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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

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ALLEGRA CRAWFORD, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
allegra.crawford@vuw.ac.nz

LAURA LINCOLN, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
laura.lincoln@vuw.ac.nz

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington - Faculty of Law, Adjunct Senior Research Fellow, Monash University, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
john.prebble@vuw.ac.nz

Announcements

Collected Papers by the Right Honourable Sir Geoffrey Palmer QC

Part XI Tort Law

The Palmer Series collects the papers of the Right Honourable Sir Geoffrey Palmer QC, Distinguished Fellow of the Victoria University of Wellington Law Faculty. The Palmer series is sponsored by an anonymous donor whom the Faculty gratefully acknowledges.

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"The Iowa Spring Gun Case: A Study in American Gothic"

56 Iowa Law Review 121, 1971
Victoria University of Wellington Legal Research Paper Series Palmer Paper no. 45

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

A striking analogy can be made between the "American Gothic" painting and the recently decided Iowa case of Katko v Briney. In that case the Supreme Court of Iowa affirmed a verdict for both compensatory and punitive damages in respect of an injury inflicted on the plaintiff by the defendants, who set a spring gun to protect their uninhabited house. The trial jury was instructed that reasonable force could be used in the protection of property, but that in no circumstance would it be permissible to use such force as would take human life or inflict great bodily injury. The trial court felt that such force as the defendants used would be justified only when a trespasser was committing a felony of violence or a felony punishable by death or endangering human life. American law has had a history of consistent difficulties with

spring guns set to protect buildings, especially when applied to situations involving injury to persons engaging in criminal activity. This article briefly examines some of the issues involved in the common law's treatment of spring guns, and suggests possible resolutions of the conflicting interests involved.

The paper discusses the place of punitive damages in tort law, and considers whether punitive damages have been abolished by stealth in English common law. In the case Rookes v Barnard punitive damages were held appropriate in only three situations: 1) for oppressive, arbitrary or unconstitutional acts by government servants; 2) where the defendant's conduct has been calculated by him to make a profit exceeding the probable compensatory damages payable; and 3) where expressly authorised by statute. This decision has not been welcomed in some Commonwealth countries outside England. The primary justifications for awarding punitive damages, punishment and deterrence, are however also the object of the primary criticism of awarding them. Those opposing punitive damages argue that punishment and deterrence are not among the proper objectives of tort law. The idea that tort law should supply punishment for antisocial behaviour to deter similar future behaviour has historical support. The trend in the law of torts in this century, however, has been toward fulfilling a compensatory function. It has been suggested that the defect of "windfall" damages could be cured by making punitive damages a kind of civil fine payable to the government. This would however likely discourage plaintiffs from filing suit in those situations wherein punitive damages are thought to be most useful – cases in which the plaintiff's actual loss is small but the defendant's conduct is particularly offensive.

The crucial issue which developed in Briney was a determination of the proper limits of the privilege for defence of property, a defence to intentional tort actions which resembles the privilege of self-defence. The privilege for defence of property is designed to allow property owners to protect their possessions in situations in which aid from the law is not available by the use of force which otherwise would constitute a criminal act. The author considers how the spring gun problem has been treated in Commonwealth countries and concludes that the appropriate way to deal with such a problem is by legislation, which would best promote civilised values if it prohibited spring guns altogether.

"Inspired Tinkering versus Holistic Social Engineering: Jeffrey O'Connell and the American Tort System"
25 Drake Law Review 893, 1976
Victoria University of Wellington Legal Research Paper Series Palmer Paper no. 46

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

This paper serves as a review of Jeffrey O'Connell's "Ending Insult to Injury", which proposes an elective system of no-fault insurance for products and services. All potential tortfeasors are permitted to insure against their liability. The system of insurance will offer certain incentives to the insured to substitute elective no-fault liability for common law tort liability. This would eliminate payment for pain and suffering, collateral sources, and the expense of determining fault and the value of pain and suffering. Another important advantage argued by O'Connell is the reduction of the stigma of liability, particularly important to professionals such as medical practitioners.

There are two problems with O'Connell's method: 1) is his initial premise that it is not financially or politically feasible to simply abolish the tort system correct and 2) if it is correct, will not the nature of his proposals influence the system which is likely to eventually replace the tort system? That it is not financially feasible to abolish the tort system is a presumption for which no hard evidence exists. The cost of abolishing the tort system in New Zealand has not proved to be exorbitant. There is more substance in the second point, namely, that it is not politically feasible to abolish the tort system. It cannot be denied that the political obstacles to reform of the tort system in the United States remain substantial. O'Connell's proposal for a system of elective no-fault liability is certainly more compatible with American views of private market alternatives and options. But from a social welfare perspective, the idea of options seems peculiar.

The central ambivalence in O'Connell's approach flows from the point that he wants to make change, but not so great a change that he stirs up opposition likely to prevent his change from being put into effect. Although tinkering may be the only thing which is practical in the US, O'Connell now owes his public a duty to outline what he sees as the ultimate pattern of personal injury law in the United States. In short, the time has come for O'Connell to stop tinkering and turn into a holistic social engineer.

"Privacy and the Law"
New Zealand Law Journal, 1975
Victoria University of Wellington Legal Research Paper Series Palmer Paper no. 47

SIR GEOFFREY PALMER QC, Victoria University of Wellington - Faculty of Law
Email: geoffrey.palmer@vuw.ac.nz

This paper was originally presented as a public lecture delivered to a Victoria University of Wellington Symposium on Computers, Records and Privacy. The increased amount of planning in our sort of society requires limitless quantities of data of all types and from many sources to be collected, to be instantly accessible to be used by the State for many different purposes. It is feared that police and other investigators will follow people around, snoop on them, tap their telephones, and employ electronic listening devices to monitor their conversations and compile secret dossiers. The natural reaction to such widespread invasions of privacy is to frame a law to protect privacy. There are indications that we in New Zealand would like to pass a privacy law or laws.

Privacy as a legal issue arrived in New Zealand by osmosis. Our present concern stems more from the avalanche of publication overseas than from any systematic and principled examination of our own condition. Many of the issues in privacy law involve questions of size and scale met with only in the "mass society". New Zealand observance of the privacy value will flow from our way of life not our laws. Privacy as a concept is unmanageable and to a large extent

unintelligible. As an ordering principle in the law privacy embraces so much that our law would have to be fundamentally restructured to accommodate it. To isolate one value like privacy and discuss it separately from other competing aims and values is fundamentally unsound, because all legislative and judicial decisions represent a balance between competing values and objectives.

The paper considers the different definitions of privacy and discusses the American tort of privacy including several important cases. No such principle of civil liability has developed in our law although many of the matters covered by the American tort are protected by other remedies. From the American experience with the tort of privacy a number of conclusions can be reached. The tort or torts have been unsatisfactory. The operation of the law has been unpredictable, the complications with freedom of expression have raised constitutional difficulties, and it cannot be said that the protection offered in the US is substantially better than New Zealand law. For these reasons we should avoid developing an independent common law tort of privacy although the Courts should be encouraged to be bold in their extension of existing heads of liability which could be expanded to protect a privacy value.

The paper then turns to an enumeration of areas where the privacy value may not have been taken into account sufficiently. It considers that there are three possible legislative approaches toward privacy. The first entails passing a general law encompassing all aspects of privacy for breach of which there would be criminal or civil sanctions or both. The second involves a wide-ranging implementation of privacy protection but at the same time keeps the matter within manageable bounds by restricting the law's application to defined areas. The third approach, and the only one which the author supports, requires separate examination of privacy issues in particular areas with legislative measures designed to deal with specific problems rather than grant general rights.

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About this eJournal

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the **Law School** has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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Directors

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: **rgilson@leland.stanford.edu**

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