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COMPOUNDING THE ABUSE: FAMILY VIOLENCE, DAMAGES AND THE TENANCY TRIBUNAL

Bridgette Toy-Cronin

In cases where family violence has caused damage to a rented home, a tenant-victim is often found to be liable for that damage. This article considers the interpretation of the Residential Tenancies Act 1986 (RTA) that leads to that result and proposes an alternative interpretation for the family violence context that would achieve fairer outcomes without the need for legislative change. The drafting of the RTA allows space for an interpretation that both takes into account the context of family violence and the policy attempts to prevent family violence. Such a reading acknowledges that not everyone has the physical and social power to control who comes into their home and what they do once admitted. Interpreting the RTA to recognise the realities of family violence would ensure that tenancy law and practice supports the strategy of keeping victims of family violence safe.

THREE STRIKES AND THE INTERPRETATIVE OBLIGATION: PARLIAMENTARY INTENTION AND THE ASCRIPTION OF MEANING UNDER THE NEW ZEALAND BILL OF RIGHTS ACT

David Bullock

Section 6 of the New Zealand Bill of Rights Act 1990 requires a court to prefer a rights-consistent meaning wherever one can be given to an enactment that disproportionately limits the rights and freedoms it affirms. The prevailing approach of the New Zealand courts has treated the interpretative obligations as being constrained by the text and purpose of the impugned provision – a court is limited to meanings that can be ascertained from the text of the impugned statute and Parliament's intention in passing it. This article argues that s 6 of the Bill of Rights Act requires the courts to ascribe a rights-consistent meaning to the impugned statutory provision – even if that meaning contradicts parliamentary intention or legislative text – unless to do so would contradict an express and unambiguous legislative countermand, or would entirely defeat the policy objective of the impugned provision. The article develops an autochthonous "ascriptive approach" to s 6 of the Bill of Rights Act, supported by constitutional principle, its text and the judicial methodology adopted in leading decisions. Two recent decisions of the Court of Appeal concerning the application of the so-called "three-strikes" sentencing regime – Fitzgerald v R *and* Barnes v R – *are used as a point of departure and conclusion to illustrate the wrong turn taken by the courts and the promise of the ascriptive approach.*

TECHNIQUES OF NEUTRALISATION IN PRACTICE AND PRACTISE: HOW LAWYERS RATIONALISE MISCONDUCT

Lisa Marriott and Jessica C Lai

Social actors use techniques of neutralisation to "neutralise" their wrongdoings. By employing certain linguistic or rhetorical techniques, one can align one's behaviour with one's conceptualisation of self. The exact techniques used and their effectiveness depend on the socialisation of the actor and of the receiver. In this article we look at how lawyers in New Zealand invoke such techniques of neutralisation when they are brought before the Lawyers and Conveyancers Disciplinary Tribunal (the Disciplinary Tribunal) for serious misconduct. We find that these lawyers use multiple techniques (often simultaneously), including claiming that their conduct did not result in loss to their clients, there was no dishonesty, or they suffered from physical and/or mental health issues. These are consistent with studies of techniques of neutralisation used by white-collar criminals. We conclude that the Disciplinary Tribunal should be aware of the main techniques employed and that they are invoked to alleviate guilt and shame, and that law firms should be made aware of the circumstances that engender misconduct.

CHRISTIAN V R AND *JONES V R*: HOW BAD CONSENT LAW CREATES BAD EVIDENCE LAW IN NEW ZEALAND SEXUAL OFFENCE TRIALS

Scott Optican

This article discusses the impact of the decision of the New Zealand Supreme Court in Christian v R *[2017] NZSC 145, [2018] 1 NZLR 315 on the decision of the New Zealand Court of Appeal in* Jones v R *[2018] NZCA 288.* Christian *is critiqued as a deeply problematic application of s 128A of the Crimes Act 1961 that permitted the notion of "relationship expectations" to ground a rape defendant's claim of consent or reasonable belief in a complainant's consent. Basing its judgment on* Christian*,* Jones *is likewise critiqued for allowing evidence of such "relationship expectations" to be admitted in a sexual offence trial under the Evidence Act 2006. The article discusses the state of current New Zealand criminal and evidence law that led to the results in* Christian *and* Jones*, explaining the retrograde nature of each decision as regards progressive legal approaches to the issues of consent and sexual history evidence in sexual offence proceedings. Stemming from recommendations of the New Zealand Law Commission, current legislative proposals and academic scholarship – and in order to avoid decisions like* Christian *and* Jones *in future – the article concludes with various suggestions for reforming the law of consent (or reasonable belief in consent) to sexual activity in New Zealand as well as the "rape shield" provision set out in s 44 of the Evidence Act.*

AGONY, EXCLUSION AND COLONIAL REPRODUCTION: A CRITICAL EXAMINATION OF THE DOCTRINE OF DIFFERENCE IN AOTEAROA NEW ZEALAND

George Fitzgerald and Stephen Young

This article examines how contemporary legal discourse perpetuates and reproduces colonial structures and some less risky alternatives. It does so through an inquiry into how First Peoples enter into legal relationships with the Crown. In this inquiry, we combine the doctrine of discovery, a well-known concept in the literature of Indigenous peoples and law, with the "dynamic of difference", a concept stemming from 'Third World Approaches to International Law', to generate what we call the "doctrine of difference". The doctrine of difference aids in orienting legal discourse within broader conceptualisations of power to better understand the risks that arise when First Peoples enter into legal relationships with the Crown. One way of entering into legal relationships is to use rights-based legal discourse. Through the doctrine of difference, we argue that this requires rights claimants to construct themselves as subjects of a pre-existing legal discourse, which reproduces the universalising and naturalising dynamics associated with colonialism. In contrast, First Peoples may enter into a legal relationship through an agonistic deliberative process that re-centres and invests in place-based legalities, languages and forms of life. Such agonistic deliberative alternatives may partially avoid some of the universalising and naturalising effects (re)produced by rights-based legal discourse.

FINGERPRINT EVIDENCE IN NEW ZEALAND'S COURTS: THE LIMITS OF LEGAL "CHALLENGE"

Gary Edmond

This article documents the variety of challenges made to latent fingerprint evidence in New Zealand's courts. It explains how legal procedures and trial safeguards failed to expose an acute absence of fundamental scientific research and empirically-based standards, or recognise that equating a fingerprint match with categorical identification of an individual constituted overstatement. At no stage did a prosecutor, defence counsel or judicial officer require scientific evidence of validity or reliability before latent fingerprint evidence was admitted and relied upon as complete proof of identity. The article portrays a century of legal practice largely detached from scientific research, including critical scientific perspectives emerging at the start of the 21st century. It demonstrates how trial procedures and safeguards have not contributed to endogenous legal understandings of the forensic sciences or encouraged legal engagement with mainstream scientific perspectives. Continuing confidence in legal institutions, personnel, procedures and safeguards is considered.

127 HOBSON STREET LTD V HONEY BEES PRESCHOOL LTD: THE PENALTIES DOCTRINE, SIGNALLING AND THE BALANCING OF LEGITIMATE INTERESTS

N A Tiverios

In 127 Hobson Street Ltd v Honey Bees Preschool Ltd *[2020] NZSC 53, the Supreme Court of New Zealand became the latest final appellate court to endorse the legitimate function approach to determine whether or not an agreed contractual remedy is a penalty. In doing so, the Court drew heavily on what it saw as the "persuasive" recent developments in England and Australia. This article draws on the English and Australian experiences in order to provide a brief commentary on the merits and limitations of the Supreme Court's decision. In a conclusion that will be unsatisfying to contract law purists, this article argues that it is possible that the modern law of penalties ultimately has settled on a messy, but welcome, compromise. That compromise being that contracting parties are granted increasingly wide powers to agree remedies, albeit in circumstances where some of the key benefits of having a penalties doctrine are retained.*

CONTRACT LAW: THE SCOPE OF PART PERFORMANCE

Francis Dawson

This article examines the scope of the doctrine of part performance. It asks whether the doctrine is to be explained as a separate and technical head of equity which requires, in order to maintain consistency with the policy behind the Statute of Frauds, that the acts of part performance relied upon by a plaintiff evidence the existence of a contract for the sale of land. Must the acts relied upon be acts in the performance of the contract which unequivocally refer to some such agreement as that alleged? Or should the doctrine rather be viewed as precluding a defendant acting unconscientiously by sheltering behind the Statute of Frauds after having induced the plaintiff to carry out the acts of part performance relied upon by the plaintiff?

This article has been prompted by the reasoning to be found in a recent High Court of Australia decision endorsing the first approach, which views the doctrine as a separate and technical head of equity and rejecting much of the reasoning in an earlier House of Lords decision, which had rejected that approach as being inconsistent with the underlying nature of the part performance doctrine.

THE DUE DILIGENCE DUTIES IN THE HEALTH AND SAFETY AT WORK ACT 2015

Nadia Dabee

The aim of this article is to provide some clarity on the due diligence duties of officers in the Health and Safety at Work Act 2015 (HASWA). Officers, such as company directors, are seen as most able to take action to improve workplace health and safety, thus Parliament imposed criminal liability on these duty-holders to improve workplace health and safety (WHS). Indeed, there is empirical evidence to suggest that organisations in which officers are committed to WHS are more likely to have better WHS outcomes. To date, there have been no prosecutions against officers in New Zealand. Since the HASWA is based on the Australian Model Work Health and Safety Act 2011, this article draws on Australian jurisprudence and on some of the available empirical evidence on improving WHS to suggest how the due diligence duties might be interpreted in New Zealand.