ADDRESS TO THE DISTRICT COURT JUDGES' CONFERENCE

Millennium Hotel, Rotorua
Thursday 19 March 2009

*Sian Elias

[1] Judging is not easy work. I don't need to tell any of you that. But it always surprises me how often outsiders seem to think otherwise - and not just radio talk-back callers (who seem to think it is something like being a referee). Even lawyers who have observed the system for years are often unprepared when asked to step up and take it on. Most of us spend the first year shocked. It takes till then to get used to the rhythms of the system, the lack of personal freedom, the sitting still and the sense of being turned inside out in those back corridors. After about a year when your bladder has been disciplined to the morning, lunch, and afternoon adjournments and you start to get some repeat work, it becomes more familiar, and you think "I'm getting the hang of this". Then the Court of Appeal tells you, publicly, that you are not.

[2] This is never a job in which you can relax vigilance. It constantly throws up challenges. It is also a job which carries special stresses. Not the stresses of practice. But the stresses of a job in which all your work is open to public scrutiny. And often to criticism which you cannot answer. The stresses of a job in which decision-making cannot be delegated and cannot be avoided. The stresses that come from the public expectations that you must act always with demonstrable integrity, resolute even-handedness (whatever the provocation), conspicuous humanity, with apparent wisdom and (if not a counsel of perfection) unflagging good humour and courtesy. You cannot refresh yourself with the odd day of ill-humour or unreasonableness.

[3] You cannot even prioritise to any great extent. The greatest priority is not the medical appointment you have deferred for too long. It isn't even the queue of people and cases waiting for your attention or the reserve judgment you have back in your chambers, although they will never be far from your mind. The greatest priority is the litigant appearing before you at that very moment. His case you have sworn a solemn oath to hear without fear, favour, affection or ill-will. To him you owe right according to law.

[4] Jeremy Bentham, who didn't really think much of what he called "Judge & Co", thought the true virtue of judicial work is that it takes place "in the face of mankind". To the litigant before you and to all who watch, the Judge represents justice in our country. As Bentham said, that means that the Judge is on trial even as he judges. That is certainly a check on judicial power. And indeed, no Judge I have ever met thinks about our function in terms of the exercise of power. Lord Diplock, for example, always referred to

the separation of *functions* under our constitution, rather than power. A great American judge described it well, I think, when he said:[1]

> As [Judges] analyse issues that have been disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions bound to hurt one litigant or the other, they come to understand the courts' responsibility in terms, not of power, but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation.

[5] I have been asked to speak to you today about judicial obligations. I feel some diffidence in speaking on this topic to you, who are in the front line. Many of you have been doing this work, and living with these obligations far longer than me. And indeed, among you are some I appeared before when young and feckless and unbound by judicial obligations – and that *was* a very long time ago. All of you know that judicial appointment is not a destination, but the start of an arduous journey. My remarks are offered as a fellow-traveller on that journey.

[6] You know all about judicial obligations, because you live with them every day. So what I am to discuss is nothing new. But, indeed, because it is all so familiar, it is easy in the press of cases and people to defer reflection about the core values of the service we have joined. I think at times we get distracted by judicial management, or by enthusiasms for reform. These are important in themselves because we must as judges be trying to improve our responses to the community in the provision of judicial services. But at times in concentrating on change, we do not perhaps allow sufficient time to reflect on the fundamentals of judging. And it is the core business of the judge that I want to address here. It defines the obligations we have. And I want to suggest that it is in fulfilling those obligations that the deepest satisfactions of our work is to be found. They are what make the life of judging challenging and worthwhile.

[7] I want to start by looking at the bigger picture. The obligations we have as judges – "the 'chains' that bind us" as Aahron Barak of Israel described them[2] – arise out of the expectations held of the judge by the wider community and indeed the legal order. We don't talk much about these matters. It is difficult to avoid deep philosophical waters which in our pragmatic, even un-intellectual, New Zealand tradition we seem to find a little embarrassing. But I think it is a mistake to be so coy. Because these expectations – which are not static – are our compass.

---

* The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

1 Traynor, "Some open questions on the work of State Appellate Courts" (1956-1957) 24 *University of Chicago Law Review* 211, p 224.

2 *Efrat,* 47(1) PD at p 782. See also "A Judge on Judging: The Role of a Supreme Court in a Democracy", the foreword to the 2001 Supreme Court year, (2002) 116 *Harvard Law Review* 19 at p 56.

The expectations of justice according to law

[8] What expectation of judging is assumed by New Zealand society? At the root, I think it is what Sir Gerard Brennan calls "the pursuit of justice according to law".[3] Justice according to law is the responsibility of the Judge. The public expectation is that the application of law will be just.

[9] Today it is hard to find any society which does not profess to live under the rule of law. Most would not meet our idea of a society under law. The rule of law exists to prevent the exercise of arbitrary power. It checks the powerful. The basic tenet of constitutional government is that everyone is subject to the law, as Chief Justice Coke so bravely reminded James I in the dark days at the beginning of the struggle to establish constitutional government in England. John Locke, writing later in the same century put it this way: [4]

> Whoever has the supreme power of any Commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by *e tempore* decrees. There must be independent and upright judges, who are to decide controversies by those laws. And all this is to be directed to no other end but the peace, safety, and public good of the people.

[10] Perhaps it is the moral force of the rule of law that matters most. Because the fact is that the idea of law is bigger than the sum of enacted and judge-made rules. Lord Radcliffe made the point. If law means only what he called "the vast and complicated mass of things [a citizen] is compellable to do or not do by virtue of some Act of Parliament or some order or regulation", then people will adhere to it only for the purely practical reason of keeping out of trouble.[5] If that is so, Radcliffe thought:[6]

> Something has gone wrong. Some clue has been lost.

[11] In the days when legislation was intensely prescriptive and the declaratory theory of the common law held sway, the moral underpinnings of law could safely be left to legal philosophers and did not need to trouble judges in their day to day work. Indeed, we have largely got out of the habit of thinking of law as a moral force. The legal historian, Holdsworth put this neglect down to the hold of positivism on law. It had, he thought led to the impoverishment of ethical reasoning in law through the strict separation of morals from law and a hard and fast line between moral and legal rights.[7] In an age of human rights and legislation which leaves significant policy

---

3 "Why be a judge?" (Speech at the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 12 - 13 April 1996).

4 *Treatise on Civil Government* (1690) ch IX, § 131.

5 "Law and the Democratic State" in *Not in Feather Beds* (1968) 45, p 50.

6 Ibid, p 51.

7 *Some Lessons from our Legal History* (1928), p 158.

judgments to judges, such neglect is no longer available. Nor do I think it ever reflected the popular expectations of the courts as courts of justice.

[12] The immediate point to be made is that in societies as complicated as ours, with laws that require judges to weigh values which are often incommensurable, the expectation of justice cannot be fulfilled without the professionalism and unquestioned integrity of the judges. Our job is not to be social engineers, but to ensure that people live under the security of law, justly applied. Sir Robert Megarry described the Judge's duty in a society operating under law as "one of obedience to the law and to his judicial conscience".[8] The judge "must not do what he wants to do, but what he ought to do".[9] Deciding what the judge "ought" to do is much more difficult in our society than it was in the days when the law reports were dominated by cases about sale of goods and conveyances of land.

[13] What is more, comfortable assumptions about judicial omniscience are no longer widely held. Modern insights have exploded the view that on appointment judges somehow obtain the capacity to identify truth from falsehood by some sort of sniff test. We now operate also within a culture of justification which requires judges to explain exactly how they arrived at their determinations. Conclusionary reasoning is no longer acceptable in such a culture. That has implications not only for first instance judges but also for appellate judges. Wide areas of discretion are no longer conceded to judges, just as they have been withdrawn from administrators.

[14] Lord Bingham tells the story of a judge who whenever he encountered a problem of unusual difficulty, would glower at counsel in his most forbidding manner and demand "is this not a matter within my discretion?"[10] When counsel hastily agreed he would sink back in his chair in relief in the knowledge that whatever he decided his decision would be immune from successful challenge on appeal. That is no longer a course to be recommended. The area of true judicial discretion has shrunk almost to vanishing point. While some may deprecate that trend – and it certainly increases the load for intermediate courts of appeal – I think it more closely accords with popular conceptions of the pursuit of justice in which the outcome of a case should not depend on the individual judge. Commentators since Samuel Johnson have said as much:[11]

> To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies in private understanding are to be supplied.

[15] On the other hand, in our participatory democracy, the independence of the judge is not well understood. I was shocked when newly appointed as

---

8 "The Judge" (1983) 13 *Manitoba Law Journal* 189, p 190.
9 Ibid, p 190.
10 "The Discretion of the Judge" in *The Business of Judging* (2000) 35.
11 Boswell, *Life of Johnson* (1976), p 496.

Chief Justice to receive newspaper calls and comments from senior politicians that I should "sack" a Judge. Independence of course exists to ensure impartiality, and I want to come on to speak about it further, but in an age of transparency and accountability, the reasons why judges must be independent of government and indeed of each other in judging needs constantly to be explained. Justice Stevens, of the US Supreme Court dissenting in *Republican Party of Minnesota v White*, explained the critical difference between the work of a judge and the work of other public officials:[12]

> In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.

[16] It is right that judges should be indifferent to unpopularity. Judges are not always immune from the pressure of public clamour, as we have seen with cases like *Liversidge v Anderson*[13] in the United Kingdom and in *Korematsu*[14] in the United States. We have come to view both those cases with shame. The dissenting judgments of Lord Atkin and Justice Jackson stand as beacons because of their fidelity to fundamental principle. The insight that these decisions were wrong springs from fundamental values in the legal system which are the source of the obligations of the Judge. I think the public expectation is that judges will not judge according to political or social pressures. Of course, deciding when social or political pressure is illegitimate and when it represents enduring values the Judge should apply in a particular case is easier said than done. And invocation of "enduring public values" in judgments may sometimes mask political choices by the Judge. There is no chart for negotiating these shoals. It is necessary to understand the principles that underlie the law. And only those who know a great deal of law are qualified to do so. Even then, the principles shift, because law responds to human needs, and they do not stand still.

[17] Nor is understanding and explaining the abstract moral values underpinning the law enough. They must be applied to the circumstances of individual litigants. Justice David Souter of the United States Supreme Court has described this need to ground the values of the law in actual cases as "the judicial paradox":[15]

> [W]e have no hope of serving the most exalted without respecting the most concrete. Judicial duty points to Blake's grain of sand.

---

12 (2002) 536 US 765, p 798.
13 [1942] 2 AC 206.
14 *Korematsu v United States* (1944) 323 US 214.
15 "Gerald Gunther" (2002) 55 *Stanford Law Review* 635, p 636.

[18] This is the view that "details spark the intuition and real judging gets done from the ground up".[16] Good judges do not stray from the people caught up in the case. And they must be willing to express their needs and explain why the law should respond to them. That is why, in the pursuit of justice through the courts, the work of the first instance judge is critical.

Legitimacy

[19] The fact that judges cannot judge according to popular demands sometimes leads to tension in societies like ours where accountability through the ballot box or through executive responsibility is expected of those who exercise public power. It raises questions of legitimacy of judicial action, which are serious questions. So, it is common for it to be said that in the exercise of judicial authority judges are "unelected". To that, critics often add that judges are unaccountable. No one here, familiar with the public exercise of judicial function and the need to demonstrate authority for everything that is done in reasons, will think judges unaccountable. (And I want to discuss some aspects of accountability further). But the description of us as "unelected" is, as it is meant to be, a reminder that judges do not have political legitimacy in the way that governments who submit to regular electorate approval and who operate within a representative democracy do have.

[20] The allocation of responsibility between Parliament, the Executive and the Judiciary is a result of the history and values of our society. Changes do occur and as the former Chief Justice of Australia once remarked:[17]

> Defining the field of proper judicial activity is a matter of public policy that is always under review.

[21] The obligation of loyalty to the legislation of Parliament, is a considerable restraint within which judicial function is exercised. It is the constitutional obligation of the judges. But Parliament speaks to the judges only through legislation. And the relationship with the executive is necessarily aloof because the Executive is a principal litigant in the Courts. The need for caution in the relationship between judges and the Executive is not always easy to observe in a Parliamentary democracy in which the government has the responsibility to promote law reform to Parliament in which the Judges may have particular expertise or interest and in a system where judicial administration is undertaken by the Executive. I want to say something more about both these matters. But to put them in perspective it is necessary to say something further about the independence of judicial function.

---

16 Ibid.

17 Gleeson CJ, "The Role of a Judge in a Representative Democracy" (speech to the Judiciary of the Commonwealth of the Bahamas, 4 January 2008).

Judicial independence

[22] Lord Cooke of Thorndon said once:[18]

> The first requirements of a judge are integrity and impartiality. The second requirements are also integrity and impartiality.

[23] As "Handmaids", coming after integrity and impartiality them he put professional learning and expertise and judgment. I want to say something about these "handmaidens" of professionalism later. I don't think it necessary to enlarge upon the integrity of those exercising judicial office. But it is necessary to say something further about impartiality and, its essential condition, independence.

[24] Judge Learned Hand always counselled that cases should be decided without passion and always "as though it weren't your fight".[19] Impartiality is the supreme judicial virtue.[20] It must not reasonably be open to doubt or a challenge. Impartiality is the reason that judges must in judging be free of direction and independent of influence. Independence requires not only that the judge is free from political influence but also from peer pressure or the direction of the Chief Judge. The requirement of impartiality also has implications for the selection of judges for cases. There can be no suggestion of selection of particular judges for particular cases.

[25] Judges must be free of relationships which might properly influence determination of the case or be reasonably seen to do so. This is a very difficult area, in which public expectations and legal responses may be in a state of flux. There are few black and white rules. The ethical guidelines adopted by the New Zealand Judiciary try to assist. I do not enlarge upon them here. I have written on the subject of presumptive bias more generally and the matter is under active consideration by the Supreme Court.

[26] Rather, today I want to talk a little more about relations with government which may cross over the divide between judicial and executive function or which may give rise to concerns about lack of impartiality. I think we have not always been careful enough in our dealings with government, especially over law reform and in our willingness to serve on government committees. Such non-judicial contributions should I think in general be formal and public and should usually be channelled through heads of bench. In particular, I have been concerned from time to time about judges being co-opted into contexts which are highly politically charged. Sir Gerard Brennan has said of this concern that:[21]

---

18 "The Judge in an Evolving Society" (address given to Judges and Judicial Officers of the High Court of Hong Kong, 17 December 1997).

19 Shanks, *The Art and Craft of Judging* (1968), p 20.

20 Devlin, "Judges and Lawmakers" (1976) 39 *Modern Law Review* 1, p 4.

21 "Why be a judge?" (Speech at the New Zealand High Court and Court of Appeal Judges' Conference, Dunedin, 12 - 13 April 1996).

> Much depends on the manner in which the judge is selected, the nature of the non-judicial function, its political significance, the ongoing nature of the task and the extent of interaction with Ministers and their departments. If non-judicial functions are to be performed by a serving judge, the involvement of the Chief Justice of the court in the selection of the judge may provide a measure of protection for both the judge and the court from undue executive interference.

[27] Sir Gerard was referring in particular to the involvement of judges in commissions of inquiry. At least those sort of undertakings are carried out largely in public and are a matter of public record. But membership of departmental working parties or even some statutory committees may not be compatible with judicial function. The US Supreme Court said in *Mistretta v United States* that the reputation of the judicial branch:[22]

> may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action.

[28] For this reason, co-operation with the executive in law reform is something to be approached with caution. That is why the convention is that such borrowings occur only with the approval and through a Judge nominated by the Head of Bench. And that approach is followed in the Ethical guidelines produced for New Zealand Judges. This is one of the obligations that goes with judicial office.

[29] The suitability of judicial involvement was a principal concern I had with the form of the Sentencing Commission originally proposed by the Law Commission. It frankly acknowledged that one of the reasons for the Commission was to permit the Executive to give directions to the Judiciary in sentencing. And although the eventual proposal backtracked from this, it was impossible not to have misgivings about the extent of Executive control, particularly given the original aim. A senior English Judge once said that while Parliament speaks to the Judiciary through legislation, the Executive and the Judiciary are not on speaking terms. I do not think it necessary to be quite as purist. But it is essential when we are asked to provide assistance to the Executive in developing its policy to ensure that judges are not being co-opted to provide legitimacy and that the judicial perspective is formally recorded and has the legitimacy of being endorsed by the head of Bench. In the past the Law Commission has provided a useful meeting point for less formal judicial input into law reform by individual judges because it is set up to be independent. Its recent method of operation, in working directly to Cabinet, calls in question the suitability of judicial membership of the Commission and its committees.

Speaking out

[22] (1989) 488 US 361 at p 407.

[30] Another obligation that goes with judicial office is the obligation to let our judicial work be its own vindication. Although judges have to set their jaws when asked to decide unpopular causes, unpopularity of the legal process itself is not a matter to which we can be indifferent, because it is destructive of public confidence. Although judges have the principal responsibility to demonstrate through action their impartiality and independence in judging and although that is the best answer to misconceived criticism, they are not well placed to speak out in defence of their judgments. They can of course speak extra-judicially as to their role but there are limits to what can be said. There are dangers of descending into the fray and they are open to the suspicion that they are simply 'defending their patch'. This reticence too is an obligation of judicial office.

The chains that bind

[31] I have spoken of the obligations that follow from the separation of functions between the branches of government. They include the discipline of loyal observance of legislation, which requires judges to ensure that the common law and statutes work together. And they include the obligation to stick to judicial function and not to compromise judicial independence, which protects the fundamental virtue of impartiality. Other obligations arise from the nature of judicial structure and method.

[32] The most obvious mechanism for judicial accountability is appeal. The right of appeal gives rise to special obligations on judges. I have mentioned the Judge who thought his discretion was appeal proof. And indeed, we have all had experience of magistrates and judges who have tried one way or another to make their judgments appeal-proof. Thankfully that attitude is rare today. It raises issues of integrity. The fact of the matter is that while no one enjoys being overturned on appeal, all judges are. Indeed, some of the very greatest judges have been overturned for breach of natural justice. Where appeal is permitted as of right, all litigants are entitled to a second look and usually on the facts as well as the law.

[33] There is very little room for deference in such cases because the obligation of the appellate judge is to come to his or her own conclusion. In very many cases different outcomes on appeal will be because the issue is one on which different minds can reasonably differ. In many cases it will be because the case develops on appeal into something quite different than the judge at first instance was dealing with. In some cases a busy first instance judge will have overlooked an aspect that an appellate court has the opportunity to consider more fully. Such correction is to be welcomed. It is institutional protection for all judges in the system. Some of the worst miscarriages of justice occur when an appellate court strains to uphold a decision or protect the system at first instance from criticism or when it is perfunctory or tries to cut corners. We can all think of examples. They are at the root of much subsequent vexatious litigation and sometimes they stain the system.

[34] I know that you may say this is easy for an appellate judge to counsel resignation, but some of the worse examples of correction on appeal have come when appellate judges have flinched. It is not necessary to look past *R v Taito*.[23] And one of the more embarrassing moments in our legal history (one which continues to vex our legal system) was the Protest of Bench and Bar about the Privy Council's view that it was "rather late in the day" for the New Zealand Courts to say there was no Māori property interest in land recognisable in our courts.[24] Accepting correction on appeal at least with fortitude, if gratitude cannot be mustered up, is a judicial obligation. It isn't your fight. It is the appellate responsibility.

[35] Nor do I think that one should be too sensitive about the way the message is delivered. It just isn't possible to hide the identity of a Judge who is being overturned. Such coyness suggests more personal criticism than should be acknowledged in a structural correction. It would be comforting to think that salutary lessons, like that delivered in *Wallis v Solicitor-General for New Zealand*,[25] belong to an earlier age. That would, however, be to mistake the nature of the appellate process. Plain error must be corrected plainly. Systemic error must be systematically confronted. And where plain error is made in judicial systems, it has to be faced unflinchingly. In my time, there has been no lesson as salutary as that delivered by the Privy Council in *R v Taito*. The opinion, delivered by Lord Steyn, is direct, as it had to be. It is also undoubtedly correct. And even if it were not, the obligation of the judges who sat in the Court of Appeal was to receive it without rancour.

[36] The principal mechanism of accountability is judicial method. The job of a judge in the common law tradition is not one of mechanical application of rules, even when applying statute. But the area of discretion is, as I have suggested, narrow. There is no room for discretion in finding the facts or finding the law. And even in considering options on disposition, whether of remedy or sentence, the precedents provided by the case-law limit the options. Adherence to precedent is a judicial obligation which follows from the structure of the courts and the nature of appeal. A principal reason for such observance is the need to ensure that like cases are treated alike. As Lord Denning said in *Ward v James* this is "an essential attribute of justice".[26]

[37] Of course no two cases are ever entirely alike. But even the discretion on sentencing has become more judicial in the sense, described by Lord Bingham, that "it is subject to much narrower constraints and is much more readily reviewable than it ever used to be".[27] And that is a good thing. I expressed criticisms before about how the Sentencing Council was originally conceived. But I do not criticise the purpose of obtaining more

---

23 [2003] 3 NZLR 577

24 *Nireaha Tamaki v Baker* [1901] NZPCC 371 at p 382 per Lord Davey for the Committee.

25 [1902-03] NZPCC 23.

26 [1966] 1 QB 273 (CA).

27 "The Discretion of the Judge" in *The Business of Judging* (2000) 35, p 47.

consistency in sentencing. For serious crime, the supervision of the Court of Appeal narrows the discretion. But for minor offending the disparities indicated by the Law Commission research suggest that a better system is necessary, whether by way of non-binding guidelines or more formal regulation. The challenge is not to throw the baby out with the bathwater and prescribe such rigidity that judgments as to critical interventions are not unduly constrained.

[38] I have talked about the necessary discipline of precedent. But I would not want to leave the impression that I see its application as mechanical. I am with Lord Mansfield, who thought "the law of England would be a strange science if indeed it were decided upon precedents only":[28]

> Precedents serve to illustrate principles and to give them a fixed certainty. But the law of England which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.

[39] The method he was describing indicates the next obligation of the Judge I want to mention, the need to understand the law that the Judge is applying by reference to the principles to which the rules give effect. Lord Bingham once said in an interview that he regarded consistency in a judge "as a vice".[29] I do not think he meant to suggest that inconsistency is a virtue. But the Judge must be constantly thinking. Is this case really comparable to that case? Does this precedent accord with modern conditions. And to make such assessments, the Judge has to understand legal principle and the society he or she serves. None of us can rest on what we learned in law school, or assume that the society we live in is the society of our youth. The need to keep up to date in law and in life is a professional obligation of the Judge.

[40] Most of us can point to examples of where the provision of justice through the Courts has lagged well behind changing social conditions. Those most familiar to me concern the way in which from the late 1960s the Judges found they were out of touch with the public mood in the control of administrative action. Similar lag occurred in my early years of practice with judicial hostility to matrimonial property legislation. Other legislative initiative, such as the move to openness in government caught the judiciary napping and has in recent years made it necessary for us to respond with much closer attention to reasons than was countenanced in the past. Legislation such as the New Zealand Bill of Rights Act has made it necessary for us to learn to apply very different standards than *Wednesbur*y unreasonableness and has required us to look to the international conventions and the case-law

---

[28] *Jones v Randall* [1774] Cowp 37 at p 39; (1774) 98 ER 954 at p 955 (CA).

[29] Moss, "Cry Freedom" (31 May 2005) <http://www.guardian.co.uk/> (accessed 14 July 2008).

they have produced both internationally and comparatively. So too, as our society changes, we have to accept that many areas of cultural and social dispute are now considered in our courts, and that the role of the Courts contributes to the wider social debate, irrespective of the outcome of the litigation. All this means that the legal education we had in our youth does not fit us to be judges today. It means that continuous judicial education is a critical judicial obligation. It also means, although this is a topic I won't enlarge on here because I have spoken about it on other occasions, that diversity in our benches is an important qualification for judiciary of today.

[41] The final obligation I want to discuss is the obligation to the tradition we have joined. I am told that once, when Sir Robin Cooke was presiding over the swearing-in of a new judge, he recited the names of each of the judges who had held office as judges of the High Court of New Zealand, beginning with William Martin, appointed as Chief Justice in 1842. The purpose was to ground the new Judge in the tradition he was joining. That is significant discipline. The layers of tradition behind us mean that "in the law, nothing is the work of one court or one man".[30] And, standing on the shoulders of those who have gone before, it is only too evident that there are few ultimate truths to be viewed. The judge of today is just another platform for the stargazer of the future. The process is "ageless":[31] There is comfort in this. But if we in our turn for our time are to do our part we must recognise that principled response to human needs in individual cases is creative and difficult work. Identifying the principles and values that stand the test of time and applying them to the controversies of today is rightly been described as "thinking at its hardest".[32]

[42] An American professor of English once likened writing judgments to writing poetry. While the judge operates within a different discipline and must rehearse facts and law at length, he too, like the poet described by Robert Frost, is "attempting 'a momentary stay against confusion'".[33] That is our obligation.

[43] In a letter to Benjamin Cardozo towards the end of his life, Oliver Wendell Holmes wrote of the satisfaction of judging:[34]

> I have always thought that not place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal. The only ground that warrants a man for thinking that he is not living a fool's paradise if he ventures such a hope is the voice of a few masters … I feel it so much that I don't want to talk about it.

---

30 "The Judge as Lawmaker: An English Perspective" in *The Business of Judging* (2000) 23, p 34.

31 Cardozo, in *The Nature of the Judicial Process* (1921), p 179.

32 Traynor, "Some open questions on the work of State Appellate Courts" (1956-1957) 24 *University of Chicago Law Review* 211, p 218.

33 Gibson, "Literary Minds and Judicial Style" (1961) 36 *New York University Law Review* 915, p 930.

34 "Mr Justice Holmes" in Cardozo, *Selected Writings* (1947), p 77.

[44] In the tradition we belong to we have the hope of coming near to an ideal. Few can say as much about their occupations. Trying for the ideal is the obligation and the great privilege of our work.

****