

SOCIAL NORMS AND LAW REFORM

THE IMPORTANCE OF A CREDIBLE STORY FOR THE ONGOING LEGITIMACY OF A LEGAL SYSTEM



Gay Morgan

Te Piringa – Faculty of Law

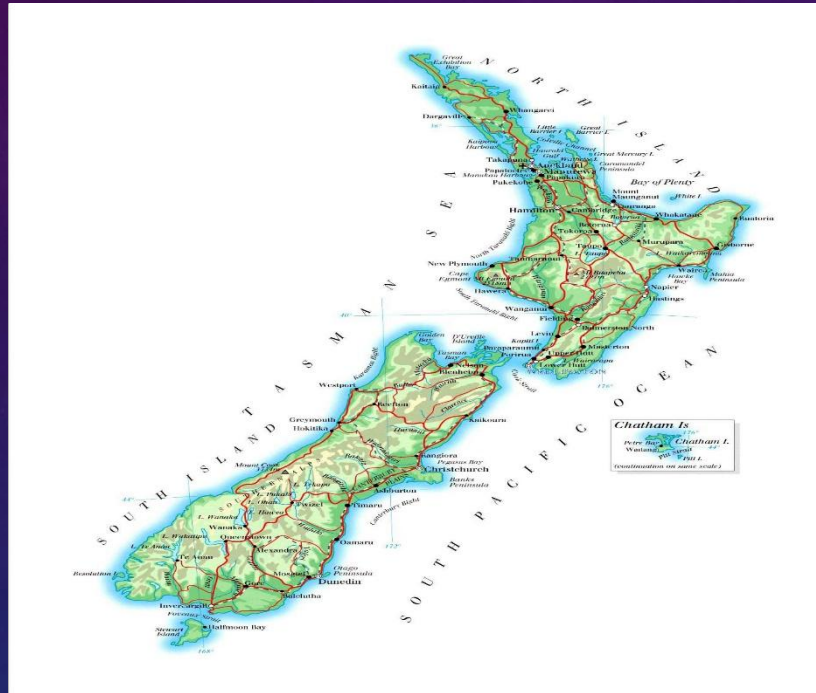


THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

INCREMENTAL INCOHERENCE IN CONDUCT REGULATION

- **QUERY:**
- **WHEN A LEGAL SYSTEM DEVELOPS CONDUCT REGULATION WHERE SIMPLY BEING AN ORDINARILY FALLIBLE HUMAN AND MORAL LUCK RATHER THAN ANY SPECIFIC 'CRIMINAL' MENS REA IS THE DETERMINING FACTOR FOR CRIMINALITY – WHAT IMPACT DOES THAT HAVE ON:**
- **A) ANY DETERRENCE FACTOR DERIVED FROM UNDERSTANDING CRIMINALITY AS BOTH BLAMEWORTHY AND AVOIDABLE, AND**
- **B) ON ANY PERCEIVED MORAL AUTHORITY OF LAW (i.e. LEGITIMACY)?**
 - **HOW DOES THAT IMPACT A SOCIETY'S SHARED HEIDEGGARIAN BACKGROUND OF IMPLICIT OR INCOHATE KNOWING/KNOWLEDGE OF THE DIFFERENCE BETWEEN 'GOOD' (usually LAWFUL) v 'BAD' (usually CRIMINAL) CONDUCT?**
 - **IF WE ARE ALL COMMITTING CONDUCT IN SOME CONTEXTS THAT, BUT FOR MORAL LUCK, IS CRIMINAL: HOW DOES THAT AFFECT ATTITUDES TOWARDS 'CLASSICAL' (REQUIRING MENS REA) CRIMINALITY?**
 - **IF THE SAME (OR WORSE) CONDUCT IS EXCUSED (NOT CRIMINALISED) IN OTHER CONTEXTS, DOES THAT UNDO ANY REMAINING LEGITIMACY/MORAL AUTHORITY OF THE SUM TOTAL OF A SYSTEM'S CONDUCT RULES?**

CRIMINALISING ORDINARY HUMAN FALLIBILITY – JURISPRUDENTIALLY & HISTORICALLY INCOHERENT



NEW ZEALND CASE STUDY



DIFFERENTIATING CRIMINAL v CIVIL WRONGDOING

- Roman Law: **Ill Intent required for crime (Dolus Malus)**, minors & insane exempt.
- Dark Ages & Medieval Europe: Animals, Objects, People could be held accountable in criminal law for injury to others regardless of intent, horses hung, objects destroyed if they'd caused harm. (**Ineffective re deterrence (you can't deter a cart or a horse w/this system), economically destructive**)
- 1300s Common Law: **TRESSPASS/CASE** – recognised difference between civil wrongs (**ordinary fallibility or pure accident**) & crime (**mens rea**) qua crime. For 'Tresspass' the penalty: fine, imprisonment only if fine unpaid. (Tresspass focused on the action itself as injury, Case on the quality of an act causing indirect injury, which evolved into Negligence based Tort) (**Civil Tort Actions: Deterrence of harmful conduct w/out destroying productive assets or applying criminal penalties to ordinary human fallibility**)
- 1600s Common Law: People act at their own risk in Tort, re responsibility for financial compensation for injury their acts inflict on others. Courts look to causation, not intent as 'the Devil himself knoweth not the thought of men' (// strict liability – financial damages to injured regardless of intent of actor)
- 1800s Common Law: **Morality of act matters in Tort – falling below the required duty of care needed to impose responsibility for damages or the formal emergence of 'Negligence'** (strict liability the exception)

ACCIDENT COMPENSATION ACT 1972: NEW ZEALAND'S TORT REFORM OF PERSONAL INJURY LAW

- The Act created the Accident Compensation Corporation (ACC) which came into being in 1974 as a State based universal Insurance Agency to cover all personal injury. The Act also barred Tort claims for personal injury. The reform was enacted in response to the Woodhouse report that had been commissioned to examine options for compensation for work related injuries. The report went quite a bit beyond that brief to consider all personal injury compensation. The Act was then passed partially in pursuit of fairness, as not everyone had the means to pursue personal injury claims in Court, leaving them uncompensated & the Public Health System on the hook. ACC is funded via ACC levies on legal activities that may result in harm to others.
- **ACC system – Requires alternatives to tort damages as a deterrent of careless conduct which may or does cause personal injury**



NEW ZEALAND: A NATION OF CROOKS

ONE EXAMPLE: (DRIVING AS A LICENSED ACTIVITY)

LAND TRANSPORT ACT 1998: SECTIONS 8, 37 & 38

8: DRIVERS NOT TO BE CARELESS OR INCONSIDERATE

37: VIOLATION = FINE + POSSIBLE DISQUALIFICATION (// TO A CIVIL PENALTY)

38: VIOLATION CAUSING DEATH OR INJURY = IMPRISONMENT OR FINE + MANDATORY DISQUALIFICATION

IMPRISONMENT = CRIMINAL PENALTY, NOT A CIVIL PENALTY

IN NZ CRIMINALITY = MORAL LUCK, AS AVERAGE HUMAN CANNOT AVOID OCCASIONAL CARELESSNESS
(NOTE: AN AVERAGE PERSON CAN AVOID GROSS NEGLIGENCE OR RECKLESSNESS – THE ISSUE HERE IS CRIMINALISING ORDINARY HUMAN FALLIBILITY AKA CARELESSNESS)



BUT: IN OTHER CONTEXTS NONCRIMINAL
DETERRENTS TO CARELESSNESS/NEGLIGENCE & EVEN
ARGUABLE RECKLESSNESS CAUSING INJURY HAVE
BEEN DEVELOPED



A Counter Example: (PRACTISING MEDICINE AS A LICENSED ACTIVITY)

- **Medical Misadventure Causing Injury** - Health & Disability Commissioner Act 1994 created as deterrent in response to impact of ACC bar on Negligence Claims, the Unfortunate Experiment & Cartwright inquiry. (Some gaps enabled D Suit in Trespass re invasion of the person RE experiment w/out consent)
- **Potential CONSEQUENCES For CAUSING INJURY— Apology, DAmages & Remedial Action Plan To Avoid Future Injuries.**
- Health Practitioners Disciplinary Tribunal (Health Practitioners Competence Assurance Act 2003)- **registration/licensing consequences**

- **SUMMARY:**
- **DETERRENCE of CONDUCT THAT MAY LEAD TO INJURY DUE TO HUMAN FALLIBILITY SHOULD BE A CIVIL MATTER**
- **ORDINARY HUMAN FALLIBILITY SHOULD NOT BE CRIMINALISED, CRIMINALITY MUST BE RESERVED FOR CONDUCT WE CAN HUMANLY AVOID.**
- **RECKLESSNESS IS NOT ORDINARY HUMAN FALLIBILITY, OCCASSIONAL CARELESSNESS IS**
- **WHETHER ONE'S CONDUCT IS WORTHY OF IMPRISONMENT SHOULDN'T DEPEND ON MORAL LUCK – EITHER ALL CARELESS DRIVING IS WORTHY OF IMPRISONMENT OR NONE IS SO WORTHY.**
- **PENALTIES FOR THE SAME LEVEL OF BLAMEWORTHY CONDUCT CAUSING HARM SHOULD BE CONSISTENT**

QUESTIONS:

- A) **WHAT ARE THE SYSTEMATIC CONSEQUENCES vis a vis FALLIBILITY AS CRIMINALITY –EITHER ON DETERRENCE OR OTHERWISE?**
- B) **HOW DOES THIS AFFECT OUR 'HEIDEGGERIAN BACKGROUND' OF TACIT, INARTICULABLE KNOWLEDGE OF RIGHT/WRONG, CRIME/NOT CRIME?**
- C) **WHAT ARE THE LEGITIMACY CONSEQUENCES OF INCONSISTENCY IN PENALTIES FOR INJURIES RESULTING FROM THE SAME LEVELS OF FAULT?**
- D) **HOW DO THESE AFFECT THE MORAL AUTHORITY OR CREDIBILITY OF THE ESSENTIAL STORY OF NZ'S LEGAL SYSTEM?**

IN OTHER WORDS:

- **WE TINKER WITH TINKERBELL
AT OUR OWN PERIL....**