Critique of Justice Hardie Boys' paper

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It is with considerable trepidation that I embark on the task of critiquing Justice Hardie Boys' paper. My comments and indeed my capacity to comment stem from my position as a pragmatic legal practitioner, rather than from the standpoint of a theorist or academic. With this in mind I look at his paper from the point of view of a customer or client of the Court of Appeal. From that perspective I suggest there are three main points to which should be explored.

1 The issue of certainty for clients. Each individual who requires advice in relation to property issues wishes that advice to be as certain as it can be. That certainty disappears where there are major issues of judicial discretion, no legislation or common law doctrines.

2 The issues which presently permeate into the Court of Appeal and which Justice Hardie Boys has succinctly identified. In that respect I note there is a trend towards fewer cases ending up in the Court of Appeal, and these are only those which are discussed.

3 The position of children in relation to property matters is the third angle which needs to be considered.

As I have already said it is a challenge to explore judicial thinking, an exploration which is usually undertaken in the absence of judicial thinkers. Practitioners do not often get such an opportunity and hopefully my attempt will lead to constructive questions being raised rather than the mere voicing of criticism.

Justice Hardie Boys was well known during his days in private practice as being a forward thinker, and a thoughtful and considerate lawyer alert to family issues, and issues arising for both children and parents on and after separation. That reputation was preserved in his days on the High Court bench in Christchurch and it is obvious from his paper, despite the present paucity of property work in the Court of Appeal, that his approach has not changed. This Judge is still throwing out challenges to practitioners and indeed some curve balls. His thorough and astute analysis of the Court of Appeal processes and decisions has led me to identify several issues worthy of further comment.

Most clients wish to have property disputes resolved without acrimony, and certainly without spending too much money on lawyers to assist them. It is in that regard that I believe certainty in property issues is of great benefit to clients. Indeed, that was Parliament's intention when passing the Matrimonial Property Act in 1976. One of the difficulties of being in private practice is the essential uncertainty which prevails in a number of areas of property law. Moreover advice is required generally at a

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time of a breakdown of a partnership or relationship, or when advice is required for taxation or estate planning reasons. Recently the latter has been extended to include advice to protect future claims by potential creditors.

Justice Hardie Boys brings home the first of those difficulties early in his paper when he concedes that even in the Court of Appeal the application of the Matrimonial Property Act 1976 is achieved by a process of trial and error. His example of the reversal in thinking in the Court of Appeal from *Brown* v *Brown*[1] to *Dahya* v *Dahya*[2] is indeed interesting and intriguing. Unfortunately more particularly so for me, as I was one of the advisors for Mr Dahya and had been relying upon the Court of Appeal decision in *Brown* to support the advice we were giving.

Among the present issues which may or may not trouble the Court of Appeal again in the future are many of those previously dealt with by that Court.

A present standout is still section 20 and if, as Justice Hardie Boys comments, the Judges find it difficult, then please spare a thought for practitioners, and a few more, even for our clients. That section demands a degree of sensible and practical tinkering by Parliament.

The ground of extraordinary circumstances which justifies a departure from the principle of equal sharing under section 14 is frequently raised by clients, even those who seek to establish it on financial considerations alone. It appears however that the law on this point is settled and indeed the Court of Appeal continues to affirm/apply the consistent approach it has adopted over the past 15 years.

Should we be using section 18(3) more? If so how will it be applied in the Court of Appeal? Issues which concern overseas property, especially those which relate to moveables are becoming instrumental in terms of the way in which practice is moving. Cases like *Gilmore* [3] which fortunately for the client, but unfortunately for practitioners never went to trial demonstrate the willingness of the Australian jurisdiction to deal with New Zealand real property situated in New Zealand. It also, to me, disclosed the natural desire and perhaps yearning on the part of the Australian Court to have those particular proceedings processed rather more quickly than is standard in Sydney. Perhaps that is a sign of things to come where there are conflicting jurisdictions, each of which wishes to do its best for its own citizen.

There is still the pivotal question relating to finance. Are we still too mesmerised by the financial success of one partner? Can that now be countered by spousal maintenance which appears to be making a return despite its limitations? Can in fact this area be extended to cover the points raised by Justice Hardie Boys in relation in section 15?

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1 [1984] 1 NZLR 374.
2 [1991] 2 NZLR 150.
3 [1993] NZFLR 561.

What about the lively topic of de facto property? How can we possibly advise clients in relation to this area of the law? Will Parliament eventually intervene or will it not? If so, how? Principles of equity are neither tangible nor very easy to explain to clients. Right now practitioners are eagerly awaiting the decision in the *Lankow case*.[4] If I may be tempted to switch hats briefly and examine this case from the point of view of a sports lawyer: is it one that we can take a bet on, or perhaps a sweep? Perhaps we can infer from Justice Hardie Boys' paper that there is to be some further development in this area contained in this decision. Certainly it would be welcomed by practitioners and clients if it were to lead to more certainty. At present it is a lottery. Litigate and take your chances.

It is my belief that there are still major issues to be determined in relation to property agreements made under section 21 of the Matrimonial Property Act. There appears to be a relaxation in the certainty of those agreements being upheld by the court. Rather the likelihood that they will sustain the test of time in the scrutiny of the courts seems to be lessening. This has implications in terms of both responsibility and liability for those giving and drafting agreements. Perhaps indeed it would be more appropriate to have all property agreements resolved by orders in the court.

The rights of children surface under the Matrimonial Property Act. Those rights and claims on property may be expanded in my view. That opinion stems from Justice Hardie Boys' comments about spousal rights to future income. Perhaps children might have similar rights? This is a matter which warrants close attention and scrutiny especially in light of the United Nations Convention on the Rights of the Child which amongst other things affirms the child's right to housing and support. Maybe along with de facto property and Maori property which was briefly touched upon by Justice Hardie Boys this issue demands further examination.

In conclusion, I note that Justice Hardie Boys points to the fact that there have been fewer property cases in the Court of Appeal in recent years. Perhaps that is attributable to the increasing certainty of the law at least under the Matrimonial Property Act, the increasing speciality of the Family Court (and the ability of its judges to get it right), and the increasing difficulty and cost of litigation and therefore access to the law. It would be interesting, for example, to analyse how many women appellants there are in cases heard by the Court of Appeal.

Certainly Justice Hardie Boys has challenged us, and I suspect the law makers, to confront matrimonial and de facto property issues from the perspective of fairness, gender equity and the law.

Is therefore the Matrimonial Property Act socially acceptable yet? I think probably not. All of us in this field can think of examples which stem from concepts of male pride or the adage that man's home is his castle where equity is not yet socially understood, let alone accepted. There has been a successful narrowing of the gap but it is my that belief we still have some ground to make.

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4 See now *Lankow* v *Rose* [1995] NZFLR 1.

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