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FINGERPRINT EVIDENCE IN NEW ZEALAND'S COURTS: THE OVERSIGHT OF OVERSTATEMENT

Gary Edmond

This article documents the persistent misrepresentation and misunderstanding of the most ubiquitous forensic science of the past century. That is, the treatment of latent fingerprint evidence as categorical identification of a specific person. Following a review of the manner in which latent fingerprint evidence was presented in trials and appeals, starting at the beginning of the 20th century and continuing until the present, it introduces scientific research and advice. This juxtaposition allows us to observe how New Zealand's legal institutions have not required fingerprint examiners to temper their claims in response to mainstream scientific research and advice (emerging largely out of the United States and the United Kingdom). In conclusion, drawing upon scientific recommendations, the article explains what is required to make the claims of latent fingerprint examiners scientifically grounded such that their probative opinions can be evaluated in ways that facilitate the goals of rectitude and fairness.

EVIDENTIAL SUFFICIENCY HEARINGS: IS SECTION 10 OF THE CP (MIP) ACT FIT FOR PURPOSE?

Dr Warren Brookbanks

THE 'ANY EVIDENCE' RULE IN NEW ZEALAND FAMILY LAW

Anna High and Caroline Hickman

The 'any evidence' rule provides judicial discretion to admit evidence in the Family Court that would otherwise be inadmissible. Although the rule has frequently been criticised, its operation and ongoing value have not been closely examined. In its recently-reformed iteration, the 'any evidence' rule embodies and demands a rigorous approach to evidentiary issues in the Family Court, premised on fundamental Evidence Act principles of relevance, probative value and prejudicial effect. In this first comprehensive review of the New Zealand family law 'any evidence' rule, based on an analysis of post-reform case law, we argue that the rule should be repealed. It is unnecessary, other than in relation to the special issue of children's hearsay, and in practice contributes to a lax approach to the admission of evidence in the Family Court. We conclude by setting out recommendations for reformed law and practice, and directing users towards a more principled approach to family law evidence in the meantime.

NO SET-OFF CLAUSES AND THE COURT RULES

John Ren

No set-off (NSO) clauses, widely used in a variety of contracts and transactions, typically state that payment must be made without deduction, set-off or counterclaim. This article examines the relationship of NSO clauses with stay of execution and the summary judgment procedure under the court rules. Although comparison is made with English law, the focus is on New Zealand. The main arguments are as follows: it is the law and good law that NSO clauses do not have the effect of barring the court from exercising the discretion to stay execution of judgment. However, such clauses should have an impact on the discretion, and certain principles governing the exercise of the discretion can be restated in such a way as to reflect the impact. To enter summary judgment on the ground of an NSO clause and to do so purely on the 'no arguable defence' ground in the court rules are two different things. In particular, while the court has the discretion to decline summary judgment even though the defendant has no arguable defence under the court rules, it should not have that discretion when an NSO clause is resorted to.

NO SET-OFF CLAUSES AND STATUTES

John Ren

No set-off (NSO) clauses, widely used in various contracts and transactions, typically state that payment must be made by one party to the other party without deduction, set-off or counterclaim. Relevant statutes regulate the validity or enforceability of such clauses or have an impact on them in other ways. But court decisions on the relationship of NSO clauses with some statutes are arguably problematic. The court has held that NSO clauses override s 290(4)(b) of the Companies Act 1993, so that an offsetting claim precluded by such a clause can no longer be a ground for setting aside a statutory demand, even though it would be a valid ground according to s 290(4)(b). This article argues that there is no conflict between NSO clauses and s 290(4)(b); and that, even assuming a conflict, s 290(4)(b) should prevail. The court has also held that NSO clauses exclude mortgagees' duty of care under s 176 of the Property Law Act 2007 and are therefore invalid. Again, this article argues for the contrary conclusion.

OVER AND ABOVE: REPARATION FOR LOST EARNINGS CONSEQUENTIAL ON INJURIES COVERED UNDER THE ACCIDENT COMPENSATION SCHEME

Craig Tatley and Simon Connell

New Zealand's accident compensation provides, among other things, compensation for lost earnings to people injured in accidents and incapacitated from work. A person with cover under the scheme cannot bring a claim for compensatory damages. However, where the accident also constitutes a criminal offence for which an offender is prosecuted, the offender can be ordered to pay reparation for lost earnings over and above the compensation payable under the accident compensation scheme. This article provides a recommended approach to a number of issues that have arisen recently with respect to how the quantum of such reparation should be determined, an issue which is underexplored in case law and academic writing. The most significant question, which was first addressed at appellate level last year in the decision of Oceana Gold v WorkSafe New Zealand *[2019] NZHC 365, is whether reparation should follow the same approach to determining earnings as the accident compensation scheme does. The High Court found that it should, so as to prevent reparation from becoming a true exception to the accident compensation scheme. We argue that Parliament intended reparation to involve an assessment of the victim's actual losses, which necessitates stepping outside the accident compensation scheme's blunt approach to earnings and, in practice, will often involve actuarial assessments. We also consider questions of whether reparation should be reduced for reasons including: to reflect that reparation is an up-front-payment? (yes); because the victim avoided litigation? (no); because of other accident compensation payments (no); or because the victim contributed to their injury? (perhaps, but only for turpitudinous conduct).*

HOW MIGHT DIGITAL TRADE AGREEMENTS CONSTRAIN REGULATORY AUTONOMY: THE CASE OF REGULATING ALCOHOL MARKETING IN THE DIGITAL AGE

Professor Jane Kelsey

Digital technologies are driving a "4th industrial revolution". New trade rules on electronic commerce or digital trade are being devised to enable the expansion of the digital economy and to shield digital technologies and the first-mover corporations that control the digital infrastructure from restrictive regulation. Countries are being asked to adopt these binding and enforceable new rules, even as they struggle to understand the digital technologies and the options to regulate them. This paper uses the regulation of alcohol marketing to concretise that dilemma: traditional ways of regulating the alcohol industry and products are proving impotent to achieve long-established public health goals in the era of social media and digitised services, but international trade rules risk pre-empting the adoption of more effective innovative measures.

SHARK EXPERIENCE LTD V PAUAMAC5 INC: MISSED OPPORTUNITIES?

M B Rodriguez Ferrere and N R Wheen

The Supreme Court gave judgment in Shark Experience Ltd v PauaMAC5 Inc *[2019] NZSC 111 late in 2019. In doing so, it engaged for the first time in a deep, granular analysis of the Wildlife Act 1953, New Zealand's primary legislative regime for protecting endangered wildlife, and this paper is a detailed examination of the case. At issue was whether shark cage diving is caught by the provisions in the Wildlife Act, and the answer to that question demanded close attention to its arcane and often confusing provisions. Ultimately, while the Supreme Court's analysis into the Act's provisions is useful, given it declined to provide a definitive answer as to whether shark cage diving was 'molesting' or 'disturbing' wildlife – an offence under the Act – this paper concludes that this was a missed opportunity. Disappointing as it was, however, the decision highlights the deficiencies of this outdated legislation and provides further impetus for reform.*