

**NZULR ABSTRACTS**  
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**RIGHTS-THREATS, WRONGS AND INJUSTICES:  
THE COMMON LAW'S CAUSES OF ACTION**

STEPHEN A SMITH

*On what grounds are private law remedies awarded? Focusing on private law remedies that require defendants to do or not to do something, I argue that there are three basic “causes of action” in the common law: rights-threats, wrongs and injustices. Specifically, I argue that: (1) proof of a rights-threat is the cause of action for injunctions, specific performance, orders to pay a sum due under a contract, orders for the recovery of land or other property, and some (not all) orders to pay damages that are given in lieu of specific relief; (2) proof of a wrong is the cause of action for awards of “direct” (“non-consequential”) damages; and (3) proof of an injustice is the cause of action for most restitutionary awards, awards of consequential damages, and certain statutorily-authorized orders. The essay also briefly discusses the meaning of “remedy” and the general role of judicial remedies.*

**ANOTHER MISSTEP IN NEGLIGENCE AND ILLEGALITY**

SHARON ERBACHER

*The Supreme Court of the United Kingdom has held that claims founded on illegal conduct must be assessed according to contextual policy considerations and the proportionality of denying relief. This paper argues that this multifactorial approach is not appropriate for the negligence context. It confers an undesirable degree of discretion on judges while at the same time distracting them from an evaluation of key relational matters, including an evaluation of relational principles that reflect the combined operation of the criminal law and negligence law. An important opportunity has been missed to reconceptualise illegality doctrine by aligning it with the identified rationale of preserving the coherence of the legal system.*

**NEW VARIATIONS ON THE RULE AGAINST PENALTIES:  
OPTIONS FOR NEW ZEALAND**

SAM CATHRO AND SIMON CONNELL

*As a consequence of the rule against penalties, contractual clauses with a penal character are unenforceable. The rule has recently undergone significant revision in both the United Kingdom and Australia, following decisions by the highest courts in those jurisdictions. This article sets out and considers the options that those decisions put forward for the development of the rule against penalties in New Zealand. The variants are presented in terms of answers to two questions. The first is the “engagement question”: which kinds of contractual clauses are capable of being subject to the rule against penalties? At first glance, the English and Australian authorities present different answers to this question. However, we argue that their answer is essentially the same – the clause must be a secondary obligation triggered by failure to perform a contractual promise. We suggest the English framing of the engagement question should be followed in New Zealand, primarily because it is clearer. The second question is the “test question”: given that a clause engages the rule, what is the test for whether the clause is penal? The new cases are in agreement that a clause is a penalty if it is out of proportion to a legitimate interest in the performance of the contract, but two competing approaches emerge as to what can qualify as such an interest. We call the narrower approach the “bargain approach”; it focuses on interests that are protected by the parties’ bargain, and we argue it is preferable for this reason. However, on the broader approach, which we call the “party purposive approach”, the courts can look further to the innocent party’s motives for entering into the contract. This approach has overwhelming judicial support, and is more likely to be adopted in New Zealand.*

**ENGAGEMENT, CRITICISM AND THE ACADEMIC LAWYER**

ALLAN BEEVER

*This article examines and criticises the way in which academic lawyers relate to the work of their colleagues. It does so by examining two recent reviews of *A Theory of Tort Liability*, one of which appeared in an earlier edition of this journal. It explains that, due to a lack of commitment to the principle of charity and a lack of engagement with the arguments of interlocutors, much academic disagreement misses its mark. The article suggests that for these reasons serious deficiencies exist within the discipline of academic lawyering.*

**RELEVANCE AND PROBATIVE VALUE**

BERNARD ROBERTSON

*The High Court of Australia’s judgment in *IMM v The Queen* [2016] HCA 14, (2016) 257 CLR 300 raised the question whether a judge, when required to assess the probative value of any evidence, should take into account factors bearing on the credibility and reliability of the evidence or treat it as if true. While the judgment revolves around specific statutory provisions in the Australian Uniform Evidence Act, the discussion is relevant to common law and to jurisdictions such as New Zealand where “probative value” is not defined by statute. This article argues that the disagreement between the Judges in *IMM* is due to a failure to distinguish between “evidence” in the sense of the fact of testimony by a witness and “evidence” meaning the content of that testimony. Absent statutory provision otherwise, the decision on relevance should focus on the content of the evidence while consideration of its probative value should take into account the characteristics of the witness, the circumstances under which it was obtained and other factors that might logically affect its weight as evidence.*

**“HAVE YOU SEEN DIGNITY?”:**

**THE STORY OF THE DEVELOPMENT OF THERAPEUTIC JURISPRUDENCE**

MICHAEL L PERLIN

*In this article, for the first time, the history of the therapeutic jurisprudence movement is set out. Focusing extensively on the work of one of its founders – Professor David Wexler (work that is still ongoing) – the article canvasses developments from the past nearly 30 years, including how the original insights of Professor Wexler and the late Professor Bruce Winick led to the characterisation of this school of thought as “therapeutic jurisprudence” (TJ); how it initially grew out of mental health law but quickly expanded to include other scholarly disciplines; how it “internationalised” (and the significance of that movement); how it expanded from law to psychology, criminology and other scholarly disciplines, its impact on the way trial courts operate and (to a lesser extent) on case law; how “problem-solving courts” owe their creation to TJ concepts; and how those courts that work well follow TJ principles closely; how Professor Wexler has focused recently on the relationship between the Therapeutic Design of Law and the Therapeutic Application of the Law; and how TJ-focused lawyers need to have TJ-infused dialogues with their clients, and the likely path of future developments, looking especially at the significance of the recent creation of the International Society for Therapeutic Jurisprudence.*

## **NZME/FAIRFAX:**

### **DID THE COMMERCE COMMISSION KNOCK THE STUFFING OUT OF THE PUBLIC BENEFIT TEST?**

AN HERTOGEN

*This paper assesses the Commerce Commission's Final Determination in which it declined to authorise the proposed merger between NZME and Fairfax New Zealand Ltd, New Zealand's two main media companies. Authorisation is the second step in the merger approval procedure that is available to mergers that result in a benefit to the public, despite being ineligible for clearance due to a lessening of competition. In this particular case, the Commission's analysis showed that the merger would result in net quantified efficiency gains. Nonetheless, authorisation was declined on the ground that the merger would reduce external media plurality, which in turn would negatively affect government accountability. Therefore, the Commission argued, the merger would not result in a public benefit so as to justify authorisation. While the Commission admitted that the impact on media plurality is different from the factors that it usually takes into account under the public benefit test as set out in its own Authorisation Guidelines, it argued that it has the power under the Commerce Act 1986 to look at all the negative consequences of a merger, including consequences that are unrelated to competition and occur outside the relevant markets identified. In this paper, I reject the Commission's arguments for such an expanded public benefit test. I take a closer look at the statutory framework and the relevant case law to show that these do not unambiguously support the Commission's arguments for an expanded public benefit test. Moreover, the case law has never expressly addressed a situation where the non-competitive out-of-market negative consequences came into play. I argue that, had the courts been presented with a case that raised such consequences, policy considerations would have pointed against an expanded public benefit test.*

### **THE RISE AND FALL (?) OF TWO CHARITIES COMMISSIONS: HOW COMMON LAW COUNTRIES CAN LEARN FROM THE EXPERIENCES IN NEW ZEALAND AND AUSTRALIA**

FIONA MARTIN, SUSAN BARKER, MARINA NEHME AND ELEN SEYMOUR

*The New Zealand charitable sector argued for many years that it was important to establish a Charities Commission to oversee and regulate the charities sector. The rationale was that charities involved in fraud, tax avoidance and the like could be "weeded out", and the public could have trust and confidence in those that remained. In 2005, New Zealand established a Charities Commission. In 2012, Australia also established a similar commission, the Australian Charities and Not-for-profits Commission (ACNC). The reform agenda was encapsulated into three main objectives: "to maintain trust and confidence in the NFP sector", "protect against the misuse of charitable monies", and to better describe "the front line delivery of services and benefits" to the community. Both commissions were empowered to encourage accountability and transparency of charities, enable their registration, and make registration and deregistration decisions. However, in 2012 the New Zealand Commission was disestablished and replaced by a Charities Board. At the same time the ACNC was also coming under political scrutiny. There was a change in the political party holding government in September 2013. The new government had a political agenda of "reducing red tape", which it considered would be partially satisfied through abolition of the ACNC. Legislation to this effect was presented to the Federal Parliament in March 2014; however, it was defeated in Parliament's Upper House. This paper argues that State regulation is essential to the credibility and transparency of charities, and to ensuring that the government subsidies that they receive are appropriately accounted for. It also demonstrates that the NFP sector and the public are generally supportive of regulation as long as it is handled appropriately. However, the paper also highlights that establishing a regulator is a highly politicised process, and that other common law countries can learn from this experience.*

### **THE PROBLEM OF "ADVERSE SELECTION" IN THE (PROPOSED) REGULATION OF FINANCIAL ADVICE IN NEW ZEALAND**

MATTEO SOLINAS

*This paper considers the changes to the current regime for the regulation of financial advice in New Zealand proposed in the Financial Services Legislation Amendment Bill 2017 (291-1). It examines critically the regulatory strategies that have been deployed and how the new rules may help consumers to overcome asymmetric information and limitations in their own decision-making capacity. Special emphasis is placed on the main conduct of business obligations that address the perceived imbalance in the relationship between financial advisers and their clients, and in particular on the measures designed to deal with remuneration-based risks.*