Announcements

Victoria University of Wellington and the Social Science Research Network announced the Victoria University of Wellington Legal Research Paper Series on 27 July 2011. Welcome to all our readers. This is the first issue of the series.

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"The Legitimacy and Purpose of Intellectual Property Chapters in FTAs"

Victoria University of Wellington Legal Research Paper No. 1

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This chapter discusses the role and function of intellectual property chapters in Free Trade Agreements (FTAs). In the intellectual property context, FTAs are primarily used to increase the obligations of parties. Multilateral negotiations at the TRIPS Council, of the World Trade Organization (WTO), are largely stalled and so proponents both for and against any increases in intellectual property protection use alternative forums to pursue their interests. One such forum, used mostly by those seeking to increase levels of intellectual property protection, is FTAs. The other key WTO agreements, the GATT and GATS, provide most-favoured nation (MFN) exceptions for FTAs. This means that the provisions of the FTA only apply to the FTA parties and not to other WTO members. The TRIPS Agreement has no equivalent MFN exception. This chapter discusses how the absence of an MFN exception for intellectual property chapters in FTAs only serves to increase protection; protection cannot be decreased. Against this background the chapter analyses the legitimacy of this one-way effect, in light of the object and purpose of the TRIPS Agreement. The chapter discusses the impact of TRIPS-plus on small, developed countries with market economies. Although of different sizes, both New Zealand and Australia may fit this description when compared with, for example, the United States and the European Union. This chapter suggests that continuous wave of TRIPS-plus in FTAs is not sustainable or desirable in the long term. The final part discusses some alternative approaches to the use of FTAs to negotiate new intellectual property norms.

"Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges"

Victoria University of Wellington Law Review, Forthcoming
Victoria University of Wellington Legal Research Paper No. 2

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Fifteen years after the Law Commission’s rejection of pre-trial recording of cross-examination, it is back on the reform agenda. Drawing from research examining comparative pre-trial and trial practices in cases of sexual offending, this article discusses the backdrop to the debate surrounding pre-recording, including the provisions of the Evidence Act 2006 and
the approach of the courts to alternative ways of giving evidence. The benefits and drawbacks of pre-trial recording of evidence for adult witnesses are canvassed – including practical, evidential and psychological issues – leading to the conclusion that rather than a presumption in favour of any particular alternative way of giving evidence, close consideration of the individual circumstances of each case is required.

"Remoteness Re-Invented?"

Victoria University of Wellington Legal Research Paper No. 3

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This article discusses the fundamental questions concerning the application and conceptual basis of remoteness of damage in the law of contract that are raised by the decision of the House of Lords in The Achilleas [2009] 1 AC 61. It commences with a review of the academic literature that had a significant influence on their Lordships’ judgments in that case. While acknowledging the obvious theoretical difference between the two main schools of thought - one treating the remoteness rule as agreement-centred (with the task of the court being to identify an implicit allocation of risk) and the other treating it as a gap-filling device or default rule - the article questions whether the distinction has practical consequences. After a close analysis of each of the judgments in The Achilleas, which reveals, contrary to the view expressed in a recent English High Court case, a majority in favour of an agreement-centred approach, the article discusses, inter alia, the factors that ought to be weighed in determining whether a loss is too remote and the correctness of their Lordships’ unanimous decision to overturn the award of damages for lost profits that had been made by the, also unanimous, lower courts.

"The Sky Didn’t Fall In’: An Emerging Consensus on the Shape of New Zealand Labour Law?"

Victoria University of Wellington Legal Research Paper No. 4

GORDON JOHN ANDERSON, Victoria University of Wellington - Faculty of Law
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When the Labour government introduced the Employment Relations Act 2000 it was met with a hostile and vociferous campaign of opposition from both the opposition National party and employer lobby groups. A decade later that opposition has largely faded away as it became clear that the labour market changes achieved under the Employment Contracts Act remained intact and as the ground of labour relations changed within that new environment. A year after its election in late 2008 the National government has yet to introduce significant amendments to the Employment Relations Act and looks unlikely to do so. This article asks whether a broad consensus has emerged on the shape of labour law and examines the reasons why such a consensus seems plausible. In doing so it reviews developments under Labour and considers the direction that National might take during its term of office.

"The Problem with Suing Sovereigns: Sloman v. Governor and Government of New Zealand (1876)"

Victoria University of Wellington Legal Research Paper No. 5

GEOFF MCLAY, New Zealand Law Foundation, Victoria University of Wellington - Law Faculty
In Sloman v. The Governor and Government of New Zealand the plaintiff attempted to sue the New Zealand Government for failing to make good on emigration contracts concluded in Europe. This article analyses the decision in Sloman, that the New Zealand government could not be sued in English courts, both within its own historical context and with respect to 19th century concerns over the general inability of the Crown to be sued. The article points to archival documents which show that the New Zealand Government itself was concerned, in the wake of the earlier loss of the Cospatrick, as to its own ability to recover the passage monies it had paid, and whether that recovery might be prevented by a lack of legal personality in the English Courts. The article concludes that while Sloman is an important case in its own right, there is also a need for greater investigation of both the practical and theoretical legal difficulties that faced the New Zealand Government in its development and immigration projects of the 1870s.

"Essay - Tolerating Confusion About Confusion: Trademark Policies and Fair Use"


TRADEMARK LAW AND THEORY, Graeme B. Dinwoodie and Mark Janis, eds., Elgar Press, 2007

Arizona Legal Studies Discussion Paper No. 07-18

Victoria University of Wellington Legal Research Paper No. 6

GRAEME W. AUSTIN, Victoria University of Wellington

In this essay, Professor Austin urges courts to be more critical of the role played by the "ordinarily prudent consumer" in trademark law. Trademark infringement law's "straightforward story," which typically justifies trademark rights in terms of protecting consumers from the harms of likely confusion and dilution, does not adequately capture the need for countervailing principles and policies to contribute to the shape of trademark doctrine. The essay argues that recognizing the incapacity of the likelihood of confusion and dilution analyzes to capture the empirical reality of the consumer experience should lead to a greater preparedness to weigh countervailing policies and principles more heavily in the scale.

Trademark "fair use" doctrine provides a useful context in which to explore these ideas. The Supreme Court's approach to fair use in KP Permanent Make-Up, Inc. v. Lasting Impressions I, Inc. risks valorizing consumer confusion in a context in which it should be downplayed. Moreover, the Court's holding risks constraining the analytical space available in trademark law for expression and development of policy concerns other than those that underlie trademark's straightforward story.

Solicitation of Abstracts

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 Massachusetts 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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