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THEY WERE JUST SEVENTEEN, BUT THE WAY THEY VOTED WAS WAY BEYOND COMPARE: OPERATING A THREE-DECADE-OLD BILL OF RIGHTS IN NEW ZEALAND

James Allan

In this article, the author considers the extent to which New Zealand's statutory bill of rights has swelled the input of the judiciary beyond anything mooted by Geoffrey Palmer back when this instrument was being shepherded through Parliament. There is a recap of the author's two-decade old arguments that used the "Clark Kent to Superman" metaphor and then an extended consideration of the recent Make It 16 case. Here the author focuses on the quality of the majority judges' reasoning (spoiler alert: it is not good), together with some peripheral commentary relating this case and a few other matters to that earlier "Clark Kent to Superman" metaphor.

AGAINST VULNERABILITY

Allan Beever

It is now widely accepted that one issue to be examined when determining the existence of duty of care in the law of negligence is the vulnerability of the plaintiff. Naturally, this is supported by the idea that vulnerable plaintiffs deserve more protection than the less vulnerable. Thus, the doctrine is perceived to have the effect of protecting vulnerable people. This article argues that this is an illusion. Rather than expanding liability to protect the vulnerable, the vulnerability doctrine is more often used as a justification for contracting liability. Moreover, in cases where the vulnerability doctrine supports liability, that liability would exist even without the doctrine. The article further argues that in a well-functioning legal system, the vulnerability doctrine could play no role, as the vulnerable would already be properly protected.

THE INTERACTION OF PUBLIC AND PRIVATE LAW

James Farmer

An impressionistic observation about the work of Judges in the Courts is that their primary task is to interpret and apply legislation enacted by those elected to Parliament and that Judge-made law through the common law is of decreasing relevance and importance. This article acknowledges the superiority of Parliamentary sovereignty as established by the Bill or Rights Act 1689 but points to the continued influence of common law principles and values, most prominently the assumption by the Courts of a judicial review jurisdiction by which the exercise of (principally) statutory powers could be kept within the bounds of legality, fairness and reasonableness. Private law remedies, notably from the law of tort, have also in recent times been applied to hold statutory bodies whose acts and omissions cause damage to private property to account. The resulting mix of public law and private law values benefits both areas of law though not without some controversy.

ADMINISTRATIVE LAW RETROSPECTIVE

Philip A Joseph

Developments since the Second World War have transformed the law of judicial review. The judicial method last century was avowedly formalist, organised under the doctrine of ultra vires, the concepts of justiciability and jurisdictional error, and a panoply of binary dichotomies. The courts sought to inject intellectual rigor into an area of the law thought to be "backward" and in need of nurturing. These developments unnecessarily complicated judicial review and deflected it from its threshold objectives: exacting public accountability, protecting individual rights and upholding the rule of law. Judicial review method in the New Zealand courts mirrored that in the English courts, until the Cooke Court (1986–1996) explored more imaginative responses to judicial review. Legal education exhibited the same unquestioning acceptance of English developments, with the law schools using standard English administrative law texts. The paucity of local legal resources that marked my early career is offset today by a rich reservoir of legal literature. Today, the law schools can report that the courts have moved away from legal formalism and fixed principles of legality, in favour of a more evaluative approach to judicial review.

MĀORI REJECTIONS OF THE STATE'S CRIMINAL JURISDICTION OVER MĀORI IN AOTEAROA NEW ZEALAND'S COURTS

Fleur Te Aho and Julia Tolmie

A significant and little-known protest is happening in Aotearoa New Zealand's criminal court. For years, on an almost daily basis, Māori defendants have been rejecting the state's exercise of criminal jurisdiction over them – claims that have been repeatedly rejected by the courts. In this article, we examine the extent and nature of this jurisdictional protest in the criminal court and offer some initial reflections on the implications of the protest and the court's response to date. We suggest that this protest is notable both for its scale and, at times, sophistication but that the court's response has been simplistic – dismissing without truly addressing the defendants' arguments. In our view, the courts cannot authentically address such claims without first acknowledging that their jurisdiction – and the state's authority to govern Māori – is founded on an illegitimate and unilateral assumption of power.

REFLECTIONS ON CONSUMER LAW OVER THE PAST 60 YEARS

Kate Tokeley

This article reflects on the changes and challenges in consumer law over the past 60 years. At the beginning of this period there was a paucity of consumer protection law. It was a time when the market was viewed as the best mechanism for maximising consumer welfare and the consumer was regarded as a sovereign player in possession of dollar votes. The article canvases the evolution of consumer law from this time to the present. The journey is one from free-market neoclassical theories (which advocate for very limited consumer protection laws), to the recognition of growing asymmetries of information and disparities in bargaining power (which provide rationales for misinformation rules, statutory quality guarantees and unfair terms prohibitions), to findings in behavioural economics (that justify more paternalistic consumer protection laws), to the challenges of regulating to solve modern day consumer concerns around technology (eg, privacy/data issues, excessive manipulative marketing practices and dark patterns) and the environment (eg, green-washing, the right to repair and fast fashion).

THE PLACE OF TIKANGA

Valmaine Toki

Tikanga Māori is the first law of Aotearoa New Zealand. Recognition of tikanga, however, portrays a problematic path, a path not tied to its validity but a path impacted by the changing historical landscape. Te Tiriti guaranteed tikanga; however, this was used as a tool to alienate tikanga through policies and legislation. Today, the decisions of our courts offer an approach where tikanga can be relevant through the window of the common law. These are large and significant strides. This paper reflects on the journey of tikanga within our legal landscape and asks whether, despite the recent acknowledgment from our courts, more should be sought, and whether tikanga should indeed be its own source rather than seek its validity through the common law.

REIMAGINING THE COMPANY IN AOTEAROA NEW ZEALAND

Susan Watson, Lynn Buckley, Billie Lythberg, Jamie Newth, Carla Houkamau and Christine Woods

The Companies Act 1993 provides a process for incorporation of companies and then regulates those companies. 2023 marks thirty years since the inception of our current Act, meaning it has been in place for only half of the life of this journal. Aotearoa New Zealand had general incorporation prior to the current Act. The Companies Act 1993 is significant because we ceased to mirror English legislation; the prior Companies Act 1955 was almost a replica of the Companies Act 1948 (UK). But how independent are we really of our common law legislative forebears? The departures from the English common law may go only as far as drawing features from the North American statutes also based on the common law, even though these departures relate to an earlier version of corporations' law in place before the American Revolution. But is corporate law wholly derived from England and the United States wholly right for New Zealand?

This article evaluates the New Zealand company and the application of the Companies Act 1993, asking whether both are fit for purpose in 21st-century Aotearoa New Zealand, a land of small and medium enterprises with a bicultural base and evident desire for more sustainable approaches to enterprise. Questions considered are whether our one-size-fits-all Act, with a key feature extreme ease of incorporation, best serves the needs and aspirations of our peoples and our piece of the planet. And, as a reimagining, what possibilities might be realised with the existing form?