# Book reviews

## PRAGMATISM AND PROGRESS. SOCIAL SECURITY IN THE SEVENTIES

by Brian Easton, University of Canterbury, Christchurch, 1981, 118 pages (including index and bibliography). New Zealand price $7.95 (paperback). Reviewed by V. H. Ullrich.*

This is a very useful and interesting book but it is not a satisfying book.

It is useful and interesting in its descriptive information about social welfare development in the 1970s. There is enough history to provide a sense of context for the 1970s. The criticism of the political parties, the bureaucrats and the intellectuals in their approach to social welfare is informative and valid.

Easton identifies five "points of stress" in the social policy area and discusses their development through the 1970s, i.e. policy relating to the elderly, the disabled, solo parents, family policy and the status of women. Later in the book he undertakes four case studies in the crucial areas of (a) superannuation, (b) the Domestic Purposes Benefit Review Committee, (c) the Rise of Family Policy and (d) the 1979 Budget. He uses his discussion of these four areas to highlight the general criticisms of policy makers that he has expounded earlier. There is enough factual and critical material included to form a good basis for further thought and study. I will certainly recommend this book for students studying welfare law.

The book is not satisfying in that although Easton purports to see the need for an underlying theoretical construct in approaching social policy, he does not explain his own theory and the reader is left floundering in criticisms that ring a little hollow. The middle intellectuals and bureaucrats are cast as baddies and the goodies are to be found among those Easton calls the younger intellectuals (including himself) and the technocrats.

I understand why Easton has cast the bureaucrats and middle intellectuals as baddies. They have tended to discuss various problems such as child abuse and ex nuptial births as separate pathologies with separate solutions rather than taking more all-encompassing views of those problems within a total context. There has been a tendency to note social stresses and respond to political pressure groups by applying bandages without a careful assessment of the facts or an analysis of the prognosis for their recommendations including accurate costing.

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I understand less well how the younger intellectuals and technocrats are cast as goodies in terms of Easton's own critique of those he does not favour. The positive attributes of the younger intellectuals and the technocrats, according to Easton, are that they favour the development of family policy and they have the social science and economic background to be skilled at analysis of statistics and in assessing the long term financial and economic consequences of various alternative policies. I agree that we need more informed debate. Even the middle intellectuals have been heard to criticise the Domestic Purposes Benefit Review Committee for its lack of any use of hard statistical information and for presenting a report which is merely a mish-mash of opinion.

An informed family income policy is not a theoretical construct in itself, it is just a slightly broader approach to dealing with the problem of poverty within the community by including some social engineering in respect of earned incomes as well as incomes in the form of welfare benefits. Family policy in this sense is still treating a problem. It does not explain the problem any more than recommendations for better treatment of child abuse explain the problem in the first place. David Bedgood whom Easton includes as a younger intellectual may have an underlying theoretical construct as a Marxist for his concern with family policy, but nowhere does Easton explain his own theory or ideology.

Easton raises the valuable insight of Kuhn's paradigm theory early in the book to explain how different groups came to "define the problem of poverty in New Zealand". He states that the middle intellectuals categorised the poor as the elderly, the disabled and the solo parents and therefore sought to alleviate the problems of poverty by devising schemes which made these groups less disadvantaged. What is Easton's paradigm? He does not tell us. I do know that had this book been written by a feminist or a social welfare beneficiary, for example, the approach would have been very different. Easton advocates a family income policy but is this not just defining the poverty-stricken group a little differently, i.e. as families with young children whether their income is derived from welfare or from earnings. He does state in his discussion of paradigms that "[the intellectuals who currently appear more successful are also] working within a paradigm which may blinker them to new problems, even though it offers powerful insights into old ones."[1] Easton does not satisfy me that the younger intellectuals or the technocrats have a new paradigm but merely that they have some new ways of dealing with the old paradigm, i.e. look at family incomes, use social science research, and have an awareness of the economic consequences. The paradigm which runs through the history of New Zealand social welfare policy, remains unquestioned. This is that poverty is a problem and that the way to deal with the problem is to do something with the people who are currently poor. A new paradigm, in Kuhn's sense would be, e.g. to acknowledge that some people are poor because socio-economic differentials in society are desirable or inevitable and that if some are to have higher incomes others must have lower incomes. In New Zealand the paradigm has only ever shifted so far as to say that no one ought to be left without a minimum standard of living. The debate so far centres around what is that minimum

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standard to be, and who is to be held at that minimum standard. On this basis, the bureaucrats and the technocrats do not differ in their paradigms, they merely go about making the distinctions within the same paradigm in slightly different ways.

In the concluding chapter Easton does acknowledge that technocrats do not have a common theoretical basis. Technocrats have skills and theory in respect of statistics and analysis, they do not have a common ideology which encompasses choices about the direction in which society should move. "For instance," says Easton, "their concern about national superannuation in 1975 was with its fiscal implications. It is not easy to judge what the group's attitude to the two superannuation schemes would have been if each had had the same fiscal impact."[2]

I doubt that there are many who would disagree with Easton's plea for a more informed and analytical approach to social welfare policy in New Zealand. For too long there has been a tendency to fire from the hip at a superficially identified problem. But the appropriate use of statistics and analysis will not give us watertight answers. Technocrats are only technical specialists. They have no special prerogatives for deciding how we would like our society to be, only for making us aware of some of the practical consequences of differing options. Easton acknowledges this in odd paragraphs scattered throughout the book. But the general impact of the book is one of supporting the so-called younger intellectuals and technocrats against the middle intellectuals and bureaucrats across the board when in fact each group merely operates slightly differently within the same paradigm. It is this which makes the book unsatisfying.

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**THE CONTRACTUAL REMEDIES ACT 1979** by Francis Dawson and David W. McLauchlan. Sweet & Maxwell (N.Z.) Ltd., 1981, xxii + 217 pp. (including Appendix and Index), $35. Reviewed by F. M. B. Reynolds.*

The Contractual Remedies Act 1979 is an intriguing example of the chances that lead to law reform. The Report of the Contracts and Commercial Law Reform Committee on *Misrepresentation and Breach of Contract,* from which it originated, was produced in 1967, when the law as to misrepresentation was, as all contract teachers knew and had quite a lot of intellectual capital locked up in explaining, in an unsatisfactory state. The report gave a good exposition of the problems as they were then customarily expounded; disliked the dicta of Lord Denning in the *Dick Bentley* case[1]; disliked the Misrepresentation Act 1967 (U.K.); and thought that the solution to the problems of the various differing types of pre-contractual and contractual representation was to amalgamate them and treat them all as contractual promises. The issues were tied up with the parol evidence rule, as to

2 Pages 112-113.

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1 *Dick Bentley Productions Ltd.* v. *Harold Smith Motors Ltd.* [1965] 2 All E.R. 65, 67.

which the committee was divided, but considerations relating to which seem to have given much impetus to the feeling that reform was needed. The law as to pre-contractual representations, breach of contract and damages has come a long way since then, but just as it was arguably beginning to "work itself pure" the 1967 report was during 1977 suddenly disinterred and rapidly put into legislation.

To effect such a complete reformation of the remedies for misrepresentation and breach of contract is to reform almost the whole law of contract from the back end, so to speak; and it seems undeniable that for a project of such magnitude the reports were, in the words of this book, "gravely under-researched".[2] At the same time it is true that the best can be the enemy of the good; that arguments that research was inadequate have delayed necessary legislation and codification on several occasions in history; and that it may be that in a fairly small country such as New Zealand reform can and and should be put into operation rapidly, and subsequently monitored and (if necessary) amended rapidly. *Solvitur ambulando.*

This book gives a most thorough analysis of the Common Law and Equity as to misrepresentation and breach of contract in order to consider how the problems which now arise are to be solved under the Act. The accounts are in general so lucid that they make reading which is instructive even in a jurisdiction which does not have to contend with the Act. It may be said that there are three main areas of change produced by the Act; and there may be some value in considering, from an author's point of view, and on the basis of what emerges from this book, the extent to which the Act may improve the position in each.

The first area is that of pre-contractual misrepresentations, which the Act assimilates to contractual promises. There are undoubted difficulties in this part of the law, but, as the authors demonstrate, it is very doubtful whether they are best solved by denying any distinction. The difference between representations and promises is not mere conceptualism, though some of its formulations, going constantly to the intention of the parties, may be misleading. Rather, it marks off two types of situation for which the legal results are rightly differentiated. There is a difference between saying that one thinks something is true and asserting that it is true. It might be thought that the appropriate remedy for untruth in the first situation is not damages, and certainly not contract damages, but rather rescission — "money back", "unscramble the transaction" — with perhaps some limited money award where rescission is not possible or appropriate. In this connection the statement in the 1967 report that "negligence has no place in the law of contract" seems unduly simplistic, especially if the law of contract is taken to cover the area of pre-contractual negotiation. Something of this sort would be the approach of most civil law systems; and it may be that the maligned Misrepresentation Act 1967 (U.K.) had correct policy objectives and was unfortunate only in its detailed drafting. There was no discussion of these matters, which have long occupied European purists, in the 1967 report, and the legislation arising from it leads instead to an increased reliance on damages and a considerably

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reduced possibility of rescission. As the authors suggest, the courts will doubtless be able to reach appropriate decisions under the new framework, by drawing on existing case-law as to the nature of the promise made and by formulating more flexible rules as to damages (for which Sir Robin Cooke has recently made a cogent plea[3]). But the likelihood seems that the Act will be found to have provided a statutory starting point from which it is more, rather than less, difficult to reach appropriate results.

The second area is that of repudiatory breach of contract. This topic was long left in a woolly condition, as a glance at the earlier editions of *Cheshire and Fifoot* shows: but it has been the subject of much attention and analysis over the last 20 years. Chapters 6 and 7 give an admirable survey of the problems as they now appear. I leave aside the question of conferring discretions on courts, to which the New Zealand law of contract is now firmly committed, though this Act is more far-reaching than its predecessors. The result which seems to emerge is that the remedy of cancellation provides a new set of starting-points for solution of the problems, and these starting-points may prove on balance neither better nor worse than the existing ones. Some certainty may be an improvement: thus the rather stringent test for discharge by breach laid down by the *Hong Kong Fir* case[4] is modified. But many of the changes needed could be achieved without legislation, and overall one is led to doubt whether legislation drafted in the fairly precise way usual in New Zealand and the United Kingdom provides a better set of base-lines than a mass of case-law which is constantly reformulating itself. In any case, as the writers demonstrate, it is probably impossible to abolish recourse to all the previous law relating to repudiation and breach.

The third area is that of restitutionary remedies on rescission for misrepresentation and breach of contract. Lord Devlin made a plea for modification of the all-or-nothing rules of the Common Law more than 25 years ago.[5] Here I would suggest, with the custom of an amateur, that it may be that the existing Common Law is tied up in some rather unpromising channels, and that the effect of the discretions conferred by the Act may be to liberate the case law and enable the courts to develop principles which prove more satisfactory for their purpose. Certainly the book recommends American solutions with great freedom: and one may guess that the existing precedents do not make the adoption of some of the recommended solutions easy.

Contract lawyers elsewhere will watch with interest to see what happens under the Act. This book, the interest of which goes well outside the New Zealand legislation, is an excellent, though in places far from elementary, manual on the types of point which arise under the common law and which will arise in some form under the Act. It also collects a number of New Zealand and Australian cases, many of considerable interest, not well known in the northern hemisphere. The Act itself is plainly a famous victory: but, as the source of the phrase shows, it is not always clear whether or why such a victory was needed.

3 "Remoteness of Damage and Judicial Discretion" [1978] C.L.J. 288.
4 *Hong Kong Fir Trading Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26
5 [1966] C L.J. 192, 201.