

## BOOK REVIEWS

JUDGES by David Pannick. Oxford University Press, 1987. vii and 255pp.

In *Judges* David Pannick, a practising barrister, examines the performance of the English judiciary. It is an account liberally interspersed with hilarious but disturbing anecdotes about judicial behaviour. Sections of the text first appeared as articles in the *Guardian*, which may explain the intense and colourful style throughout the book.

Pannick begins with the obvious: the judicial role of public decision-making has never been an easy one. Not only are judges relatively isolated from the public, but also their decisions are necessarily influenced by their own upbringing and experience. Pannick gives colourful examples of some judges' expertise in making inappropriate statements which only serve to illustrate their immunity from contemporary knowledge and concerns. Of course, the issuing of broad propositions of social policy is generally unnecessary to the determination of individual cases, and can have direct and negative consequences. For example, in 1982 an Ipswich Crown Court Judge fined a rapist rather than sending him to prison, after holding that the teenage victim, who had innocently accepted a lift in his car, was "guilty of a great deal of contributory negligence."<sup>1</sup> Pannick notes the proposition that judges share a particular sort of values as a class. He cites Griffith's statements of the content of these values:<sup>2</sup>

It concerns first, the interest of the State (including its moral welfare) and the preservation of law and order, broadly interpreted; secondly the protection of property rights, and thirdly the promotion of certain political views normally associated with the Conservative party.

The first chapter concludes that since judgments are inevitably influenced by judicial character and experience, it is extremely important who is appointed to the Bench.

Accordingly, Pannick argues in subsequent chapters that litigants are entitled to be heard by judges who understand and reflect the values and concerns of contemporary society. Although the method of judicial appointment in New Zealand differs from that in England, his criticisms regarding judicial appointment and training apply equally to the New Zealand Bench. According to Pannick the English judiciary still consists almost exclusively of

<sup>1</sup> Cited at 33.

<sup>2</sup> Griffith, *The Politics of the Judiciary* (3rd ed). Cited at 45.

middle-aged European men who were barristers for twenty years or more prior to appointment. In New Zealand, appointments to the Bench have attempted to make the judiciary more representative of society. There is, however, a concern that the quality of decision-making will suffer as a result.<sup>3</sup>

Pannick promotes a new system of judicial appointment and suggests that the more open American system, in which judges are subject to public and political criticism, could be initiated in England to great advantage. The clear implication is that judicial decision-making is inherently political, and that instead of idolizing the unrealistic concept of complete judicial independence from Government, the inter-relationship should be publicly acknowledged.

Litigants may on occasion be sorely aggrieved by judicial behaviour. In chapter four Pannick describes various judicial escapades, including threats to the jury to induce them to make a quick decision<sup>4</sup> and falling asleep in court. In England, as in New Zealand, an aggrieved litigant's remedies for inappropriate judicial behaviour are virtually non-existent.<sup>5</sup> *Judges* illustrates this omission and strongly advocates a Judicial Performance Commission to consider complaints of injudicious behaviour. The author suggests the need for a "job-training" scheme for judicial appointees, so that the first few litigants to appear before a new judge will be spared the brunt of any "teething" problems.

Pannick's promotion of an independent review body is in sharp contrast to the opinion of some judges. It has been contended extra-judicially that the maintenance of ethical standards by the judiciary itself will render it unnecessary for the State to establish any formal complaint or disciplinary procedure.<sup>6</sup> It is argued that there is an inherent danger of review in the public arena, which could create a climate in which Judges are seen to be accountable to apparent public opinion and, possibly, to the litigants themselves.<sup>7</sup> Pannick fails to address this concern. In New Zealand, Hardie Boys J has recently noted that there have been few complaints about judicial conduct and that no Judge has had to be removed from office.<sup>8</sup> However, one can only wonder at the massive judicial indiscretions which make for such colourful reading in *Judges*, and ask what less sensational indiscretions are perpetrated on a day-

<sup>3</sup> See for example Potter, "Women in the Law II" [1988] NZLJ 148, 150: "My personal hope . . . is that [the next High Court] appointment will not be made in response to any pressure, political, consumer or otherwise, but that the appointment when made is made purely on merit and will be recognised as such. The woman who holds the position as the first woman High Court Judge must be able to hold that position very confidently."

<sup>4</sup> *R v McKenna* [1960] 1 QB 411.

<sup>5</sup> For an account of recent Australian discussion on this point see The Australian Institute of Judicial Administration Inc, Victoria (1989), *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers*.

<sup>6</sup> See for example Thomas J, *Judicial Ethics in Australia* (1988).

<sup>7</sup> See the review of *Judicial Ethics in Australia* (supra) by Hardie Boys J in [1988] NZLJ 235, 236.

<sup>8</sup> *Ibid*, 235.

to-day level and pass unnoted.

The author contends that genuine criticism of the judiciary is frequently stifled by the "mystique" surrounding the law generally and judges in particular. Judges are seen as the moral guardians of the community, rather than as qualified individuals interpreting and applying the law. This is part of the liberal tradition, whereby the rationale of the law tends not to be questioned and the theory that law is God-given and "natural" is perpetuated. Chapter five details, for example, the way in which the branch of contempt of court known as "scandalizing the judiciary" has served to inhibit criticism of the courts and how it survives in a limited form today, in Pannick's view unjustifiably, as an impediment to freedom of speech. The author contends that there should be free and open criticism of judicial performance because of the unique security of tenure that Judges enjoy. The judicial reticence to criticise other members of the Bench is also condemned: "Members of the judiciary should remember that they do not belong to a private club in which loyalty is the prime virtue."<sup>9</sup>

It can be argued that judicial mysticism is perpetuated by the traditional attire and speech of the courtroom. Current discussion in New Zealand as to the appropriateness of the traditional wig and gown in court renders Pannick's scathing remarks concerning such "paraphernalia" topical.<sup>10</sup>

[W]igs and gowns epitomize all the defects of English law, its remoteness, its uncritical reverence for tradition, its absence of rationality, and its inability to see obstacles in the way of the understanding of the legal system by laymen.

Equally harsh criticism is levied against the euphemisms and jargon of legal speech, which, it is contended, hold the "legal charade" together.

The final chapter concludes that judicial mysticism is perpetuated by a lack of publicity, a factor which also helps to explain why the general public has remained largely uncritical. Pannick urges that the mysticism be dispelled, thus encouraging public criticism in order that the necessary changes can be identified and made. English law is based on the principle of open justice. According to the author that principle will remain merely cosmetic for so long as judges continue to avoid publicity both in and out of court.

However, while Pannick acknowledges the political content of judges' views, he fails to draw the conclusion that such mysticism is necessary to perpetuate these views through the mechanism of legal enforcement. Pannick fails to develop and connect the criticism he has made to the larger questions of the degree of social control exercised by the judiciary. Although he is prepared to attack judges in certain aspects of their performance, he does not take the requisite step his criticisms would seem to demand, and question the root concept of an independent judiciary. The fact that the author practises at

<sup>9</sup> At 124.

<sup>10</sup> At 147.

the English Bar may make such an ideological leap impossible.

Pannick states that the quality of judges in the United Kingdom has never been higher and that because of this robustness any criticism is tolerable. However the unsupported statement that judicial quality is high is not easily reconciled with the descriptions of bizarre judicial behaviour. The anecdotes about judicial incompetence are amusing at face value, but an assessment of the harm inflicted upon litigants is chilling.

*Judges* is comprehensive, interesting and enlightening. If a cynical attitude toward the judicial process has not yet permeated your deepest fibre, then *Judges* will aid the osmosis.

– Colleen Flood

**TORTS IN NEW ZEALAND: CASES AND MATERIALS** by W.C. Hodge and J.E.S. Allin. Oxford University Press, Auckland, 1988. xxi and 434pp.

The authors of *Torts in New Zealand: Cases and Materials*, both lecturers in tort law in New Zealand, have prepared these course materials with the antipodean law student in mind. Hodge and Allin's book provides ready access to the relevant cases and materials and for this reason will be a welcome addition to the student armoury. It will provide respite from the near-ritualistic student sprint each year for the few available, outdated and out-of-print copies of the only previous New Zealand collection of cases and materials, *Tort in Transitions*, by McKenzie, Palmer and Clark (1976).

This work is, as it states, a collection of cases and materials. It is not, nor should be regarded as an authoritative indigenous text on tort law. Students who purchase *Torts in New Zealand* in the hope of obtaining a simplified analysis and summary of the law will therefore be disappointed. Rather, the book is intended as a teaching guide and its strength lies in that approach. The intention of the authors has been to illustrate legal rules and reasoning through concrete examples rather than to state the law in black letter form. This approach seems particularly appropriate, given the "formless and elastic nature of tort law".<sup>1</sup>

Hodge and Allin have, in their own words, ". . . adopted, primarily, a categorisation of 'torts' based upon an analysis of the defendant's conduct, and the nature of the defendant's fault." The book is, accordingly, divided into sections corresponding to the defendant's fault: first, the intentional torts, and second, the non-intentional torts of negligence and strict liability.<sup>2</sup> There is further subdivision within this categorisation, where appropriate, based on the particular interest of the plaintiff which has been invaded. Such interests

<sup>1</sup> The authors define tort law negatively as "the non-criminal pursuit of one of a miscellany of wrongs which are not breaches of contract."

<sup>2</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

include one's physical person, together with one's rights to liberty and emotional dignity.

As already noted, Hodge and Allin do not seek merely to enunciate legal rules. Instead their aim has been to leave the reader with an understanding of the tensions in the law by posing questions and difficulties for the reader to resolve. These questions, which follow each bracket of cases and which are supplemented by notes of other relevant cases and materials, will assist the reader to develop his or her perception of the relevant legal principles. Dissenting judgments have been clearly pointed out, requiring students to consider conflicts of opinion. And, importantly, the book amuses as well as educates, by including the occasional snippet of legal trivia in order to relieve the cases and commentary.

The authors' policy evaluations, where they occur, are most helpful and highlight for the reader the kinds of considerations (both overt and implicit) which are relevant to judicial decision-making. Hodge and Allin have also suggested, where appropriate, likely future directions in tort law. For example, it is noted that McGechan J's obiter comments in the *Tucker* decision<sup>3</sup> allude to the need for legal protection of personal privacy, possibly through an extension of the principles relating to intentional infliction of emotional distress. In this instance legislative intervention seems more probable if the promises of the Minister of Justice are a reliable indication.<sup>4</sup>

Needless to say, any book purporting to deal with torts in New Zealand must examine the Accident Compensation legislation. The authors do so by highlighting the extensive difficulties in defining "personal injury by accident" and the prospect of punitive damages as revived by the Court of Appeal.<sup>5</sup> Useful reference to "personal injury by accident" is also made in the section on false imprisonment concerning trespass to the person, where the *Craig*<sup>6</sup> and *Howley*<sup>7</sup> cases are discussed with regard to the jurisdiction of the Accident Compensation Corporation.

At little more than 400 pages *Torts in New Zealand* is a relatively compressed work. Perhaps due to this brevity, aspects of legal history which might be taught in lectures are largely omitted, such as discussion of the limited categories of duty situations prior to the landmark case of *Donoghue v Stevenson*,<sup>8</sup> or consideration of Lord Denning's famous dissent in *Candler v Crane, Christmas & Co*<sup>9</sup> and of other cases leading up to the House of Lord's

<sup>3</sup> *Tucker v News Media Ownership Ltd, Tucker v Auckland Star Ltd and Tucker v Broadcasting Corp of New Zealand*, 1986. High Court, Wellington. 7 November 1986 (CP 477/86; CP 488/86).

<sup>4</sup> *The New Zealand Herald*, 14 February 1989.

<sup>5</sup> *Donselaar v Donselaar* [1982] 1 NZLR 97.

<sup>6</sup> *Craig v Attorney-General*, High Court, Auckland. 21 August 1986 (M 609/85). Tompkins J.

<sup>7</sup> *Howley v Attorney-General*, High Court, Auckland. 30 June 1986 (A 586/85). Chilwell J.

<sup>8</sup> [1932] AC 562.

<sup>9</sup> [1951] 2 KB 164.

decision in *Hedley Byrne & Co v Heller & Partners*.<sup>10</sup>

*Torts in New Zealand* is not immune from criticism, particularly with respect to the uninviting nature of its type and layout. It is important in works of this kind to avoid a visual "running together" of case extracts and the subsequent commentary. Hodge and Allin's book suffers from a lack of differentiation between extracts, commentary, questions and further references. This tends to confuse and distract the reader, and could have been alleviated, for example, by the use of different margins, a greater range of print sizes and more frequent use of bold print. A further criticism is that the contents page is spartan. Indicating the component parts of each major heading would particularly assist those new to the subject of tort law. For example, the chapter entitled "Defences to Intentional Torts" might have listed the separate defences (such as consent, self-defence, and defence of property) with their corresponding page reference. Similarly, the interesting and difficult area of negligence resulting in economic loss deserves to be separately noted on the contents page, rather than being incorporated into the section on duty.

While there are no significant omissions in the text itself, the book would have benefited from a more complete presentation in some areas. An example is chapter one, concerning the intentional torts, which begins immediately with the first case extract; the authors have not provided a general introduction to the intentional torts, nor is a background given to the case extract and analysis which follow.

Notwithstanding these criticisms, which might easily be amended in a subsequent edition, Hodge and Allin have provided law students with a timely and useful resource. At \$40.00 *Torts in New Zealand* is very reasonably priced and will form a worthy complement to any course on torts in New Zealand.

– Ian Bloemendal

PUNISHMENT AND POLITICS: THE MAXIMUM SECURITY PRISON IN NEW ZEALAND by Dr Greg Newbold. Oxford University Press, Auckland, 1989. ix and 310pp.

Amid growing social and political turmoil over the issues of justice and penal reform, Dr Greg Newbold has written *Punishment and Politics: The Maximum Security Prison in New Zealand*. Described as a "literate and scholarly documentary"<sup>1</sup> *Punishment and Politics* is a balanced and detailed overview of the history of the prisons at Mt Eden and Paremoremo. Every aspect of the prison system is studied thoroughly, from its administrative workings to the social structure among the inmates themselves. It is, however,

<sup>10</sup> [1964] AC 465.

<sup>1</sup> *The New Zealand Herald*, 11 February 1989.

the in-depth discussion of the politics within the prison itself that makes this work unique.

Newbold has a special insight into prison life which may not be available to other sociologists. In June 1975 he was arrested for a drug dealing offence and was sentenced to seven and a half years' imprisonment. He served five and a half years of this sentence, first at Paremoremo Maximum Security Prison and then at Hautu, a prison camp near Taupo. On each day of imprisonment Newbold wrote in a journal which eventually became a manuscript of approximately 2,500 pages. It was from this material that he wrote *The Big Huey*,<sup>2</sup> a best-selling personal account of his time in jail.

In 1977, while at Paremoremo, he began writing his MA thesis, entitled "The Social Organisation of Prisons",<sup>3</sup> and in 1978 he gained a Masters degree with First Class Honours. It is the research for this thesis, added to and expanded upon by six years of doctoral research at Auckland University, which provides the bulk of material for *Punishment and Politics*. Currently a lecturer in Sociology at the University of Canterbury, Newbold is a frequently consulted authority on prisons and penal policy.

Newbold's prison experience has not biased his writing. Despite the self-confessed hatred of authority that he felt upon leaving jail<sup>4</sup> he has striven in *Punishment and Politics* to give a fair account of each event. For example, there is a particularly thorough study in chapter eleven of the devastating riot at Mt Eden Prison in 1965. As in the rest of the book Newbold's discussion draws from an exhaustive list of sources, and thus the event is looked at from a number of different perspectives. Notably, the official Commission of Enquiry Report contrasts sharply with the picture created by interviews with officers and inmates.

"The Escape Attempt" which opens the chapter is especially compelling reading. There is a humorous account of the colourful character Daniel MacMillan, who had been charged with the 1965 robbery of the Avondale Bank of New Zealand. MacMillan's challenge to authority was vigorous:<sup>5</sup>

For Macmillan its rejection was automatic. Conventional society was a travesty and he saw its acolytes as vacuous fools. Prison officers were amongst the worst, and at Mt Eden he refused to address them at all, except in the most contumely fashion. 'How dare you speak to me you filthy little pleb!' he would exclaim, indignantly, when spoken to by a member of the staff. 'How dare you feed your wife and kids on my misfortunes! Begone!'

The Maximum Security Prison is a very serious and at times disturbing topic, and anecdotes such as these, peppered throughout the book, lighten what could have been a heavy and depressing text.

The chapter continues with an analysis of the riot and its significance, the

<sup>2</sup> (1982).

<sup>3</sup> Unpublished. Anthropology Department, University of Auckland.

<sup>4</sup> *The New Zealand Herald*, 11 February 1989.

<sup>5</sup> At 145-146.

possible reasons for its occurrence and the effect that it had on penal policy. Newbold examines riot patterns in overseas prisons and the theories of overseas sociologists and academics. These he relates to the Mt Eden riot and to conditions in the prison at that time which may have contributed to the riot. Interviews with inmates and officers are particularly illuminating, and create a damning exposé of the superintendent's ineffectiveness when dealing with the crisis. The thorough analysis and attention to detail to be found in this chapter are evident throughout *Punishment and Politics*.

Prisons are once again a politically contentious issue. The recently released Roper Report<sup>6</sup> has focused public attention upon this uncomfortable facet of our justice system. Described by Justice Minister Mr Geoffrey Palmer as "bold and innovative",<sup>7</sup> the recommendations in the Roper Report have nevertheless been coolly received by the Ministry. The cost involved in implementing *Te Ara Hou: The New Way*, coupled with Opposition claims that the recommendations "are truly swamped by the erosion of discipline, soft options and extra goodies",<sup>8</sup> may explain the lack of Ministerial enthusiasm for the Roper Report.

Nevertheless this country is faced with the inescapable fact that the current penal system is not working. One illustration of this is the severe overcrowding now being experienced in New Zealand prisons<sup>9</sup> – and the predictions are that this will worsen. Overcrowding creates tensions in all spheres of prison life, and raises the issue of prisoners' human rights. Other topical issues include the controversial availability of drugs in prison, homosexual activity, and the threat of AIDS. Even more serious problems – indeed, imminent crises – are the soaring suicide rate and increasing gang violence within jails. Prison staff are under constant threat of assault, receive scant recognition for the performance of a difficult job, and face a working environment which imprisons officers as effectively as it does inmates.

Meanwhile, opposing sectors of the public are pressuring politicians and prison administrators for more liberal penal policy on the one hand, and for harsher sentencing, including capital punishment, on the other. Anyone who advocates the return of capital punishment must read Newbold's disturbing account in chapter eight of the return of capital punishment in the 1950s. The paragraph relating the death of James Bolton, the recently re-publicised case of the last man to hang in New Zealand,<sup>10</sup> is particularly chilling.

In the final chapter, "Portents for the Future", Newbold suggests that:<sup>11</sup>

[F]rom now on and into the 1990s legislative policy or political change is unlikely to have

<sup>6</sup> Ministerial Committee of Inquiry into the Prisons System: *Prison Review. Te Ara Hou: The New Way* (1989).

<sup>7</sup> *The New Zealand Herald*, 9 June 1989.

<sup>8</sup> *Auckland Star*, 9 June 1989.

<sup>9</sup> *The New Zealand Herald*, 23 May 1989.

<sup>10</sup> *New Zealand Listener*, 22 April 1989.

<sup>11</sup> At 297.

great effect on the goal. The superintendent, his interpretation of management, and the way he responds to the push-pull of prison staff and inmates are factors of far greater importance to the institution of the late 1980s than those of central directorship.

Whether the powers that be heed this advice or not, it is apparent that Newbold is the authority on the Maximum Security Prison in New Zealand. As he comments, "[w]ithout knowledge of a system's background, its course cannot be steered properly."<sup>12</sup> *Punishment and Politics* provides that much-needed background. Newbold has recorded past and present penal policy, administrative advances and disasters, and successful and unsuccessful strategies in prison management. The unique viewpoint to be gained from inmates who have confided in Newbold means that this text does not become entrenched in idealism and theory but remains both factual and down to earth. *Punishment and Politics* is essential reading for anybody involved in the "wheels of justice", or indeed for anyone who professes to hold an interest in justice or penal reform.

– Lopè Heath

THE LAW OF INTELLECTUAL PROPERTY IN NEW ZEALAND by Andrew Brown and Anthony Grant. Wellington, Butterworths, 1989. lii and 716pp.

The area of law known as intellectual property has increased in importance in the Commonwealth and North America over the last two decades, as is evidenced by the establishment of many new journals and reports of intellectual property cases. In the past, practitioners and students in New Zealand needing to research intellectual property law have been obliged to rely on texts from other jurisdictions, principally England. This year sees the publication of the first indigenous text on intellectual property law by two leading practitioners, Andrew Brown and Anthony Grant.<sup>1</sup>

The range of rights to which the term intellectual property refers has widened significantly since the term was first used to describe the grant of copyright in literary, artistic and musical works. The World Intellectual Property Organisation defines intellectual property as including:<sup>2</sup>

- (i) literary, artistic and scientific works;
- (ii) performance of performing artists, phonograms and broadcasts;
- (iii) inventions in all fields of human endeavour;
- (iv) industrial designs;
- (v) trademarks, service marks and commercial names and designations;

<sup>12</sup> At vii.

<sup>1</sup> Published in conjunction with the first volume of the Intellectual Property Law Reports (Butterworths, 1989).

<sup>2</sup> Article 2(viii) of the Convention establishing the World Intellectual Property Organisation, Stockholm, 14 July 1967 to 13 January 1968. From Ricketson, *The Law of International Property* (1984) 3.

(vi) protection against unfair competition;

as well as all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields.

There has not, however, been a recognition in New Zealand of the totality of rights referred to by the World Intellectual Property Organisation. Rather, the development of intellectual property law here, as elsewhere, has been piecemeal.<sup>3</sup>

[Courts of Equity] have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organisation of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interest and not under a wide generalization.

Brown and Grant identify a common thread running through the law relating to these "special heads of protected interest", which they define as:

the protection of the output of human intellectual endeavour and the goodwill and reputation which is created in names, marks, get up and even products.

*The Law of Intellectual Property in New Zealand* is stated by the authors to be an exposition of the New Zealand law relating to trade marks, passing off, copyright, registered designs, patents, trade secrets and the Fair Trading Act 1986; an exposition which is most timely in view of the increasing distinctiveness of the New Zealand case law. Thus, in the recent decision of the High Court of New Zealand in *International Business Machines v Computer Imports Limited*<sup>4</sup> Smellie J held that a computer program in object code (machine language) was protected under the provisions of the Copyright Act 1962 as a translation of the source program. The source program was a "literary work" for the purposes of the Act. His Honour declined to follow a decision of the High Court of Australia and a decision of the Federal Court of Canada, and reached a different conclusion on the interpretation of the word "translation".

The case is indicative of the challenges being faced by intellectual property law with the advent of new technologies. It may also indicate a need for reform of the Copyright Act 1962, at least with regard to computer programs. As Brown and Grant discuss, the issue of protection for computer programs in New Zealand was the subject of two reports by the Industrial Property Advisory Committee, dated 10 December 1984 and 18 March 1986. The final report pressed for the introduction of new legislation which has not as yet eventuated. Clearly, intellectual property law is affected by rapid technologi-

<sup>3</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 509 per Dixon J.

<sup>4</sup> High Court, Auckland. 21 March 1989 (CP 494/86). Smellie J. The case was decided subsequent to the publication of *The Law of Intellectual Property in New Zealand*, which states the law as at 1 August 1988.

cal and societal change, and Brown and Grant's examination of the need for reform is an important element of their text. The authors, when discussing existing inadequacies of the law in particular areas, have indicated the likely form of proposed new law.

Further changes in the intellectual property field are likely as a result of the Closer Economic Relations Trade Agreement between New Zealand and Australia. The commitment to harmonising Australasian law is already apparent with the Fair Trading Act 1986 which, as the authors note, substantially enacts in this country Part V of the Australian Trade Practices Act 1974. Brown and Grant are of the view that the rights and remedies created by the Fair Trading Act 1986 have the potential to supersede the passing off cause of action. They refer to the Australian equivalent of s 9 of the Fair Trading Act and note one commentator's description of the section as a "plaintiff's new exocet".<sup>5</sup>

The material in Brown and Grant's book is clearly set out, facilitating easy access to required sections. Although there is only a brief table of contents at the beginning of the book, each chapter is prefaced by a detailed summary of contents and a statement of the intended ambit of the chapter. The material is then divided into numbered paragraphs, which deal with the "special heads of protected interest" in a logical sequence. In a comprehensive work of this kind the numbering of paragraphs is of considerable assistance. Similarly, the detailed index is an acknowledgement by the authors of the time constraints placed on practitioners. Reference has been made throughout the work to other texts, periodical literature and academic commentary, so that the reader, whether student or practitioner, can pursue aspects of the law in greater depth.

Each chapter deals with the historical basis of particular intellectual property rights and the rationale for their protection. Certainly, the present scope of each area of the law is more easily understood when placed in its historical context. A significant proportion of the commentary is devoted to the necessary definition of rights conferred by the law and the extent of the protection thereby afforded. Where a right exists by virtue of statute, the relevant provisions are set out and closely examined. The chapter concerning copyright – governed in New Zealand by the Copyright Act 1962 – is the lengthiest in the book, which is not surprising in view of the width of that topic.

Rather than providing a separate analysis of the remedies available to the owner of an intellectual property right which has been infringed, Brown and Grant set out, in each chapter, the remedies available in particular circumstances. For example, the Anton Pillar order (which is designed to prevent a defendant from destroying incriminating documents or articles) is covered by Brown and Grant in the section dealing with copyright infringement reme-

<sup>5</sup> Warren Pengilly, "Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?" [1987] 15 ABLR 247, 274. Cited at 560.

dies.

The style in which the book has been written demonstrates clearly that the authors intend the work to benefit others beside those already familiar with intellectual property law. There is no doubt that *The Law of Intellectual Property in New Zealand* will be of considerable practical use to both students and practitioners and that it will be an important addition to any law library. The work is well-presented, easy to read and aesthetically pleasing. It has a look of permanence which the work deserves.

In the foreword, Sir Robin Cooke, President of the New Zealand Court of Appeal, states that the field of intellectual property law is "full of challenges for lawyers" and that "*Brown and Grant* will have an enduring influence on the shaping of the New Zealand response." With this statement I would respectfully concur.

– Ruth Grupen

STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION by Jim Evans. Oxford University Press, Auckland, 1988. 318pp.

I've often wondered what 'mean' means  
– Harold Pinter

*Statutory Interpretation* is not simply a book about how to apply legislative rules. Rather, it asks why we have problems interpreting statutes in the first place. The author's answers to that question introduce an analysis of the types of difficulties that we have, the way in which they arise, and how to resolve them.

The book is structured in three parts. Part one discusses two fundamental problems of interpretation: meaning, and the connection between meaning and purpose. Here Dr Evans identifies the two central species of difficulty in the application of rules. The first is to establish whether a rule includes the instant case, and in order to do so one must decide what that rule means.<sup>1</sup> The second is to decide what to do if a rule includes an unforeseen case when the reasons for having the rule do not apply to that case, and vice versa.

Part two examines the particular forms which these two difficulties can take. Dr Evans presents his own theories as to how they come about, and concludes that an understanding of the underlying interpretation problems leads naturally to their solution. The author closes with part three, discussing existing legal doctrines of interpretation. This book, however, is not really about such doctrines – it is concerned instead with deeper patterns in the

<sup>1</sup> In general, the most important type of rule in an analysis of our legal system is that which imposes a duty. A statute which seeks to do so must specify (i) to whom the rule applies (that is, the ambit of the rule); (ii) the character and content of the obligated performance (which may be an omission); and (iii) when the obligation arises, and for how long it continues.

statutory interpretation process.

Much of the book can be seen as a detailed exposition of the two basic species of difficulty identified by Dr Evans. The first, to establish whether a rule includes the present situation, is a problem of subsumption. Finding that the facts of a case fall within a rule (or that the purported discharge of a duty satisfies the obligated performance) is not always a mechanical process. Professor Hart, in his book *The Concept of Law*,<sup>2</sup> contends that this is due to the presence of "open texture" in the law, which in turn may be attributed primarily to vagueness and logical inconsistency in rules. In particular, vagueness arises because there is a "core" and a "penumbra" of meaning about words: where a case falls within the penumbra of a statutory word, then judges have a discretion to determine if the relevant rule applies to that case.

Dr Evans here presents his own theory as to how one ascertains the meaning of rules and thereby subsumes given cases within those rules. In doing so, he implicitly rejects Professor Hart's approach. In part two he shows us that vagueness, for instance, can be further analysed into a number of different phenomena, including in particular those of missing or additional features and of blurred boundaries. And his objections run further. There are other causes of subsumption difficulty besides vagueness: in chapter four we see some carefully analysed classes of ambiguity, and in chapter six the author presents categories of conventional shorthand that a legislator is likely to indulge in. The treatment of ambiguity is particularly welcome; it includes specific identification of "type-token" ambiguity, which (one hopes) may assist to expunge a confusion that judges have occasionally exploited.

Moreover, the author suggests that there is a proper approach to these problems. The view of Professor Hart, that the judiciary are entitled to "make" the law where cases fall within a statutory penumbra, derives from an overly limited conception of meaning itself. Implicit in any act of communication is the making of discriminations: the "meaning" of any word is, equivalently, the result of an application of the particular discrimination technique which that word invokes. In effect, "meaning" is a process rather than a thing. Unfortunately, Dr Evans does not suggest in what manner such discriminations are made, and this is an area of the book that would benefit by further discussion. Perhaps, since most things are conceived of in terms of their nature or appearance (to the various senses) and of their function or utility,<sup>3</sup> "meaning" may be found by discriminating according to the twin criteria: nature and function.

How is this important? When one looks to classify an instance within a rule, one therefore looks to employ the particular discrimination technique

<sup>2</sup> (1961). See chapter 7.

<sup>3</sup> For a discussion of this idea in a different context see Wellek & Warren, *Theory of Literature* (3rd ed) chapters 2-3.

that the legislator intended, provided that technique is within general public understandings about meaning.<sup>4</sup> Consider Fuller's example<sup>5</sup> of a statute prohibiting "dangerous weapons". After the statute is passed a hand-held death-ray machine is invented. Is it prohibited? Clearly it is, and this is so because if one classifies the death-ray machine according to the functional characteristics the Legislature intended, it falls within the meaning of "dangerous weapon".

It follows from this that it is the Legislature's intended meaning which is decisive in cases of ambiguity, vagueness or conventional shorthand. The establishment of intention may of course involve consideration of the context of the legislative purpose:<sup>6</sup> the book contains a useful chapter on evidence that may be adduced as to the Legislature's intent, including an interesting discussion of the recent use of parliamentary history for this end. Additionally, judicial discretion during the interpretation-subsumption process is circumscribed by the various maxims, presumptions and rules of interpretation in our legal system (discussed in chapter 13), and by the need to decide cases in a manner consistent with extant cases and legally appropriate values. Judges cannot claim the autonomy postulated in *The Concept of Law*.

Professor Hart<sup>7</sup> draws upon Aristotle's idea of unforeseen cases<sup>8</sup> in support of his "core and penumbra" theory. In doing so, he omits the central point of Aristotle's discussion; which point founds the second major species of difficulty identified by Dr Evans as inherent in the formalisation of rules. This second difficulty is not one of communication. Indeed, it arises when it is clear that a statutory rule applies and that the person subject to the rule is, on the intended meaning of that rule, obliged to do his or her duty (the nature of which is also undisputed). The difficulty is that in some circumstances – unforeseen by the Legislature – the reasons for imposing the duty are applicable but outweighed, or are inapplicable altogether (and therefore outweighed). Alternatively, the reasons for imposing the rule are applicable to circumstances which do not fall within the preconditions of that rule and which the Legislature would have intended to include if it had thought of the case.

This is a problem of imperfect "situational appreciation" on the part of the legislator, discussed by philosophers as early as Aristotle and which necessarily renders all practical judgments potentially defeasible. Dr Evans suggests that in fact this is the problem behind a number of "hard cases" in the law, where judicial ingenuity has been used to achieve an unacknowledged, "back door" exception from, or extension to, statutory rules. He argues that the

<sup>4</sup> An important if recondite proviso, noted at 2-3 and 59-60.

<sup>5</sup> "American Legal Realism" (1934) 82 U Pa L Rev 429.

<sup>6</sup> See for example 60-61 and 123-125.

<sup>7</sup> At 125.

<sup>8</sup> *Nicomachean Ethics* Book V, chapter 10.

disadvantages of varying otherwise precise rules can be outweighed if a doctrine of exceptions, and perhaps extensions, is developed which depends on clear public understandings about the evaluative goals relevant in each instance.

In doing so, the author presupposes an ascertainable set of community values. There are, however, practical objections which the author has not addressed here. How universal must a value be for it to be recognised judicially? In particular, might not individual judges possibly interpret community views in the light of their own – this all the more given the current tendency towards "judicial legislation" in New Zealand? If there are advantages to having precise and inflexible rules,<sup>9</sup> by how much must the reasons for a rule be outweighed before that rule will be excepted? Finnis<sup>10</sup> has pointed out the difficulty of choosing between incommensurate evaluative goals. Nevertheless, these objections are essentially practical rather than theoretical, and Dr Evans' thoughts should provoke further discussion of a doctrine perhaps inopportunistically abandoned in the nineteenth century.

The book is completed with thoughtful chapters on the effect of legislative mistake; the implication of duties when a statute confers a power; and on the effect of procedural rules (how obligatory are procedural duties intended to be in administrative law cases?). The chapter on procedural duties is more readable than the author's earlier article "Mandatory and Directory Rules",<sup>11</sup> and avoids the terminological problems which plague that area.

The author has incorporated a wealth of thinking into this book. It is not simply a book about the mechanics of statutory interpretation, for it propounds a theoretical understanding of the issues involved in interpreting and applying a statutory rule. In doing so, the book canvasses philosophical and linguistic, as well as legal, matters. Bearing in mind his intended audience, Dr Evans has set himself a hard task. The result is a book that is difficult for first year students and simplified to academics. But it is nevertheless important. In particular, a reader of *Statutory Interpretation* will get a better understanding of what causes communication difficulties. To those (including students) who come to argue the reading of statutes, this will be a valuable asset: by better comprehending what the problem in each case is, one moves closer to finding the best solution. At the same time, a book that deals so extensively with the causes of interpretation problems will demand the attention of legal academics and philosophers. Although not expounded fully, the "bones" of the author's theories are laid out for all to ponder.

– Andrew Simester

<sup>9</sup> Outlined at 61-63.

<sup>10</sup> *Natural Law and Natural Rights* (1980).

<sup>11</sup> [1981] 1 *Legal Studies* 227.

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