

# WHAT MAKES A LEADING CASE? THE NARROW LENS OF THE LAW OR A WIDER PERSPECTIVE?

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*This article suggests that an examination of leading cases should be extended beyond an exploration of the role that a decision has played in settling an area of law. It is also necessary to examine the social and historical implications and underpinnings of a decision. Further, a concentration on leading cases alone is too narrow a focus. The study of the ordinary run of cases can say much about the law and its relationship to society and about wider trends in society. The article illustrates these themes with a discussion of a number of leading cases in New Zealand and also of the work done by the author on criminal cases in Rouen during the French Revolution.*

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The wide diversity in opinion that emerged among members of the legal profession when asked to compose a list of cases considered particularly significant for New Zealand<sup>1</sup> vividly illustrates the difficulty that arises when trying to identify leading cases. What quickly becomes apparent when examining the differing definitions offered by legal theorists is that achieving consensus as to the definition of a leading case proves to be equally difficult. Broadly, two contrasting views can be discerned in legal scholarship and this paper first briefly examines these differing opinions with a view to exploring the benefit of adopting a wider sociological and historical analysis when considering what constitutes a leading case. It then poses the question whether, from a purely historical perspective, the study of leading cases, however defined, is too narrow.

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\* Justice of the New Zealand Court of Appeal. This article was presented at the Leading Cases Conference, Victoria University of Wellington Law School, Wellington, 25 June 2010 as a commentary on the paper presented at the same conference by the Rt Hon Sir Ivor Richardson. My thanks go to my clerk, Natasha Caldwell for her help with the research for and writing of this article. Any errors remain my own.

<sup>1</sup> Outlined by Ivor Richardson "The Permanent Court of Appeal: Surveying the 50 Years" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009) ["The Permanent Court of Appeal"].

## ***I THE SEARCH FOR A DEFINITION***

When one is asked to consider the cases that have emerged as of true significance in New Zealand's jurisprudence, the first question that arises is how a leading case should be defined. Sir Ivor Richardson identifies the value in turning to legal scholarship in examining this question,<sup>2</sup> and, following this approach, it is useful to turn the threefold definition of a leading case provided by *Black's Law Dictionary*. First, a leading case is stated to be a judicial decision that first definitively settled an important legal rule or principle and that has since been often and consistently followed.<sup>3</sup> Second, a leading case is defined as one that provides an important, often the most important judicial precedent on a particular legal issue.<sup>4</sup> Third, a leading case is seen to be a reported case that is cited as the dispositive authority on an issue being litigated.<sup>5</sup>

The common theme that emerges from these definitions is the proposition that the significance of a case is dependent on its value as precedent or its role in establishing fundamental legal principle. Such a view is reflected by the opinions of the three legal scholars to whom Sir Richardson refers, such authors similarly placing focus on the precedent value of a case when undertaking a determination as to the significance of a legal decision.<sup>6</sup> Such a view has long prevailed. Indeed, Samuel Warren, the individual who has been attributed with creating the concept of publishing a collection of 'leading cases,' focused on the legal significance of such cases, claiming that leading cases would be those of "incalculable value in practice, serving as ... landmarks upon the trackless wilds of the law."<sup>7</sup> Accordingly, a leading case has traditionally been defined as one that has played a crucial role in jurisprudential development.

While it is admittedly unsurprising that the orthodox definition of a leading case focuses upon the impact that a decision has on the creation of legal principle and precedent, it is interesting to note that such a view is not shared by all legal scholars. For instance, Sir Ivor traverses the writings of Professor Simpson when undertaking the examination as to what makes a leading case.<sup>8</sup> Professor Simpson challenges the traditional view that the examination of leading cases should be restricted to exploring a decision's legal influence alone. He makes the argument that a wider analysis should be undertaken, on the basis that case law cannot be understood by sole reliance on

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2 Richardson in this volume.

3 Bryan A Garner *Black's Law Dictionary* (9th ed, Thomson Reuters, Minnesota, 2009) at 969.

4 Ibid.

5 Ibid.

6 Richardson, above n 2.

7 Cited in AW Brian Simpson *Leading Cases in the Common Law* (Oxford University Press, Oxford, 1996) at 6.

8 Richardson, above n 2.

law reports.<sup>9</sup> Professor Simpson's ultimate thesis that "cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law,"<sup>10</sup> illustrates a belief that much value can be gained by broadening the determination as to what constitutes a leading case beyond the confines of a narrow legal lens.

Two contrasting viewpoints thus emerge in legal scholarship. On one hand, a leading case is viewed as a case that has played a pivotal role in shaping jurisprudence and a decision that has significant precedent value. On the other, a broader view can be identified in which it is argued that the inherent value in considering the social and historical impact of the decision should not be forgotten.

## ***II TAKING THE WIDER VIEW***

Bearing in mind these two perspectives, it is interesting to turn to the comments made by the retired judges surveyed by Sir Ivor as to the methodology they used to determine cases of particular significance in New Zealand. The variance in the views expressed indicates that not all those surveyed viewed the significance of a case as dependent upon its precedent value alone. For instance, one judge was of the opinion that the number of times a case is cited does not measure its comparative importance,<sup>11</sup> and that a "one off" case could still have great significance.<sup>12</sup> The alternative approach favoured by another judge of looking at institutional and process issues, as well as substantive ones<sup>13</sup> demonstrated a willingness to explore factors other than the impact of a decision on New Zealand's legal landscape.

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9 Simpson, above n 7, at 11. Of course, this was also one of the themes of Professor Jim Phillips' Salmond lecture given on 24 June 2010, the evening before the Leading Cases conference. See Phillips in this volume.

10 Simpson, above n 7, at 12.

11 The Judge noted that the number of citations might reflect the likelihood of cases in the particular subject area coming to court or the age of the case. Older leading cases may be cited more often simply because they have been around longer. I also comment that a true leading case may settle a particular question thus obviating the need for further litigation on the point. Equally, a case may be cited frequently not because it says anything new but merely provides a useful summary of the relevant principles which may have been dispensed through a number of decisions.

12 Richardson, above n 2.

13 Ibid.

The link between leading cases and new legislation, including the New Zealand Bill of Rights Act 1990 and matrimonial property legislation<sup>14</sup> and the significance of administrative law and Waitangi issues in the decade of privatisations and the setting up of State owned enterprises was also noted.<sup>15</sup> Yet another of the judges was influenced by how important a decision was in the day to day work of the courts and at least two of the judges saw the importance of a case as being related to its role in developing a specific New Zealand legal identity. The link between nationhood and the law is an interesting one, as is the finding of the right balance between an indigenous jurisprudence<sup>16</sup> and a jurisprudence that takes account of globalisation.<sup>17</sup>

It is thus interesting to note with regard to the three cases that gained the highest ranking in Sir Ivor's survey, emphasis was placed on the legal significance of the case alone. For instance, the decision in the *Maori Council*<sup>18</sup> case was seen to be noteworthy in light of the judicial guidance that the Court of Appeal offered as to how the raft of cases that were expected to follow under the legislation should be dealt with.<sup>19</sup> Similarly, the Court of Appeal's decision in *Invercargill City Council v Hamlin*<sup>20</sup> was seen to be significant in light of its role in developing legal principle.<sup>21</sup> Finally, Sir Ivor opines that the fact that the majority of judges' clerks (as against the retired

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14 Richardson "The Permanent Court of Appeal", above n 1, at 316. Case law can also lead to legislation. One measure of a leading case might be the fact it is enshrined in legislation: see for example *R v Shaheed* [2002] 2 NZLR 377 (CA) and Evidence Act 2006, s 30(2)(b).

15 Richardson "The Permanent Court of Appeal", above n 1, at 316-317. Some at least of the judges were looking at the wider perspective.

16 See generally David Baragwanath "A Second-Hand Rose? Creating a New Zealand Jurisprudence" (Address to Otago Law School, Dunedin, 23 April 2010); David Baragwanath "The Treaty of Waitangi – where to from here?" (Lecture to University of Waikato, Hamilton, 14 May 2010); and David Baragwanath "A Capital Opportunity: Creating a New Zealand Jurisprudence in Public and International Law" (lecture presented for Victoria University's New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 28 April 2010).

17 Arguably, the willingness of New Zealand courts to take international law into account is also (ironically) itself a particular feature of New Zealand jurisprudence. See generally, *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); Gerard van Bohemen "Commentary: Sir Ken's Contribution to the Making of International Law – Observations from a Practitioner" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008); and Claudia Geiringer "International Law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300.

18 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Maori Council*]. This was the overall highest ranking case in the two combined lists.

19 Richardson "The Permanent Court of Appeal", above n 1, at 316.

20 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).

21 Richardson "The Permanent Court of Appeal", above n 1, at 316.

judges)<sup>22</sup> identified *Hosking v Runting*<sup>23</sup> to be significant could be explained by a perception held by the latter group that the nature of the principle established by the decision was somewhat amorphous.<sup>24</sup> This supposition would appear to indicate the case was seen as significant by the judges' clerks in light of the fundamental role it played in acknowledging that a tort of privacy could exist in New Zealand. The wider social impact of these three decisions did not appear to have been the subject of much consideration.

It is, however, quite clear that, when a wider examination of the impact of these decisions on New Zealand's social, economic and political climate is undertaken, the decisions can be considered to hold particular significance for New Zealand more generally.

### **III MAORI COUNCIL CASE**

The Court of Appeal's decision in the *Maori Council* case has been viewed by New Zealand historians as one of the crucial measures that helped facilitate Maori development and identity through propelling extensive social and political change in New Zealand. It has been argued that the decision, which has been seen as giving the Treaty of Waitangi an explicit place in New Zealand jurisprudence for the first time,<sup>25</sup> was one of the catalysts for the creation of a general acceptance that the state has a responsibility actively to fund the promotion of Maori language and culture and language.<sup>26</sup>

Additionally, the Court of Appeal's decision has been seen as having influenced the downturn in the Maori protest moment that had burgeoned during the 1970s.<sup>27</sup> It has also been argued to have played a role in the emergence of a 'treaty industry' in New Zealand, in which treaty law, research and settlement negotiations have emerged as a growth industry.<sup>28</sup> Interestingly, the moral, historic and emotional significance of the case has been argued to surpass its importance as legal

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22 It appeared in the lists of eight of the nine clerks but in only two of the lists of the retired judges and lawyers.

23 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

24 Richardson "The Permanent Court of Appeal", above n 1, at 316.

25 In fact, as Richard Boast points out, the decisive step in this regard was not the *Maori Council* decision but Parliament's inclusion of a reference to the Treaty in the State-Owned Enterprises Act 1986. See RP Boast "The Court of Appeal and Indigenous Rights: From Ninety Mile Beach to Ngati Apa" in Bigwood, above n 1.

26 Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 500-501.

27 James Belich *Paradise Reforged: A History of the New Zealanders* (Penguin Books, Auckland, 2001) at 479-480.

28 *Ibid.*

precedent.<sup>29</sup> Such comments reveal that it may be unduly narrow to focus upon the legal impact of a decision alone when examining New Zealand's leading cases.

Indeed, as pointed out by Sir Ivor and Professor Boast, the *Maori Council* case can be regarded as having required the orthodox application of well settled principles relating to the exercise of statutory powers<sup>30</sup> and conventional statutory interpretation,<sup>31</sup> (given the explicit statutory reference to the principles of the Treaty of Waitangi in the relevant legislation).<sup>32</sup>

Sir Ivor sees the real significance of the *Maori Council* case as being factual, including the elaboration of some of the complexities surrounding the Treaty of Waitangi. Professor Boast sees the real significance as giving some context to the "amorphous" nature of the statutory language (the principles of the Treaty) through the (possibly contradictory) notions of "partnership" (bilateral) and "active protection" (the unilateral responsibility of the Crown).<sup>33</sup> He points out that these concepts are now widely used in the Waitangi Tribunal's work.

#### **IV HAMLIN**

Similarly, while it cannot be doubted that *Hamlin* is a case of legal significance in light of the Court of Appeal's decision not to apply the decision of the House of Lords in *Murphy v Brentwood District Council*<sup>34</sup> in New Zealand, when the case is viewed from a wider perspective, it is once again apparent that the decision can be seen to be one that has had far-reaching social and political impact. As Professor Simpson outlines, much value can be gained from looking beyond the law reports to explore the context in which litigation arose.<sup>35</sup>

Following this approach, it is clear that the social context in which *Hamlin* took place sheds light on the significance of the litigation. Throughout the twentieth century home ownership was a goal for many families in New Zealand and, from the 1950s, the post-war baby boom and the expanding economy created increased demand for new housing for New Zealanders, which led to the negligent construction of many New Zealand homes.<sup>36</sup> The significance of the social and historical context in the Court's decision was outlined by Richardson J (as he then was) in his

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29 RP Boast cited in Peter Spiller *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers, Wellington, 2002) at 403.

30 Richardson, above n 2.

31 RP Boast, above n 25, at 280.

32 State-Owned Enterprises Act 1986, s 9.

33 RP Boast, above n 25, at 283-284.

34 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

35 Simpson, above n 7, at 11.

36 Spiller, above n 29, at 405.

judgment who stated<sup>37</sup> that the common law of New Zealand should "reflect the kind of society we are and meet the needs of our society". He identified "six distinctive and long-standing features of the New Zealand housing scene" in the 1970s and 1980s:

- (a) The high proportion of occupier-owned housing. The New Zealand Official Year Books confirmed that over 70 per cent of permanent housing was occupier owned and that over 80 per cent of permanent housing was in detached houses on their own sections.
- (b) The fact that much of the housing construction, including low cost housing, was undertaken by small-scale cottage builders for individual purchasers.
- (c) The nature and extent of governmental support for private home building and home ownership.
- (d) The surge in house building construction in the buoyant economy of the 1950s and 1960s. In 25 years through to the mid-1970s the housing stock more than doubled.
- (e) The wider central and local governmental support for private home building.
- (f) The fact that it has never been a common practice for new house buyers, including those contracting with builders for the construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building.

Moreover, while the decision was hailed by legal academics as a landmark decision in the development of New Zealand's duty of care jurisprudence, it is interesting to note that the attention of the New Zealand public was conversely focused upon on the individual success of Mr Hamlin in overcoming the power of his local authority. Media commentary at the time on the decision focused on the success of a "true Kiwi battler" in taking on a local authority that had called in powerful insurance interests,<sup>38</sup> and reference to the success of an "ordinary citizen" in taking on the power of a local authority was still the subject of media comment many years later.<sup>39</sup> The public celebration of Mr Hamlin's victory over the Invercargill City Council provides an interesting insight into the New Zealand psyche. Indeed, the widespread delight expressed over the Court's finding provides support for the social research which has found that the mentality of New Zealanders is shaped by a belief in the strong need to favour the underdog.<sup>40</sup>

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37 *Invercargill City Council v Hamlin*, above n 20, at 524-525.

38 As noted by Spiller, above n 29, at 409.

39 "Taking on the Big Boys" *Manakau Courier* (New Zealand, 12 June 2001).

40 V Suchitra Moulya and Jayaram Sankaran "The tall poppy syndrome in New Zealand: An exploratory Investigation" in M Sheenan, S Ramsey and J Patrick (eds) *Transcending Boundaries: Integrating People, Processes and Systems* (Griffith University, Brisbane, 2000) 285 at 286.

The economic and political implications of the *Hamlin* decision have been significant, especially with regard to the more recent leaky homes crisis that has affected many New Zealand home owners. It has been claimed that the failure to build watertight homes in New Zealand has been an economic disaster with a magnitude comparable to the global financial crisis<sup>41</sup> and the cost of the leaky building crisis has been estimated to be the greatest of any disaster that New Zealand has faced.<sup>42</sup> The Court of Appeal's recent finding that North Shore City Council owed a *Hamlin* duty of care to owners of a leaky apartment complex even when the owners were not occupiers and experts had been involved in the construction<sup>43</sup> emphasised the far-reaching implications of the *Hamlin* decision.

Recent reports of the North Shore City Council pleading for the Government to play more of a role in paying for the leaky homes crisis,<sup>44</sup> and the creation of a Government rescue package under which a local authority and Government each meet 25 per cent of repair costs for leaky buildings<sup>45</sup> illustrate that *Hamlin* continues to have a significant political impact. While an application for leave to appeal the Court of Appeal's finding is currently before the Supreme Court, and thus it is not yet clear whether the particular issue has been definitively determined, it is clear that the *Hamlin* decision has certainly left its mark on New Zealand's socio-political climate.

In my view, *Hamlin* is an illustration of the symbiotic relationship between society and the law: on the one hand the decision in *Hamlin* was grounded in and a response to the particular social context in which it arose, but on the other it continues to have an effect in an ever-changing social context.

## V *PRIVACY TORT*

Finally, turning to the decision of *Hosking v Runting*, this case has as its background the growth in the economic and symbolic power of celebrities. This might, with some justification, be thought a less interesting (or indeed worthy) background than that of the previous two cases discussed but it nevertheless shows a context behind the decision which is not narrowly legal.

The emergence of a societal fascination with various media personalities has been viewed by sociologists and social historians as a defining factor of the twentieth century. Indeed, the phenomenon of celebrity has been seen to reflect a shift in popular culture, such that the

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41 Brian Easton "Crisis Point" *New Zealand Listener* (Auckland, 20 February 2010).

42 "Leaky Homes Crisis, New Zealand's Worst" *Otago Daily Times* (Dunedin, 26 March 2010) 1.

43 *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.

44 Anne Gibson "Judges Back Leaky-Home Owners Over Council" *New Zealand Herald* (Auckland, 23 March 2010).

45 See generally Dave Burgess "Wellington City Council first to accept leaky home package" *The Dominion Post* (Wellington, 27 May 2010).

proliferation of reporting on the private lives of public personalities and the correlative growth in a paparazzi industry has been attributed to the societal loss of community that occurred throughout the twentieth century.<sup>46</sup> Thus, the factual context of the *Hosking* decision, in which a women's magazine contracted a freelance photographer to take candid photos of the ex-wife and the children of a high profile television presenter can be seen to demonstrate the growth of a new form of aggressive reporting by New Zealand's media, which is no doubt driven by the heightened public demand for reporting on celebrity culture.

More generally, it has been argued that legal cases which pitch the rights of celebrities against the rights of media have been an important factor in reshaping celebrity power in the twenty-first century.<sup>47</sup> Indeed, social theorists view cases in which celebrities seek to protect their privacy as significant in that they open up for wider consideration the issue as to how the phenomenon of celebrity functions as an economic as well as a symbolic commodity.<sup>48</sup> Following such reasoning, it can be argued that *Hosking v Runting* played a vital role in exploring the extent of the power that should be granted to celebrities in their pursuit to control and manufacture their image in New Zealand. While the Court of Appeal acknowledged that in certain circumstances the right to privacy could be recognised, the broad implication of the majority decision was that public personalities would not be granted an unfettered right to manipulate the presentation of their image in the media.

The decision in *Hosking v Runting* seems so far to have had no wider significance. For example, the privacy value did not loom large in the Supreme Court's decision of *Brooker v Police*<sup>49</sup>, as I recently noted in *R v Morse*.<sup>50</sup>

## **VI FINNIGAN V NEW ZEALAND RUGBY FOOTBALL UNION**

It is apparent that decisions that can be considered to be of significance for the development of New Zealand's jurisprudence may also have wider societal implications. The issue, however, arises as to whether it is possible to define a leading case by reliance on its social and historical impact alone. Arguably, the trilogy of decisions in the *Finnigan v New Zealand Rugby Football Union*

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46 Graeme Turner *Understanding Celebrity* (Sage Publications, London, 2004) at 6.

47 Philip Drake "Who Owns Celebrity?: Privacy, Publicity and the Legal Regulation of Celebrity Images" in Sean Redmond and Su Holmes (eds) *Stardom and Celebrity: A Reader* (Sage Publications, London, 2007) 227.

48 *Ibid.* That in many cases it all comes down to money rather than human dignity is a suspicion that one cannot entirely dispel.

49 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

50 *R v Morse* [2009] NZCA 623 at [81].

litigation<sup>51</sup> illustrate that legal decisions that have played a vital role in shaping New Zealand's history may not be those that have established lasting legal precedent.

In order to explore the *Finnigan* decisions it is first useful to traverse briefly the factual context in which the litigation took place. On 17 April 1985 the Council of the New Zealand Rugby Football Union decided to accept the invitation of the South African Rugby Board for a New Zealand representative rugby football team to tour South Africa, a country still divided by apartheid. On 20 May, a member of the Auckland University Rugby Football Club and a member of the Teachers Rugby Football Club commenced an action in the High Court challenging the Council's decision. They claimed that the decision failed to comply with the object stated in the New Zealand Union's rules of promoting, fostering and developing amateur rugby union football throughout New Zealand, and that for various specified reasons it gave the game a tarnished and sullied image and would reflect adversely on the game. On 31 May the defendants moved to strike out the action on the ground, inter alia, that the plaintiffs had no standing. The defendants' motion was successful in the High Court<sup>52</sup> on the grounds that the plaintiffs were not in a direct contractual relationship with the Union but, on 21 June, the Court of Appeal ruled that the plaintiffs did have standing to bring their action.<sup>53</sup>

A hearing of the substantive action commenced in the High Court on 8 July. The All Blacks were due to leave for South Africa on 17 July and on 11 July the plaintiffs applied for an interim injunction. On 13 July the High Court granted an interim injunction, restraining the Union from proceeding with the proposed tour until the plaintiffs' action had been determined.<sup>54</sup> The following day, the tour was cancelled and the parties subsequently agreed not to continue with the action (but the Union reserved the right to apply for leave to appeal the issue of standing to the Privy Council).

Interestingly, the Court of Appeal's judgment in *Finnigan (No 1)* was included by two judges' clerks and two judges within their list of cases that were seen to have had particular significance in New Zealand.<sup>55</sup> The inclusion of this decision within the list is noteworthy in light of the contrasting views held by the members of the Court of Appeal when debating the issue as to whether or not the decision could be considered to have any wider precedent value when later dealing with an

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51 The three decisions were as follows: *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (HC and CA) [*Finnigan (No 1)*]; *Finnigan v New Zealand Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 (HC) [*Finnigan (No 2)*]; and *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) [*Finnigan (No 3)*].

52 *Finnigan (No 1)* (HC), *ibid.*

53 *Finnigan (No 1)* (CA), *ibid.*, at 190.

54 *Finnigan (No 2)*, above n 52.

55 Richardson "The Permanent Court of Appeal", above n 1, at 366 and 368.

application seeking leave to appeal the decision to the Privy Council.<sup>56</sup> While the members of the Court ultimately refused to grant leave on the basis that the proposed appeal was academic because the issue of standing was no longer a live issue, the judges were required to deal with the submission that the decision had wider significance for later cases.

In *Finnigan (No 3)*, Cooke J (as he then was) said that the decision on standing was unlikely to operate as precedent for later decisions. In considering the argument that the Court's decision had wider legal significance, Cooke J emphasised that the decision was unique to the social conditions of the time. Indeed, the Judge reasoned that the case arose at a particular moment in the history of what has traditionally been regarded as New Zealand's national game and in a combination of circumstances that were most unlikely to be repeated. It was also argued that, although other plaintiffs in other cases might try to invoke the judgment as a precedent, it by no means follows that they would succeed. While Cooke J acknowledged that in some future years the New Zealand Union could wish to consider another invitation to tour South Africa, he noted that it would be difficult to believe that the Council would ever again wish to accept such an invitation. Moreover, the Judge also placed emphasis on the fact that the Court in *Finnigan (No 1)* was aware that the substantive trial should not be complicated or prolonged by the issue of standing, as the possibility of delaying tactics was not able to be ignored with the tour planned to start very soon. It was thus also argued that such a factor would not necessarily be present in any future case.<sup>57</sup>

Sir Thaddeus McCarthy similarly emphasised that the Court's ruling was of a limited nature. He reasoned that a great number of the issues raised by the tour had been enveloped in a cloud of highly charged emotion and misunderstanding and it was in part due to that atmosphere that many people appeared to lack an accurate realisation of the limited nature of the Court's ruling.<sup>58</sup> Moreover, Sir Thaddeus expressed the view that the question as to who should have access to the courts of a country, and in what circumstances, and subject to what conditions was not solely a legal question. Rather, the importance of historical background, the racial make-up, and the trends in social aims and cultural perspectives of the particular country were seen by Sir Thaddeus as important factors in the determination of the question.<sup>59</sup>

The emphasis placed by these judges on the unique social context of the time is unsurprising. Indeed, when some of the reasons set out by for the Court in *Finnigan (No 1)* are examined, the social significance of the decision is truly brought to light. For instance, the Court reasoned that, in terms of its bearing on the image, standing and future of rugby as a national sport, the Rugby Union's decision to tour was one of, if not the, most important decisions in the history of the game in

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<sup>56</sup> *Finnigan (No 3)*, above n 51.

<sup>57</sup> *Ibid*, at 198-199.

<sup>58</sup> *Ibid*, at 207.

<sup>59</sup> *Ibid*, at 208.

New Zealand; the decision affected the community of New Zealand as a whole, and affected the international relations and standing of New Zealand; and the anti-tour viewpoint was not held by a tiny or negligible minority and the opponents were not busybodies, cranks or mischief makers.<sup>60</sup> Thus, some of the factors given weight by the Court in its determination can be located within a historical period in which New Zealand was still recovering from the social upheaval occasioned by the 1981 Springbok tour.

It must, however, be noted that the belief in the limited nature of the Court's decision was not a view shared by all members of the Court. Indeed, Richardson J argued that the standing of grassroots members not in direct contractual relationship with the parent organisation was an issue of wide public and general importance.<sup>61</sup> Accordingly, Richardson J was of the view that, in wider precedent terms, the Court's judgment in *Finnigan (No 1)* could not be read as allowing only those public interest considerations affecting rugby tours of South Africa to be taken into account.<sup>62</sup>

In light of the contrasting views held by members of the Court as to the legal significance of the *Finnigan (No 1)* decision, it is not possible to conclude definitively that the decision's inclusion within the lists of New Zealand's cases of significance by four of those surveyed by Sir Ivor could solely be attributed to the decision's historical importance, rather than its role in establishing legal precedent.

However, when one turns to the interim injunction that was granted by Casey J to prevent the All Blacks from leaving for South Africa until the determination of the substantive action,<sup>63</sup> it is quite clear that that decision is one that has no precedent value,<sup>64</sup> but, in terms of its historical impact, should undoubtedly be included within any compiled list of New Zealand's cases of significance.

As noted above, on 11 July 1985, the plaintiffs applied for an interim injunction to prevent the team from leaving until the action had been determined and Casey J granted the injunction on 13 July. In his decision, Casey J acknowledged that the plaintiffs had a strong prima facie case for the proposition that the tour could not benefit rugby in the country. It was noted that it was impossible to regard the leaders of nearly all New Zealand's major churches, or a unanimous House of

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<sup>60</sup> *Finnigan (No 1)*, above n 51, at 179.

<sup>61</sup> *Finnigan (No 3)*, above n 51, at 200.

<sup>62</sup> Ibid. I would tend to favour the Richardson view. Michael Taggart in "Rugby, the Anti-Apartheid Movement, and Administrative Law" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Lexis Nexis, Wellington, 2006) at 85-87 notes that the Court applied the liberalised standing rules of public law rather than the more restrictive rules of private law, despite it being essentially an action in private law.

<sup>63</sup> *Finnigan (No 2)*, above n 51.

<sup>64</sup> See discussion in Taggart, above n 62, at 91 and 98.

Representatives or the Auckland and North Harbour Rugby Unions as irresponsible trouble makers or publicity seekers, as had been suggested by the Union, and the plaintiffs were on strong ground when they argued that ignoring such an attitude, spread so widely among all sections of the community, would tarnish the image of the game.<sup>65</sup>

The interest of the public and the nation in not having the tour go ahead was seen as the most potent factor in Casey J's decision to exercise his discretion to grant an injunction. It was noted that the tour was contrary to a clear direction from the Government because of the harm it would do to New Zealand's national interests; the unanimous resolution of Parliament for the serious harm it would do to New Zealand's interest at home and abroad; and the spirit of the Gleneagles Agreement<sup>66</sup> to which the country was fully committed. Casey J also noted that there was also the risk of violence and bloodshed – even loss of life – to Africans.<sup>67</sup> While Casey J's judgment indicated that an appeal from the decision would be able to be heard on 15 July, the Rugby Union made the decision not to appeal on 14 July, called off the tour and the case was discontinued on agreed terms.<sup>68</sup>

The impact of the decision was immense for New Zealand. Indeed, one commentator has noted that, while the shock of a court stopping a tour might not seem so great today, before the High Court decision it "seemed impossible for a mere bunch of judges to interfere with something as inviolable as an All Black tour."<sup>69</sup> The public outcry over the decision was unprecedented. One of the plaintiffs, Phil Recorden, now a District Court Judge, has recounted that he was faced with an onslaught of abusive phone calls, letters and faeces through the letter box and threatening parcels on his door-step.<sup>70</sup> The decision also attracted political scrutiny, with the then Leader of the Opposition interpreting the decision as having implications for the rights of New Zealanders to travel overseas.<sup>71</sup>

The vehemence with which opposition to the decision was voiced across the county not only demonstrates the significance of the decision for many New Zealanders, but also serves to highlight

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65 Ibid, at 184.

66 For an explanation of the Gleneagles Agreement see Taggart, above n 62, at 74-75.

67 *Finnigan (No 2)*, above n 51, at 188.

68 Taggart, above n 62, at 90.

69 Phil Gifford "The Day A Court Dropped A Rugby Bomb" *The Sunday Star Times* (New Zealand, 3 March 1996).

70 Catriona MacLennan "Legal Action to Stop 1985 All Blacks Tour 'Changed Millions of Lives For the Better'" (2005) 44 *Law News* 4 at 4.

71 Simon Watt "*Finnigan v NZRFU: Judicial Handling of a Political Controversy*" (1991) 21 *VUWLR* 147 at 164. On the other hand, Watt at 167 notes that the Prime Minister's reaction to the case was one of "exquisite relief".

the pivotal role that rugby has played in the construction of New Zealand's national identity. As acknowledged by a number of authors, sport has been a crucial element in the creation of New Zealand's identity, and national sport has been a factor of self-identity for many New Zealanders.<sup>72</sup> With the wide recognition that rugby is considered to be New Zealand's secular religion,<sup>73</sup> it is unsurprising that Casey J's interim injunction was viewed as a landmark decision in New Zealand's social history.

The decision not only serves to highlight the unique role that the game of rugby has played in forming New Zealand's national identity, it has also been seen as important in light of its place in helping to facilitate a broader understanding of race relations in New Zealand. For instance, Professor Taggart argues that the decision was indicative of the fact that over a 30 year period, the anti-apartheid movement in New Zealand moved from the fringes to the centre of public opinion.<sup>74</sup> Accordingly, he argues that the judgment enabled New Zealanders to confront their own past and their own racial stereotyping by forcing them to reflect on how New Zealand had treated its own indigenous people.<sup>75</sup>

Professor Taggart also, however, points to three earlier cases where anti apartheid campaigners failed.<sup>76</sup> It may be that *Finnigan (No 1)* was a decision whose time had come, given the mainstreaming of the anti-apartheid movement and its place in the middle and upper echelons of New Zealand society.<sup>77</sup> As this brief examination of the social impact of the *Finnigan* litigation illustrates, it is quite feasible for legal decisions of social significance to fall outside the stringent confines of the narrow definition of a "leading case" that prevails in much legal scholarship.

### **VII IS A STUDY OF LEADING CASES TOO NARROW?**

From an historical perspective the next question is whether leading cases, however defined, are in fact the most interesting. It can be argued that it is the general run of decisions that have the most

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72 See for example Malcolm Maclean "Of Warriors and Blokes: The Problem of Maori Rugby for Pakeha Masculinity in New Zealand" in Timothy John, Lindsay Chandler and John Nauright (eds) *Making The Rugby World: Race, Gender, Commerce* (Bookcraft, Somerset, 1999) at 7; David Black and John Nauright *Rugby and The South African Nation* (Manchester University Press, Manchester, 1998) at 80.

73 Black and Nauright, *ibid.* I note the belief expressed by a delegate to the 1970 Conference of the Race Relations Council that the Rugby Union was even more influential than the Government in New Zealand.

74 Taggart, above n 62, at 91.

75 *Ibid.*

76 *Parson v Burke* [1971] NZLR 244 (SC); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); and *Clements v Attorney-General* HC Christchurch M307/81, 17 July 1981.

77 Taggart, above n 62, at 92. Taggart opines that this "is a far cry from the situation of cause lawyers campaigning for the poor and the marginalised of society, who mostly exist at the professional fringes with little recognition or prospect of advancement", at 93.

effect on the work of the courts and on the societies that the courts serve. It can also be argued that the real historical interest of cases is not necessary the legal aspects but what the cases show, through the subject matter and the evidence, about the society of the time.

At this point I feel obliged to disclose that I have effectively chosen my position on this question by my choice of doctoral thesis. My thesis was a study of the criminal courts in Rouen from just before the French Revolution (and the inauguration of a new modern criminal justice system) until 1810.<sup>78</sup> Rouen was chosen because, unlike other areas in France it was relatively untouched by the Revolution. This meant that it was ideal for an examination of the courts in their work of judging ordinary rather than political criminals and the findings demonstrate well the utility of examining ordinary cases as a means of gaining a better understanding of society. The criminal code that was brought in during the Revolutionary period was one of the first modern criminal codes based on Enlightenment principles. One of the aims of my study was to examine whether this total change had indeed taken place in practice and to identify areas where the law may not have been applied as envisaged. The Revolutionary legislators were convinced that they were instituting a totally new system of criminal justice and correcting all the abuses of the old regime, replacing the old regime system with a rationalised court structure, a more humane procedure (with proper safeguards for the accused) and an exact relationship between crime and punishment. With regard to punishments, physical punishments were phased out<sup>79</sup> and custodial sentences were to become the main form of punishment.<sup>80</sup> The reasons for this were not necessarily humanitarian.<sup>81</sup>

The Revolutionary legislators felt that custodial sentences would be more effective by improving society in punishing criminals. The elimination of harsh punishments for less serious crimes would also mean increased certainty that criminals would be brought to justice. Reacting against what they saw as the arbitrary nature of punishments during the old regime, the legislators

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78 SGM Glazebrook "Justice in Transition: Crime, Criminals and Criminal Justice in Revolutionary Rouen, 1790–1800 (D Phil thesis, University of Oxford, 1988). The work of the criminal courts in the Revolutionary period was studied in depth but, for the purpose of comparison, old regime court records and those for the years 1806 to 1810 were sampled.

79 After much discussion the death penalty was retained (but was to be inflicted by decapitation with no preliminary torture). Ironically Robespierre was one of the voices raised on opposition to the retention of the death penalty.

80 But without money available for new prisons the conditions left a lot to be desired and escape seemed relatively easy.

81 It has been argued by Marxists that the *philosophes* and the revolutionary legislators were not motivated by the humanitarian concerns but wishes to improve the protection of property and to enhance the power of the bourgeoisie, see Georg Rusche and Otto Kirchheimer *Punishment and Social Structure* (New York, 1939) at 76-79.

set out a hierarchy of crimes and punishments and, in the higher courts, ostensibly gave the judges no discretion in setting punishments.<sup>82</sup>

Rouen was also chosen for the study because it was a town beginning to industrialise and was thus ideal for testing some of the theories about changes in the criminal justice system in the modern age. For example, one theory postulated a progression from the occasional and very violent criminal of the seventeenth century to the professional and intelligent criminal of the eighteenth century who stole, and as the century progressed, turned to the more sophisticated crime of fraud.<sup>83</sup> Another theory was that there was a change in punishments from those affecting the body to those affecting the mind, thus providing a more effective means of social control for an industrial society.<sup>84</sup> There was also a theory about the gradual overtaking of community law by state law. Most disputes were contained within the community and it was only when a person had passed a certain tolerance threshold that they were turned over to outside justice.

The examination of the court records in Rouen showed that the Revolution had created a transformation in the areas of court structure, procedure, personnel and type of punishment<sup>85</sup> but, to a large extent, the underlying attitudes to crime and criminals remained the same. Despite the legislators' wish for certainty of punishment, in the lower courts, those sentencing probably took more account of the character of the person committing the crime than of the crime itself. Allowances for such mitigating factors as need, family commitments, usefulness to society, repentance or lack of mental capacity. A person of bad character or one who was an outsider and not part of the community could expect no leniency.

Even in the higher courts, where there was supposedly no power at all to vary sentences, the court in fact took into account the character of an accused. Acquittals (or convictions on lesser charges) were used to introduce flexibility into a rigid system. An accused had a good chance of being acquitted if of good character, just as someone of bad character stood a chance of being convicted on slender evidence. The higher courts were also much more likely to convict persons

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82 In fact old regime punishments were not as arbitrary as they were portrayed, at least in Rouen. The old regime courts looked both at the character of the crime and the character and circumstances of the person committing the crime when sentencing.

83 This theory stemmed from studies in Normandy convened by Chaunu, such as Bernadette Boutelet "Etude par sondage de la criminalité dans le bailliage de Pont-de-l'Arche (XVIIe-XVIIIe siècles)" in *Annales de Normandie*, xii No 4 (1962) at 235-262 and Jean-Claude Gégot "Etude par sondage de la criminalité dans le bailliage de Falaise" (XVIIe-XVIIIe siècles). *Criminalité diffuse ou société criminelle*, *annals de Normandie*, xvi No 1 (March 1966) at 103-164 but note the contrary view in Iain A Cameron *Crime and Repression in the Auvergne and the Guyenne, 1720-1790* (Cambridge, 1981) at 191.

84 M Foucault *Surveiller et Punir: Naissance de la Prison* (Paris, 1975).

85 Although there had been a certain lessening in the severity of punishments in any event towards the end of the old regime.

guilty of crimes against property than they were to convict people accused of crimes against the State and, to a lesser extent, of crimes against the person. Women and children were also more likely to be acquitted than men. The same applied to the very young. High acquittal rates were also present in cases which may be regarded as a reaction against the intrusive power of the State.

Another major element of continuity with the old regime was the continued existence of community law. Authorities continued to accept informal arrangements made between the parties, especially in relation to crimes of violence and simple theft. Indeed, conciliation was encouraged. Further, until the Empire period, there were no significant changes in the number of police and their limited resources were used for the preservation of order rather than on actively seeking out criminals. General policing of ordinary crime depended very much on victim cooperation. In only 29 per cent of cases were people brought to justice before the higher courts through police action.<sup>86</sup> This means that an overwhelming 71 per cent were brought before the courts after investigation by the victim or through an informal community watch system.

For example, there was one case where a woman, who was a manufacturer, suspected that an employee had been stealing from her. To verify her suspicions before calling in the authorities she made some holes in her attic floor and her daughter, two other workers and, for good measure, two neighbours hid up there and saw the employee take some cotton. Needless to say with all that testimony stacked against the hapless employee, he was convicted.

There was also a continuity in the type of crime tried by the courts. As in the old regime, the higher criminal courts tried few cases of violent crime. Violent crime was the province of the lower courts. Violence was usually not serious but it was widespread in Rouen society and was used to solve the problems of ordinary people such as money problems, sexual jealousy or quarrels between neighbours. The courts, however, saw these cases as primarily civil rather than criminal. The courts tended not to interfere in family quarrels, except where violence threatened the structure of family life. Violence against parents was not tolerated (despite acceptance of violence against other family members, including spouses).

The crimes against property that came before the courts in the Revolutionary period did not support the view that there had been a trend towards the more sophisticated type of crime and criminal. The majority of crimes against property were unplanned and showed little sophistication of method and there were a few fraud cases tried. Even organised crime tended to be based on family groups and their crimes were largely opportunistic. Criminals tended to be young, usually in their 20s and came from the lower classes. Most were not merely occasional criminals and many regularly supplemented their incomes through crime. The criminals who ended up before the higher

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<sup>86</sup> I note, however, that the police had a good knowledge of suspect people and suspect houses and they were the first to be searched if there were difficulties. They also seemed to have elaborate information networks with police informers and also between towns.

criminal courts tended to be people who were not part of a community and therefore were not shielded by it.

Even more interesting to me than the trends discussed above were the individual stories that emerged from the court records and what they tell us about the society of the time. One of my favourite stories is that of the *femme* Dauteney. She would appear to have made the journey from the country to town to find her wayward husband. She found him in the company of the *femme* Bernardon and was rewarded for her pains by being attacked by her husband and his mistress. She was holding her child at the time of the attack. Before the court she pleaded for her husband, recounting how her young children would starve if her breadwinner was not restored to her. She declared that he never ill-treated her and that it was only in a moment of 'forgetfulness' that he had left her and that he had been drunk at the time of the attack. She asked the court to take into account the fact that he repented. The court was obviously sensitive to such considerations and only sentenced him to three days in prison, even though his offence was exacerbated by the fact that he had made no declaration to the *Bureau des Etrangers* on his arrival in Rouen. The *femme* Bernardon was sentenced to three months imprisonment and one wonders if this heavy prison sentence inflicted on her was to remove the bad influence on the Dautenay marriage.

Another favourite story of mine was that of Pierre Brochard. A large quantity of stolen goods had been found in the house he had recently rented. He had admitted the theft right up until trial when he hit on the expedient of explaining in a letter to the court that his admissions were in reality an elaborate means of committing suicide. He had been to visit the house that he had just rented and found, to his surprise, the stolen goods. He went to sit outside the church in order to reflect on his situation. In the course of this meditation he had decided to end it all. He then, according to his story, proceeded to seek detailed information about the means by which the crime had been committed in order to make his declaration of guilt believable. It is unlikely that a lawyer would have imagined that such arguments would influence the court and one can safely assume that the idea had been his own. It is indeed a pity that such a lively imagination should not be rewarded, but Brochard was found guilty as charged.

### ***VIII HISTORIANS AND COURT RECORDS***

The important role that the study of courts and legal cases can play in demonstrating social conditions and societal attitudes is well acknowledged by historians. Court records and associated court documents have been relied upon by New Zealand's social historians to shed light on social attitudes that prevailed at the time in which such records were kept. For instance, Robinson has turned to nineteenth century Canterbury court records to explore the nature of colonial Canterbury society and examine the prevailing gender norms of the time.<sup>87</sup> The belief that females were the

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<sup>87</sup> Jan Robinson "Of diverse persons, men and women and whores: women and crime in nineteenth century Canterbury" (MA thesis, University of Canterbury, presented October 1983).

weaker sex was strictly adhered to in colonial Canterbury, with the records demonstrating that women who were viewed as weak and helpless were often treated with comparative leniency by the courts.

Robinson uses the case of Annie Wilson, a woman charged with concealment of birth, to illustrate this proposition.<sup>88</sup> In Wilson's case, when she sobbed bitterly and could say nothing in defence of the charge, the judge commented that he was "grieved" to see her before him and he could only suppose that "(her) conduct hitherto had, with this one exception, been reasonable."<sup>89</sup> The judge's regret was reflected in Annie Wilson receiving a minimal sentence of two months imprisonment. As this case illustrates, if a woman in court embodied notions of weakness, victimisation and respectability, this was likely to result in a degree of leniency being shown to her.

The case of Emily Ann Needham is also used to demonstrate this hypothesis.<sup>90</sup> Although Emily Needham was convicted of charges of forgery and uttering, during her trial she was referred to as a "poor weak woman" and the Judge stated that he would give her a lighter sentence than he would give a man because he did not want to risk her contamination by "drunken prostitutes" contained in the Lyttleton Gaol.<sup>91</sup> The favourable judicial treatment accorded to women who conformed to the societal ideals of frailty and vulnerability illustrates the strength of the gendered ideologies that operated in nineteenth century society.

The court records also show the courts' application of the presumption that, if a wife commits a crime in the presence of her husband she must have been acting under coercion.<sup>92</sup> For instance, Matilda Skinner was charged with feloniously aiding and assisting her husband John to break and enter into the dwelling house of Henry Wilson and assisting her husband in violently assaulting the said Henry Wilson.<sup>93</sup> The recorded evidence suggested that Matilda was very much involved in inflicting bruises and scratches on the victim and that it was she not her husband who returned to Wilson's house the next day to mock and jeer and threaten him with a broom handle. Yet the Court

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88 *R v Annie Wilson*, SC Christchurch, 1 September 1869 per Gresson J, reported in *Lyttelton Times* (Christchurch, 2 September 1869) at 4.

89 Robinson, above n 87, at 161.

90 *R v Emily Ann Needham*, SC Christchurch, 3 March 1869 per Gresson J, reported in *Lyttelton Times* (Christchurch, 4 March 1869) at 4-5.

91 Robinson, *ibid*, at 162. Compare Anne Summers *Damned Whores and God's Police: The Colonization of Women in Australia* (Penguin Books, 1975, 1994, 2002).

92 Robinson, *ibid*, at 141.

93 *R v John & Matilda Skinner*, SC Christchurch, 1 March 1859, per Gresson J reported in *Lyttelton Times* (Christchurch, 2 March 1859) at 4.

found only John guilty and fined him forty shillings, while the case against Matilda was dropped and she was discharged without conviction.<sup>94</sup>

Finally, Robinson argues that the widespread societal view that women were mentally unstable is highlighted by the treatment of women in infanticide cases in the nineteenth century Canterbury. As Robinson notes, the fact that all male juries were reluctant to declare women guilty of such a crime demonstrated a societal perception that women were mentally weak and that hormonal imbalances could quickly precipitate a change from sanity to insanity.<sup>95</sup> The court records played a useful role in revealing the paternalistic viewpoints that prevailed in colonial Canterbury society.<sup>96</sup>

The use of nineteenth century court records to explore the social conditions in early New Zealand has also been employed by historian, Dr Rod Phillips, in his examination of the social history of divorce in New Zealand. A study of the cases that reached the divorce court within the Auckland region provided a way to examine the realities of family life in the nineteenth century and to investigate the characteristics of marital breakdown in that historical context.<sup>97</sup> Moreover, such records (and the documents associated with such proceedings) can be used to explore topics such as the sex roles within the New Zealand family of the past, influences on family life, and relationships among wider family members.<sup>98</sup>

The court records examined by Dr Phillips challenged the commonly held view that, in early New Zealand society, the family was a strong and stable social unit. Dr Phillips' case study revealed that adultery was not uncommon in the nineteenth century, with adultery serving as the principal ground for most divorce actions.<sup>99</sup> Moreover, while male initiated adultery would be the most prevalent, with the extra-marital relationship between a male and a female domestic servant being the most common, female initiated adultery did occur, mostly involving women's sexual liaisons with male borders.<sup>100</sup> Thus societal adherence to wholesome family values in nineteenth century New Zealand was not as strict as many would have believed.

Dr Phillips also argues that the records highlight the dominance of the husband in the family context in early New Zealand society. Divorce records illustrate that domestic violence was a

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94 Robinson, *ibid*, at 143.

95 *Ibid*, at 166.

96 For a later case study, which highlights the societal attitudes of the 1950s regarding suspected lesbian relationships and other cultures, see Julie Glamuzina and Alison J Laurie *Parker & Hulme: A Lesbian View* (New Women's Press, Auckland, 1991) at 88-89.

97 Roderick Phillips *Divorce in New Zealand: A Social History* (Oxford University Press, Oxford, 1981) at 12.

98 *Ibid*, at 13.

99 *Ibid*, at 112.

100 *Ibid*, at 113-114.

common occurrence in colonial New Zealand. Such violence included violence against pregnant women, and violence that was driven by intoxication.<sup>101</sup> Further, the records reveal that violence frequently compelled women to flee from their houses and to seek refuge with relatives or neighbours.<sup>102</sup> Plus ça change, plus c'est la même chose.<sup>103</sup>

The link between law enforcement, court proceedings, politics and society is also aptly demonstrated by those who have been privileged to hear Dame Judith Binney talk about the court proceedings involving Rua Kenana and the religious community he built at the foot of Maungapōhata, the sacred Tuhoe mountain.<sup>104</sup> The use of liquor laws, the manipulation of evidence by the police and the harsh punishment meted out saw the law being used as a means of repression of a man and a community.

## **IX CONCLUSION**

It is clear that an examination of New Zealand's leading cases should be extended beyond an exploration of the role that a decision has played in settling an area of law. As Sir Ivor outlines, it is necessary to bear in mind that the determination as to the impact of judicial decisions is not necessarily the exclusive preserve of judges and lawyers.<sup>105</sup> Examining the social and historical implications and underpinnings of a decision is undoubtedly beneficial to gaining a greater understanding of its significance. To explore a decision's impact in isolation from such factors is an unduly narrow approach.

It is equally clear to me that a concentration on leading cases alone is too narrow a focus. The study of the ordinary run of cases can say much about the law and its relationship to society and court records provide a mine of information about wider trends in society.<sup>106</sup> Indeed, as demonstrated by the studies discussed above, the court records of Revolutionary Rouen and New Zealand's court records of the nineteenth century provide a unique insight into the societal beliefs and trends of the time. As sociological jurist Roger Cotterrell argues, understanding society can be seen to be a necessary means of broadening legal understanding.<sup>107</sup> Therefore, in my opinion, it is

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101 Ibid, at 118.

102 Ibid, at 119.

103 The more things that change, the more they stay the same.

104 For writing on this topic see Dame Judith Binney, Gillian Chaplin and Craig Wallace *Mihaia: the Prophet Rua Kenana and his Community at Maungapohatu* (Auckland University Press, Auckland, 1996) and Dame Judith Binney *Encircled Lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, 2009).

105 Richardson, above n 2.

106 The papers to be given at this conference and their treatment of the lost cases illustrate this proposition well.

107 Roger Cotterrell cited in MDA Freeman *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, London, 2001) at 685.

quite misguided to dismiss the significance and utility of cases that fall outside the scope of those that can be considered to be 'leading'.