Insurance Law: Practice, Policy and Principles, Webb and Rowe (eds), Centre for Commercial and Corporate Law, Christchurch, 2003.

Insurance law has a reputation for being a little dry and complex. As Procaccia noted, "[i]nsurance policies are not likely to emerge, even at the present, as a major source of recreational reading".[1] However, *Insurance Law: Practice, Policy and Principles* makes for an interesting and compelling read. The book consists of thirteen essays written on a diverse range of topics by some of New Zealand's leading insurance law practitioners and lecturers. The following aims to provide a brief guide to the contents of the thirteen essays.

Andru Isac, "Genetic Testing and Insurance: the Role of the Industry and the Welfare State"

This essay examines the potential impact of genetic testing on the insurance industry. Isac argues that the developing ability of scientists to isolate the genes that cause serious diseases in humans has profound implications for the insurance industry. Insurance is based upon an insurer taking a calculated risk to indemnify an insured against loss in the occurrence of an uncertain event. The insurer's financial survival depends upon it being able to accurately tailor the insured's premium to reflect the risk of that uncertain event occurring. Isac argues that advances in science, and in particular the ability of scientists to isolate the genes that cause diseases, means there will be a decrease in risk as we can predict with greater certainty an individual's chances of developing a serious illness. Unless preventative measures are taken this may result in "genetic discrimination" and whole classes of individuals with a proven predisposition to a certain disease group becoming "uninsurable".[2] Most overseas jurisdictions have moved to limit the ability of insurers to use genetic information to discriminate against insureds. In New Zealand, although there are no formal protections in place, the Investment Savings and Insurance Association has put in place a self-imposed moratorium on the use of genetic information to determine premiums.[3]

Melanie Biss and Hamish McIntosh, "A Guide to ADR in Insurance"

This essay considers the use of alternative dispute resolution (the use of negotiation, mediation or arbitration to avoid going to Court) in the New Zealand insurance law industry. Biss and McIntosh argue that although ADR has taken

1 Procaccia, "Readable insurance policies: judicial regulation and interpretation" [1979] 14 Israel L Rev 74.
2 Webb and Rowe (eds), *Insurance Law: Practice, Policy And Principles* (2003) 5.
3 Ibid 8.

longer to catch on in insurance law than other areas, it is becoming increasingly popular due to the increasing costs and delays associated with litigation. In particular, they argue that ADR has the added advantage to insurers that it is confidential, thus protecting image-conscious insurers from the adverse publicity of opposing claims, and ensuring that if the dispute is resolved in favor of the insured, no legal precedent is created that can be exploited by latter claimants.[4] This means that we are likely to see more ADR clauses being inserted in insurance contracts in the future.

Craig Brown, "Determining Cover: Interpretation of Policies, Causation and Fortuity"

Answering the "million dollar question" of whether or not there is cover under an insurance contract for loss caused by a particular event is a complex question involving interrelated issues of contractual interpretation, causation, fortuity, and public policy. Brown examines the various ways in which the Courts have approached these issues, making particular use of authorities from our "litigious Canadian Cousins" which he believes may act as a guide for New Zealand Courts in novel fact situations.[5] The essay aims to provide a "practical framework" for determining whether cover exists, and contains useful analysis of the rules and leading cases.

Les Arthur, "Recent Developments in the Scope of the Insured's Precontractual Duty of Disclosure: Strategies for Reform"

Insurance contracts are unique in that they are "uberrima fides" and involve a mutual duty of "utmost good faith" between the insurer and insured. This means that at common law the insured is under a positive duty to disclose all facts that a "prudent insurer" would consider relevant to assessing the risk, regardless of whether or not the insurer asks about them. Although the original object of the duty was to correct the information imbalance that existed between the insurer and the insured, the duty has come to be regarded as rather onerous and a source of potential injustice to the insured, who may be deprived of cover. In this essay Arthur evaluates the effect that the decisions in *Economides v Commercial Union* and *Pan Atlantic v Pine Top* have had on the duty of disclosure and looks at possible reform options. In particular, Arthur considers whether section 9 of the Fair Trading Act 1986 might be applied against insurers who do not ask the insured questions that would be routinely regarded as material, and later try to avoid the contract of insurance when it is discovered that the insured did not

4 Ibid 19.
5 Ibid 31.

disclose that material information.[6] Arthur also examines the potential use of the discretionary damages provisions of the Contractual Remedies Act 1979 as an alternative to the "all or nothing" remedy of avoidance ab initio.[7]

Chris Chapman and Jo Girvan, "An Insurer's Right to be Subrogated to the Insured's Contractual Claims"

"Subrogation" is the right of the insurer, who has indemnified the insured for its loss, to "stand in the shoes" of the insured and use the insured's rights under contract, tort, or statute, to recover from third parties. This reflects the "indemnity principle" and the idea that an insured may never recover more than it has lost. This essay examines the origins of the right of subrogation, and in particular the subrogation of contractual rights.

D F Dugdale, "Misrepresentation and Non-disclosure"

In some circumstances, a breach of the insured's duty of disclosure may also amount to a misrepresentation (for example where an omission has the effect of falsifying the answer to a question in the proposal form). Despite this, however, the rules and remedies relating to non-disclosure and misrepresentation are discrete. Dugdale examines the history and rationales of the law of misrepresentation and non-disclosure, the differing remedies, and possible reform options.

Jeanette Hobbs, "The Exercise of a Contractual Discretion: The Insurer as a Judge in its Own Cause"

In some contracts of insurance there is a condition precedent to recovery by the insured that the insurer or the insurer's nominee must be satisfied by proof of loss. Hobbs argues that where there is room for a difference of opinion regarding the loss, such clauses effectively make an insurer a judge in its own cause. However, the insurer's discretion to act in its own self-interest and deny the insured any recovery is tempered by its duty to act honestly, reasonably, and in good faith in these situations. Hobbs examines the requirements of these duties and the remedies available to the insured upon breach, namely the Court substituting its own view. Hobbs argues that the Court substituting its own view as to whether loss has occurred is inappropriate because it does not reflect the intention of the parties, and the Courts are often overly generous in their remedies.[8]

6 Ibid 73.
7 Ibid 67.
8 Ibid 118.

Paul Michalik, "Formation of the Contract-Insurance Law or Contract Law? *Wynne v New Zealand Insurance*"

The extent to which "ordinary" principles of contract law should apply to contracts of insurance is a controversial issue in insurance law. This essay examines the problems of applying contract law precedents to insurance law cases, and in particular on the recent decision in *Wynne v New Zealand Insurance*.[9] In that case the District Court Judge found that an "unattended vehicle exclusion" in a standard form insurance contract should not be applied against the insured. The judge relied on contract law authority dealing with exclusion clauses in the "ticket" cases that onerous terms should be bought to a person's attention before they can be relied upon.[10] Michalik argues that the case represents an undesirable precedent. He says that it is "anomalous to try and incorporate the ticket cases into insurance law",[11] because insurance contracts are distinguishable from the normal "run of the mill" ticket cases.

Jon Parker, "*Gazelle Properties Ltd v G J Hulst* – A Case Apart?"

This essay also examines the extent to which ordinary principles of contract and commercial law should apply to contracts of insurance. Parker argues that insurance contracts are different because they have for a long time been in a "standard form" format, and the Courts have a tendency to resolve disputes in favor of the insured. Parker then goes on to provide some interesting analysis of the *Gazelle Properties* decision, which concerns issues arising from the repudiation of an insurance law contract.[12]

Tim Stephens, "Insurance Against Knowing Conduct and Offences"

This essay provides a survey of the principles relating to indemnity insurance where the damage to property or personal injury is caused by conduct that is either deliberate, reckless, or constitutes a criminal offence. Recovery in such instances is controversial and usually involves consideration of both the terms of the policy and matters of public policy. Stephens concludes from his survey that recovery for deliberate loss will usually be excluded by the words of the policy. The situation regarding recovery for recklessly-caused loss is more complex. As Stephens notes, traffic accidents are often caused by behaviour such as reckless driving or excessive speed, which will normally infringe the law. Although Courts may be tempted to deny recovery on the basis that it might encourage anti-social behavior by indemnifying individuals from the financial consequences of

9 [2002] DCR 217.
10 Webb and Rowe, supra note 2, 142.
11 Ibid 147.
12 Ibid 151.

their actions, Stephens believes that a distinction should be maintained between the criminal law and civil agreements. He concludes that provided there is cover under the insurance contract, that cover should only be denied on the grounds of public policy if there is evidence that it was obtained specifically to get around criminal or regulatory penalties, because this would undermine the penalties' effectiveness.[13]

Karen Stevens, "The Insurance and Savings Ombudsman Scheme"

The Insurance and Savings Ombudsman Scheme aims to "provide a fair, impartial and independent dispute resolution service, which is accessible and freely available to the public...".[14] Stevens provides an in-depth examination of this important scheme, its history, and the way it functions, backed up by the use of examples and case studies.

Neil Campbell, "A Skeptical View of Good Faith in Insurance Law"

The proposition that insurance contracts are contracts involving a duty of the "utmost good faith" would seem elementary and uncontroversial to any insurance law student worth his or her salt. However, Campbell argues that "[t]he special good faith aspect of insurance contracts has taken on a life larger than it deserves", and proposes to cut it down to size.[15] Campbell, a good faith sceptic, claims that historically the duty of good faith has been limited to a duty of disclosure in the formation of the contract, making claims, and when a liability insurer is conducting the defence of an insured. Campbell concludes that judicial recognition of a duty of good faith is limited to these particular circumstances and cannot be used to justify a "general duty" of good faith.[16] Moreover, conceptualizing things such as a breach of contract by the insurer as a breach of the duty of good faith, is unhelpful, and adds nothing to the ordinary rules of damages.[17]

Mark Fisher, "The Concept of Insurable Interest: Inherent Requirement or Inherent Quandary within Modern Insurance Contracts?"

The author of this essay is an undergraduate Law and Commerce student from Canterbury University. However, this is scarcely apparent to the reader, and a credit to Fisher in such illustrious company. His essay examines the concept of an "insurable interest": the idea that the insured must have some kind

13 Ibid 177.
14 Insurance and Savings Ombudsman Scheme, "Mission Statement".
15 Webb and Rowe, supra note 2, 206.
16 Ibid 210.
17 Ibid 211.

of legal interest in the insured property in order to have an enforceable right of recovery.[18] This is essentially what distinguishes a contract of insurance from a bet or a wager, and it was once thought that all enforceable contracts of insurance required an insurable interest. However, in New Zealand the common law has been modified by statute and the position now is: contracts for marine insurance require an insurable interest; contracts for life insurance and indemnity insurance do not; while contracts that are non life insurance and non indemnity insurance do. Fisher goes on to argue that the state of the law in this area is illogical and could benefit from reform.

Conclusion

Although it is not a text-book, *Insurance Law: Practice, Policy and Principles* aims to provide a practical guide to students and practitioners seeking a better understanding of this fascinating area of law. To this end, the thirteen essays are concise, easy to read, and full of up-to-the-minute information about the state of insurance law in New Zealand. The book does not purport to offer a broad overview of all aspects of insurance law, but rather specialized insights into particular sub-topics or points of interest. Accordingly, those new to this field of law might find some of the content of the book difficult to follow as a certain level of knowledge of insurance law is assumed. The book is therefore best seen as a valuable resource for students who wish to broaden their understanding of insurance law, with it providing an interesting mix of both practical issues facing practitioners along with some more esoteric topics.

Warren Bangma

18 Ibid 217.

Civil Remedies in New Zealand, Blanchard (ed), Brookers Ltd, Wellington, 2003.

'There are no rights without remedies.' This is a time-worn legal maxim, but nonetheless an expression of an eternal truth. Law schools have a strong tendency to focus on the legal basis of rights: they separate law either into circumstances, as they do with employment and family law; or into areas of legal doctrine, as with, for example, contract law and equity. The majority of each course is spent explaining the theory, and content, of these areas of law. Where the law is applied to fact scenarios, the focus is limited to assessing how the legal theory affects issues of liability. Rarely is thought given to the types of remedies available, or the basis on which one particular remedy should be chosen. Remedies tend to be something of an afterthought. Yet the reason doctrines of law exist is so that people can vindicate their rights: surely the goal of the process deserves more attention.

The lack of focus on remedies at law school has its effects in the profession. In his foreword, Justice Blanchard reveals the motive for the book: his exasperation at the number of practitioners who take great trouble to master the substantive law, but do not make themselves aware of the remedies.[1] The book is an innovation in New Zealand. The authors, drawn from firms and the bar, as well as universities, provide expertise that covers the entire breadth of private law in New Zealand. The book boldly tries to create a grand taxonomy of remedies. Thus, a true overview is possible: crossing the boundaries of areas of legal doctrines, and approaching the end concerns directly.

The first section, entitled "Remedies of Compensation", deals with all the variations of damages: those of contract, tort and equity. While the tort and contract damages are dealt with in a more or less orthodox manner by Maree Chetwin and Bruce Pardy,[2] an unflinching approach is taken by Geoff McLay to summarize the place of equitable damages in our legal system, incorporating the significant changes to the application of equitable doctrines over the last two decades.[3] The discussion of the development of equitable damages (or "compensation" according to some), and the resistance it created, is brief. It gives way to an explanation of the practicalities of how equitable damages are measured in different types of cases, whether aggravated and exemplary damages are available in equity, and the relationship between the new category of equitable damages and other remedies (including remedies under Lord Cairns' Act),[4] as well as a brief discussion of the practical benefits of different remedies. This is heartening: the editor has managed to achieve a taxonomy that is clear and

1 Blanchard (ed), *Civil Remedies in New Zealand* (2003) vii.
2 Ibid 1.
3 Ibid 127.
4 Ibid 187.

understandable while avoiding both the use of dogma and excessive formalism, and the inserting of square pegs in round holes.

The second section deals with "remedies of prohibition and compulsion".[5] Included under this rubric are injunctions (both permanent and interim), freezing and seizing orders, and specific performance. The author of the chapters on injunctions, Andrew Barker, admits that his task requires him to condense an area about which others have written vast treatises, into a presentation that is comprehensive.[6] This applies to most of the other chapters in the book and, inasmuch as this is successful, it is one of the book's main accomplishments: condensing wide areas of the law of remedies into concise segments that give practitioners and students, who may not be familiar with those fields, a basic understanding of how the relevant remedies operate. While noting the equitable origins of the remedy, and some of the effects that this has on its application even today, Barker's treatment of injunctions takes a broader view of an institution that has escaped doctrinal boundaries.

Occasionally in the course of a law degree, a student will read briefly of remedies with intriguingly specific names, such as "Anton Piller orders" and "Mareva injunctions". Caveats on land, by contrast, are well traversed in the Land Law course (at least at Auckland Law School). J Stephen Kos covers all of these, with impressive brevity.[7]

The section of the book dealing with remedies based on disgorgement and return of property is written by Charles Rickett and Ross Grantham.[8] The two chapters (on restitution and proprietary remedies respectively) are essentially an abridged version of their textbook on the subject. As students of Grantham and Rickett will know, the pair base their teaching on their own taxonomy of the law. This style fits in well with the taxonomic structure of the book. Restitution is one area of law which is named after the remedy, rather than the set of events that precipitates the remedy, or the legal reasoning that allows it. There is much conceptual sense in combining the different "restitutionary" remedies into one category.

The chapter entitled "Statutory Discretion as to Remedies" by John W Turner, deals with the complex issue of the intervention of statute into areas that were previously controlled by common law contractual, or equitable, principles.[9] The focus is on the broadly-worded relief provisions of section 9 of the Contractual Remedies Act 1979, section 10 of the Illegal Contracts Act 1970, and section 42(3) of the Fair Trading Act 1986.

5 Ibid 197.
6 Ibid 201.
7 Ibid 279.
8 Ibid 361.
9 Ibid 451.

Near the end of the book appears a section on rights and remedies conferred by particular statutes: the Official Information Act 1982, the Privacy Act 1993, and the Human Rights Act 1993.[10] These chapters in fact spend much longer discussing the contents and application of those statutes rather than remedies available to the individual. Nonetheless, they are an important inclusion.

Perhaps the most interesting chapter in the book is that of Rachael Schmidt on declaratory remedies.[11] Growing up in an age increasingly focused on money and material measurement of achievement, the idea of an entire phylum of remedies revolving around the simple vindication of a position, and nothing more, seems strange, and perhaps quaint.

There are few quibbles that one can raise with this book. Obviously, the brevity of the coverage of each area of remedy places inherent limitations on the depth available. It will serve as a jumping off point, rather than a comprehensive guide to remedies. One might question the ordering of the topics: the main section on compensatory damages is separated from the chapters on aggravated and exemplary damages and contribution, which are near the end: although there is perhaps a valid conceptual reason (the different theoretical grounds of the damages), it would be more convenient for the user to group them together. Also, it could be argued that aggravated damages is actually a compensatory remedy (unlike exemplary damages), and should have been included in the first section. Likewise, it perhaps may have made more sense for contribution to be included as an addendum in the damages section (where it would be most useful), rather than left to the end.

In all, though, this book is a valuable addition to New Zealand legal publications. It will become a core item in the library of every practitioner. However, unless the manner in which undergraduate law is taught in New Zealand changes dramatically in the near future, it will be of limited utility to students in any particular paper. This does not mean that it would be of no use to the law student: it would afford an overview of our legal system from the perspective of the vindication of rights, and how this is to be accomplished, rather than merely the rights themselves.

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10 Ibid 637.
11 Ibid 591.

Books Received

AYERS K & WYLLIE P, Trusts and Relationship Property, Brookers Ltd, Wellington, 2003, xx and 200pp.

ROWE D & HAWES C (eds), Commercial Law Essays, Centre for Commercial & Corporate Law, Christchurch, 2003, xiv and 143pp.