BOOK REVIEWS

The New Todd on Torts

***THE LAW OF TORTS IN NEW ZEALAND*, edited by S Todd, Brookers, Wellington, 2nd edition, 1997.**

The new edition of *The Law of Torts in New Zealand*[1] – often known simply as Todd, after its general editor – is an essential purchase for both law students and practitioners seeking an excellent general reference for tort law in this country. New Zealand tort law now diverges significantly from its English counterpart in many important areas. The first edition of Todd having become somewhat dated, this book comes as welcome relief to those who have found themselves cast upon the pages of *Clerk & Lindsell* or *Salmond & Heuston*.

The most important feature of *The Law of Torts in New Zealand* is its indepth coverage of the New Zealand law of negligence. In keeping with the first edition, separate chapters are devoted to The Duty of Care, Particular Categories of Duty, and Breach of Duty. As the introduction notes, the starting point for duty of care issues is the Court of Appeal's decision in *South Pacific,*[2] which followed the first edition. There is full discussion of this and subsequent New Zealand cases, as well as commentary on the approaches taken in England, Canada, and Australia.

In 1983 in *McLoughlin v O'Brian*[3] Lord Scarman said: " if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy to the judgment of Parliament." If this was ever true, it certainly is not today, and the chapters on negligence look behind judicial decisions at the policy considerations influencing the judges. In particular, almost twenty pages are usefully devoted to financial loss and again differing Commonwealth approaches are surveyed. Whereas the floodgates argument continues to haunt English courts and hamper the law's development outside *Hedley Byrne,*[4] in New Zealand, where accident compensation legislation already greatly limits negligence law, the fact that a claim is for economic loss is merely an important factor to be considered in assessing whether a duty of care will lie.[5]

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1 Todd (ed), *The Law of Torts in New Zealand,* (2nd ed 1997).

2 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] NZLR 282.

3 [1983] 1 AC 410.

4 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

5 See supra at note 2, at 296 per Cooke P.

The changes wrought by the National Government to accident compensation law in 1992 have led to considerable new analysis in this area. The many significant differences between the 1982 and the 1992 Acts are considered, and much discussion is devoted to the meaning of terms such as "personal injury", "accident", "medical misadventure", and "occupational injury". While the bar to actions arising directly or indirectly from personal injury remains, Todd argues that the narrower coverage provided by the 1992 Act allows greater room for common law claims. The further the statute moves from Sir Owen Woodhouse's goal of comprehensive coverage for accident victims, the more the common law must return to fill the gap. In particular, this has led to careful consideration in the Duty of Care chapter of recovery for mental injury and of English decisions in relation to both primary and secondary victims: most importantly *Page v Smith*[6] and *Alcock v Chief Constable of South Yorkshire*[7] respectively. The possibility of an extended role for exemplary damages is considered; this subject is also discussed in the Remedies chapter.

A welcome addition is the chapter on Abuse of Public Office. In the first edition, misfeasance in a public office was treated with the economic torts; it is in fact directed towards the interest in public officers observing their duties, and secondarily towards compensating individuals for injury caused by breach. The tort has seen a recent resurgence in New Zealand, the principal authority being the Court of Appeal's decision in *Garrett v Attorney-General*,[8] which adopted reasoning from the English case *Three Rivers District Council v Bank of England (No 3)*.[9] Todd covers this and another important decision (*Northern Territory v Mengel*[10]), in a thorough analysis of the elements of the tort. To Todd's list of public officers covered by the tort must now be added District Court judges.[11] The rights of the individual against the state are further considered in the second half of the chapter which is devoted to an analysis of the area of public law compensation created in *Baigent's Case*.[12]

Other areas have changed little. The intentional torts remain substantially the same; Abuse of Process has seen few new developments although there has been some structural rearrangement, and Breach of Statutory Duty is largely unaltered bar a word on the New Zealand Bill of Rights Act 1990. Inducement to Breach of Contract has been more appropriately named Interference with Business Relations. As author Margaret Bedggood notes, breach may not be essential[13] and

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6 [1996] 1 AC 155.

7 [1992] 1 AC 310.

8 Court of Appeal, 19 December 1996, CA 129/96, (Richardson P, Gault, Henry, Keith, Blanchard JJ).

9 [1996] 3 All ER 558.

10 (1995) 69 ALJR 527.

11 *Rawlinson v Rice*, Court of Appeal, 9 September 1997, CA 246/96, (Richardson P, Gault, Thomas, Keith, Tipping JJ).

12 *Simpson v Attorney-General* [1994] 3 NZLR 667.

13 Para 12.2.3.

inducement also is too strong a word for the element of intention required.[14] The rule in *Rylands v Fletcher*[15] is reassessed in light of *Cambridge Water Co v Eastern Counties Leather plc*,[16] which removed any supposed differences with nuisance, and *Burnie Port Authority v General Jones Pty Ltd*,[17] where the High Court of Australia subsumed the rule within the law of negligence. The first edition doubted whether any material differences existed between *Rylands v Fletcher* and nuisance, and *Cambridge Water* is understandably applauded in the new edition.

Despite the advent of the Fair Trading Act 1986 and the supposition that claims under it may in time supersede common law passing off actions, Chapter Fourteen on Tortious Aspects of Unfair Competition still devotes a large proportion of discussion to the latter. One of the more interesting points raised is whether passing off can further expand to protect character merchandising rights. Not surprisingly, the paragraph draws heavily on the judgment of Fisher J in *Tot Toys Ltd v Mitchell*[18] (the Buzzy-Bee case), delivered since the first edition. His Honour there concluded that any argument that loss of a "right" to charge a licensing fee for character merchandising equates to damage, is circular; the existence of such a right being the very issue to be determined in a passing off action. The true question is therefore whether there *should* be such a right. The authors draw no conclusion on this issue, preferring to refer the reader elsewhere. Likewise, the interesting comment made in *Tot Toys* that a case may exist for granting protection for images of real persons over and above those of fictitious characters is repeated but not elaborated on. Nor is the distinction made between those persons who are celebrities, and who might be considered to have goodwill in their image and consequently an actionable right for dilution of that goodwill, and persons of lesser fame who arguably cannot satisfy this element. The reader is provided only with a cursory statement, without conclusion, of reasons for and against granting protection; to which Locke's classic property principle of preventing reaping without sowing should be added. Remedies for passing off including damages, account of profits, and permanent and interim injunctions are discussed.

The discussions of interim injunctions both in relation to passing off and in Andrew Beck's Remedies chapter, outline the two step approach taken by the House of Lords in *American Cyanamid Co v Ethicon Ltd.*[19] Regrettably, neither chapter's authors identify Hugh Laddie J's important decision in *Series 5 Software Ltd v Clarke*,[20] which questions the interpretation modern courts have put on Lord

14 See *Sefton (Earl) v Tophams Ltd* [1965] Ch 1140.
15 (1886) LR 1 Ex 265.
16 [1994] 2 AC 264.
17 (1994) 179 CLR 520.
18 [1993] 1 NZLR 325.
19 [1975] AC 396.
20 [1996] 1 All ER 853.

Diplock's speech in that case. *Klissers*[21] notwithstanding, New Zealand courts, like their English counterparts, have been too willing to apply the balance of convenience test and maintain the status quo by interim injunction, despite the apparent merits of the case. This has led to the granting of interim injunctions, incompatible with freedom of expression and the public interest, which stay in force for a considerable time: see, for example, *European Pacific Banking Corporation v Fourth Estate Publications,*[22] which kept details of the winebox papers out of the press for eighteen months.

John Burrows' Defamation chapter is thorough in its discussion of the elements of the tort and extensive examples are given of the types of statement capable of being found defamatory. "Humour" has been added to the list of examples given, the defamation action having become the (re)tort of choice for the victims of satirical writers: see *McCrae v Australian Consolidated Press.*[23] Many of the current issues in defamation law, such as the effect of the New Zealand Bill of Rights Act 1990 and the public interest in political comment, are identified and discussed, although unfortunately the chapter predates Elias J's important decision in *Lange v Atkinson.*[24] There is some criticism of the ill-defined Australian approach to political speech taken in *Theophanous,*[25] but this too has since been addressed, by the High Court in *Lange v Australian Broadcasting Corporation.*[26] In reality, many defamation actions settle out of court with plaintiffs preferring an apology to lengthy and expensive litigation. Witness, for example, the full page apology to Anne Geddes in the September 1997 Metro Magazine, resolving a potentially far more serious defamation action than that brought by Toni McCrae. Given this reality, too little space is spent on the place of the apology (four lines at para 16.14) although the passage on retraction and reply (para 16.6.5) is better. In another challenging area for defamation law, it is disappointing that there is no discussion of the place of defamation on the Internet. This is a tricky issue, yet to be litigated in New Zealand, and it might have been hoped that some guidance would have been provided with discussion of overseas cases such as Australia's *Rindos v Hardwick*[27] (defamation on Usenet), and American cases *Cubby v Compuserve*[28] and *Stratton Oakmont v Prodigy Services*[29] (Internet Service Provider liability).

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21 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142. In that case Cooke J said that where the balance of convenience is fairly even "regard to the relative strengths of the parties will usually be appropriate".

22 [1993] 1 NZLR 559.

23 Unreported, but noted in *The Press,* 28 April 1994.

24 [1997] 2 NZLR 22. See Able, "Rethinking Political Expression" (case note), previous.

25 *Theophanous v The Herald and Weekly Times Ltd* (1994) 124 ALR 1.

26 High Court of Australia, 8 July 1997, FC 97/021, S 109/1996.

27 Supreme Court of Western Australia, 31 March 1994, No 1994 of 1993 (Unreported Judgment 940164), Ipp J.

28 776 F Supp 135.

29 23 Media L Rep (BNA) 1794.

Privacy is another area of the common law where New Zealand is diverging from its English heritage. Whereas in England the possibility of a privacy tort has been rejected,[30] two New Zealand High Court cases have hinted at the potential for its development here.[31] Although the conclusion to the Privacy chapter notes that "no case has unequivocally granted a remedy on the basis that such a tort exists", Burrows provides an excellent discussion of the embryo tort. There is also valuable discussion of statutory protection of privacy by the Privacy Act 1993 and the Broadcasting Act 1989, and comment on the Privacy Principles formulated by the Broadcasting Standards Authority.

One criticism that can be made of the book, is that it risks replacing analysis of the principles of the law with case citation and surveying of authorities. Although it is arguable that more sophisticated analysis can be left to other works, many students will turn to a single source and in some places in this book they risk failing to see the wood for the trees. In voicing his disapproval of a passage in Cyprian Williams *The Contract of Sale of Land* Lord Wilberforce said in *Johnson v Agnew*:[32]

> My Lords, this passage is almost a perfect illustration of the dangers, well perceived by our predecessors, but tending to be neglected in modern times, of placing reliance on text book authority for an analysis of judicial decisions. It is on the face of it a jumble of unclear propositions not logically related to each other. It is 'supported' by footnote references to cases (two of this House and one of the Privy Council) which are not explained or analysed.

This criticism can also be levelled at passages in *The Law of Torts in New Zealand*. On occasions examples are provided which seem to fall wholly outside the previously given definition of the tort. We are told, for example, that "battery is the act of intentionally applying force to the body of another person without that person's consent",[33] but the author later speculates that such things as "shining a bright light causing injury to sight" and "inducing a person to remove his or her clothes" could qualify as a battery "although in these cases the element of force seems to be lacking."[34] Both examples are, as with the comments so offending Lord Wilberforce, "supported" by footnotes, but one is left wondering how the element of force can be absent when we are told that the application of force is an essential part of the tort. Whilst Glidewell LJ did, in *Kaye v Robertson*,[35] speculate that retinal or other damage to the person caused by the shining of a bright light or

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30 *Kaye v Robertson* [1991] FSR 62.

31 *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (McGechan J); see also the unreported decision of Jefferies J, High Court, Wellington, 12 October 1986, CP 477/86; and *Bradley v Wingnut Films* [1993] 1 NZLR 415.

32 [1979] 1 All ER 883, 892. For discussion on the role of the textbook see Jones, "'Traditional' Legal Scholarship: A Personal View" in Birks (ed) *What are Law Schools For?* (1996) 9.

33 Para 3.4.

34 Ibid.

35 [1991] FSR 62, 68-69.

the taking of a flash photograph could be a battery (could one not find the element of force present here?), Marshall Evans QC in *Bayliss and Barton v Home Office*[36] acknowledged that a strip search without touching could not be a battery. Rather, a new tort described as "unlawfully inducing a person to remove their clothes" was proposed.[37] Similarly, in the Nuisance chapter, "reflection of sunlight" appears in a long list of the causes of nuisance. Whether this is actually correct was the subject of much debate in the recent House of Lords decision in *Hunter v Canary Wharf*.[38] While the result in *Bank of New Zealand v Greenwood*[39] seems largely to have been accepted, that case falls close to the "brightline" which the Lords have established between situations where some by-product crosses the boundary line and situations where there is no such by-product.[40] The English Court of Appeal's decision in *Canary Wharf* is cited as evidence that the courts do not consider television viewing to be "ordinary beneficial enjoyment of land", but the Nuisance chapter fails to foreshadow the debate on the very nature of the tort which took place in the House of Lords. As Lord Cooke noted, the majority gave some symmetry to the law of nuisance, thereby succeeding where textbook writers had failed. Lord Goff aptly laments in his judgment that in some situations "a crumb of analysis is worth a loaf of opinion".[41] So, although *The Law of Torts in New Zealand* does an excellent job of providing references and documenting decided cases, there is some lack of clarity in defining, and more importantly confining, the elements of each tort.

This lack of clarity is, of course, a problem with the law of torts generally, and the book does make a valiant attempt in the opening chapter to describe the nature of tortious liability which "in the abstract is hard to pin down".[42] Tort law is somewhat shambolic, unsure of the limits to place on its own expansion: consider *Spring v Guardian Assurance plc*.[43] In some instances these problems *are* correctly identified by the authors. Take the problem of solicitor liability for negligently prepared or executed wills. This is a wrong in need of a remedy, and that remedy can be provided by the law of negligence. Todd argues[44] that this can be done in a straightforward manner, as in *Gartside v Sheffield, Young & Ellis*,[45] without need for the legal gymnastics performed by the House of Lords in *White v Jones*[46] where liability is brought within an extension to the rule in *Hedley Byrne*. Tort law requires someone to do for it what Peter Birks has done for restitution:

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36 See Williams and Deighton [1993] 137 Sol J 377.
37 Ibid.
38 [1997] 1 All ER 426.
39 [1984] 1 NZLR 525.
40 See McLay, "The Once and Future Law of Nuisance" [1997] NZLJ 222.
41 [1997] 1 All ER 426, 440.
42 Para 1.1.1.
43 [1995] 2 AC 296.
44 Para 4.10.
45 [1983] NZLR 37.
46 [1995] 2 AC 207.

strip things back to basics and ask which events require which responses from the law.[47] There could perhaps be more of this in what is clearly New Zealand's foremost book on torts.

In conclusion, the authors have succeeded in creating a uniquely New Zealand text that also manages to explain and document developments elsewhere in the common law world. There is no doubt that this is an excellent book. But it is hoped that students, their lecturers, and practitioners will not be persuaded by the breadth of its coverage to eschew primary sources and forgo careful thought about the most basic elements and principles underlying the law of torts.

Stephen Hunter, with assistance from the Review editorial team.

Cheshire & Fifoot's New Zealand Successor

***LAW OF CONTRACT IN NEW ZEALAND,* by Burrows, Finn, and Todd, Butterworths, Wellington, 9th New Zealand edition 1997.**

Introduction

The authors of the 8th New Zealand edition of *Cheshire & Fifoot's Law of Contract* have, this year, delivered its much awaited successor. No longer is it *Cheshire & Fifoot's Law of Contract*, but rather Burrows, Finn, and Todd's *Law of Contract in New Zealand.*[1] The change of title is perhaps evidence that the time has come to fully recognise the unique character of New Zealand contract law, which has developed independently of England, notwithstanding the continued authority of the Privy Council. This new edition boasts the latest developments in New Zealand contract law, and has been designed to incorporate more elements indigenous to New Zealand, emphasising this country's native ingenuity and autonomy.

Overview: A Review of the Medium

The format of this new edition is highly reminiscent of *Introduction to Land*

47 See Birks, *Introduction to the Law of Restitution* (1989).

1 Burrows, Finn, and Todd, *Law of Contract in New Zealand* (9th New Zealand ed 1997).

Law by Hinde, McMorland, and Sim (2nd ed 1986). Unlike its predecessor, titles, subtitles, and sub-subtitles are now numerically sequential. This improves the structure and arrangement of the text. Through careful use of this numerical system, the refinement of broader ideas is made transparent, improving the clarity of the authors' reasoning. However, this new method of ordering is not without casualties. Elegance has given way to a more utilitarian approach. The upside of this trade-off is, of course, the greater accessibility of the text to both the neophyte and the veteran.

Format is not the only apparent change. There appears to be an effort to simplify the language used. There is also a more conscientious use of authorities; English authorities are only used when necessary, with preference given to New Zealand cases, where possible. Quotes are not used as an end in themselves, but rather as strategic devices to further the ultimate goal of clarity of expression. Ostensibly, greater weight has been given to New Zealand statutes. This is not surprising given the continued growth of legislation indigenous to New Zealand (which is the prime source of New Zealand's divergence from England). This emphasis is true to the authors' intent to create a truly New Zealand textbook on the law of contract. This objective is also furthered by the omission of the chapter on Quasi-contract, the authors recognising its greater affinity with the law of Restitution.

A disappointing aspect of the book lies in its editing. There are manifest typographical errors which detract from the text's overall presentation, beginning with the "Erratum" on the very first page. Perhaps time was a factor, and given the impressive improvements over the earlier edition in other respects, the authors deserve the benefit of the doubt.

Chapter One: Historical Introduction

A feature of the new edition is a rewritten Chapter One, with Finn replacing A W B Simpson as author. True to the objective of producing a truly New Zealand textbook, Finn strives to relate the historical development of contract law to conditions unique to New Zealand. While Simpson's approach was more from an historian's perspective, Finn could be said to have taken the opportunity to set the stage for the rest of the book. Put differently, although the title of Chapter One remains unchanged, Simpson emphasised "history", while Finn accords greater prominence to "introduction". This improved coordination is to be applauded, as Chapter One fits in better with the remainder of the book, providing links with discrete principles discussed subsequently. With the shift of focus from history to introduction, the chapter's greater brevity is not unexpected. Rather than expounding the minutiae of history, Finn resolves to highlight and summarise watershed events in the history of contract law.

Chapter Two: Some Factors Affecting Modern Contract Law

The rewriting of Chapter Two has generally yielded greater clarity. New influences affecting modern contract law are recognised. Both judicial flexibility and statutory discretion feature accordingly. Chapter Two is no exception when it comes to improvements in organisation. For example, while the prior edition treated the inequality of bargaining power as a topic separate from the use of standard form contracts, the new edition treats the latter as an aspect of the former. Care has been taken to update the chapter to account for recent developments, such as the impact of the decision in *Clark Boyce v Mouat*[2] on the relationship between fiduciary and contractual duties. Further, there is the recognition of developments in the relationship between tort and contract.

Chapter Three: The Phenomena of Agreement

As noted above, one of the text's highlights is its greater incorporation of New Zealand material. In this respect, Chapter Three is no exception. However, the omission of *Maintec Ltd v Porirua City Council*[3] and *Far North District Council v Falcon Contracting Ltd*,[4] as extensions of *Gregory v Rangitikei District Council*,[5] is moderately disappointing. Another omission of some importance is the case of *Morley v Spencer*[6] - a recent New Zealand example of the distinction between contracts and deeds. Inclusion of this case would have complemented the discussion on the difference in limitation periods in actions on contracts and deeds. Other aspects of note include the explicit recognition of modern means of communication such as faxes, e-mail, electronic data interchange, and couriers. Further, stronger and surer reference is made to equitable estoppel as an alternative to the use of collateral contracts.

An interesting feature of this chapter is the change in tack taken by the author in two matters. First, care is taken to reclassify the "objective" approach to contract formation as the "global" approach. The reason posited for this reclassification is sound. A global approach would avoid restricting the examination of contract formation to the manifest assent of the relevant parties. Second, the author now supports the contention that identical counteroffers cannot result in an agreement, both in principle and on practicalities. In the earlier edition, the opposite position was preferred.

As with the other chapters, a better state of organisation is apparent in Chapter Three. Unlike the earlier edition, telephones and electronic means of communication are set apart from the discussion of cases where there is no

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2 [1993] 3 NZLR 641.
3 High Court, Wellington, 19 October 1995, CP 189/95, Gallen J.
4 (1996) 5 NZBLC 104,080.
5 [1995] 2 NZLR 208.
6 [1994] 1 NZLR 27.

prescribed mode of communicating acceptances. This is appropriate as, although not mutually exclusive, the two are not necessarily interrelated.

Chapter Eleven: Duress, Undue Influence, and Unconscionable Bargains

In the preface, the authors promoted Chapter Eleven as a highlight as "[m]uch of the chapter on duress, undue influence and unconscionability is new".[7] Although recent developments have been included, and the authors' punctiliousness is to be lauded, it might be a stretch to suggest that "much" of the chapter is new. The structure of the chapter remains largely unaltered, and elements of the doctrines remain unchanged. That which is new, are more recent refinements of older authorities such as *CTN Cash and Carry Ltd v Gallaher Ltd*,[8] a case which dealt directly with the difficult issue of distinguishing between legitimate threats of lawful actions, and those which constitute economic duress. Other examples include *ASB Bank Ltd v Harlick*[9] and *Banco Exterior Internacional SA v Thomas*[10] - a recent example of the exercise of rebutting a presumption of undue influence. In any event, the greater care paid to communication is in itself a reason to consider the chapter a considerable improvement. For example, the chapter benefits from a clearer breakdown of presumed undue influence, distinguishing undue influence at law from that which arises on the facts of each case.

Chapter Twelve: Contracts Contrary to Law or a Statute and the Illegal Contracts Act 1970

It is clear that effort has been made in this chapter to incorporate more New Zealand material. Even older New Zealand cases, absent from the prior edition, have been included (*Heathwaite v NZ Insurance Co Ltd*[11] and *Clausen v Denson*[12] for example). There are, however, more recent cases which could have been included. *R v Collis*[13] may not have been a contract decision, but it does examine the "conscience test" said to be relevant to the exercise of the court's discretion under the Illegal Contracts Act 1970, where the court is required to consider the public interest in granting relief. Support for the use of this test in this manner, can be found in the New Zealand case of *Farquhar v Property Restoration Ltd*,[14] which has also been omitted from the text. Other cases similarly neglected include *Re Freshford Holdings Ltd*,[15] where the Court took a broad approach to the granting of

7 Supra at note 1, at v.
8 [1994] 4 All ER 714.
9 [1996] 1 NZLR 655.
10 [1997] 1 All ER 46.
11 [1951] NZLR 6.
12 [1958] NZLR 572.
13 [1990] 2 NZLR 287.
14 (1991) 1 NZ ConvC 190,804
15 (1991) 5 NZCLC 67,186.

relief in the context of the Companies Act 1955. In cases of technical breaches of the Land Settlement Promotion and Land Acquisition Act 1952, it is observed in Chapter Twelve that the courts have been willing to take a pragmatic approach to the granting of relief. Authority used to support this in the text suggests that the courts would grant relief in cases where government consent to the acquisition of land is expected to be given. It is disappointing that *Robert Shand & Co Ltd v Ching*[16] has been ignored as it clearly illustrates the approach of the court in action. Further, the omission of *Seelig v Kelsey*[17] deprives this examination of other factors which the courts will consider in determining whether the policy of the statute would be frustrated by the granting of relief. Another case of some importance which has been overlooked is *Dairy Containers Ltd v First City Corp Ltd.*[18] This was the first time the relationship between the Illegal Contracts Act 1970 and the Land Transfer Act 1952 was given due consideration. A book designed to capture the law of contract truly indigenous to New Zealand would do well to recognise these cases.

The Contractual Remedies Act 1979

Material on the Contractual Remedies Act 1979 ("the Act") is clear and well presented. Although most cases of note have been incorporated, there are omissions worthy of mention. The decision of *Bailey v Tobin*,[19] for example, would have enriched the sections considering s 4 of the Act. This case illustrates the judicial process of examining whether a provision said to oust the court's jurisdiction to investigate representations between the parties, is, on grounds of fairness and reasonableness, valid. Similarly, *Martin v Pont*[20] could have been mentioned as a missed opportunity for the court to address the relationship between the Act and money had and received. *Haddon v PK & CA Bird Motel Ltd*[21] and *Miller v Mattin*[22] should have been included for the light they shed on the relationship between leases and the Act.[23] Finally, the case of *Trustees of Manchester Unity Friendly Society v First Medical Corp Ltd*,[24] if included, would have modified the reliance in the text on *Mayall v Weal*[25] as authority for the

16 Court of Appeal, 11 June 1992, 276/90, (Richardson, Gault, Hardie Boys JJ).

17 (1995) 3 NZ ConvC 192,097.

18 High Court, Hamilton, 8 May 1990, CP 14/90, Anderson J.

19 High Court, Auckland, 13 May 1991, M 1358/90, Barker J.

20 [1993] 3 NZLR 25.

21 (1993) 2 NZ ConvC 191,600.

22 (1993) 2 NZ ConvC 191,714.

23 Although Greig J in *Haddon* was driven to conclude that the parties were free to specify any basis for termination, even if these were insufficient grounds for cancellation under the Act, his Honour was inclined to hold that such minor grounds for cancellation should not sound in damages. The Court of Appeal in *Miller* disagreed with this latter point. Their Honours were of the view that minor breaches were still grounds for awarding damages, assessed on ordinary principles.

24 High Court, Auckland, 6 May 1994, CP 113/94, Anderson J.

25 [1982] 2 NZLR 385.

proposition that the court would not award an injunction to prevent the use of monies paid upon cancellation of the contract. *Trustees of Manchester* confirms that any return of property is discretionary under s 9 and not automatic on cancellation under s 8, but, in cases where there is a sufficient possibility of revesting, conditions can be imposed to protect the innocent party's position in the interim. Thus, to assert that no injunction would be granted is to portray only part of the picture.

Privity and Negligence

The relationship between tort and contract is better explained in the new edition. The impact of the Consumer Guarantees Act 1993 ("the CGA") on the issue of privity and third party rights is precisely outlined. For example, a clear distinction is drawn between defective buildings and chattels, with remedies to third parties for the former being provided by the common law in tort, and remedies for the latter being provided by the CGA. The need for tort as a means of addressing claims by third parties not caught by either the doctrine of privity, or the Contracts (Privity) Act 1952, is much reduced with the imposition of statutory duties under the CGA. The passing of the CGA, and its incorporation in the new edition, support the authors' contention that the time has come to break from *Cheshire & Fifoot*, as the law of contract in New Zealand has diverged from that of England. It is timely that this development is recognised in contract, as it has been recognised for some time in tort.

Damages

Another highlight of the new edition is the chapter on damages. Recent developments have been incorporated with care. However, it is notable that *Telecom Corp of NZ Ltd v Business Associates Ltd*[26] has not been discussed. Inclusion of this case would have provided support for the High Court decision in *Tak & Co Inc v AEL Corporation Ltd*[27] which was cited as precedent for the award of exemplary damages. Similarly, the discussion on general damages, awarded for vexation, annoyance, and distress, would have benefited from the inclusion of *Watson v Dolmark Industries Ltd*,[28] *Anderson v Davies*,[29] and *Cornelissen v NZ Hydroponics Ltd*.[30] *Watson* is authority for the distinction drawn between commercial and noncommercial bargains, with general damages being awarded only in the latter. *Anderson* could have been cited in support of the "objects of the

26 Court of Appeal, 23 June 1993, CA 7/93, CA 41/93 (Cooke P, Richardson, McKay JJ).
27 (1995) 5 NZBLC 99,357.
28 [1992] 3 NZLR 311 (CA).
29 [1997] NZLR 616.
30 High Court, Nelson, 21 October 1996, M4/96, Heron J.

contract" approach to the issue of general damages, adopted by a majority of the New Zealand Court of Appeal in *Bloxham v Robinson*[31] (which was referred to in the new edition). Although *Cornelissen* was a case of negligent advice, the Court in that case held that *Bloxham* could be applied in tort as it is applied in contract. On the facts of the case, notwithstanding the commercial nature of the transaction, the Court awarded general damages for distress on grounds of a special feature of the case - hardship. Finally, *Sutton v Wadsworth Worton*[32] could also have been discussed, as it contributes to the discussion of a number of different aspects of damages, including: the general rule that damages ought normally to be assessed as at the date of the breach of contract; and the award of damages for the loss of a chance.

Consumer Guarantees Act 1993

The authors have hailed the CGA as the greatest New Zealand statutory development of the past five years. As such, the authors give serious consideration to its impact in the context of privity (which has already been considered in this review), and in the contexts of contractual terms and the cancellation of contracts.

The introduction of the guarantees imposed by the CGA on consumer transactions is clear, and takes up where the earlier edition left off. The new edition makes it clear that the use of the expression "implied terms" has grown obsolete. Such terms are imposed, not implied as a product of the parties' intentions. The exceptions to the imposition of such terms are fully considered. For example, a buyer acquiring a kettle for use in her place of business, might not have the benefit of the guarantees if the supplier contracts out of them in writing. The simplicity of the description of the CGA's effects on cancellation is to be commended, given the inherent complexity and fragmentation of remedies in cases of breach.[33]

Conclusion

The successor to the 8th New Zealand edition of *Cheshire & Fifoot's Law of Contract* is worthy of its predecessors. True to the authors' goal of producing a uniquely New Zealand text on contract, the new edition is evidently "kiwi", while due recognition is given to its English roots. Burrows, Finn, and Todd is recommended as a text for the novice and as a reference for the practitioner.

Michael Yew Seong Chin

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31 (1996) 7 TCLR 122.

32 High Court, Auckland, 5 June 1996, CP 587/94, Elias J.

33 For example, distinctions are drawn between contracts depending on whether they are "consumer" transactions, whether they are for the supply of goods or services, and whether it is the seller or buyer seeking a remedy.

A Beginner's Guide to Constitutional Law Under MMP

***BRIDLED POWER*, by Palmer and Palmer, Oxford University Press, Auckland, 1997.**

Although the intellectual origins of *Bridled Power*[1] have come from Sir Geoffrey Palmer's previous work in *Unbridled Power*,[2] this edition is valuable because of the significant number of changes which have been made to the New Zealand constitutional framework since the first edition appeared. The passing of the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, and the Fiscal Responsibility Act 1994, among other statutes; as well as the growth of Treaty of Waitangi and international jurisprudence, combined with adoption of the Mixed Member Proportional (MMP) electoral system, has meant that constitutionally, New Zealand is a very different nation. This book effectively outlines the changes in the political environment and how they have positively affected the issues raised in earlier editions of the book.

The authors state that the primary purpose of *Bridled Power* "is to inform and educate New Zealanders, in a straightforward, accessible manner, about the ground rules of the New Zealand system of government, particularly as they are undergoing fundamental changes brought by the transition to an MMP ... electoral system".[3] They have not deviated from this aim throughout the book. This is not an over-complicated work, but rather a simple, easy to read account of the fundamentals of the New Zealand constitution. While it does not provide intensely stimulating or controversial comment, the book provides the reader with a basic outline of the functioning of government.

The book is divided into five parts. Each part is made up of a number of chapters that describe important constitutional functions and concepts, and predict, and question how these roles will be modified under MMP.

The two chapters in Part One set the scene for the rest of the book. The authors briefly outline the previous electoral system, summarising the concerns highlighted by Sir Geoffrey in *Unbridled Power*. The MMP system, including electoral procedure, is described along with a list of changes that will occur to the political process under the coalition or minority governments which are a feature of the new electoral system. They conclude with the observation that:[4]

> MMP adds new, and more complicated dynamics to government structures and processes, but because these allow more points of view to be heard, developed, and considered in the process of governing, our democracy will be enhanced.

1 Palmer and Palmer, *Bridled Power* (1997).

2 Palmer, *Unbridled Power* (2nd ed, 1987).

3 Supra at note 1, at 2.

4 Ibid, 20.

This clearly shows the authors' belief that public debate is crucially important in any democratic constitution. The remainder of the book explains and offers stimulus for this debate.

Part Two describes the executive government. The opening chapter deals with the ongoing question of whether New Zealand should become a republic, particularly relevant as the authors predict that the Governor General is likely to have an increased role under MMP. However, the republicanism issue is really only touched on, and the chapter ends with a warning that there needs to be careful thinking in a constitutional context because of the substantial legal powers that a President would hold. The following chapters deal with important constitutional roles and ideas. Interestingly, the concept of ministerial responsibility is afforded extensive attention, accompanied by the prediction that it will be "sharpened in an MMP environment".[5] Again the authors are starting from the position that the politicians of today have integrity. Having experienced, albeit briefly, the running of the country under the new system, the reader may be left with a feeling that this assumption is far from the truth. This raises questions regarding the difference between the theory behind MMP (that it enhances both democracy and political accountability), and the reality, where little has changed.

Part Three provides an analysis of Parliament. Chapter seven discusses the function of the Member of Parliament (MP) and other parliamentary inhabitants, some of whose roles have dramatically changed under MMP (this is especially true with the distinction between list and constituency MPs). The authors pose a list of questions which query the function of an MP in the changed electoral system, and warn of the danger of losing a clear definition of the role.[6] The functions, principles, and privileges of Parliament are then outlined, with a chapter devoted to legislation. The authors predict a slowing of the legislative process due to the added complexity of the parliamentary process. This will lead to less statutes being passed, an outcome considered desirable as in the past New Zealand has had a tendency to pass too much legislation. However, the book highlights a valid concern with the quality of the laws enacted given the compromise between political interests - a characteristic of the MMP environment. The next chapter predicts that this will lead to increased use of regulations to circumvent the parliamentary process, requiring close scrutiny from the courts.

The greatest amount of detail in *Bridled Power* is devoted to Part Four, which concentrates on government power. This section is the most interesting part of the book. It is also crucial to the authors' opinion that the restraints on the executive and Parliament have been enhanced in the MMP environment. This in turn has increased democracy in the political process. Chapter eleven deals with the impact of public opinion on the government, as a result of the improved access to information which filters to the public through the Official Information Act 1982

5 Ibid, 77.
6 Ibid, 121.

and the media. The book comments unfavourably on the use of citizens initiated referenda, especially with regard to the costs of the process. The following chapter introduces local government as a check on political power. Interestingly, the authors foresee a greater role for local government calling for "greater authority, along with a more robust accountability regime".[7] Chapter thirteen deals with avenues for complaint. Rather than predicting how the different structures will change under MMP, the authors choose to explain what the agencies do and how they do it. The only change anticipated to the complaints arena is that there may be a tendency to create more agencies under MMP.

Four principal restraints on government power are afforded their own chapters. Chapter fourteen describes the role of the courts in the political process. There is an interesting summary of the arguments as to whether to retain the Privy Council as our highest appellate court. The authors believe that the New Zealand courts have, in general, been able to "strike lethal blows to the abuse of power by government".[8] The subsequent chapter introduces the New Zealand Bill of Rights Act 1990 as legislation designed to protect fundamental rights from encroachment by government. The authors claim that it will be interesting to see whether MMP will enhance the development of attitudes towards more formal constitutional arrangements, including an entrenched Bill of Rights - something presumably close to Sir Geoffrey Palmer's heart. They present a concise summary of the far-reaching impact that the Act has had on the constitution and in the courts, believing that it has been far more effective than the legal profession and political commentators had foreseen. Chapter sixteen covers the Treaty of Waitangi.[9] The final chapter in this part effectively summarises the increasing impact international law has on the laws of New Zealand. The authors predict that "[t]he importance of international issues and international obligations within New Zealand's system of government will only increase in the years ahead".[10]

The final part of *Bridled Power* consists of a single chapter entitled "Where Next?". While not offering any answers on the direction for reform, the authors predict that New Zealand will confront its constitutional destiny in the next decade by seeking a uniquely New Zealand identity for our system of government. This may include the need for a written constitution as a form of higher law. The public's role in this evolution is presented as one of discussion and debate on the exercise of power in New Zealand. The chapter presents a brief yet effective conclusion to the book, outlining issues and arguments which may facilitate this debate.

Overall, the authors are positive about MMP, believing that government in New Zealand will be more democratic and more accountable than before. It

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7 Ibid, 218.

8 Ibid, 243.

9 See Taurau "*Bridled Power* - A Partial View", following.

10 Supra at note 1, at 304.

appears that they have not foreseen the political environment that operates at the moment, with a lack of accountability, and the dominant political objective seemingly being to hold on to power. In short, while this account inspires confidence in the theoretical effectiveness of MMP, the system in practice has proved to be entirely different. However, this has not detracted from a book which provides a thorough and useful account of the significant features of New Zealand's constitution and government.

Gerald Bethell

Bridled Power[1]- A Partial View.

One of the most interesting issues in the Mixed Member Proportional ("MMP") environment is the unmistakable political visibility of Maori. In a book that purports to stimulate public debate and inform the ordinary person of the likely scenarios that may evolve in this new environment, the authors overlook this. Outside of the section entitled "The Treaty of Waitangi",[2] *Bridled Power* makes only minimal reference to Maori political and constitutional issues.

Part I begins by introducing the issue of New Zealand's changing constitution; the constitutional beginnings of New Zealand are identified as at 1852.[3] Ignoring the Declaration of Independence 1835 and the Treaty of Waitangi signed in 1840, amounts to cultural blindness. Even within the narrow compass of constitutional law, these two documents are established as part of the fabric of our society.[4] Maori claims to Rangatiratanga as reserved under Te Tiriti O Waitangi (the Maori version of The Treaty) are not addressed at all in *Bridled Power.*

Bridled Power is divided into five parts and, although the book covers the institutions of government and the possible effects on those institutions of MMP, there are few page turning sections. In Part II, under the title "The Republican Debate in New Zealand", the authors note the discussion that has taken place across the Tasman, and mention our current Prime Minister's enthusiasm for change here. The authors sound a caution with regard to a shift to republicanism, and counsel a thorough investigation of the legal and political arguments as a

1 Palmer and Palmer, *Bridled Power* (1997).

2 Ibid, 278.

3 The New Zealand Constitution Act 1852 (UK).

4 See for example, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 per Chilwell J.

precursor to any movement away from our present Westminster-type constitutional system. The notions of national identity and independence are cited as reasons for New Zealand to divest itself of the largely symbolic tie with the British monarchy. In themselves, these ideas are not objectionable. However, no consideration is given to Maori attitudes towards republicanism. Questions that Maori validly ask include: whether a New Zealand Republic would recognise and give effect to Te Tiriti O Waitangi; and what status Maori claims to Tino Rangatiratanga would be given under a new constitution. The authors assert that MMP provides the opportunity for New Zealand to find its own way in constitutional arrangements. In *Bridled Power* however, there appears to be little recognition of the role of Maori as Tangata Whenua within this opportunity.

There is a brief discussion in *Bridled Power* of the possible abolition of the Privy Council as the highest appellate jurisdiction in New Zealand.[5] Here, the authors are dismissive of any objections that Maori might raise to this abolition. They state that Court of Appeal decisions on Maori issues have had more influence than those of the Privy Council in elevating the legal status of the Treaty.[6] The authors note that the Government has stated that there is no logical connection between the abolition of appeals to the Privy Council, and the availability of Treaty rights. The authors appear not to have taken into account the huge moral and political force of the Treaty (both English and Maori texts), or such pronouncements as have been made by the Privy Council in, for example, the *Broadcasting* case in 1993.[7] In this case, the Privy Council made statements to the effect that the Crown was under an obligation to honour its duty to Maori under the Treaty. A comment from such a body on the duties of the Crown, undoubtedly does much to elevate the political, moral, and possibly even legal, status of the Treaty. From a Maori perspective, before any replacement of the Privy Council can occur, opinion must be widely canvassed. The authors' proposed alternative court structure appears merely to be a reshuffling of the Court of Appeal. That body, and indeed the High Court, are unrepresentative of society in make-up, and, in particular, have no skill in Te Ao Tikanga Maori. Perhaps judges with proven expertise in this area, such as Judge Eddie Durie, could be utilised in a higher forum, especially one developed to be culturally representative.

The authors speculate that in the new MMP environment it will be easier to prevent government from acting, and a new era of increased consideration at select committee level will be advantageous to lobby groups. Traditional lobbyists such as Federated Farmers and the Employers Federation are put forward as groups that attempt to influence government.[8] Again there is an obvious failure to identify the

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5 Supra at note 1, at 48.

6 It is assumed that references to the Treaty are to the merged Maori and English texts as used in s 5 Treaty of Waitangi Act 1975.

7 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

8 Supra at note 1, at 199.

increased Maori presence in this area of private/government interaction. It is difficult to think of more effective lobby groups than the New Zealand Maori Council, and Iwi bodies such as Tainui, Ngai Tahu, and Muriwhenua. With increased lobbying by Maori, from the times of the land marches in the 1970s, to the claims of the Urban Iwi Authorities of the 1990s, nonrecognition of Maori groups as participants in the pluralist system reinforces an impression of monoculturalism.

Part IV identifies the "Restraints on Government", one such restraint being the Treaty of Waitangi. In this section the authors restate the principles of the Treaty as accepted by the courts and government.[9] These principles have existed for over a decade and yet have never been universally accepted by Maori either within, or outside the political and legal frameworks in which they were developed. Professor Mason Durie's proposals of guides and foundations of Tino Rangatiratanga for the modern day are presented, but there is no discourse or comment on his proposals. This is reflective of the lack of academic discussion, exhibited throughout *Bridled Power*, of the debate over Rangatiratanga.

While a concession is made that in some sense the legitimacy of the New Zealand Government rests on the Treaty document,[10] this contrasts with a more adventurous approach taken in *Constitution in Crisis*.[11] In that book Sir Geoffrey Palmer stated that "[i]t can even be said that the effects of parliamentary sovereignty have been blunted in relation to the Treaty."[12] By 1997, in *Bridled Power*, Sir Geoffrey seems to have forgotten this bold statement. The authors identify two "significant developments" in the way the Crown has managed claims under the Treaty: first, the growing attention among Maori to the constitutional place of the Treaty; and second, the growing awareness of the social and economic disadvantages faced by Maori. In 1997 the presentation of these two topics as "significant developments" appears conservative in the extreme. The debate over Rangatiratanga has been alive and well within Maori society since well before the Treaty was signed. A corollary to that debate is that the claim under the Treaty for Tino Rangatiratanga has been strengthened by the persistent failure of the Crown to address the poor statistical record of Maori in health, education, employment, and justice. The authors do not offer an opinion as to *whether* Maori will be better served by MMP, nor do they suggest exactly *how* the new electoral system might benefit Maori.

It is suggested in *Bridled Power* that the most significant feature of the Treaty is its length. This is an obvious reference to the English Text, as the Maori text is tino taonga (highly treasured), and to Maori that is Te Tiriti's most significant feature. The most striking physical feature of the Treaty is the fact that there are two versions which do not exactly correspond. There are differences placed on the

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9 The principles enunciated by the Fourth Labour Government of 1989.

10 See supra at note 1, at 278.

11 Palmer, *Consititution in Crisis* (1992) 98.

12 Ibid.

meaning of the texts. The authors attempt to interpret these differences by inferring that Maori aspirations to Rangatiratanga may be satisfied through interaction with a government department. The example given is that of the Department of Conservation consulting with local Tangata Whenua caring for a commercially and ecologically important wetland. By suggesting that an interpretation of the Treaty should be constructed through such practical applications avoids and marginalises the central issue in any political environment for Maori, that of Rangatiratanga.

The most positive and interesting statements that the authors make are at the end of the chapter. Had the statements entitled "Constitutional Place of the Treaty" appeared in the introductory comments, *Bridled Power* would have demonstrated the authors' desire to attract a wider and more diverse readership. When comparing the collective rights that exist under the Treaty, with individual rights which arise under human rights law, the authors identify the different philosophical underpinnings of each. The development in international law of the recognition of indigenous peoples, is also noted. Any analysis of the situation of Tangata Whenua in the context of those trends, however, is not put forward.

From a Maori perspective, another topic of interest that *Bridled Power* could have covered is the issue of Maori seats under MMP as compared with the former system. In particular, the authors could have examined what the most effective way for Maori to vote is, especially where there is a high proportion of Maori in an electorate (that is, whether it may be more advantageous to be registered on the general roll in these areas). *Bridled Power* would have been a far more interesting and relevant book had the position of Maori in Aotearoa in the MMP environment been considered in areas other than those traditionally identified.

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Ngapuhi

BOOKS RECEIVED

BURROWS JF, FINN J, and TODD S. *Law of Contract in New Zealand.* (A successor to the 8th New Zealand edition of Cheshire & Fifoot's *Law of Contract*), Butterworths, Wellington, 1997. xcvi and 818pp.

CAMPBELL I. *Compensation for Personal Injury in New Zealand: Its Rise and Fall.* Auckland University Press, Auckland, 1996. 286pp.

MILLER G. *The Legal and Economic Basis of International Trade.* Quorum, Connecticut, 1996. 250pp.

PALMER G and PALMER M. *Bridled Power.* Oxford University Press, Auckland, 3rd edition 1997. ix and 340pp.

SHARP A. *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s.* Oxford University Press, Auckland, 2nd edition 1997. viii and 346pp.

TODD S. *The Law of Torts in New Zealand.* Brookers, Wellington, 2nd edition 1997. xcviii and 1316pp.

WILLIAMS DAR. *Environmental and Resource Management Law.* Butterworths, Wellington, 2nd edition 1997. lxxxiv and 694pp.