrested or detained under any enactment, the rights of persons charged with an offence, the right to be tried without undue delay and retroactive penalties and double jeopardy. He co-authored with Paul Rishworth minimum standards of criminal procedure for trial, sentencing and appeals.

While these chapters clearly present the law as it is, Optican makes clear his view on the gaps and omissions of the courts in dealing with particular issues, for example the lack of a concise definition of 'search'. Optican, more than any other author in this book, sets out his views on how these gaps and issues should be resolved. Undoubtedly, his views are closer to a due process model[5] than a crime control model and for that reason more orientated to defence counsel.

Those students who have experienced Optican's colourful and animated criminal procedure classes will be extremely familiar with the layout of the search and seizure chapter. This right is one of the most litigated in criminal procedure jurisprudence. Consequently, this chapter is much longer than the others. A breach of this provision relating to search and seizure in the Act is likely to lead to an exclusion of evidence during trial. For this reason, the section has a significant impact on a number of criminal trials. Students, academics and other actors in the judicial process continually debate the provision along with the associated consequences for its breach.

The variety of opinions about the reasonableness of any search and seizure can be classified on a continuum that starts with due process and ends with crime control. It is, arguably, inevitable that these views will differ according to a variety of factors, such as the circumstances of the case, the subject of the search and the viewpoint of the person trying the facts of the case. Optican offers a view that may be characterised as being closer to the due process model. If there were any criticism of this chapter, it would be Optican's failure to acknowledge arguments for interpretations at both ends of the continuum.[6]

The chapter logically commences with a discussion of what constitutes a search. Optican identifies this as an issue that the courts regularly avoid. He

---

4 Hereafter "Optican".

5 Criminal procedure rules balance society's need for the investigation, detection and prosecution of crime (the crime control model) against protecting the rights of people in the criminal justice system from unfair and oppressive conduct (the due process model).

6 For example the discussion of *R v Loh* (1997) 14 CRNZ 649, 446 (CA) and the conclusion that *Loh* "ratifies a police decision to target a number of motorists for criminal investigation based largely on their ethnicity, and highlights the manner in which s 21 has frequently been used in the service of unlawful, results-orientated policing rather than to control the police." See the discussion of *R v Bradley* (1997) 15 CRNZ 363 (CA) and *R v Gardiner* (1997) 15 CRNZ 131, 459 – 460 where the possibility that privacy expectations in a dwellinghouse may vary by conduct bringing suspicion upon the occupants is rejected in favour of very strict reasonableness criteria to "... enforce and regulate, rather than expand, present police powers ...".

suggests that the Court of Appeal needs to define an approach to the determination of the issue and that Parliament, if dissatisfied, should legislate.[7]

The second aspect of the chapter relates to the reasonableness test. Optican considers that the Court's approach to the determination of the issues is too flexible and variable, and as a consequence, it diminishes any principled approach to the search or seizure tests.[8] As a result, Optican has analysed precedents in terms of patterns of decisions, for example: searches of houses; cars; and persons rather than having one reasonableness standard or test to apply to all searches and seizures. This is a practical and sensible approach to make sense of the variety of decisions.

The chapter headed "Other Rights of Persons Arrested or Detained Under Any Enactment", more than any other, highlights the absence of comprehensive New Zealand empirical studies in the area of criminal jurisprudence, for example the existence of a number of rights is justified as being required to balance the inherent pressure that custody may place upon the accused person.[9] While undoubtedly that pressure may exist, there are no New Zealand studies on rights within a New Zealand context, such as lawyer access rights, which would allow the courts to consider precisely and in an informed way the effect and consequence of a breach of those rights. In the main, the views presented in this book will be relevant. However, it is worth considering alternative views and hypotheses that may be particular to New Zealand.

A distinction not drawn in the analysis of these rights is that between police action in making patrol and investigative arrests. The approach currently taken by police to execute arrests may have a significant effect on a Court's determination of the reasonableness of an arrest, for example in relation to the right to be informed of the reason for an arrest and the right to be charged promptly if at all. In the case of the former, it will usually be apparent why the suspect has been arrested; whereas in the latter case, police may require more time to investigate.

There will be an infinite variety of situations arising in criminal law and in Bill of Rights jurisprudence. Not all situations can be identified and commented

---

7 "Finally, judicial rationalization of the term 'search' — accompanied by Court of Appeal decisions explaining clearly why police conduct will or will not be subject to the Bill of Rights restraints — may galvanise Parliament to legislate where is concludes that various techniques of criminal investigation are best dealt with by statute rather than by common law elaboration of s. 21," supra note 1, 428.

8 "As long as the Court of Appeal continues to assess the reasonableness of police investigations based on their individual facts, it will be difficult to state convincingly what circumstances will cause a search and/or seizure to violate or comply with the Bill of Rights. Thus, at present, the most useful method of analysis under s 21 is to identify certain persistent patters of official investigative activity and to examine the judicial criteria of reasonableness (or unreasonableness) typically applied to those recurring sets of facts. Accordingly, the categories set out below attempt to examine, in thematic fashion, search and/or seizure scenarios ..." Ibid 438.

9 For example see supra note 1, 552 where Optican states "The core purpose of s 23 is to ensure that, in their initial, official encounter with authorities, those suspected of wrongdoing have some protection against the police-dominated atmosphere typically associated with deprivations of liberty pursuant to law." Optican cites *R v R* (CA) (184/92, unreported 3 August 1993) 6, noting that "a person under official detention is in a vulnerable position and so is more subject to coercive pressure than when official questioning takes place on more equal terms.

upon, and this book makes no claim to answer the full range of difficult questions that arise in the context of criminal rights. However, the book does provide a strong starting point and well reasoned jurisprudence from which to address new and significant issues as they arise in New Zealand.

Criminal procedure and Bill of Rights' jurisprudence will continue to evolve in New Zealand. While it would have been ideal if, from the commencement of the Act, clearly defined rules and rights were ascertainable, it is hopeful that a degree of certainty will develop with emerging case law. I hope that the demand for this book is sufficient to justify the authors publishing regular updates and continuing to provide invaluable assistance to people involved in the criminal justice system.

Paul J C Davies

internet.law.nz, Judge David Harvey, LexisNexis, Wellington, 2003.

The confluence of established law and networked technologies is the focus of the innovatively titled *internet.law.nz* written by District Court Judge David Harvey. His Honour is well suited to deliver an informed discussion on the interaction between the law and the Internet. Judge Harvey developed an interest in information technology while in practice, and following his appointment to the bench he has been involved in the introduction of information technology to the judiciary. The Judge is also a member of the Faculty of Law at the University of Auckland where he lectures on Law and Information Technology, and makes editorial contributions to Butterworths Technology Law Forum and Butterworths Electronic Business and Technology Law. He is also involved in several Auckland District Law Society committees and was recently appointed Chair of the Copyright Tribunal.[1]

This book is a significant analysis of legal issues arising from the development and utilisation of networked technologies. Judge Harvey states that his intention is not to create a definitive text; in fact he questions whether one could be produced and still claim to have any currency, such is the pace at which networked technology is developing.[2] For this reason he focuses on specific topics, the diversity of which is notable. He addresses the following issues: internet information and research; jurisdiction and conflict of laws; governance; criminal law; evidence and technology; tortious liability; e-commerce; and copyright.

A consequence of this diversity is that the book will prove relevant to many audiences: students, practitioners, business people, and others will find material of benefit to their work or research. As the title suggests, selected issues are primarily addressed in a local context. However, in recognition of the internet's cross-jurisdictional nature, case law from foreign jurisdictions is explored, without loosing sight of divergent underlying policy factors.[3]

Judge Harvey acknowledges that networked technology is developing quickly. As such, the legal boundaries of commercial practice may not be clear. His Honour adopts a rigorous method of assessing the state of the law in relation to internet associated activities. First, he identifies the law as it stands and questions whether it correctly applies to the activity in question.[4] If it does not, he analyses whether its application can be developed correctly to apply, and if not, he assesses the policy behind the law and questions its applicability to the activity instead.[5] Finally, where appropriate he postulates a revised approach or

---

1 New Zealand Internet Safety Group, "Symposium Speakers — Judge David Harvey" *Netsafe: Society, Safety & the Internet Symposium* http://www.netsafe.org.nz/ie/netsafe_society/netsafe_dharvey.asp (last modified 27 January 2002).
2 Harvey, *internet.law.nz* (2003).
3 Ibid vi.
4 Ibid v.
5 Ibid.

reform.[6] Given the uncertainty of internet users and law practitioners as to the boundaries of legality, this may prove a useful methodology for identifying internet codes of practice.

Judge Harvey's book reflects the relationship between networked technologies, globalization, and the law. Generally, while networked technologies and globalization symbiotically drive each other forward, the law has failed to maintain the same pace. This deficiency is demonstrated in the recent amendments to the Crimes Act 1961 that were intended to address crimes pertaining to networked technologies but which contain significant loopholes.[7] Paradoxically, the ability of hackers to strike at computers around the globe with the aid of the Internet suggests that a globalized form of criminal law is needed. By comparison, copyright law has contained an element of international law since the Berne Convention of 1886.[8] Judge Harvey considers various arguments regarding a greater internationalist approach to copyright.[9] In keeping with his objective approach he does not favour any specific theory, but he does put forward the opinion that the internet represents a significant challenge to areas of law where territoriality is traditionally a consideration. He concludes by stating that on his analysis of the various theoretical approaches put forward, a change in approach to issues of jurisdiction, forum, and choice of law is inevitable as the digital paradigm becomes ubiquitous.[10]

The first part of Judge Harvey's book addresses the reliability of information accessed on the internet and provides practical guidelines for evaluating websites.[11] As electronic sources supplement and frequently replace manual sources, this chapter will be of value to students, website developers and practitioners seeking to ensure their research material will stand up to scrutiny.

The rest of the book is divided into two broad categories: the application of the law to the internet that addresses issues surrounding governance and jurisdiction; and behaviour that the existing law may potentially address, including torts, crime, and online contracts. Judge Harvey also addresses overarching issues such as evidence and intellectual property in the context of the internet.

The second chapter commences by examining theoretical[12] and judicial[13] approaches to issues about jurisdiction on the internet. Here Judge Harvey

---

6 Ibid.

7 Ibid 196-201.

8 Infra note 23.

9 Arguments considered are by: Graeme Austin, Tanya Poth, Graeme Dinwoodie, Ruth Okediji and Jane Ginsburg.

10 Supra note 2 at 538.

11 Ibid 1-24.

12 Generally: David Johson and David Post, Juliet Oberding and Terje Norderhaug, Yochai Benkler, Stephan Wilske and Teresa Schiller, and Henry Perritt. In relation to copyright: Graeme Austin and Jane Ginsburg.

13 Notably: *Twentieth Century Fox Film Corp v iCrave TV* No00-121 (Unpublished decision, WD Pa, Jan 20 2000); *Yahoo! V LICRA* 145 F Supp 2d 1168; *Gutnick v Dow Jones* (2001) VCS 305; *NZ Post v Leng* [1999] 3 NZLR 219.

addresses High Court Rules 131, 219 and 220, District Court Rule 139 and the proposal made by Clive Elliot[14] in response to *NZ Post v Leng*.[15]

Typically, a court may have jurisdiction in a case but it may not represent the most appropriate forum for the trial.[16] Judge Harvey explains that this may be particularly problematic in relation to internet based activity.[17] The presence of a website or a contractual provision stating which forum is preferred may not alone be sufficient to justify an exercise of jurisdiction by local courts.[18] However, if these factors are coupled with injury to the plaintiff occurring within the forum or the solicitation of business in or the targeting of the forum, then they may be sufficient to justify bringing an overseas defendant under a domestic court's jurisdiction.[19]

In this chapter, His Honour emphasizes that issues of jurisdiction arising from the internet demand 'a principled, intellectually rigorous' application of existing rules.[20] The myth that activities occurring over the internet are beyond the reach of the courts is emphatically rejected.[21]

The third chapter of the book addresses internet governance. This chapter is particularly appealing for those with an appreciation of jurisprudence. Judge Harvey analyses various regulatory theories, then considers the role of international organizations and domestic courts in the administration of domain names on the "world-wide-web".

Judge Harvey places the major schools of regulatory theory on a continuum from formal approaches based upon conventions of law and the state through to informal approaches based upon technical conventions, private responsibility and trans-national scope.[22] Towards the formal (right) side of this continuum is found the school of digital realism which enunciates the principle that "there [is] no more a law of cyberspace than there [is] a 'Law of the Horse'."[23] At the opposite end are the cyber-anarchists who promote the free and open flow of information across the internet and challenge state regulation and the application of intellectual property rights to the internet. Central on the continuum is the 'Code is Law' theory that states that 'in cyberspace, architecture is the dominant and most effective modality to regulate behaviour'.[24] Some readers may question the importance of what can be mistaken to be high theory divorced from the true sources of internet regulation, namely national legislative bodies and select international organisations. However, it is unreasonable to suggest that theorists do not influence the discussions that precede the formulation of regulatory policy.

14 Elliot, "The Internet — A New World Without Frontiers" [1998] NZLJ 404.
15 [1999] 3 NZLR 219. Elliot's proposal is examined in depth at Harvey, supra note 2 at 27-28, 83-87.
16 Ibid 27.
17 Ibid.
18 Ibid.
19 Ibid, 27-28.
20 Ibid 87.
21 Ibid.
22 Ibid 91.
23 Easterbrook, "Cyberspace and the Law of the Horse" (1996) Univ Chicago Legal Forum 207.
24 Harvey, 101.

In showing no preference for any particular theory, Judge Harvey leaves the way open for the consensus of theories that is likely to emerge in the years ahead as the Internet becomes subjected to greater and more sophisticated regulation.

Judge Harvey discusses the origins of the Internet Corporation for Assigned Names and Numbers and critiques the procedure it adopts to resolve disputes about top level domain names (those following the single suffix pattern, such as .com).[25] His Honour also discusses litigation in the domestic courts of disputes involving country code domain names (those using a double suffix, such as .co.nz) under the tort of passing off, the Fair Trading Act 1986 and trademark law.[26] This discussion illuminates the need, in cases involving the Internet, for a rigorous application of traditional common law principles to the facts of each case. It also emphasises the broad role taken by relatively new and versatile statutory causes of action.

While much law may be applied consistently to the internet, in some instances application of existing rules is problematic. This is particularly so in relation to criminal law. Judge Harvey recognises the inherent difficulty of defining computer related criminal activity and encapsulating these definitions into a workable legislative scheme.[27] For instance, prior to the enactment of the Crimes Amendment Act 2003, the Crimes Act 1961 was clearly deficient in prohibiting 'hacking'.[28] The recent amendments have prohibited several activities associated with computers, to address concerns about hacking. These include accessing a computer system for a dishonest purpose;[29] damaging or interfering with a computer system;[30] making, selling, distributing or possessing software for committing a crime;[31] and accessing a computer system without authorisation.[32] Unfortunately, the scope and application of these provisions has not been made by the definitions accompanying the amendments, for example, the meaning of 'computer' has not been specified. Judge Harvey highlights the risks inherent in the knee-jerk criminalisation of online behaviour that is treated differently offline.[33] His Honour equates accessing a computer system without authorisation to entering an office and browsing through a filing cabinet. Arguably tort law addresses the latter behaviour adequately. Furthermore, existing legislation may apply to behaviour unique to the internet, such as cyber-stalking and online harassment.[34]

Judge Harvey discusses the practical and legal implications of the collection, admissibility and presentation of evidence harvested from the internet under

---

25 Ibid 99-100, 115-144.
26 Ibid 144-160.
27 Ibid 213-214.
28 Ibid 174.
29 Crimes Amendment Act 2003, s 250.
30 Ibid s 251.
31 Ibid s 252.
32 Ibid s 253.
33 Supra note 2 at 213-214.
34 Ibid 227-239.

existing law. His Honour notes there is potential for conflict between online surveillance and the New Zealand Bill of Rights Act 1990.[35] Practical guidelines are set out for the use of demonstrative evidence and reconstructions in court, and the presentation of evidence using new technology.[36] This credible advice will prove to be increasingly useful for practitioners.

Judge Harvey examines liability for tortious acts committed online. In relation to negligence, His Honour notes that expert systems[37] attract a duty of reasonable care in the information supplied, while on websites the standard of care is based upon an assessment of the authority that the particular site conveys.[38] Internet relay chat rooms are thus unlikely to attract liability.[39] Trespass is reasoned to be applicable to virus attacks on the basis that interference, rather than physical contact creates liability[40] and the harm caused may be merely functional under *R v Garrett (No 1)*.[41] Trespass has also been applied successfully to 'spam' email.[42] Defamation is discussed[43] with consideration given to the Internet defamation case *Gutnik v Dow Jones*.[44]

Online business relationships are also discussed in the book, with a focus upon electronic commerce. The internet has been compared with the industrial revolution in its importance to human development. However, the full potential of this new medium of exchange has yet to be reached.[45] Judge Harvey argues that the courts will take an important role in facilitating the effective utilisation of the internet as a mechanism to conduct commercial transactions in the future, as they have done under the Sale of Goods Act 1908 and subsequent legislation. New means of contracting, such as shrink-wrap,[46] click-wrap,[47] and browse-wrap[48] contracts are discussed.[49]

This chapter is notable for containing significant contributions from two of Judge Harvey's former students. The structure of the discussion in paragraph 7.2.3 on contract formation and the postal acceptance rule is credited to Adeep Segkar,[50] and paragraph 7.2.4 on the Electronic Transactions Bill 2000 was based

---

35 Ibid 278-281.
36 Ibid 281-285.
37 These are defined as "intelligent knowledge-based advisors [which] could consist of a distillation of an area of [...] expertise into a body of rules", ibid 293.
38 Ibid 293-298, 298-300.
39 Ibid 298.
40 *Hamps v Darby* [1948] 2 KB 311.
41 (2001) DCR 955. The need for intention is not absolute provided harm results: Wilson v New Brighton Panelbeaters [1989] 1 NZLR 74.
42 Supra note 2 at 309-316.
43 Ibid 316-342.
44 [2001] VSC 305.
45 Supra note 2 at 343.
46 This term refers to the licence agreement that is presumed to have been accepted when the plastic shrink-wrap that allowed the terms to be viewed was broken open by the purchaser of the software inside.
47 This term refers to the licence agreement that is presumed to have been accepted when a box is clicked to indicate acceptance of terms set out on web page or window.
48 This term refers to the licence agreement that is presumed to have been accepted when a licence is referred to in the course of using a program without the terms being displayed on the user's screen.
49 Supra note 2 at 361-371.
50 Ibid 371-395.

on a supervised research paper by Karen Riddle.[51] His Honour's willingness to incorporate research by students is somewhat unusual but is nothing less than successful. There appears to be no difference in quality to the material written wholly by His Honour.

The final chapter of the book is a selective discussion of intellectual property rights on the internet with a preliminary précis of basic copyright principles. Digital rights management, copy protection and circumvention are discussed in depth.[52] His Honour notes copyright legislation reflects a print paradigm and, as such, requires reconsideration to counter the tension between traditional rights given to users and producers and the special privileges conveyed to copyright holders by new technologies.[53] His Honour also discusses the copyright implications of hyper-linking following the finding in *Universal Studios v Reimerdes*.[54] His Honour also discusses peer-to-peer file sharing, analysing *A&M Records v Napster*,[55] and concludes with premonitions of the globalization of copyright law as a consequence of the internet.[56]

Comparisons may be made between Judge Harvey's book and a substantial intellectual property treatise published in 2002, *Intellectual Property in New Zealand*.[57] In terms of scope, Judge Harvey's exposition on copyright takes up 116 pages whereas the relevant section of the treatise addresses the same topic in only 14 pages. Additionally, it must also be noted that other intellectual property issues are addressed elsewhere in the book: there is a significant discussion of intellectual property rights in domain names, and briefer consideration to intellectual property issues is given in relation to online research. The picture that emerges, of intellectual property issues distributed throughout the fabric of the book, is reflective of the close association between the Internet and intellectual property law. Given this close association, the approach taken in *Intellectual Property in New Zealand* of having a section specifically addressing the Internet does not seem as well conceived as Judge Harvey's approach, which allows him to approach the topic in much greater detail in respect to various issues where they arise. This is not to suggest that *Intellectual Property in New Zealand* is anything less than a very respectable work. Rather, it demonstrates the consequences of His Honour's particular perspective, arising from his knowledge of intellectual property and networked technologies.

On reaching the end of the book, readers might well ask whether Judge Easterbrook was correct when he stated that "there [is] no more a law of cyberspace than there [is] a 'Law of the Horse'."[58] Judge Harvey argues that there

51 Ibid 395-415.
52 Ibid 423-538.
53 Ibid 423.
54 2000 WL 1160678 SDNY 2000 (17 August 2000). It was held that linking to a site that contained software for circumventing DVD Encryption was functionally equivalent to making the software itself available.
55 114 F Supp 2d 869 (2001).
56 Supra note 2 at 533-538.
57 Frankel and McLay, *Intellectual Property in New Zealand* (2002).
58 Supra note 2 at 91.

are areas where the existing law fails to meet the challenges posed by the internet, notably in relation to criminal law, particularly hacking. It follows that where the existing law falls short there is a necessity for some kind of "law of the horse", although His Honour does not suggest that the internet merits an entirely separate legal structure. Judge Harvey's pragmatism on this and other issues is admirable. It can be seen most vividly operating in the discussion of governance theories where Judge Easterbrook's famous quote first arises, where a wide variety of theories are discussed with no apparent preference on His Honour's behalf.

Overall, *internet.law.nz* is to be highly recommended. It combines clarity of thought and expression, informed analysis, and clear organization in a way that only the best legal texts seem to achieve. These attributes combine to create a rare species of legal text: one that may be read for understanding and also for pleasure. His Honour's unmistakable enthusiasm for the subject helps to ignite a keen interest in the reader. The only criticism that may be made of the book is the disappointing regularity of typographical errors in some sections of the text. Regrettable as these errors are, these do not reflect upon the author as much as they do on his publisher's editorial team, nor do they detract from what is overall a work of high quality and superior insight.

Thomas William Hill

Private Property and Abuse of Rights in Victorian England, Michael Taggart, Oxford University Press, London, 2002.

Private Property and Abuse of Rights[1] offers a detailed investigation of the social context and legal ramifications of the leading case *Bradford v Pickles*,[2] which provides a vehicle for the examination of the scope of legal property rights.

Edward Pickles ("Pickles") owned land adjacent to a fresh water spring that the local authority of Bradford ("the Corporation") utilised to supply the town with water. Pickles asserted the desire to mine his land for flagstone and conceived of a plan to drain subterranean water from his soil to expose the deposits. This plan threatened the local water supply fed in part by the spring that flowed under Pickles's land. At the time, it was believed that flagstone was worthless and the local authority suspected Pickles to be pursuing an ulterior motive maliciously designed to coerce the Corporation to purchase his land. Terse negotiations led to an impasse, prompting the Corporation to litigate for relief.

The Corporation prevailed at first instance,[3] but ultimately failed to injunct Pickles from draining the water beneath his land.[4] Together with an alternative claim under statute, the Corporation argued that Pickles' exercise of his property rights was malicious and hence a breach of the common law. In finally deciding the case in favour of Pickles, the House of Lords unambiguously stated:[5]

> It is the act, not the motive for the act that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

Professor Taggart has undertaken extensive archival research to illuminate the broader context of the litigation and to present the reader with a more circumspect view of this nineteenth century case. The importance of the decision tends to have been distilled to a fine point by the rigours of common law evolution. *Bradford* now stands for the proposition that motive is irrelevant to tortious liability. However, one can glean more legal edification from the case than this point alone.

One of the underlying themes of *Abuse of Rights* is the difference between the common law and the civilian approach to the exercise of property rights. Professor Taggart reveals the diametrically opposed nature of the two systems in his analysis of the judgments given in the litigation. Their core differences warrant a deeper investigation, a process that is systematically fulfilled as the chapters of the book proceed. Professor Taggart begins with a focus upon the case

---

1 Taggart *Private Property and Abuse of Rights in Victorian England* (2002) [*"Abuse of Rights"*].
2 [1895] AC 587 ["Bradford"].
3 [1894] 3 Ch 53.
4 [1895] 1 Ch 145.
5 Supra note 2 at 600-601 per Lord Macnaghten.

itself, but expands to consider the broader theoretical and historical issues of the case upon which I will comment further below.

Professor Taggart's overt fascination with the facts and history of the case produces a work that is both thoroughly researched and well written. Chapter One acquaints the reader with the town of Bradford at the end of the nineteenth century, tracing the town's emergence as an incorporated borough and the 'municipalization' of the local water supply. It becomes clear to the reader that, with the passage of numerous private bills, the process of municipalization was achieved in a piecemeal fashion. Professor Taggart later illustrates that the private legislation affecting this process was complex, woefully drafted, and ultimately failed to capture the mischief of Pickles's actions.

Professor Taggart adeptly animates the characters involved in the dispute, leaving the reader to enjoy the unfolding events of the book as if it were a novel. One such protagonist was the Town Clerk, William McGovern, who formed 'the hub around which the multifarious activities of the Council took place.'[6] Such research also reveals the history of the Pickles family, in particular the successful attempt by Pickles's father ("Pickles Senior") to procure payment for a part of his land containing coal.

In Chapter Three, each of the three stages of the litigation[7] is examined and the judgments analysed closely. In rendering their judgement, the House of Lords eschewed any reference to the burgeoning influence of civil law concepts on the acceptable exercise of property rights. The reader detects Professor Taggart's frustration that '[R]oman and civil law learning ... was given short shrift on the basis of precedent in the courts below.'[8] That is regrettable to Professor Taggart because civilian influences 'gave the courts in Pickles the chance to think through in a careful way the implications of [previous] decisions ....'[9]

Chapter Four examines the statutory provisions relevant to the case and Taggart vividly illustrates shortcomings of the legislative effort aimed at safeguarding Bradford's water supply. Despite a seemingly exhaustive prohibition,[10] the House of Lords opined that since it did not own the water before it reached their land, the Corporation had no right to the flow of the water. Professor Taggart explains that the right to property was considered to be a fundamental one, and in light of Dicey's theory of Parliamentary Sovereignty,[11] it was guarded in practice by rules of statutory interpretation alone. Therefore, any statute expropriating private property required clear wording to justify an

---

6 Supra note 1, at 23.

7 [1894] 3 Ch 53; [1895] 1 Ch 145; [1895] AC 587.

8 Supra note 1, at 63.

9 Ibid 23.

10 See Bradford Corporation Waterworks Act 1854, s 49 :

> And be it enacted, That after the said *Many Wells* Springs have been purchased by the Company, it shall not be lawful for any Person other than the said Company to divert, alter, or appropriate in any other Manner than by Law they may be legally entitled, any of the Waters now supplying or flowing from the same [Part A], or to sink any Well or Pit, or do any Act, Matter, or Thing whereby the Waters of the said Springs may be drawn off or diminished in Quantity [Part B] [as annotated by Professor Taggart].

11 Dicey *Introduction to the Laws of the Constitution* (1885).

interference with the private property owner's rights. So in relation to the Bradford Waterworks Act 1842, the public interest in an adequate water supply justified the grant of Parliamentary power on the proviso that all property interference was to be fully compensated.

Pickles was excluded from public consultations and not offered compensation because his land existed above the percolating spring water, as opposed to downstream from the point at which it emanated. The interpretation given to the s 49 by their Lordships meant that prior interference with the spring water was not actionable, according to accepted principles of statutory interpretation. Professor Taggart presents the archetypical common lawyer as having 'an ingrained resentment of statute law,'[12] and observes that the 'methods of interpreting statutes developed against the common law backdrop: the preservation of property and liberty, and the minimisation of State interference.'[13] This assessment fits well with the substance of the judgments themselves, which are at pains to underline the fundamental nature of Pickles's property rights. Had Professor Taggart concluded his treatment of the case here the reader would have gained a superior grasp of the legal implications and social context of the case.

Henceforth, Professor Taggart undertakes a more theoretical study, beginning with a consideration of property and water rights. Sources as early as Blackstone are examined to trace the emergence of the theory of prior appropriation as the governing rule of subterranean water. According to this rule, the first landowner to appropriate flowing water has the right to use it to the detriment of all other subsequent users upstream or downstream.

Equipped with this cogent analysis of nineteenth century property rights in relation to water, the reader feels obliged to concur with Professor Taggart's sentiment that 'what was done (by the Corporation) ... was manifestly inadequate for the protection of the water supply.'[14] The scrupulous analysis of theories of property rights provides a vital context to the case. By coalescing important legal historical thought on property rights, Professor Taggart's book offers a rich source for future academic work in this area.

The final two chapters constitute the pièce de resistance. Professor Taggart examines several doctrines which mediate a property owner's absolute right to use their property in any way. He begins with the doctrine of abuse of rights as it derived from French law. The doctrine was perceived as a 'manifestation of equity'[15] serving to demarcate the extent of private rights when important collective interests were prejudiced. Several illustrative cases are provided to demonstrate the concept in action. Similar treatment is afforded to the Scottish doctrine of *aemulatio vicini*, which recognised the right of a landowner to use his property in any way except for pure spite or other oblique motives. Finally

12 Supra note 1 at 105.
13 Ibid.
14 Ibid 118.
15 Ibid 145.

Professor Taggart turns to consider why the equitable courts of the English Chancery Division did not develop a remedy for the abuse of property rights. The reasons he provides, centre on the historical formalisation of the equitable jurisdiction — '[t]he animating and universalising moral spirit was somehow diminished or entirely lost'.[16] This brief survey of the doctrine of abuse of rights discloses the wealth of civilian acumen, which had evolved to moderate the type of dispute contemplated by their Lordships' decision in the case.

Professor Taggart distils the main causes of the absence of a common law abuse of rights doctrine down to an unwillingness to follow civil law traditions, the effect of legal positivism (in that Pickles's immoral behaviour had to be unlawful before it was actionable) and the common law's predisposition towards wrongs and remedies rather than rights themselves – 'The history of the common law is of the remedial tail wagging the substantive dog'.[17] A clearer way of expressing this is to note that the Corporation failed to win their case because they could identify no legal wrong committed by Pickles. A civilian approach would place more importance on the exercise of the rights at stake, rather than simply looking for a legal wrong.

Malice and tort law are analysed in Chapter Seven. Professor Taggart notes the American approach to malice, citing Oliver Wendell Holmes's suggestion that the intentional infliction of injury should be actionable without any additional requirement of unlawful conduct. He reflects that this created a 'doctrinal vehicle for attacking the malicious exercise of legal rights' in America, under the guise of a prima facie tort.[18] Without such a doctrine (which Holmes oddly chose not to apply to subterranean water rights) the English common law provided only the tort of nuisance. This was unhelpful due to its traditional focus upon emanations from a person's land, not the prevention of such emanations. Perhaps legal evolution of the tort of nuisance could have spanned the conceptual gap. It did not, and it became embedded in the common law of torts that the motive with which conduct is done is irrelevant to its tortiousness.

In his Epilogue, Professor Taggart briefly considers the public / private law divide. He manages to draw the threads of his tale together, noting how the rejection of the Corporation's argument underscored the attitude toward property at the time. He ends with the stimulating observation that:[19]

> If the common law is to continue to have a role to play in the control of (public and private) power, it is vitally important to recognise the pervasiveness of the doctrines and ideas which limit the exercise of power in the interests of neighbours, the public, and the public good.

---

16 Ibid 155.
17 Ibid 157.
18 Ibid 186.
19 Ibid.

Professor Taggart notes in his first sentence that '[t]his book tells the story of a water dispute in Bradford, England, in the late nineteenth century'.[20] To accept this as the only function served by this work would be misleading. Together with providing an engrossing study of the case in its broader context, *Abuse of Rights* addresses profound topics in an economical fashion to keep the book a manageable and pertinent work. The second half of the book examines cavernous issues which demand a greater depth than Professor Taggart can provide. It is regrettable that Professor Taggart has dichotomised the book into a case study and a theoretical foray. The reader could easily tolerate a work twice the length, and this would do true justice to the implications raised. When one considers the relevance of property law theory to contemporary legal issues it seems inevitable that further work will follow. The current furore in New Zealand over riparian rights and foreshore ownership taken on a new light after digesting Professor Taggart's venture into nineteenth century property law.

At some points, the repetition of material is evident, a matter addressed explicitly in the text. This seems well intentioned but unnecessary as *Abuse of Rights* is an alluring read that demands thorough attention and sequential reading. So in that respect the chapters could have been constructed to produce a seamless flow without detriment to the topics covered. This indicates the expansive nature of the subject matter covered, which together with Professor Taggart's assiduous referencing will assist in any further research into the area. *Abuse of Rights* provides an engrossing study of the legal landscape of nineteenth century England together with a fine study of the antithetical relationship between common and civil law approaches to property rights.

Andrew Hough

20 Ibid 1.

BOOKS RECEIVED

BUTLER A (ed), *Equity and Trusts in New Zealand* Thomson Brookers, Wellington, 2003, cxx, 1247p.

ROWE D and HAWES C (eds), *Commercial Law Essays: A New Zealand Collection,* The Centre for Commercial and Corporate Law, Christchurch, 2003, xiv and 143pp.