IN THE SUPREME COURT OF NEW ZEALAND SC 64/2012

BETWEEN	**Philip Dean Taueki**	Appellant
AND	**The Queen**	Respondent

APPELLANT'S CASE ON APPEAL

(Hearing: 11 March 2013)

Procedural History

1. The Appellant was originally charged with assaults and tried in the summary jurisdiction[1]. He relied on ss56 and 58 Crimes Act 1961 and was convicted by the District Court Judge, but on appeal the convictions were quashed[2]. The retrial occurred in the indictable jurisdiction of the District Court (Judge alone)[3]. The same defences were raised. On appeal the convictions were affirmed by the Court of Appeal[4]. This Court[5] granted the Appellant leave to appeal (in relation to Charge 1 only: common assault, contrary to s196 Crimes Act 1961) and on the following approved Ground of Appeal: "Whether Mr. Taueki had a defence under s56 Crimes Act 1961 to that first charge?"

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[1] Police v Taueki : DC Levin, Judge Ross
[2] Taueki v Police HC Palmerston North, CRI-2009-454-38, 25 June 2010, Mallon J
[3] Judge LH Atkins QC
[4] Taueki v R [2012] NZCA 428, [2012] 3 NZLR 601 (CA) (Arnold, Ellen France and Fogarty JJ)
[5] SC 64/2012, 14 November 2012, McGrath, William Young and Glazebrook JJ

Brief Overview of the Facts

2. The Appellant technically assaulted the complainant. This occurred on the Māori-owned dewatered area adjacent to Lake Horowhenua. The lake and the surrounding land is Māori freehold land owned in fee simple estate. Title was granted as "Horowhenua 11" in 1893[6]. As the Māori freehold land encircles Lake Horowhenua, the lake cannot be accessed without crossing the Māori freehold land. The assault, was a defence of the land, against trespass by the complainant.

3. On 14 September 2008, the complainant, a member of the Horowhenua Sailing Club was intending to access over the dewatered area to the lake, with an unwashed powerboat that had a 40 horsepower engine, to be used on the lake. The Appellant, a beneficial owner of the freehold land over which the complainant intended to pass, admonished the complainant that to use that boat and with that size engine would be to break the Bylaws made by the Domain Board that administered the land. There were no proper washdown facilities for the boat, so the runoff impermissibly entered the Lake. The Bylaw required boats be properly washed down in advance – to prevent eutrophication of the Lake. The Appellant contended that the intended action being unlawful as prohibited by the Bylaws, or as in any event,

[6] The only land leased by the Crown is from 30 June 1961, an area of 32 perches in perpetual lease. It is a small portion of the lake bed and simply not relevant or engaged in this appeal in any way, contrary to the view of the Courts below. The prosecution, never adduced any surveying or cadastral evidence at the trial.

unreasonable conduct, would make the complainant's access over the land of which he was a beneficial owner, a trespass. Upon the insistence of the complainant of his right to cross, reinforced by the complainant's adult son calling the Appellant "a Māori bastard", the Appellant took the defensive and reasonable action of taking the complainant "by the shoulders" to prevent the threatened trespass to land. That limited action, which it is accepted amounts to a technical assault, was justified by the Appellant's rights in relation to the land, by s56 Crimes Act 1961.

Section 56(1) Crimes Act 1961

4. Section 56 Crimes Act 1961 provides:

> "56 Defence of land or building
> (1) Every one in peaceable possession of any land or building, and every one lawfully assisting him or acting by his authority, is justified in using reasonable force to prevent any person from trespassing on the land or building or to remove him therefrom, if he does not strike or do bodily harm to that person."[7]

5. In the judgment below[8] it was correctly stated that s56 had a long pedigree; although the judgment omits that it was first introduced

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[7] Section 56(2) Crimes Act 1961 was repealed on 1 January 1981, by s2(2) Crimes Amendment Act 1980. Sections 52(2), 53(2), 54(2), 56(2), 57(2) and 57(3) were all repealed. Very oddly and inconsistently s58(2) was not repealed. In Gorrie v Police HC Timaru AP 3/02, 31 October 2002, William Young J correctly observed of s58(2) that it remains only as a result of legislative oversight and is "bereft of effect".

[8] [2012] 3 NZLR 601 at §41

into NZ law as s65 Criminal Code Act 1893[9]. At §42 the judgment details the failed attempt by the Crimes Bill 1989 to have removed the defence and to have replaced it with a provision significantly more restricted, to avail only a person in "lawful occupation or possession" of the relevant land. The failure to enact the amendment was attributable to the principled insistence of the Crimes Consultative Committee[10], under the Chairmanship of Sir Maurice Casey, that retaining "peaceable possession", although "virtually impossible" to define, was much preferable to diminishing the protection afforded by the defence.

6. The concept of defence of property, justifying the use of force which would or may otherwise be unlawful, is central to ss52 – 58 Crimes Act 1961. The force is justified – these are justificatory rather than excusatory defences – to prevent or resist what is threatened or is actually being done.

7. Sections 52, 53, 54, 55, 56 and 91[11] Crimes Act 1961 all use the phrase "peaceable possession"; whereas sections 57 and 58 use the

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[9] "Every one who is in peaceable possession of any house or land or other real property, and every one lawfully assisting him or acting by his authority, is justified in using force to prevent any person from trespassing on such property or to remove him therefrom, if he does not strike or do bodily harm to such person; and if such person resists such attempt to prevent his entry or to remove him, he shall be deemed to commit an assault without justification or provocation."

[10] "Crimes Bill 1989: Report of the Crimes Consultative Committee" (Wellington 1991) p 21

[11] Note s91 Crimes Act 1961 is specifically referred to in s28(4)(b), s137(1)(a), s240(6)(a) Property Law Act 2007. The offence of forcible entry created by s91, is authoritatively considered in Prideaux v Director of Public Prosecutions (1987) 163 CLR 483; R v D (J) (2002) 171 CCC (3d) 188 (Ont: CA)

expression "peaceably entering". The statutes in: Canada[12], Queensland[13], Western Australia[14], Tasmania[15], and the Northern Territory[16] provide broadly similar defences.

8. Once an evidential basis for the s56 defence is raised then the defence will succeed, unless the prosecution disproves beyond reasonable doubt, the absence of one or more of the four cumulative elements of the defence. : R v Haddon[17]; Dharam Singh v Police[18]. In R v Gunning[19] it was also accepted that where there was an evidential basis for the defence, [the Canadian equivalent of s56], that it was for the prosecution to then disprove the defence beyond reasonable doubt.

9. The four elements of the defence are:

   (i) the defendant must have been in possession of the land and
   (ii) the possession must have been peaceable and
   (iii) the victim of the assault must have been a trespasser and

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[12] See: R v Born with a Tooth (1992) 76 CCC (3d) 169 (Alb: CA)
[13] See: R v Byrne and Poid [2006] QCA 241, 23 June 2006 (McMurdo P, Williams JA, Fryberg J)
[14] See: Etherton v Western Australia (2005) 153 A Crim R 64 (WA: CA) (Steytler, P, Roberts-Smith and McClure JJA)
[15] See: Turner v Maher, unreported, SC Tas. No. 102/1989, 6 April 1990, Underwood J
[16] See: R v Van Bao Nguyen (2002) 130 A Crim R 447 (NT: SC) Angel J
[17] [2007] NZAR 135 (CA) at [46] per Gendall J (William Young P and Hugh Williams J concurring)
[18] [2003] NZAR 596 (HC) Hugh Williams J
[19] [2005] 1 SCR 627 at [25] Charron J (8 other Judges concurring)

(iv) the force used to eject the trespasser must have been reasonable and must not have included striking or causing bodily harm to the victim.

10. In R v Born with a Tooth[20] the Alberta Court of Appeal correctly accepted that the common law defence of mistake[21] is available for any or all of the first three elements of the equivalent of s56 (e.g. a mistaken belief in facts which, if true, would render the complainant a trespasser). The same conclusion was correctly reached in R v Haddon[22] ("...the circumstances as seen by ... the ... occupier.")[23]

11. For the purposes of s56 whether a person is in possession of the land will be a matter of fact, taking into account all the circumstances in each case. Possession for the purposes of s56, is not a dogma but requires a contextualised multi-factorial, fact-sensitive and context-specific evaluation. The ownership of Lake Horowhenua and the land that encircles it is the subject of very special statutory recognition. In the present case, the trial Judge and Court of Appeal each overlooked and therefore gave no weight to the special legal relationship of Muaupoko to this land – and in particular to this Muaupoko land that was recognised by Parliament as "declared to be and to have always been owned by the Māori

[20] (1992) 76 CCC (3d) 169, 177f (Alb: CA); followed in R v George (2000) 145 CCC (3d) 405 §38 (Ont: CA)
[21] Available too under s20 Crimes Act 1961
[22] [2007] NZAR 135 (CA) at §40
[23] However, only possession and not occupation is required by s56.

owners" : s18(2) Reserves and Other Lands Disposal Act 1956 ("ROLD").

Section 18 Reserves and Other Lands Disposal Act 1956

12. The Courts below erred in overlooking the crucial significance of ROLD[24] and therefore in applying to this land a technical and ungenerous conception of "possession", that not only subordinated but eliminated the fundamental connection of the beneficial owners to their land. After all *tangata whenua* means "people of the land". ROLD recognises and reaffirms ancestral rights in and of the land in Muaupoko in a deeply-etched way, beyond the consequences that can be achieved by declaratory legislation.

13. In relation to the particular Lake and the land in this case, recognised by Parliament as always having been owned by Muaupoko, then an autochthonous approach to the concept of "possession" in relation to that Lake and land by a person of Muaupoko is mandated. *A fortiori*, in the context of the criminal law, such an approach is required to understand the justification to defend the Lake and the land from an actual or apprehended trespass.

14. This appeal against a conviction for common assault, occurred on land encircling Lake Horowhenua, that s18(2) ROLD

[24] The Court of Appeal abruptly deals with ROLD in only §6 of its judgment. Section 18(2) ROLD is never mentioned in the judgment at all.

unequivocally states is "declared to be and to have always been owned by the Māori owners". The beneficial owners of the land are, as set out in the Preamble to s18, the Muaupoko Tribe, of which the Appellant is, as is common ground, a member. Indeed the Appellant's name appears on the title as a specific beneficial owner[25]. By s18(2) ROLD the land is "hereby vested in the trustees appointed by Order of the Māori Land Court dated 8 August 1951 in trust for the said Māori owners". In short, the legal title to the Lake and the land is vested in the trustees but the beneficial title is vested in Muaupoko. By s18(13) ROLD the "bed of the lake, the islands therein, the dewatered area and the strip of land 1 chain wide around the original margin of the lake", as well as other land detailed therein, is beneficially owned by Muaupoko.

15. By s9 Horowhenua Block Act 1896, piscatory rights to the Lake and Hokio stream that flows out of the Lake were granted to Muaupoko. Section 18(6) ROLD preserves and maintains those rights. Under the 1896 Act, the Māori Appellate Court on 12 September 1898 made an Order determining the owners and relative shares to the Lake and the surrounding land: see the Preamble to s18 ROLD. The Preamble to s18 identifies the considerable legislative history and the fact that drainage operations (around 1926) had lowered the level of the lake creating a

[25] Note at the trial, CA 241, Counsel for the Crown argued that the rights of the Appellant were merely the same as those of the public. The Judge asked: "... your argument is that those people who are listed as owners, the only significance it has is names on a piece of paper?" Counsel replied "Yes...the public and the owners have the same sorts of rights."

dewatered area. Uncertainty as to the ownership of that area and other issues culminated in the passage of s18 ROLD.

16. Section 18(5) ROLD provides that:

> "the Māori owners shall at all times and from time to time have the free and unrestricted use of the lake and the land fourthly described in subsection (13) ... but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under this section, to use as a public domain the lake and the said land fourthly described."

17. Section 18(7) requires the Minister of Conservation to appoint a Domain Board. Its composition is set out in s18(8). But the Domain Board has no control over the Māori owners, who have "free and unrestricted use" of the lake and the land. The Domain Board may however, determine the reasonable rights of the ordinary public. The reasonable rights of the public (not the Māori owners) are prescribed by the Bylaws promulgated by the Domain Board. The Domain Board had promulgated Bylaws in 1996 (transgression against which is punishable as a criminal offence) under the terms of s18 ROLD and the Reserves Act 1977 (the successor legislation to the Reserves and Domains Act 1953, referred to in ROLD).

18. The Bylaws prohibited any member of the public to take any (unwashed) motorboat on to the lake, i.e. such a boat could not be

taken across the Māori land and onto the Lake. To do so would have been, in any event, unreasonable.

19. While s18(4) ROLD generally reserves "to the public at all times and from time to time the free right of access over and the use and enjoyment of the land fourthly described in subsection (13)", that right of access over etc. the land, was itself specifically conditioned by the restriction created in s18(5,) that the public access over the land had to be the exercise of "reasonable rights of the public, as may be determined by the Domain Board ..." i.e. in accordance with the Bylaws.

20. It followed that to cross this tract of Māori freehold land, a member of the public had to conform with the conditions of entry prescribed by the Domain Board in the Bylaws. Failure by the complainant to act lawfully by his deliberate breach of the Bylaws or to otherwise act unreasonably could not amount to conduct which was the exercise of a reasonable right of access and his conditional access was thereupon denied and trespassory.

21. In Regional Fisheries v Tukapua[26], Cooke J said of Lake Horowhenua and in relation to s18 ROLD Act 1956, that

> "Those strong words "at all times" and "free and unrestricted" first appeared in the 1905 Act [Horowhenua Lake Act 1905] ... They are rights reserved to the Māori owners because of

[26] SC Palmerston North, M33/75, 13 June 1975, RB Cooke J

> the special history of this area. They may be unique." (emphasis added)

22. This was repeated with approval in Regional Officer v Williams[27], O'Regan J, (also dealing with the Lake and its stream), who added as to s18(2) ROLD:

> "The declaration that such was always owned by them, so it seems to me, is statutory recognition that such ownership preceded the advent of the pakeha and the introduction of his artifices for making of laws and creating and recording property rights." (original emphasis)

23. As those last few phrases state, to "create" any notion of "possession" (a "property right" in Muaupoko) that denied any substantive content of that right to the beneficial owners of the land, beyond that of the public (or non-Muaupoko), is an error of law under ROLD. It would also violate the promise and spirit of the Treaty of Waitangi (discussed below).

Possession

24. To properly approach "possession" in s56 Crimes Act, for the purposes of this case, requires first an analysis of s18 ROLD. Possession is a matter of fact, to be decided in all the circumstances: R v Haddon[28]. In the present case, what has been

[27] SC Palmerston North, 12 December 1978, Barry O'Regan J at p 8
[28] [2007] NZAR 135 (CA) at §40

repeatedly recognised as a "unique"[29] [30] legislative response, namely s18 ROLD, must be a major determinative factor in the proper consideration of what amounts to "possession" of that Māori freehold land, for the purposes of s56(1) Crimes Act 1961.

25. The Appellant[31] is of Muaupoko, the beneficial owners of the land, and has a long-held, assumed and unrebutted role as *kaitiaki* or guardian and protector of the Lake and its surrounding Māori land. The Appellant has been, with the sanction of the legal owners, the sole residential occupant on the land, since 2004. He has exercised stewardship over the Lake and its environs, as warden[32]. In relation to "possession" of special Māori land acknowledged by statute, a narrow and austere approach would be contrary to principle. Possession of such Māori land always has been integral to the fulfillment of the hopes and aspirations of Māori. For the Appellant to protect the Lake has been his destiny since his direct lineal ancestor Taueki, the Paramount Chief of the Muaupoko, signed the Treaty of Waitangi nearby to the Lake on 26 May 1840.

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[29] Regional Fisheries v Tukapua SC Palmerston North, M33/75, 13 June 1975, Cooke J

[30] Regional Officer v Williams SC Palmerston North, 12 December 1978, O'Regan J

[31] A university graduate with a Bachelor of Commerce and Administration degree: BCA (VUW)

[32] See generally CA 138-153 where the Chairman of the legal trustees accepts that the Appellant's "job description", an "oral agreement", was "governance of the lake" and "co-ordination of various tasks required for us to comply or well, for the yacht club and indeed ourselves to comply with bylaws and the various laws that we were operating under."

26. To constitute "possession" for the purposes of s56, a Court should not be hide-bound by a technical, arcane and doctrinal approach as espoused in Chancery, but should see possession, in this case, as a living and dynamic Māori-centric concept, responsive to and attuned with the promise in Art 2 of the Treaty of Waitangi, of the grant of "full, exclusive and undisturbed possession"[33] of the estate in land to Māori. If that provision is to have a meaningful and transcending value for Māori it must apply to historic Muaupoko land, beneficially owned by Muaupoko, and recognised uniquely by statute as always owned by Muaupoko.

27. Section 56 and the construction of "possession" of land in it, can and should accommodate the ethos of the Treaty of Waitangi where there are rival contentions as to the approach to its meaning. In particular the Lake and the relevant land has been gazetted as a public reserve since 1981 under the Reserves Act 1977. The Director-General of Conservation is the Crown representative for all public reserves and by s4 Conservation Act 1987 "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi"[34]. Section 18 ROLD should plainly also be interpreted to give affirmative and reconciling meaning to Art 2 Treaty of Waitangi, where possible.

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[33] See Art 2 set out in Ngai Tahu Māori Trust Board v Director-General of Conservation [1995] 3 NZLR 553, 558 L 49-51 (CA)

[34] Ngai Tahu Māori Trust Board v Director-General of Conservation [1995] 3 NZLR 534, 535 (CA)

28. The legal owners of the land and Lake – the trustees – hold the land in trust for the Appellant and the other beneficial owners. That statutory arrangement recognises that the Lake and land is held for the "free and unrestricted use" (s18(5) ROLD) of the Muaupoko Tribe (s18 Premable).

29. It would be a sterilization of the rights of beneficial ownership to conclude that they amounted to little more than the ordinary rights of the public. There must be a practical recognition in law of the beneficial ownership by the Appellant and other members of Muaupoko[35]. An obvious incident of ownership is possession, a concept that defines "the nature and status of a particular relationship of control by a person over land"[36]. While the legal owners possess the land, the beneficial owners may also do so, and the Appellant certainly did.

30. Even a trespasser can be in peaceable possession of land – in the sense of adverse possession. Commit the tort of trespass to land continuously long enough, without the owner asserting his title and

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[35] See the Preamble to the Te Ture Whenua Act 1993 in relation to the special status of Māori land: "Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu:"

[36] Mabo v Queensland (No. 2) (1992) 175 CLR 1, 212 per Toohey J

the tort transmutes into legitimacy and displaces the actual pre-existing ownership.

31. A person who is in possession of land adverse to the true owner's position has a legal interest in the land, even before the limitation period has expired: Perry v Clissold[37] Lord Macnaghten said:

> "It cannot be disputed that a person in possession of land in the assumed character of the owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

32. This identifies the true possessory issue here: the relationship at the time between the legal and beneficial owners – and not as the Judge and Court of Appeal considered, with the Domain Board, Sailing Club or Crown.

33. The trust as legal owners have never alienated or leased to the Crown or any party, the land upon which the incident occurred. Peaceable possession here is the relationship between the legal owner of the land (the trust) and the beneficial owners (Muaupoko).

34. Conduct which indicates the taking of possession of land varies with the nature and type of land concerned. The conduct of warning people off land has been characterised as an act going to

[37] [1907] AC 73, 79 (PC) (7 other Judges concurring)

establish possession of the land: Shaw v Garbutt[38], reviewing the concept of "peaceable possession" in various jurisdictions. Possession need not be : lawful[39] or exclusive[40] or even long-term[41]. It is founded on the exercise of apparent control.

35. The relevant land here is the subject of special, indeed "unique" rights in terms of Māori land. The *mana*, cultural and historical significance of that continuous, unbroken ownership and possession by Muaupoko extending from before pre-European times, would be diminished forever by a conclusion that the Appellant had no possessory right to the land of which he is a beneficial owner.

Possession

36. In Haddon at §45 "possession" was correctly held to be a question of fact – an overall evaluation of all the relevant circumstances. "Possession" exists where a person is in a position to control access to land by others, and, in general, decide how the land will be used. It is a capacity to deal with the land. It need not involve

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[38] (1996) 7 BPR 14 (NSW: SC) per Young J

[39] e.g. as in an adverse possession. But, very relevantly for a beneficial owner of the land: "The strength in law of a claim to a *right* of possession, for example, will often be determinative": R v Born with a Tooth at 178f (original emphasis)

[40] R v Born with a Tooth at 177h

[41] R v Byrne and Poid [2006] QCA 241, 23 June 2006, it was held by McMurdo P at §21 (Williams JA concurring at §39, Fryberg J concurring at §§45 – 47) that there was "...the real possibility that Byrne, as a temporary resident in Poid's home, was a person in peaceable possession of Poid's dwelling" within s267 Criminal Code (Qld). (Emphasis added)

occupation of the land. A person can be in possession of land without being in occupation of it. It is therefore an inherently behavioural phenomenon which incorporates a particular mindset. Possession can be reinforced by a demonstrated state of mind (or *animus*) which encapsulates the possessor's own perception of the strength and defensibility of his rights in relation to the land. Accordingly, Oliver Wendell Holmes said that possession "is simply a relation of manifested power coextensive with intent"[42]. The intention relates to the empirical quality of the conduct of control, rather than to its eventual legal effect.

37. The mental state (*animus*) of possession is a matter of inference from conduct, to exercise authority or control over the land. That intention, for the criminal law, is not necessarily incompatible with a mistaken or erroneous assumption as to that entitlement. De facto possession will therefore suffice. It need not be a lawful possession, or exclusive possession. A person is in factual or physical "possession" of land for the purposes of s56 if he deals with the land in question as an occupying legal owner might have been expected to or would be entitled to deal with it. Therefore a beneficial owner of the land, who acts toward land as a legal owner would act, on first principles, relevantly possesses the land. : Ezbeidy v Phalen[43].

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[42] The Common Law (Boston, 1881) p 216
[43] (1958) 11 DLR (2d) 660, 665 (NS:SC)

38. Section 56 is founded on "possession", a right incidental to ownership and it does not require the person to have a lawful "property right" – the latter involving a significantly different issue as to the formal legitimacy of the claimed entitlement. But the Appellant has an indefeasible, statutory, property right – the land is held for his benefit and that of Muaupoko. Legal ownership does not trigger the defence in s56; peaceable possession does.

39. How possession is manifested and the required intensity of control must be determined with particular reference to the nature of the land and all its history, culture and other individualized circumstances.

Peaceably[44]

40. In R (Lewis) v Redcar and Cleveland Borough Council (No. 2)[45] Lord Rodger of Earlsferry JSC considered the meaning of the term "peaceable possession" in civil law from its Roman law origins. "Peaceable" is not synonymous with "peaceful"[46]. The Appellant had no-one seriously contesting his right. As a beneficial owner his rights dwarfed the deliberately attenuated rights of the public. The legal owners factually tolerated or acquiesced in his control role over the land and Lake. The trustees had not threatened

[44] The adverb "peaceably" is used in ss33(1)(c), s33(2)(b), s35(1)(d), s253(4)(b), s255(2)(d), s258(2)(b), s260(2)(a), Schedule 3 Part 2, cl 12(2)(a) of the Property Law Act 2007

[45] [2010] 2 AC 70, 102 B – 103 B

[46] R v Born with a Tooth at 178a

proceedings against the Appellant. The trustees saw him as *kaitiaki*, warden of the Lake and its environs. That suited them.

41. Peaceable possession implies a possession by consent or by actual or constructive knowledge acquiesced in by the legal owner of the land, without serious challenge to it. The approach in Haddon[47] is correct. Peaceable possession means possession "free from disturbance"[48].

Trespass

42. The term "trespassing" in s56(1) is not defined in the Crimes Act 1961 – its essence is an unlawful presence on property owned by another.

43. Compliance with the Bylaws made by the Domain Board, are a condition of lawful public access across the Māori land. Reasonable access mandates compliance with the law and with the rights of the possessor of the land. Intentional, unlawful behaviour cannot be considered reasonable. See s17(2)(a) Reserves Act 1977 which mandates compliance with laws, bylaws and regulations.

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[47] [2007] NZAR 135 (CA). cf the definition in Etherton v Western Australia (2005) 153 A Crim R 64 (WA: CA) at §9 per Steytler P. At §6 Steytler P traced the 1924 Western Australian provisions to the Criminal Code Act 1899 (Qld) and the draft there prepared by Sir Samuel Griffith, which appeared in turn to rely upon similar language from the Criminal Code Indictable Offences Bill 1880 (UK). The marginal note in the Griffith draft refers to ss62 and 63 of the Criminal Code Indictable Offences Bill 1880 [UK].

[48] Concise Oxford Dictionary 8 ed

Failure to comply with the pre-conditions for lawful or reasonable access across is to commit trespass when asked to desist.

44. Section 104 Reserves Act creates offences for breach of bylaws. Bylaw 23 provides itself that a breach of the bylaws is a criminal offence. Access across the land to the Lake is dependent on compliance with all the Bylaws of the Horowhenua Lake Domain Board 1996 and with s18 ROLD. The Bylaws were approved by the Minister on 13 January 1998. Bylaw 19(3)

> "(3) No person shall use or be a passenger in a boat driven by a motor engine on Lake Horowhenua except with the prior written consent of the Board, and only then for such purposes and subject to such conditions as the Board determines and specifies and (sic) such written consent, but except for rescue purposes no consent shall be given by the Board in respect of a boat driven by a motor engine which the Board determines can reasonably described as a speed boat unless the Board has first obtained on each occasion the prior written approval of the Horowhenua Lake Trustees." (emphasis added)

45. No evidence was adduced that the Board or Trustees had, as required, ever given such individualised written approval to the complainant. It has common ground that the Board had been defunct since 2006 so it could not have given any written consent to the complainant. Indeed, the complainant admitted he had never bothered to read the Bylaws.

46. The section is engaged by either a threatened trespass or an actual trespass or a genuine (or honest) even if mistaken belief in facts,

which, if true, would render the complainant a trespasser. A technical trespass suffices: R v Hills[49]; R v Born With a Tooth[50]; R v Haddon[51].

47. The essence of trespass though is a person's unlawful presence on the relevant land. A person may have an initially lawful purpose to be on the property and it may change to become an unlawful one. Consequently, a person may become a trespasser despite his initial lawful authority to be on the property. A person may become a trespasser by exceeding the scope of his invitation or overstaying his welcome by threatening to contravene, or contravening, the terms and conditions of the invitation: R v Keating[52]. A statutory invitee therefore may, by his unreasonable conduct, become a trespasser.

48. Even if the complainant is found not to have been a trespasser, the Judge or jury must go further and consider whether the defendant had genuine grounds (even if mistaken) to believe that the complainant was a trespasser: R v Scopelliti[53]. This was not done in either Court below.

49. As long as 1855, R v Pratt[54], Crompton J stated

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[49] (1999) 16 CRNZ 673 (CA) (Elias CJ, Blanchard and Anderson JJ)
[50] (1992) 76 CCC (3d) 169 §36 (Alb: CA)
[51] [2007] NZAR 135 §40
[52] (1992) 76 CCC (3d) 570 (NS:CA)
[53] (1981) 63 CCC (2d) 481, 501ff (Ont: CA)
[54] (1855) 4 E&B 860, 868-9 (Lord Campbell CJ, Wightman and Erle JJ to the same effect)

> "... I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

50. The complainant had a right of access over the land to the Lake, as long as he acted lawfully and complied with the conditions precedent for that access – being both s18 ROLD and the operative Bylaws. By construction of s18 ROLD the complainant only had permission to cross the Māori freehold land for a specific and lawful purpose. His access to the Lake by crossing the Māori land was limited by the requirement of acting lawfully and reasonably. To act either unlawfully or unreasonably placed him in no better position than a person who attempted to enter without any right at all.

51. On a proper construction of s18 ROLD, for the complainant to attempt to use on the Lake a dirty motorboat (a biosecurity threat) or a motorboat at all (expressly prohibited by the Bylaws and both infractions punishable as a criminal offence upon contravention) and an interference with the Appellant's piscatory rights, was to forfeit the right of lawful access over the private property of the Māori freehold land.

52. As the judgment of Wills J in the criminal case of Taylor v Jackson[55] clearly demonstrates, for a person to be authorised by statute to enter or cross private property for one purpose makes it a trespass by that person if he goes there for another unauthorized purpose. Kennedy J concurring added that a limited permission to enter for a purpose does not prevent the conclusion that a person is a trespasser if he has an unlawful purpose in mind.

53. The complainant's ignorance of the law is no excuse. The complainant accepted in evidence that he did not know of the Bylaws at all. But his ignorance of that law meant when he attempted to transgress it or to act unreasonably he was in fact a trespasser – whether he knew that or not – as trespass to land is a strict liability concept.

54. To the same effect is Gross v Wright[56] where Anglin J (Davies CJ concurring) at 185 states

> "... having obtained a license to enter upon the plaintiff's land only for a defined purpose, his entry for a different purpose was ... clearly a trespass."

55. See further Lord Atkin in Hollen and Pettigrow v ICI (Alkali) Ltd.[57] that an invitee who

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[55] (1898) 78 LT 555; approved by Mason, Brennan, Deane and Dawson JJ in Baker v The Queen (1983) 153 CLR 338. See e.g. Mason J at §16, that it is "entry for an unlawful or unauthorised purpose that constitutes the trespass".

[56] (1923) 2 DLR 171, 185 (SCC)

[57] [1936] AC 65, 69 (HL)

"... sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser." (emphasis added)

56. Where an authority to enter on or over the land of another without his permission is conferred by the general law, whether statutory or otherwise, it will ordinarily be limited to entry for the lawful purpose for which the authority exists. The statutory consent to cross the land, provided by s18 ROLD, is limited by reference to a purpose that was lawful and/or reasonable and complied with the intention of s18 ROLD, the Reserves Act 1977 and the Bylaws made under it.

57. Section 18(5) ROLD make it clear beyond doubt, that the "reasonable rights of the public" existed to "use as a public domain the lake and the said land fourthly described" being that land set out in s18(13) ROLD but those "reasonable rights of the public" were "as may be determined by the Domain Board", itself constituted by s18(5) ROLD are determined. Unlike the "Māori owners" – who have "free and unrestricted use"[58] of the lake and the land, the public have only a conditional use.

[58] As Cooke J noted in Regional Fisheries v Tukapua (supra) "I think the result that best accords with the spirit and words of the 1956 section and with the history is to treat the maxim *generalia specialibus non derogant* as applicable. No doubt this is not the first time a Latin tag has been found convenient to solve a Polynesian problem." This approach is relevant to the meaning of "possession" in s56 in context of s18 ROLD.

Reasonable force: No "strike" or "bodily harm": s56(1) Crimes Act 1961

58. The "reasonable force" in s56(1) that is generally available, has two statutory exclusions. There must not be a "strike" nor may "bodily harm" be done. Neither occurred on the facts of this case. At common law the party in possession of land could justify gently laying his hands[59] on the trespasser and requesting him to leave.

59. To "strike" in context of s56 means to deliver a blow to the body. "Force" in s56, includes the threat of force, consistent with the definition of "assault" in s2 Crimes Act 1961 : R v Hills[60]. The justifiable conduct is to be directed "to prevent ... or to remove" the assumed trespasser, within the intention of s56[61]. However, what does not include a "strike" is: a grabbing of the arms[62] (a s53 case): a resultant minor bruise[63] (a s53 case): a "[p]roportionate pushing and shoving, fending off and obstruction resulting in bodily contact would be permissible"[64] (a s53 case): "a push to the chest with an open hand"[65] (a ss 52 and 56 case): But a "punch" to

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[59] *Molliter manus imposuit.* Discussed in Shaw v Hackshaw [1983] 2 VR 65, 99 (FC)
[60] (1999) 16 CRNZ 673 (CA) §15 (Elias CJ, Blanchard and Anderson JJ)
[61] Etherton v Western Australia (2005) 153 A Crim R 64 (WA: CA) at §124 per Roberts-Smith JA "The use of force to defend connotes a temporal and physical connection between the invasion of the right and what is done to prevent or resist it – including the retaking of property taken by a trespasser."
[62] Manase v Police HC Auckland CRI 2006-404-39, 21 July 2006, Baragwanath J §8
[63] Ruwhiu v Police HC Auckland CRI 2008-404-259, 22 December 2008, Priestley J §18
[64] Hastings v Police HC Whangarei AP 24/01, 19 July 2001, Priestley J, §30
[65] Galvin v Police HC Rotorua M44/85, 22 April 1986, Bisson J p10

the arm is a "strike" to it[66]. The expression "strike" in s56 should not be given an "overly restrictive interpretation"[67]. The authorities on what constitute a "strike" in s56 (and other cognate sections) have been seldom analysed[68].

60. Once there is an evidential basis to engage the defence, the persuasive final burden will be on the prosecution to prove that force used exceeded the bounds of what was reasonable. : R v Hills[69]. The reasonableness of that force used must be assessed in the context of the circumstances as perceived by the person in peaceable possession: R v Haddon[70]. In the present case the Appellant had only taken the complainant "by the shoulders" – that was a technical and justifiable assault, but certainly not a "strike".

Denouement

61. The Sailing Club never had a lease – only a licence. But it had expired in 2003. The Appellant was fully aware that the Sailing Club had since no rights to the land and had written to them in 2006 to that effect. Even the Court of Appeal accepted in its judgment that the Sailing Club's licence and rights had expired. The Appellant was entirely confirmed as to the position by a decision of

[66] Pile v Police HC Timaru AP 56/93, 28 July 1993, Williamson J
[67] Hastings v Police, HC Whangarei, AP 24/01, 19 July 2001, Priestley J at §30
[68] But see the discussion: Cynthia Hawes "Recaption of chattels: the use of force against the person" [2006] 12 Canta Law Rev 253, 264ff
[69] (1999) 16 CRNZ 673 (CA) (Elias CJ, Blanchard and Anderson JJ)
[70] [2007] NZAR 135 (CA) at §40 (William Young P, Hugh Williams and Gendall JJ)

the Māori Land Court[71], subsequent to the judgment in the Court of Appeal. While the relevant point of time for s56 is the date of the assault – the Appellant's belief in the lack of a licence in the Sailing Club at the material time was completely correct.

62. The Judge in the criminal trial at §150 of his decision[72] fundamentally and wrongly concluded that the Appellant

> "... should also have been aware that either the Sailing Club or – more likely – the Board, or – even more likely – the Crown was in possession of the ground on which these events occurred."

63. None of the Club, Board or Crown were ever in possession of the land. The entire focus of the trial has been misdirected. The Club had no current rights, the Crown land was under the Lake and not relevant and the Domain Board only administered the Reserves Act and had no possession at all. None of the Club, Board or Crown had hierarchically superior rights to the Appellant and could not on any view therefore have had a seriously arguable case of lawful contention against the Appellant's right.

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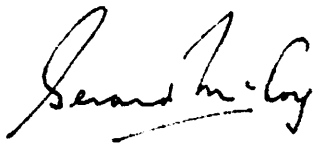
[71] In Taueki v Horowhenua District Council and Department of Conservation (2012) 294 Aotea MB 236, [2012] NZMLC 71, 18 December 2012, Judge Harvey ruled (and the Department of Conservation agreed) (§12) that since the expiry of the Sailing Club licence in 2003 its buildings and fixtures have passed to the legal owners of the underlying land. The rights of the Sailing Club to the land had gone for the last 10 years.

[72] Decision dated 11 May 2011

Disposition sought

1. Appeal allowed.
2. Conviction quashed.

Dated this 25th day of January 2013.



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[73] All counsel are on a complimentary brief and solicitors are on a complimentary retainer.