

JUDGING AND LAW REFORM

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It is a great pleasure to be back at this distinguished university where I consider myself fortunate to have studied in the Faculty of Law in the 1960s under the tutelage of such excellent and learned teachers as Jack Northey, Brian Coote, George Hinde, Doug Whalan, Richard Sutton and Jock Brookfield, the last two of whose recent deaths have caused much sorrow. I am old enough to have been taught by Professor Davis. (A man of such eminence at the time for a very junior student that I still would not dare to use his Christian name). I do not suppose that a lecturer today could follow the Davis example of telling his commercial law class, of whom I was a member, that no one who did not commit to memory the definition of a bill of exchange would pass the final exam and then fulfil that threat by failing a large part of the class who had thought he didn't mean it.

Speaking of marvellous teachers, I want to take this opportunity to pay tribute to the finest teacher I was ever privileged to be taught by. In an obituary in the Harvard Law Bulletin Benjamin Kaplan, who died last August at the age of 99, was described as a towering giant with legendary wisdom and analytic precision. Richard Sutton told me before I left for the United States that I must definitely enrol for Kaplan's class on copyright law even if I did not intend practising in that field, because of the sheer genius of his teaching method. Richard was correct. As US Supreme Court Justice Stephen Breyer said at a memorial service for Kaplan, to listen to him teach was to listen to the Socratic method at its best, used by a first-rate craftsman and articulated by a true gentleman. Kaplan went on from Harvard Law School directly to the Massachusetts Supreme Judicial Court.

¹ Supreme Court of New Zealand. This speech was given at the Auckland Live! Inspiring Minds at the University of Auckland event on 5 March 2011 as part of the University of Auckland 2011 Distinguished Alumni Awards, at which Sir Peter was recognised as a 2011 Distinguished Alumnus.

He once made a very sound observation about this transition:²

Each appellate case presents itself as a puzzle. The challenge is to find the one right solution, and to explain it in a way that satisfies not only the Bar and the specialists but also the general intelligent public. There is not much difference in the end between judging and teaching. The job of the judge, like that of the teacher, is to instruct, to educate.

My day job for the last 18½ years has been judging the cases which have *randomly* come into the courtrooms to which I have been assigned. My moonlighting (and unpaid) job during the earlier and the most recent parts of that time has been as a law reformer associated with the Law Commission. I am going to say something this afternoon about both of these jobs.

They are quite different in fundamental respects when it comes to changing the law. I have emphasised the randomness of cases coming before a judge. Judges cannot be equated with law reformers. They cannot and do not engage in systematic reform of a body of law, as the Law Commission is established to do. At most, a judge in a particular deserving case may think it appropriate to give a little piece of the law a nudge in a different direction – sometimes as much as a vigorous shove. But judges have to be cautious about doing this because they usually do not have in the evidence and arguments before them the background information which a Law Commission is able to gather together on which to base a recommendation for change. That highlights also the other reason for caution. A Law Commission does not actually change the law. It makes a recommendation for change which comes only after further consideration by Parliament. And by that means it can be done comprehensively and with time for second thoughts. In contrast, any change by a judge is (subject to appeal) immediate. And the change may have side effects which the courts cannot control. I give you an instance which will be known to lawyers in the room.

It was well recognised that the Limitation Act 1950, which we copied from the UK, was most unjust in cutting off workers' claims for industrial diseases caused by the negligence of employers, which did not manifest themselves during the six-year limitation period. You lost your claim even though the reason why you did not commence proceedings was because you had no reason to know that you had been

² Cited in "Faculty Tribute: Professor Emeritus Benjamin Kaplan: 1911-2010" (Winter 2011) Harvard Law Bulletin, found at <http://www.law.harvard.edu/news/bulletin/2011/winter/tribute.php>.

injured. These cases of industrial disease were an instance of a wider problem with the Act. Overseas there was legislation to extend the time for claiming until expiry of a period which did not begin to run until the presence of the disease or injury was known or ought to have been known to the plaintiff.

But in New Zealand Parliament did not change the law despite Law Commission recommendations. This was possibly because of the existence of the Accident Compensation scheme. Unfortunately, however, some cases not covered by ACC did come before the courts. Those I recall were not actually workers' claims but they raised the same problem. Eventually the patience of the judges, and their tolerance for the injustice they rightly saw, was exhausted. By a somewhat strained interpretation they declared that under the 1950 Act time could run from the point of reasonable discoverability of injury. So that solved that problem. However, the solution meant that memories would have to be very long and a potential defendant, like an industrial employer, would have to continue with insurance cover for former workers indefinitely because it might be decades before the injury manifested itself. What the law needed was a cut-off date or longstop but the courts had no ability to invent one by a process of statutory interpretation. So in their enthusiasm to correct an injustice the courts had created the potential for another (although rather lesser) injustice.

At least the courts kept reminding the Government of the need for reform and eventually, last year, only about 22 years after the Law Commission's original report, a new Limitation Act was passed which provides both for a late discovery extension and a longstop after 15 years. This illustrates, I suggest, what can happen if Parliament does not respond in a timely way to the need for law reform and if judges get tempted into being law reformers.

Judging

The role of a judge, particularly one who sits alone in a first instance court, can be very demanding. The law, like life in general, has grown ever more complex, witnesses can often be partial and unreliable and a large number of your customers are going to be dissatisfied. But there is considerable satisfaction to be gained from doing your best to solve the problems others bring before you. And the physical conditions in which you work are, for the most part, reasonably comfortable, even when you are away on circuit.

It is a far cry from the days when Abraham Lincoln and other lawyers on horseback used to follow the judge in his buggy around the country circuit in Illinois, sleeping in whatever accommodation they could find in the little towns each night, sometimes as many as 20 in a room and two or three to a bed. I have not heard any reports lately of judges in New Plymouth or Whangarei having to share their beds with the lawyers who are going to appear in front of them next morning.

If this has been happening, I have been spared it because for most of my judicial career I have been an appeal Judge. First in the workhouse court, the Court of Appeal, whose Judges probably work harder than any others in this country (as they do in comparable intermediate courts throughout the common law world), and for the last six-and-a-half years in the calmer atmosphere of the Supreme Court, now housed in a very beautiful building in the centre of Wellington.

The Supreme Court was a subject of much controversy when it was established by an Act of Parliament passed in 2003. Unfortunately, because of the way this happened, by a close simple majority vote, the matter became very politicised, with much public discussion and editorialising. I do not intend to rehearse all the arguments with you. They are well known: appeals to nationalism and local knowledge and to better access to justice on one side, and concerns about the abilities of New Zealand judges and their perceived lack of independence on the other. Well, the Court has been operating now for six-and-a-half years, and with really only one exception it has not attracted a great deal of attention or criticism and most of its decisions pass under the public's radar.

There are of course critics, especially in academia, of individual decisions, but perhaps less so than one might reasonably expect. Overseas supreme courts have it much rougher than we do. I have sometimes been surprised by the lack of attention paid by academic commentators to cases which merited thoughtful comment. I wonder whether this has to do with the way in which academic writing is assessed for funding purposes.

The one exceptional instance of criticism of the Court has been the Bill Wilson affair, on which I do not intend to comment, save to say that the problem arose not in the Supreme Court but in the Court of Appeal, and that I believe that if our final court were still on the other side of the world it is very likely that matters would have played out in much the same way. It is worth noting also that the role of the Supreme Court itself was

relatively limited. It had to decide whether the case should be re-heard in the Court of Appeal but after that, under the legislation governing complaints against Judges, neither the Chief Justice nor the Court itself had power to affect the situation. It would have been quite wrong for any of us to try to intervene. I say no more on that.

Going back to the establishment of the Court by the Supreme Court Act 2003, I must say that the most disappointing aspect of the public debate over whether to have the Court was the failure by any commentator of any persuasion to examine what cases were actually going to the Privy Council and what was happening there. In the bluster of opinion, no one seemed to care much about those facts, although they were surely central to the access to justice argument.

In a very real sense, New Zealand's final court was for practical purposes the Court of Appeal and we simply did not have second-level appeals, which are regarded as of fundamental importance in other jurisdictions. The Court of Appeal was both a volume error-correction court and the court which had to find time to reflect upon and formulate our law in the difficult cases. That it had been able to do so was only because of the hard work of the judges, assisted in divisional courts by High Court judges, and by the leadership of those brilliant jurists Sir Owen Woodhouse, Lord Cooke of Thorndon and Sir Ivor Richardson, to name those who led the Court for lengthy periods in recent decades.

Why do I say that we did not really have second-level appeals? Consider the figures. For each year in the 1990s there were only about six appeals heard in London. In the year 2000 there were six. Then, interestingly, when abolition was mooted the number suddenly doubled: 13 in 2001, 12 in 2002, 11 in 2003 and again in 2004 (being appeals lodged before abolition). These were still very modest numbers of appeals considering that the Court of Appeal was hearing and deciding over 150 civil appeals and about 350 criminal appeals per year.

There was another factor which went unremarked. It was that a significant proportion of the cases that did go to London should never have been permitted a second appeal. They were cases of no interest other than to the parties themselves (in other words, they had no precedent value) or where the proposed appeal was hopelessly optimistic and bound to fail because it was unarguable, as the Privy Council found. Such appeals

could be brought because the Privy Council Rules allowed them as of right where as little as \$5,000 was in issue.

Looking back at the final five years before abolition, and with the experience of the leave to appeal system which operates under the Supreme Court Act, it is clear to me that in that last period of full-time operation of Privy Council appeals as many as 17 out of the total of 53 appeals were in one or other of these categories (some in both). So there were, over the five years, only about 36 cases (roughly seven per year) which would now justify an appeal to the Supreme Court. A high proportion were commercial or tax cases.

In contrast, and even though we started slowly in our first full year (2005), we have decided 154 cases selected from 632 applications for leave. The annual numbers are still rising. Last year we delivered 34 judgments on appeals, as well as about three times that number of short-form judgments declining leave. At the beginning of this year we had 20 cases lined up for hearing plus three reserved decisions carried over from last year. Of these, 11 are commercial or tax cases.

The fact was that the Privy Council, through no fault of its own, was not providing New Zealand with final court guidance in large areas of our law because under its Rules, or for practical reasons, many important cases could not or did not proceed to London. During the period I have surveyed the Privy Council heard only two criminal appeals. I think it heard only about eight such appeals since 1840. In contrast, the Supreme Court has already decided 48 criminal appeals and we have another six under consideration at the moment.

The other glaring omissions from Privy Council appeals were in the areas of family law, human rights cases, employment law and almost anything needing relatively speedy decision, such as an application for habeas corpus. Sensible litigants often considered that the modest sum of money at stake did not justify going to London, even when the question involved had general or public importance.

In deciding some 154 civil and criminal appeals since 2004 the Supreme Court has been able to settle the course of New Zealand law and give guidance to the lower courts in a number of areas, including importantly on aspects of our criminal law (benchmarking it

against what is done in comparable jurisdictions). We have usually not departed markedly from prior law. Only on one occasion to date have we thought it right to refuse to follow a Privy Council decision on appeal from New Zealand and I would expect that to remain a rare event. Whether we are getting our decisions right I am obviously not the best person to say. But judging by the feedback we get from academics and practitioners I have the impression that we are doing about as well as our counterparts in comparable jurisdictions. Anyone who reads the Law Quarterly Review, or even English or Australian newspapers, will be aware of the sharp criticism to which decisions of the Supreme Court of the United Kingdom and the High Court of Australia are not infrequently subjected.

The proof of the pudding on the enhanced access to justice argument, which I think rightly carried the day when the Court was established, is in the types of work the Supreme Court has been doing (its “outputs”, to use the dreadful current buzzword). I suggest that there have been numerous decisions of significance and that these have been in most areas of New Zealand law. Some, however, are of niche importance rather than having more general influence, for example the interpretations of several sections of the new Evidence Act 2006. There have already been nine decisions on this important statute to guide the lower courts.

The impact of the arrival of a locally-based senior court on New Zealand law is best demonstrated by a brief survey of some of the more important cases (or groups of cases in the same area) which have clarified and sometimes brought about change in New Zealand law.

I begin with the criminal law in which, as I have said, there have already been 48 decisions. Those I have selected are, first, a group of five which dealt with the fundamental subjects of the requirements for a fair trial and the criteria for appeals from a jury verdict. In *Sungsuwan*³ the Court discussed when an appeal should be allowed because of the way in which defence counsel has conducted the defence at trial. It explained that the focus should be on whether justice has miscarried rather than on whether it can be said that there has been a serious error by counsel. It is necessary to look not only at whether there was a real risk that an error by counsel had affected the outcome, but also at whether, even if there were no such error, something had gone

³ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.

badly wrong, so that the jury verdict should be quashed. Then in *Condon*,⁴ the Court considered the defendant's right to be legally represented at trial and the circumstances in which the absence of representation (even if that had been the defendant's choice) could give rise to an unfair trial and accordingly to a substantial miscarriage of justice.

In *Owen*⁵ and *Matenga*⁶ the Court was concerned with the interpretation of the strangely worded s 385(1) of the Crimes Act 1961 (but dating from a much earlier time) – what is an “unreasonable verdict” and when does a miscarriage of justice become a “substantial miscarriage”? Similar obscure language is found in the equally elderly ss 380 and 382 governing appeals on reserved questions of law. The Court was called upon to explain these provisions last year in *Gwaze*,⁷ where the Crown appealed following an acquittal in a murder case after evidence, later found inadmissible, had been allowed to be called by the defence. The Court ordered a new trial. It is debatable whether any of these cases would have been given leave under the restrictive approach previously adopted by the Privy Council (the Court of Appeal was not permitted to give leave in criminal cases). Interestingly, in the last appeal which has gone to the Privy Council, *Barlow*,⁸ the Judicial Committee was content to apply the interpretative approach promulgated by the Supreme Court in *Matenga*.

Another criminal case to which reference should be made is our recent decision in *Hessell*,⁹ in which we disapproved of a Court of Appeal decision which created quite prescriptive requirements for judges to follow when sentencing criminals who had pleaded guilty. The Court of Appeal required a sliding scale of discounts of up to 33⅓ per cent of the otherwise appropriate sentence, depending upon exactly when the guilty plea had been forthcoming. We agreed that discounts should be available but held that Judges should not be confined in their discretion. Discounts should be tailored to individual cases, although there should be a general upper limit of 25 per cent for an early plea and the possibility of a further allowance for demonstrated remorse. The overturning of the Court of Appeal's “tariff” reflected a different reading of the Sentencing Act 2003 and a return to the position prior to *Hessell*.

⁴ *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.

⁵ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.

⁶ *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

⁷ *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734.

⁸ *Barlow v R* [2009] UKPC 30.

⁹ *R v Hessell* [2010] NZSC 135, [2011] 1 NZLR 607.

I mention next six decisions which undoubtedly made important changes to aspects of New Zealand law. Probably the most significant has been *Ben Nevis*¹⁰ in the area of tax avoidance. The Privy Council had actually looked at the section dealing with this subject in the Income Tax Act 1994 on seven or eight occasions over a period of 30 or 40 years, but it is safe to say that its decisions were rather inconsistent and had been productive of some uncertainty. What generally has happened in these cases is that the taxpayer has structured its affairs to try to meet the terms of particular provisions of the Income Tax Act, but in an artificial way. In *Ben Nevis* the Supreme Court took the opportunity of restating the function of the anti-avoidance rule. It has done so in a way which is less favourable to those taxpayers who may seek to create and take advantage of structures which have no commercial rationale and are really just a means of obtaining an alteration in the incidence of tax in a way which cannot have been within the contemplation of Parliament. That approach, which itself admittedly cannot produce complete predictability, has caused some displeasure to the tax advisory industry. But it has brought our law closer to the position in Australia.

A similar shift is evident in our recent competition law decision in *Commerce Commission v Telecom*,¹¹ in which the Court was able to give s 36 of the Commerce Act 1986 (taking advantage of market power) an interpretation which aligned it with its trans-Tasman counterpart. In doing so, the Court provided an explanation of a decision of the Privy Council¹² which, we considered, had been wrongly understood to take a narrow view of s 36.

In *Couch (No 2)*¹³ the Court has departed entirely from a Privy Council decision. The issue was whether exemplary (or punitive) damages can be awarded against a grossly negligent defendant who did not consciously appreciate that he was putting a plaintiff at risk. The Privy Council had left it open for such claims to be made. The Supreme Court has shut the door. The majority of the Court took the view that the benefit to New Zealand society of leaving the door open for a very small number of successful claims was outweighed by the trouble and expense caused by attempts to get through

¹⁰ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

¹¹ *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577.

¹² *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

¹³ *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149.

that door and the small reward if you could do so (everyone, including the Privy Council, accepted that exemplary damages awards should be modest in amount).

*Regal Castings*¹⁴ was a case in which the Court has made it a little easier to claw back assets transferred away by someone who is becoming insolvent or has acted in a way which risked insolvency. We said that someone who transfers property away, knowing that they are thereby exposing creditors to a significantly enhanced risk of not recovering amounts owing to them, is taken to have intended this consequence. The decision has already led to recoveries for general creditors in several insolvencies where the property transferred might otherwise have escaped the bankruptcy. *Regal Castings* has been cited with approval and followed by the Hong Kong Court of Final Appeal.¹⁵

I have forced myself not to talk about property law cases, which have been my particular love, but I should mention one which broke new ground. In *Dollars & Sense v Nathan*¹⁶ the Court held that a forged mortgage could be removed from the owner's Land Transfer Act title in circumstances in which the forgery was committed by a person entrusted by the mortgagee with the task of getting the signature of the owner, even when the mortgagee had no knowledge of the forgery and certainly did not intend it to happen. Breaking new ground in a case of this kind, we said that the forger was to be taken to be the mortgagee's agent because of the close connection between the task entrusted to him and what he actually did to obtain a "signature". The dishonesty of the forger/agent was attributed to the mortgagee and thus the fraud exception to indefeasible title applied. The finance company could not rely on a fraudulent act for which it was vicariously liable and but for which it would not have obtained a registered mortgage. As Professor Peter Watts of this university has said, "[t]he odds against the plaintiff are stacked too high if purchasers [a term which includes anyone acquiring an interest] can use agents to do the work of acquisition but then disavow their proven dishonesty".¹⁷

The media, comfortable with clichés, like to speak of "landmark" decisions. I suppose the cases I have just mentioned deserve that appellation. One which certainly did, at

¹⁴ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

¹⁵ *Tradepower (Holdings) Ltd (in liq) v Tradepower (Hong Kong) Ltd* (2009) 12 HKCFAR 417 at [78].

¹⁶ *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557.

¹⁷ Peter Watts "Imputed Knowledge in Agency Law – Knowledge Acquired Outside Mandate" [2005] NZ Law Rev 307 at 334, cited in *Dollars & Sense Finance Ltd v Nathan* at [49].

least for members of the legal profession, was *Lai v Chamberlains*¹⁸ where the Court threw out the old rule that a barrister could not be found liable for negligence (breach of duty of care owed to his or her client) in respect of work done in court. (It had long been the case that the barrister had no such immunity for most work done outside the courtroom.) In deciding whether a departure from the ordinary standards of performance in court could found liability if it caused the client loss, the Supreme Court had the luxury of choosing between the position taken in England (liability) or that in Australia (immunity). This ability to choose what the Court considered to be the better position for New Zealand did not in practice exist until Privy Council appeals were done away with. In theory, the Privy Council might uphold a decision which did not follow English law, but that depended upon its appreciation of differences in local conditions and was rather unpredictable. I have not seen any sign that a substantial lift in the number of professional negligence cases involving barristers has resulted from the decision.

As might be expected, the new Court has been called upon to rule on numerous claims for breach of the New Zealand Bill of Rights Act 1990. Two such cases stand out. In *Hansen*,¹⁹ the Court found that an Act of Parliament placing a reverse onus of proof on an element of a crime (ie requiring the defendant to show on balance of probabilities that the element was not established) was contrary to the guaranteed right to be presumed innocent until proven guilty. But that did not avail the defendant (convicted of possession of cannabis for supply on the basis of possession of more than a prescribed amount of the drug) because the rule in the Misuse of Drugs Act 1975 reversing the onus where the defendant was in possession of at least 28g of cannabis was too clear to be capable of being read down for consistency with the Bill of Rights.

A second important Bill of Rights case was *Taunoa v Attorney-General*²⁰ which concerned mistreatment of prisoners by prison staff. The Court had to consider whether the prisoners had been subjected to cruel, degrading or disproportionately severe treatment or punishment (by majority, holding no) or had not been treated with humanity and with respect for their inherent dignity (unanimously, yes). The Court then had to determine the appropriate level of damages which would provide an effective and

¹⁸ *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

¹⁹ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

²⁰ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

proportionate remedy for a breach of public law where no private law wrong (such as a tort) had been committed.

Questions of fiduciary duty (was it owed by a defendant and was it breached?) have been before the Court on several occasions. In *Chirnside v Fay*²¹ the Court found that two men who contemplated developing a particular property together owed mutual duties to each other, and that the action of one in securing the title and then excluding the other gave rise to a breach. A joint venture arose once they had proceeded to a point, pursuant to an understanding, where they were dependent on each other to make progress towards a common objective and to share the profits derived. It was a relationship of trust and confidence. In *Amaltal*,²² by contrast, there was no general duty as the joint venture had earlier been replaced by a jointly-owned company. The general relationship was then governed by company law. However, when the company entrusted the accounting/tax return function to one of the shareholders, that party owed fiduciary duties when performing that function for both of them. A later case, *Stevens v Premium Real Estate*,²³ involved disloyalty by a real estate agent who misled her vendor clients about the intentions of the buyer. Heavy damages were awarded for breach of fiduciary duty leading to a sale at less than optimum price (with the benefit of any doubts being given to the vendors). And the agent's commission was also forfeit. The policy was to impose a severe punishment for commercially immoral behaviour by the agent even in circumstances where the agent had not directly participated in the profits made by the buyer when he resold.

Lastly in this survey of Supreme Court cases, I go back to one of the first, and surely the best known – the *Zaoui*²⁴ case, in which the Court found that it had power at common law to grant bail to Mr Zaoui when there was nothing said about bail in the Immigration Act 1987 (but he had not been charged with any crime) and subsequently had to determine whether and how the Inspector-General of Intelligence and Security should balance any security threat posed by Mr Zaoui against the personal risks he faced if he were to be deported to his country of origin. We held that the Inspector-General should look only at the security threat. But we read into the Immigration Act, in order to make it

²¹ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.

²² *Amaltal Corporation Ltd v Maruha Corporation* [2007] NZSC 40, [2007] 3 NZLR 192.

²³ *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384.

²⁴ *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

consistent with the Bill of Rights and international law principles, a requirement that at a later stage in the process the personal risk must be taken into account by the decision-maker before there could be a deportation.

Having, I hope, demonstrated to you that the Supreme Court does provide greater access to justice for New Zealanders, I am going to turn to my second (moonlighting) activity.

Law reform

My law reform role originally came about in 1990 when I was approached to become a Law Commissioner by Sir Owen Woodhouse and Sir Kenneth Keith, the latter of whom eventually became my colleague on the Court of Appeal and the Supreme Court and later, and currently, New Zealand's first judge of the International Court of Justice in The Hague. I owe Ken Keith a great debt of gratitude for his support of my career and his friendship.

I went to the Law Commission on a part-time basis, which allowed me to continue practising law in Auckland. At the time of my appointment to the High Court in 1992, I was the Law Commissioner with particular responsibility for the project of bringing the Property Law Act 1952 up to date. That involved restating and to some extent reforming some basic rules of property law, concerned, for example, with mortgages and leases, which over the years had been collected in an Act of Parliament of some antiquity. Parts of the Property Law Act dated back as far as 1842 and it had never been comprehensively re-examined.

When I became a judge we were about halfway through. For the next two years the work had to be done at night, at weekends and in the holidays. During the day I was full-time engaged in learning to be a judge, which was rather a challenge because I had rarely been in a courtroom before my appointment. I ceased to be a Law Commissioner when the Commission gave its report to the Minister of Justice in 1994 and presented him with a Bill for which I had given the drafting instructions and for which the superb drafting had been done by the (now) Dame Alison Quentin-Baxter, also a graduate of this university.

We were confident that our work was of a sufficiently high standard and we were encouraged by the support we received from the Law Society. But after a while it became apparent that there was no thought being given to it by successive governments. It may surprise you to know that it was not regarded as a politically sexy subject. Indeed the politicians found it a complete bore. And the old Department of Justice, later replaced by the Ministry of Justice, did not have the capacity to assess it and make recommendations to the Minister. So the report and draft Bill gathered dust in some official's bottom drawer for about 12 years.

I was not very happy about this result of intensive work done over a period of four years on which taxpayer money seemed to have been spent in vain. However, a judge has little influence outside the cases in his or her courtroom, and indeed should not seek to exercise influence among politicians. So I did nothing, although I was conscious that there was growing discontent in the legal profession about the fact that several important Law Commission reports were being similarly neglected.

Then the Law Commission's fortunes changed. Prime Minister Helen Clark approached Sir Geoffrey Palmer to become President of the Law Commission. I suspect that he made it a condition of his acceptance that future reports would be given active consideration within a limited time from their delivery to the Minister (in fact there is now a protocol requiring this to occur within six months) and that the old reports would be dusted off and actioned, if they had the approval of the Government. By coincidence, and unaware of this development, I happened to mention the Property Law Act report to the Prime Minister at a social function. She took an immediate interest and directed the Ministry to get it ready for introduction.

But there was a problem. During the intervening period of 12 years the law had not stood still. There had been a number of court decisions which impacted on the draft. Of more difficulty were the changes that had been made to our statute law. The Ministry had made amendments to the Property Law Act itself without reference to the report, and the Personal Property Securities Act 1999 (PPSA) had been enacted and had come into force in 2002. (That in itself was a lengthy saga for which I do not have time today.) The problem with PPSA was that it too ignored what was proposed for the Property Law Act, which was intended to have a number of provisions about enforcement of

mortgages. Part 9 of PPSA contained a completely different set of enforcement provisions. It was obviously going to be a major exercise to align the two statutes.

I received a call from Sir Geoffrey Palmer, who told me that the Law Commission had no one on its staff who had been there when the work was done on the Property Law Report. So it had no collective memory. He felt that it would not be possible for the Commission to assist the Ministry of Justice in its review of the old draft. He asked me whether I would be prepared to act as a de facto Law Commissioner to undertake this task. I was naturally hesitant because, first of all, it was a big job and, secondly, there might in the future be a conflict between the role of the framer of legislation (something a judge does not normally do) and the role of a judge called upon to interpret the legislation, particularly in a final court with a limited membership. However, I agreed to help the Law Commission because it seemed to me that the conflict already existed for me as a result of the work I had done prior to 1994.

The experience of working on the preparation of legislation for introduction to the House was very stimulating. I had never previously appreciated the difficulties which have to be overcome when legislation affects more than one Ministry or government agency. The PPSA was under the aegis of the Ministry of Economic Development. Changes also needed to be made to the Residential Tenancies Act 1986 (which comes under the Department of Building & Housing) and to the Land Transfer Act 1952 (which required the approval of the Registrar-General of Land). Most of these negotiations were harmonious, although I have to say there was a reluctance to accept the need for changes to the PPSA. The Ministry of Justice personnel and Parliamentary Counsel's Office, with both of whom for a while I was in almost daily communication, were superb. The end result was that the Bill was made ready during the first eight months of 2006, introduced at the end of that year and passed with very little amendment, considering its length of 371 sections plus schedules, in the following year.

One of the few areas of difficulty encountered during the parliamentary process related to ss 268–272, which exonerate a lessee of commercial premises for negligently causing destruction or damage to the premises where the lessor has insurance cover against the loss. The Law Commission had included provisions having this effect because there had been several unfortunate cases during the 1980s where the lessor's insurance company had successfully claimed against a negligent lessee notwithstanding that the

lessee was directly or indirectly paying the insurance premiums.²⁵ Without legal advice it simply did not occur to your average commercial lessee that it needed to take out its own insurance cover or have the lessor's insurer expressly agree to cover it as well.

The Ministry of Justice, in carrying out its review of the draft, initially had concerns about these provisions, but when it was appreciated that the Law Society had given them support in 1994, the Ministry recommended that they should remain in the Bill as introduced. Before the Select Committee, however, the insurance industry raised strong objections which appeared to be impressing the members of the Committee. I was not present so this is hearsay. Fortune smiled. The Law Society's representative, Ian Haynes, happened to be in the committee room when the insurance people presented their submissions. He had previously finished making submissions for the Law Society on other subjects. Mr Haynes rose to his feet and asked if the Committee would hear him on the topic of exoneration of lessees. The Committee agreed and, impromptu, he took the Committee through the arguments in favour of the provisions and persuaded them that there was indeed a mischief to be remedied. It is only fair to say, however, that some of the subsidiary points made by the insurance industry were sound and the Ministry of Justice recommended some amendments which have considerably improved the detail of the sections. Their basic thrust remains, however, as was intended in the Law Commission's report.

The story does not end there. The Act came into force on 1 January 2008. There has already been a case on those sections. It does not reflect well on the insurance industry. Despite the obvious intent of the legislation an insurer, whom I will not name and shame, thought fit to cause a lessor to bring a negligence claim for damage to its building not against the lessee (which the sections certainly prohibited) but against employees of the lessee whose activity was said to have caused the damage. Unsurprisingly, you may think, both the High Court²⁶ and the Court of Appeal²⁷ were unsympathetic to the insurer and were prepared to find that, although employees were not mentioned in the legislation, they were covered by it and that, even if they had not directly been protected, for policy reasons no duty of care would have existed in circumstances where the lessor

²⁵ *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* [1981] 1 NZLR 464 (CA); *Leisure Centre Ltd v Babytown Ltd* [1984] 1 NZLR 318 (CA); and *Perimeter Investments Ltd v Ashton Scholastic Ltd* [1989] 2 NZLR 353 (HC).

²⁶ *Sheehan v Watson* [2010] 2 NZLR 419 (HC).

²⁷ *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314.

was insured. The insurer gave up after the Court of Appeal, no application for leave being made to the Supreme Court.

All this goes to show that the job of a would-be law reformer is not easy. In part this is because the substance of law reform is difficult. The law needs to be reformed because it is perceived as having taken a wrong turning or because the law's response in earlier times is seen as simply inadequate in modern New Zealand. A good part of the difficulty, however, is the lack of adequate procedural mechanisms which would enable law reform proposals – draft Bills – to get early consideration in Parliament. They get caught up in the legislative log jam. Only a certain number of Bills can be introduced during any parliamentary term because of Parliament's capacity to handle them. Governments are naturally keen to choose subject-matter which is politically important. Many law reform projects are of no interest to anyone other than specialists in the field and it is difficult to get officials to emphasise their importance to Ministers and for individual Ministers then to be able to persuade their parliamentary colleagues to give some priority to a Bill to which they do not feel any political attachment. I am not blaming the officials or the politicians for this state of affairs. It is simply a fact of life.

What is needed, it seems to me, is a separate parliamentary process for law reform projects. I appreciate at once that there may well be room for argument about which Bills should receive separate treatment. That difficulty is likely to be exacerbated by the fact that under an MMP system there are usually six or more parties in the House of Representatives seeking to differentiate themselves. This may well mean that objection by just one party could prevent a Bill from proceeding by a separate route. This certainly happens when minor reforms are being considered for inclusion in a Statutes Amendment Bill.

But, putting aside that problem, what I am suggesting is that the Standing Orders of the House should provide for Bills agreed to be law reform measures, in the sense of being what people call "lawyers' law" and the like – should be able to be placed directly before a specified Select Committee without need unnecessarily to take up the time of the House with a two-hour first reading. Then, if approved with or without amendment by the Select Committee, they should proceed directly to a truncated Committee of the Whole House stage and finally a short debate on the third reading. I am suggesting truncating the Committee of the Whole House stage so as to avoid the need for separate

consideration of each Part of a Bill, which can make the process very lengthy even where any remaining contention is quite limited. I am also conscious of the fact that the best layout of legislation may sometimes be compromised because of a wish to reduce the number of Parts and thereby lessen the amount of time before the Committee of the Whole House, which is an encouragement to the Leader of the House to give a Bill priority because it will not take very long to pass it through that stage.

Finally, I see no need for more than a handful of speeches on third reading, which is simply a yes/no vote. If a law reform measure reaches that stage there is little likelihood that anyone is going to say anything significantly new at that point in the process.

Conscious of the fact that judges should not be criticising Parliament, I should emphasise that in making this proposal, born out of the excruciating experience of watching multiple law reform projects stall, some permanently and some for many years, I am merely trying to be helpful. A cynic might say that because specialist law reform is not politically sexy, this proposal for procedural reform will itself not be of much interest to politicians. The point I would make, however, is that parliamentary time is precious and expensive. At the moment it can be said that it is being misspent and that parliamentarians could, if procedures are altered, find that their time is freed up for things which are more interesting to them.

I add a caveat. Perhaps it should be a condition of entry into the new procedure that a Bill should have been published in exposure draft (including by attachment to a Law Commission report) at least three months before it goes into the House and directly to a Select Committee. Some other qualifications may be necessary. An ability for a Bill to be moved to a different Select Committee, for instance. And it may also be desirable to require a full parliamentary process beyond the Select Committee stage if the Select Committee is not unanimous in its report. But I feel confident that details of this kind could easily be worked out if the bare bones of the proposal meet with approval.

On that optimistic note, I thank you for honouring me with your attendance here this afternoon.