# NZULR ABSTRACTS
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## JUSTICE FOR VICTIMS OF INJURY: THE INFLUENCE OF NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME ON THE CIVIL AND CRIMINAL LAW

SIMON CONNELL

*New Zealand's accident compensation scheme replaced compensatory damages for personal injury with a no-fault redistributive scheme. The central thesis of this article is that the scheme, and its influence on the civil and criminal law in New Zealand, can be better understood in terms of the interplay between corrective, retributive and distributive justice. The orthodox view that the scheme was an abandonment of the corrective and retributive justice for injury victims in favour of distributive justice is challenged, and it is argued that Parliament has a crucial role in deciding between conceptions of justice. Parliament's performance of that function is assessed, as is the performance of the Courts in terms of implementing statute law and developing the common law. Ultimately, the article concludes that the ACC scheme has had major unintended consequences, resulting from attempts to serve competing conceptions of a just outcome between causer and victim of injury.*

## IS NEW ZEALAND LAW READY FOR A *MARBURY V MADISON* MOMENT?

MAX HARRIS

*This article explores whether New Zealand law is ready for a* Marbury v Madison *moment in which judges might assume the power to strike down legislation in the face of a particularly egregious law. It aims to reorient the scholarly debate, so that the theoretical discussion of whether judges should be allowed to strike down legislation is complemented by greater practical analysis of whether current New Zealand law might authorise such an action, even in the absence of a written constitution. While acknowledging that whether judges actually assume a judicial strike-down power will turn on factors that are not confined to the law, it suggests that whether the law is conducive to the assumption of that power will have an impact on when and how the power is exercised.*

*The article begins by analysing* Marbury v Madison *and* United Mizrahi Bank Ltd v Migdal Cooperative Village*, judgments of the highest courts of the United States of America and Israel in which a judicial power to strike down legislation was assumed. It is observed that special care was taken by the judges in those cases to provide convincing arguments in favour of inferring a judicial strike-down power, so that their judgments would have legitimacy. With that point made, the article turns to what arguments might be available in New Zealand to give legitimacy to a similar move, and offers an assessment of the strength of those arguments. Arguments are considered based on statute, the common law, and the Treaty of Waitangi. Ultimately the author concludes that some of these arguments are favourable to the assumption of a power to strike down legislation. This conclusion is an important one for lawyers and judges, and the final part of the article teases out the implications of these findings for scholarship as well as legal practice.*

## MEDICAL PRIVILEGE AND COURT-ORDERED PSYCHIATRIC REPORTS

JOHN DAWSON

*Is the limited form of medical privilege that protects certain treatment-related information from disclosure in criminal proceedings set aside when a court order is made for the person's compulsory health assessment? Has the law been changed in this respect by the new statement of medical privilege in the Evidence Act? This article explains why this has become a vexed issue under the new legislation, but reaches the conclusion that the central legal principles have not changed. Unless the person concerned has given their consent, a court-appointed health assessor ought not to rely on privileged information when reporting to the court; defence counsel should object to the use of privileged information in court-ordered reports; and judges should be vigilant to protect the person's right to refuse the disclosure of such material to the court.*

## RE-DEFINING LEARNING OUTCOMES: A CASE FOR THE ASSESSMENT OF SKILLS AND COMPETENCIES IN A LAW DEGREE

PETER DEVONSHIRE AND IAN BRAILSFORD

*In John Biggs' oft-quoted refrain, it is what the student does in higher education that matters. By extension, this paper argues that a law degree should be re-conceptualised to acknowledge that the study of law is a process that requires the attainment of certain skills and competencies. This imperative should inform the design and assessment of undergraduate law courses. Focusing on what a student is able to know, do or demonstrate, places less reliance upon classroom performance and content delivery, and prompts broader enquiry as to the desired learning outcomes for a law degree and the extent to which these outcomes can be supported by assessment. While most universities in Australasia publicise the generic attributes that are, or should be, possessed by their graduating students, many vocational disciplines, such as Law, tend to hone these into specific skills, attributes and competencies which add value to both students and future employers. In theory, each course is a step towards attaining these abilities. And in turn, each course should contribute to the overall competency objectives of the degree programme. This paper discusses the rationales for defining learning outcomes for law graduates. It is hoped that this will encourage debate within the academic legal community regarding the integration of skills and*

*competencies in the undergraduate law degree. This must be linked to the adoption of an assessment regime which promotes these objectives and affirms their status within the law curriculum.*

## THE TWO FACES OF FAIR USE

GRAEME W AUSTIN

*Responding to suggestions that the "fair use" defence in US copyright law should be exported to other jurisdictions, this article scrutinises the different ways in which the defence has been applied in decisional law. Fair use cases fall into two broad categories. First, the defence has been applied to ensure that the exercise of the copyright monopoly does not significantly fetter downstream creativity by other authors. Here, the prevailing doctrine requires that the defendant's use be genuinely "transformative", which, at the very least, requires the defendant to be using the plaintiff's work in new and creative ways – transforming it into something new. Secondly, fair use has been applied to new technological innovations – such as digital search engines – that do not themselves transform the underlying works, but instead often provide new ways of disseminating copyright-protected material. The paper argues that only the first use of the fair use defence is consistent with traditional fair use doctrine. Accordingly, if policy makers anticipate that fair use should be applied in a way that shields technological entrepreneurship from copyright litigation, they ought to make that clear. Even if that approach were adopted, however, it is questionable whether fair use litigation is an appropriate vehicle for facilitating technological development. The final part of the article explores some of the problems that might arise through this kind of "economic regulation through litigation."*

## THE GENERIC TAX POLICY PROCESS: A "JEWEL IN OUR POLICY FORMATION CROWN"?

PETER VIAL

*Since the mid-1990s successive New Zealand Governments have followed the Generic Tax Policy Process (GTPP) in developing, enacting, implementing and reviewing tax policy. The degree to which the GTPP is followed varies and, on occasion, the framework or key parts of it are ignored. This article examines critically the way in which the Government developed and enacted the look through company (LTC) rules and reformed the qualifying company (QC) rules in 2010 and considers the extent to which the Government's actions complied with the GTPP. The approach adopted by the Government in the case of these reforms calls into question its commitment to the GTPP. Political expediency appears to have prevailed over due process in this instance.*

## THE SCOPE OF THE TAX EVASION OFFENCES IN SECTION 143B OF THE TAX ADMINISTRATION ACT 1994

JAMES MULLINEUX

*This paper considers the New Zealand offences of tax evasion, more particularly the crime of "actual evasion" under s 143B(2) of the Tax Administration Act 1994, against indications that the Supreme Court will adopt a more literal "text and purpose" interpretation of criminal provisions. It examines how tax evasion should be categorised, concludes that it is a specific form of fraud, and uses this conclusion to examine whether s 143B(2) is, in the words of the Privy Council, "a comprehensive system of control" of tax evasion, such that it can include even the evasion of future contingent tax.*

## STATUTORY DERIVATIVE ACTIONS IN AUSTRALIA AND NEW ZEALAND: WHAT CAN WE LEARN FROM EACH OTHER?

LANG THAỊ AND MATT BERKAHN

*This article explores the underlying reasons for the infrequent use of the statutory derivative actions both in Australia and in New Zealand. A derivative action is an action brought by a company shareholder or officer on behalf of and in the name of the company against a director or an officer of the company for an alleged breach of his or her duties or for mismanagement of the company. The article compares the Australian and New Zealand provisions and their application by the courts, focusing in particular on the criteria for leave of the court to commence derivative litigation and the courts' powers to make orders relating to the costs of such litigation. The article explores some areas for law reform, and notes that unless reform is imminent, shareholders will continue to avoid using statutory derivative action and will opt for other forms of litigation instead, such as the oppression action or shareholder class action.*