Book reviews

DIVORCE IN AUSTRALIA: A GUIDE TO THE FAMILY LAW ACT 1975

by Paul M. Guest and Maurice Gurvich. Sun Books, Melbourne 1979, xvi + 188 pp. including index. Australian price $5.95. Reviewed by W. R. Atkin.*

This is a book written for laymen. It is designed to unravel, in the words of the Foreword, the "deep dark mystery" that is family law.

Of all branches of the law, perhaps none affects the private lives of ordinary people more than family law. The law should therefore be easy to understand and easy to find out about. Unfortunately it is often neither of these things. Witness, for instance, the size and complexity of New Zealand's recent Family Proceedings legislation. The layman needs a sympathetic interpreter.

In an endeavour to translate the law in Australia into popular terms, two Melbourne barristers have combined their knowledge of the law and their practical experience to produce a book of 188 pages, divided, for ease of reference no doubt, into 48 short chapters. Their style is personal and not academic. While the legal rules are presented concisely and accurately, the emphasis is on the actual workings of the law rather than erudite points of controversy.

The distinctive mark of the book may perhaps be found in the pieces of friendly advice liberally included for the potential litigant. A chapter on choosing your lawyer is an obvious example of this. We are told:[1] "It may be unwise to rely solely on unskilled friends or acquaintances for advice, just as it is unwise to have a friend who is a lawyer act in the case." Readers are encouraged to keep records of such things as the operation of periods of access, and to take photographs of happy moments spent with the children. Potential witnesses, we are advised, should be contacted early, arrears of maintenance should be accurately recorded, and offensive letters which will be later regretted must be avoided.

Aware of how delicate and emotionally demanding is the question of custody of children, the writers devote 24 chapters to the topic. Their comments are wise and sensible. If you are about to embark on custody litigation, do lead "a discrete

* Senior Lecturer in Law, Victoria University of Wellington

1 Page 99.

[sic] life . . . , despite so-called modern developments and attitudes."[2] Possibly one of the most significant statements in the book is worth quoting at length:[3]

> Many parents, whether consciously or otherwise, lose their sense of objectivity when embarking upon and involving themselves in a custody case. Indeed, it is not only the parents who suffer that same loss of objectivity. It may be experienced by their respective families, friends, legal advisers and professional witnesses, such as psychiatrists and psychologists. Custody disputes by their very nature lend themselves to an atmosphere of subjectivity which may ultimately be the very force that generates an adverse result to that parent. We cannot stress enough the need to retain, at the very least, friends and lawyers who will not bend their judgment out of pity and sorrow but who can and will deliver sensible and objective advice.

How easy it is for otherwise excellent parents to lose their sense of balance and judgment and to jeopardise their child's welfare in favour of their wounded pride!

The overseas reader looking in this book for a comprehensive survey of how the Family Law Act 1975 is working will be disappointed. Such is not the intention of the authors. Points of interest can nevertheless be gleaned from the text. Considerable delays apparently occur in obtaining marriage counselling interviews and in presenting welfare reports in child custody cases. It is also disturbing to learn that despite power in the Act to make an appropriate order, separate representation for children is rare. Insufficient funding is the reason, something surely to be avoided in the new scheme in New Zealand. The concept of fault, although unpopular in some quarters and although no longer relevant in the dissolution process itself, continues to be of importance in ancillary matters, including custody and access. "In the circumstances, therefore, it would be unwise not to plead all matters pertinent to fault and conduct in applications involving children. This should be done responsibly and not merely to smear the other party."[4]

Questions of broad family policy are generally eschewed by the writers. On occasions, however, they do venture to express their views on matters of somewhat narrower importance. Three points which may be relevant to New Zealand are worth recording.

The phenomenon of "joint custody" is regarded as a myth":[5]

> In the early days of the Act, it was considered by many that joint custody orders would be commonplace. However, with the passage of time, practice and experience have shown that sole custody orders are usual and save by consent, joint custody orders a rarity.

Secondly, criticism is directed at the use of discretionary trusts, not only in the familiar way as a tax-saving device but as a means of avoiding the support "obligations that most members of the community otherwise have."[6] Legislation on the matter by the Federal Parliament is predicted.

2 Page 37.
3 Page 25.
4 Page 97.
5 Page 81.
6 Page 121.

Thirdly, a vigorous attack is made on the secrecy which now surrounds matrimonial proceedings. This "element of secrecy does much to excite the imagination of some members of the public who regard it with a high degree of suspicion" and "it must result in the community not being able to ascertain the attitudes of the courts and the operation of the legislation."[7] Maybe there is a lesson here for New Zealand as a new era of family law is entered.

Certain aspects of the structure of the book invite comment. Each chapter is begun by an ingeniously chosen quotation. Shakespeare's "It is a wise father that knows his own son" heralds the chapter on the position of the father in custody disputes and the chapter on child maintenance is introduced by George Bernard Shaw's "Physically there is nothing to distinguish human society from the farm yard except that children are more troublesome and costly than chickens." The chapter entitled "That other person" calls for a quote from no less a person than Dean Martin: "In Hollywood, if a guy's wife looks like a new woman, she probably is."

Chapter 20, however, is unhelpfully entitled "Access — associated problems." In fact it deals with guardianship, change of child's name, and health, education and religion. There is an unnecessary separation between "Marriage breakdown" (Chapter 2) and "Decrees of dissolution" (Chapter 5) and quite why "Nullity of marriage" (Chapter 4) merits a separate chapter in a book of this kind is hard to comprehend. One might also make a mild criticism of the extensive use of quotations from statutes. Chapter 6 for instance on "Resuming Cohabitation" has more quotation than text. The "Notes and sources" at the back of the book "are intended primarily for the use of members of the legal profession." It is a pity therefore than they are not always adequate or accurate. Footnote 1 to Chapter 23 for example reads "Lynch v. Lynch (1968) F.L.R., Begg J." The reader would be more helpfully informed by the correct citation, namely "*Lynch* v. *Lynch* (1966) 8 F.L.R. 433 per Begg J."

This book should prove to be of some interest to the practitioner, student and academic. More importantly, however, it should be appreciated and welcomed by the layman. It represents a valuable contribution in attempts to bridge the gap between the law and those whose lives the law affects.

7 Page 163.

COMPENSATION FOR INCAPACITY — A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA by Geoffrey Palmer, Oxford University Press, 1979, 460 pp. (including appendices, references and index). New Zealand price $27.00 (paperback). Reviewed by Erwin Deutsch.*

In Justinian's *Institutiones* we read that there are three main rules of the law: honeste vivere, alterum non laedere, suum cuique tribuere. From the second rule developed the law of torts; the third rule became the stepping-stone for the very modern law of social security and the welfare-state. The question Professor Palmer puts before us in this excellent book is: should Justinian's second basic rule be dropped at least in so far as it implies that the wrongdoer should himself pay compensation to the victim, and the whole law of torts be replaced by the third rule, i.e. that of the welfare-state. To answer the question with "Yes" implies that compensation never will be granted to the full amount of damage suffered. It was Frederic the Great who first made the main distinction between compensation from private sources and compensation from public funds very clear. When a person complained about the low pay he got from the king, Frederic scribbled the following note: the coat given by the king is tight, but warm. Professor Palmer stresses the second point of King Frederic — the availability of some compensation to all in the compensation law of New Zealand — "that those in distress should be helped, that the well-being of each was of concern to all". Indeed it takes an optimistic view of human nature and of economic conditions as well, I suppose, and it is about both that this book is written.

Palmer's work deals with compensation for personal injury by accident. Of all the damages suffered personal injury is the most harmful and deeply felt. It is therefore imperative for the social welfare state of the 20th century to care for persons who have been personally injured. The traditional Common Law approach to give the victim a claim in tort and grant damages if the wrongdoer acted negligently is admittedly too narrow. Certainly it has to be assisted by strict liability for traffic accidents covered by compulsory insurance and by the benefits of workmen's compensation or sickness benefits to accident victims as well.

The Woodhouse report and, acting upon it, the New Zealand accident compensation schemes tried a bold new approach. They have done away with the action in Common Law and given everybody the right to compensation that is to be paid out of funds collected from employers, motorists or the public. Two main points should be stressed in this context: compensation is granted for loss of earnings at their level before the injury (thus not following the socialist approach of treating everybody equally in distress); and further it is given, albeit in a limited form, as lump sum payments for pain and suffering, and this in the welfare state is the redress of the average man.

Professor Palmer tells the comprehensive story how the Woodhouse report became law in New Zealand and how Sir Owen Woodhouse prepared another

* Professor of Laws, University of Göttingen, West-Germany.

report for the Commonwealth of Australia. Dr. Palmer is eminently qualified to tell that story because he has worked as adviser to Mr. Justice Woodhouse. Thus we get glimpses we never had before into the preparation and the legislative path of the compensation law in New Zealand. Professor Palmer tells us about the intentions and the plans of the different groups and committees committed to promoting compensation without fault. Equally he discusses the influence of the pressure groups who attacked the plan for socialization of personal injury and the abolition of the actions in tort that arose out of personal injury.

The main theme of Palmer's *Compensation for Incapacity* is the difficulty of dealing with sickness. No one was ever able to tell why accidents should be compensated but sickness should not. Indeed a working party in New Zealand estimated in 1976 that the temporary and permanent sickness coverage of earners between the ages of 15 and 59 was between $150 million to $230 million. But eventually New Zealand decided not to include sickness in the compensation scheme. And we are told that the refusal of Australia to accept the second Woodhouse Report was due largely to the fact that it included benefits for sickness. But one really would like to see how the system would have worked had the coverage of sickness been included. Palmer himself states that after deductions something like $100 million would have covered the inclusion of sickness in New Zealand. Then for the first time we would have had the complete coverage of personal injuries be it by accident or by illness and could have seen how the comprehensive system works.

Palmer shows that for injuries caused by accidents in New Zealand the system does much good. But it has to perform a delicate balancing act: on the one hand accident compensation has to give maximum or at least adequate compensation to the injured while on the other hand the overall expenditures should not be too taxing or high. Indeed accident compensation has to pass between Scylla and Charybdis. It should give enough money to the disabled but it should not become too high a burden on the economy.

The book compares the accident compensation as it is administered in New Zealand today and as it could have been in Australia with the former system of Common Law liability in tort. This comparison could be extended by looking at other countries with similar laws, and additionally to worker's compensation and comparable insurance schemes that cover many injuries by accident, for instance in schools, and on public transport. Likewise it could include the operating costs of state-run social security agencies (normally 10%) and the overhead that is claimed by insurance companies, for instance by some automobile insurance companies in Europe (less than 4%). One could include in the comparison other models, for instance an accident compensation that just gives everybody some basic security and by which an action in tort is not precluded. Moreover one could compare the paternalistic attitude of accident compensation by rehabilitation with the more individualistic approach of giving money to the victims of accidents. We cannot even guess at the result of this complex comparison and it is still a matter of political belief which of the systems works better.

Professor Palmer believes in the system of accident compensation described in the Woodhouse Report and he bases his conviction on many facts. Not surprisingly

he looks with some distrust at groups with vested interests like lawyers or insurance companies. Indeed sometimes he is perplexed when a group with vested interest does not argue its own interests. On the other hand he does not play down the difficulties the present system of accident compensation has encountered in New Zealand. The employers do not look favourably on the system especially since the rates they have to pay have gone up and since they know that fully half of these payments cover accidents unrelated to work. The mass media have become critical since the public has learned that criminals injured performing illegal acts are protected by accident compensation, but that the New Zealanders who flew in the doomed plane that crashed on the slopes of Mount Erebus in Antarctica are not.

The starting point of the idea of the accident compensation scheme is the intolerable inequality between the accident victims: the one who has been hurt by a motorist carrying insurance gets full compensation, the other who suffers as much but is not hurt by someone who acted negligently does not get anything Indeed that inequality is shocking and the outcome has been described by no less a man than Mr. Justice Woodhouse himelf as a lottery. Treating both victims alike might not be the whole solution, because it is not obvious why the wrongdoer gets off free, since he has not paid anything to mitigate the damage. On the other hand it is hard for the victim of a crime or an intentional tort to forego full compensation just because there is a general system of accident compensation in operation.

Professor Palmer not only gives us many details about how the accident compensation scheme came into being, but he offers a lot of legal advice too. As an example I may cite what he says[2] about the interrelation between the two sections of the Accident Compensation Act 1972 that deal with compensation for pain and suffering.

If the lawyer from continental Europe is allowed to add a remark with respect to his own country: I would have given Count Bismarck his due, namely for having introduced the first system of worker's compensation and, what might be more, one that works to this day. If one reads pages 37 and 38 of *Compensation for Incapacity* one could get the misconception that worker's compensation had been invented in England.

Professor Palmer's conclusion certifies him as a keen observer of social change. Indeed the question is whether accident compensation fits into the social spectrum as it was when Judge Woodhouse started his investigation and as it is today. It can be quite different: in the middle 1960s while one still felt that all economies were growing, accident compensation might have been a negotiable instrument drawn on the future, while at the moment compensation for personal injury by accident seems to be more part of a stagnant economy, where all risks should be treated more or less equally. Professor Palmer himself asks the question whether accident compensation presages a welfare state too extended and expensive or whether it signals the achievement of real security upon which a better society

1 Page 352.
2 Pages 224 et seq.

can be built.[3] The fate of accident compensation rests upon two assumptions: first that each accident victim can be properly compensated out of more or less public funds; secondly that the public funds do not stifle the very economy on which their collection depends.

The world watches the New Zealand accident compensation scheme with undiminished interest. Particularly countries with Common Law traditions have been looking into it to see whether to follow the example or not. One understands that Professor Palmer is to some extent critical of the so-called Pearson Report that did not embrace the New Zealand accident compensation scheme. But there might be one consolation for him: when the Pearson committee sent its representatives to my country only advocates of the compensation model were called to testify. No one knows who was responsible for that lopsided inquiry in Germany!

Other countries are looking to New Zealand to see whether the system Mr. Justice Woodhouse and Professor Palmer designed achieved the results that were intended and can be followed. But it is not only the countries that are affected, but accident victims and to some respect the economy as well. We still do not know how accident compensation really benefits the individual harmed by an accident or what the economic prerequisites and consequences of comprehensive compensation are. The overall impression of my reading of Professor Palmer's admirable book about compensation for incapacity is that he feels compensation has done the job. If we look at the international reaction one has to admit however: the jury is still out.

3 Page 407.