

# Harkness Henry Lecture

## University of Waikato, 2 October 2008<sup>1</sup>

# HARD CASES AND BAD LAW<sup>2</sup>

### Introduction

[1] “Hard cases make bad law” is a well known legal phrase. It describes a difficult case which might cause the clarity (or purity) of the law to be obscured by exceptions and strained interpretations, designed to achieve justice in a particular case. The underlying idea expressed in the phrase is the need for all courts to apply statutes and binding precedents in a manner that produces consistency in the application of the law.

[2] Some Judges have balked at the notion that statute and precedent could be applied to produce an unjust result. Those Judges who subscribe to that view would put the proposition differently: “Bad law makes hard cases”. In *Re Vandervell’s Trusts (No 2)*,<sup>3</sup> Lord Denning MR said:

[hard cases make bad law] is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: 'Unjust decisions make good law'; whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it.

[3] I was sworn in as a Judge of the High Court of New Zealand at Hamilton in April 2002, having practised (primarily) as a commercial litigator for some 20 years. In the latter part of my career at the Bar, between 1997 and 2002, I had served (initially) as a Consultant and (later) a Commissioner at the Law Commission. I

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<sup>2</sup> By Paul Heath, a Judge of the High Court of New Zealand, Auckland. I thank Hayley Derrick, LLB (Hons) (Waikato), Judge’s Clerk, High Court Auckland for her assistance in the preparation of this paper.

<sup>3</sup> [1974] Ch 308 (CA) at 322

thought my experience as an advocate, an adviser and as someone engaged in law reform was an adequate foundation to understand the nature of the judicial role. I was mistaken. I soon discovered that there are aspects of the judicial role that are obscured from non-judicial eyes.

[4] With the confidence exhibited only by inexperience, I expressed the view, at my swearing-in, that an important facet of judicial decision-making was the need to ensure predictability of outcome. My experiences with the Law Commission had led me to the view that courts were ill-equipped to make difficult policy decisions, primarily because parties to particular litigation are interested in winning, not in developing the law; for that reason relevant policy information is rarely available. Further, Courts lack the benefit of wider consultative procedures available to policy makers or Parliamentary select committees.

[5] When I was invited to give this lecture, I thought this might be an appropriate time to reflect on those initial views and to ask whether, after six and a half years on the Bench, I adhere to them. Do I remain in the “hard cases make bad law” camp? Or, have I gone over to the other side?

[6] This is not a scholarly paper. My purpose is to explore the nature of the judicial role, both at first instance and on appeal, and consider various approaches to the judicial task. In doing so, I have drawn upon the approaches of two long-serving Judges of the Court of Appeal and the writings of another Judge of that Court and an academic.

### **The judicial task**

[7] Many judges, far more experienced and eminent than I, have written or spoken about approaches to the task of judging. On occasion the term “judicial philosophy” is used; on others, the more mundane phrase “judicial method” suffices. However the issue is characterised, the approach that a Judge brings (consciously or subconsciously) to his or her role undoubtedly affects the nature and quality of his or her decisions.

[8] As the Chief Justice of Canada, Rt Hon Beverley McLachlin, observed during the course of a lecture at this University in 2003, while Judges must be “impartial”, they remain “inescapably human, possessed of the loyalties and passions, the convictions and preconceptions that are the gifts and afflictions of humanity.”<sup>4</sup>

[9] Increasingly, the Judges of the higher Courts<sup>5</sup> come from different backgrounds and have very different life experiences. We are each the products of our own upbringing. In addition, more women now sit on the Benches of these Courts and bring a different (and positive) perspective to cases they hear. Gone are the days when a small group of men from privileged backgrounds and (usually) “prestigious” schools sat in judgment on all New Zealanders.

### **The Cooke and Richardson viewpoints**

[10] Towards the end of the twentieth century, two Judges dominated the New Zealand legal landscape. Each spent over 20 years of his working life as a Judge of the Court of Appeal. For about 19 years, they sat together, as members of that Court, on many important cases that were heard during the tumultuous changes in New Zealand society that followed the 1984 General Election.<sup>6</sup> While they had different approaches to the judicial task, those differences probably brought the best out of each of them. It was also a time when, for all practical purposes, the Court of Appeal was our final appellate court.

[11] Robin Cooke was appointed a Judge of the Supreme Court of New Zealand<sup>7</sup> on 8 November 1972. He was appointed as a permanent member of the Court of Appeal on 20 May 1976, becoming President of the Court on 1 May 1986. Sir Robin retired as a Judge of the Court of Appeal on 16 February 1996, following his ennoblement. For the rest of his judicial career, exceptionally, Lord Cooke of Thorndon sat as a member of the House of Lords and the Privy Council. His last

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<sup>4</sup> A Canadian Judgment: The Lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003 (Law Foundation 2004) at 1

<sup>5</sup> By which I mean the High Court, the Court of Appeal and the Supreme Court

<sup>6</sup> The most important of which was probably the Māori lands case: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

<sup>7</sup> As the High Court was then known

sitting day in the Privy Council was 9 May 2002, fittingly on an appeal from New Zealand.<sup>8</sup>

[12] Ivor Richardson was appointed to the Supreme Court on 28 February 1977. After a very short time in that office, he was appointed as a permanent Judge of the Court of Appeal on 7 October 1977. After Lord Cooke retired on 11 April 1996, Sir Ivor Richardson assumed the Presidency of the Court of Appeal. He continued in that role until his retirement on 23 May 2002.<sup>9</sup>

[13] Lord Cooke's approach to judging is synonymous with "fairness".<sup>10</sup> He opined that the judicial process involves "the search... for the solution that seems fair and just after balancing all the relevant considerations".<sup>11</sup> Lord Cooke's view was that the whole of the common law was 'judicial legislation'.<sup>12</sup> He said, on one occasion:<sup>13</sup>

Every judicial decision, to some extent, makes law, since cases cannot be decided by computer, but the great majority are not concerned with frontiers of legal development.

[14] To Lord Cooke, "fairness" was not only the touchstone of judicial decision-making, it was a core principle of all law-making – whether common law or legislation:<sup>14</sup>

All rules of law ultimately represent the view of their creators, whether the legislature or the judiciary, as to what is fair and just; and on most occasions when there is a particular dispute requiring the elucidation of a rule of law, or its application in particular circumstances, a Judge can hardly avoid attributing to it what is, in his or her opinion, as fair and just an operation as is reasonably possible in those circumstances.

[15] Many of Lord Cooke's critics focussed on what they regarded as the uncertainty inherent in an individualised approach to judging cases. But,

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<sup>8</sup> *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC)

<sup>9</sup> Incidentally, having been admitted to the Bar in September 1978 and appointed to the Bench in April 2002, there was never a time, during my career at the Bar, when Sir Ivor was not on the Court of Appeal

<sup>10</sup> Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421

<sup>11</sup> Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421, 422

<sup>12</sup> Spiller, P *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers 2002) at 125

<sup>13</sup> Sir Robin Cooke "Dynamics of the Common Law" [1990] NZLJ 261, 262.

<sup>14</sup> Sir Robin Cooke "The Discretionary Heart of Administrative Law" in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford: Clarendon, 1998) at 205.

Lord Cooke's approach was much more rigorous than mere application of the Chancellor's foot. In 1989, Lord Cooke described his judicial approach as follows:<sup>15</sup>

There is now a more open acknowledgement that deciding a new point may not be primarily a process of deduction; and that the search is rather for the solution that seems fair and just after balancing all the relevant considerations. Some lawyers, possibly many lawyers, find this disturbing. It affronts their sense of hope or ideal that the law exists apart from the individuals who make it. Probably lawyers of that school of thought would accept that at some stage the law was made by judges, but at least subconsciously they hold the belief that the time of all that has now very largely passed. They find plausible support for their position in the appeal to certainty.

It is very easy to say that if judges decide according to their view of what is fair, the law ceases to be certain. The Chancellor's foot is readily rejected as a criterion, but without consideration of how far differences in the length of human feet are significant in relation to the object to be measured. In truth, however, the cases as regards which that kind of argument is raised are usually cases where the law is uncertain: the person appealing to certainty is really appealing for the more conservative solution. The apparently black-and-white rules to be found in *Anson on Contracts* have been just as productive of litigation as, for instance, the present evolving principles about constructive trusts.

[16] And, in one of his Hamlyn Lectures in 1996, Lord Cooke said:<sup>16</sup>

The common law is always uncertain at its edges. As far as I know, it has never been demonstrated that there is less litigation in judicial climates where certainty is upheld as a priceless asset, a god, than in those where a more liberal approach prevails for the time being.

[17] Lord Cooke recognised the danger of a purely subjective notion of fairness. He met that point by linking "fairness" to the current social context of the day.<sup>17</sup>

For fairness to work as an effective criterion it is necessary that the society have a more-or-less common set of values and that this value be high among them. While New Zealand is in many respects a vocal and divided society, and while some members of the society achieve prominence by being vocal in attempts to make it more divided, I think that the ideal of fairness and a sense of what it requires in particular cases is quite strongly evident. ....

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<sup>15</sup> Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421 at 422-423

<sup>16</sup> Sir Robin Cooke "Turning Points of the Common Law" Hamlyn Lectures, (London, Sweet & Maxwell, 1997), "The Temptation of Elegance Revisited", at 60-61.

<sup>17</sup> Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421 at 423

Indeed one is beginning to suspect that the criterion of fairness can produce more certainty than the *a priori* arguments of technically learned lawyers. In a democratic and egalitarian society, and New Zealand sets out to be and largely is (though regrettably less than affluent), it may be that once the facts of any given case have been fully elicited most people would agree on the fair result. If the law provides that answer, it satisfies proper expectations. *To the extent that the law produces a result that is not fair in a particular case, the law has failed. Bad law makes hard cases.* (my emphasis)

[18] Sir Ivor Richardson has been described as having “a more restrained concept of the role of the Court” than Lord Cooke.<sup>18</sup> In his historical survey of the permanent Court of Appeal from its inception, in 1958 until 1996, Professor Spiller observed that Sir Ivor was influenced by his experience with Government Ministries and officers, quoting him as saying in an interview that each branch of Government should “stick to its last”.<sup>19</sup>

[19] Professor Spiller reported that Sir Ivor was considerably more reluctant to depart from long-standing case-law, particularly that emanating from high authority in New Zealand and England, as a result of his scepticism about idiosyncratic judging, based on notions of fairness. Sir Ivor preferred to limit his approach to established principles.<sup>20</sup>

[20] Sir Ivor Richardson’s more conservative approach was grounded in what he saw as the need for order, certainty and stability in society:<sup>21</sup>

People need to know where they stand, and what the law expects of them if they are to be able to plan their affairs with some assurance that they are not running into legal snares. So the body of legal decisions of the past should be a reasonably reliable guide for them in that respect.

[21] He saw the use of precedent as particularly important in providing such certainty:<sup>22</sup>

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<sup>18</sup> Spiller, P *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers 2002) at 136

<sup>19</sup> *Ibid* at 136 and fn 241

<sup>20</sup> Interview with Richardson J, 13 February 1998, recorded in Spiller, P *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers 2002) at 139.

<sup>21</sup> Sir Ivor Richardson “The Role of an Appellate Judge” (1981) 5 Otago LR 1, 8.

<sup>22</sup> Sir Ivor Richardson “Judges as Lawmakers in the 1990s” (1986) 12 Monash LR 35, 39.

Judges, of all people, must respect precedent, even if not in a blinkered way. They must recognise that any legal change through the adjudication process, however just, is at the expense of some certainty and predictability and may defeat some legitimate expectations.

[22] Yet, Sir Ivor Richardson agreed with Lord Cooke's view that, on occasion, it was necessary to refine or change legal principles, through judicial decisions, to reflect societal changes. Their judgments in *Invercargill City Council v Hamlin* amply demonstrate that point.<sup>23</sup>

[23] In a speech given to the Annual Judges' Conference in Auckland in January 1991, Sir Ivor said:<sup>24</sup>

. . . the values underlying particular legal principles need to be continually reassessed, modified, and in some cases replaced, to reflect contemporary thinking. This need to re-examine is particularly true where society itself has gone through or is going through a marked change. And to function effectively courts cannot afford to be too far ahead or too far behind in their thinking.

If a judge is to make these value judgments, it seems to me important that he should have a frame of reference against which to probe and test the economic and social questions involved. The identification of community values and their reflection in judicial decisions is relatively straightforward where society is homogenous and there is a single set of values which are held by a great majority of people. That is where there is a clear consensus. And there may be a consensus in relation to particular issues but not to others. The problem of identifying community values and reflecting them in judicial decisions becomes much more difficult where society is clearly divided on the particular issues: where there are different sets of values – whether economic, moral, political or social – which are strongly, even tenaciously, held. In so acting, judges are shaping the law to meet the aspirations and necessities of the times. Thus, speaking now of New Zealand, we must recognise that affirmative government is no longer such a strong feature of New Zealand life; that change and continuity sit uneasily together; that we are a multicultural society and in many areas we cannot draw on universally accepted values; and that justice in the abstract cannot always be achieved. In some cases, social awareness is just as important as technical competence.

[24] Sir Ivor was conscious that a Judge, faced with divided social values, may simply affirm one set of values and reject another.<sup>25</sup> Acknowledging that the adversary system “does not readily allow for an extensive societal inquiry”, Sir Ivor

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<sup>23</sup> [1994] 3 NZLR 513 (CA)

<sup>24</sup> Sir Ivor Richardson “Changing Needs for Judicial Decision-making” (1991) 1 JJA 61 at 64-65

<sup>25</sup> Sir Ivor Richardson “The Role of an Appellate Judge” (1981) 5 Otago LR 1, 8-9

accepted the “need for great care” when a Judge expressed views on social policy and public interest issues, based on the limited arguments and information furnished by parties to particular litigation.<sup>26</sup> During his time on the Bench, Sir Ivor often emphasised the need for better empirical data on which to base decisions having any significant element of policy.

## Two other views

[25] Rt Hon E W Thomas QC<sup>27</sup>, (to whom I refer by his former judicial title, Thomas J) has written extensively and learnedly about the judicial role. In a recent book, he launched a strong attack on what he termed “the formalist judge”.<sup>28</sup> The term “formalism” was used to describe “the notion that law is represented by a series of rules, all of which must be applied uncritically to new cases.” He said:<sup>29</sup>

[J]udicial initiative and innovation are sacrificed to the false idol of certainty in the law. At the very least, the creativity necessary to ensure justice in the individual case and to keep the law in step with contemporary requirements is diverted into the futile exercise of seeking to distinguish unwelcome arguments allegedly backed by authority or to otherwise rationalise a decision within the present rule-driven framework.

[26] While acknowledging that consistency in decision-making is “a self-evident virtue”, alongside the fundamental precept that like cases should be decided alike, Thomas J opined that the use of precedent places limits on judicial autonomy:<sup>30</sup>

Judges of a precedent-oriented bent do not have the independence or freedom to ensure that justice is done in the instant case or that the law is developed to meet society’s needs and expectations. Conversely, judges who are not hide-bound by precedent can seek to give effect to the sense of fairness or sentiment of justice rooted in the community. To the best of their ability, judges can endeavour to convert the abstract notion of justice with no specific content into the stuff that will shape their value judgment in a particular case. Having eschewed undue adherence to precedent, they are not impeded in an undertaking, which is vital if the law is to command the respect and confidence of the community which it serves.

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<sup>26</sup> Sir Ivor Richardson “Judges as Lawmakers in the 1990s” (1986) 12 Monash LR 35, 39

<sup>27</sup> A Judge of the Court of Appeal between 1995 and 2001 and an Acting Judge of the Supreme Court, from 2004 until 2006

<sup>28</sup> Thomas, E W *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005) particularly at chapter 3

<sup>29</sup> Thomas, E W *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) at 140.

<sup>30</sup> Thomas, E W *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) at 141.

[27] He continued:

Legal analysis cannot divorce itself from policy considerations and politics is not inherently irrational. Nor can formalism find its justification by seeking to be equated with legal method and analysis. No judge, formalist or non-formalist, is free from the adjudicative discipline to which the judiciary is subject. But that adjudicative discipline is properly to be seen as the framework for judicial reasoning, and not a substitute for it. *There is nothing intrinsic to legal method and analysis that requires a rule or precedent to be applied without re-evaluating its utility or fairness. What is required is that the process of re-examination be a reasoned process articulated openly by the Judge.*<sup>31</sup>

With reference to “societal expectations of the law”, Thomas J’s view is that people know and expect that the law will adapt to change.<sup>32</sup>

[28] A contrary view can be found in Professor Watts’ pungent article, “*The Judge as Casual Lawmaker*”<sup>33</sup> Professor Watts accepted that he was precisely the type of formalist to whom Thomas J had referred. In Professor Watts’ view, a Judge who engages illegitimately in lawmaking should be seen as “activist”.<sup>34</sup>

[29] In his article, Professor Watts considered particular cases, as examples of what he regards as “over-reaching” judicial conduct. In his view, the decisions he discusses are nothing less than judicial legislation, by which unelected Judges usurp the role of Parliament.<sup>35</sup>

[30] Professor Watts paints a different picture (to that advanced by Thomas J) to what he terms “judicial lawmaking”. He said:<sup>36</sup>

Litigants have always reluctantly accepted that much may turn on the Judge they get; some Judges make errors by being not flexible enough of mind, some by being too flexible. But that is one thing. I doubt that litigants would take any more kindly in 2001, than in 1901 or 1801, to statements of the following sort, were a Judge to feel inclined to advertise his or her lawmaking function: “I am entering judgment against you. It is true that at the time you acted you did so in accordance with the law. However, in my

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<sup>31</sup> Ibid at 57

<sup>32</sup> Thomas, EW *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) at 149

<sup>33</sup> Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths Wellington 2001) at 175 ff

<sup>34</sup> Ibid at 208-209

<sup>35</sup> Two particular cases discussed are *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA)

<sup>36</sup> Ibid at 195

view that law was so unjust that I am now going to apply a different rule to your conduct. This remains justice according to law, since I have retrospective lawmaking powers.”

[31] Professor Watts is an unashamed advocate of the value of precedent. He sees the properly exercised application of precedent as “an essential part of argumentation, and its by-product is often the light it throws on problems of the type under consideration.”<sup>37</sup>

[32] Nor is Professor Watts convinced that there is a need for Judges to develop the law in relation to a changing society:<sup>38</sup>

There is room for scepticism, then, as to the extent to which social and political change, and alternatively changes in the “standards, needs, and expectations of the community”, to use Thomas J’s phrase, require the judiciary to alter the law, especially the private law. *As often as not, the activist Judge is simply discontented with old solutions to old problems. And there is certainly not community consensus about many of the changes to private law that have been attempted to be wrought in recent times, within either the legal or wider communities. It is further arguable that some of the expectations that have been created in the community are ones created by the Judges themselves.* (my emphasis)

[33] An even more scathing response to Thomas J’s views came from a review of his book by Richard Ekins, a part-time jurisprudence lecturer at Auckland University and (then) D Phil student at Oxford University. He stated:<sup>39</sup>

Thomas’ method is profoundly hostile to the point of law and would, if adopted, collapse adjudication in the courts to official discretion. The judge’s duty to uphold the law entails subjecting his or her will to that law. *And it is wilful departure from the law, and from the reasoning that identifies the law, that marks out the vice of judicial activism.* (my emphasis)

[34] The views expressed by Thomas J and Professor Watts are diametrically opposed. Neither seeks to hide the contempt he holds for the approach to the judicial task espoused by the other. That is clear from Thomas J’s references to the “formalist” and Professor Watts’ references to the “activist”. In context, both are pejorative terms. With respect, each term is useful only to identify a particular

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<sup>37</sup> Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) at 205-6.

<sup>38</sup> Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) at 210.

approach; of themselves the words provide no definition of the ideas for which they are labels.

[35] I venture two comments that are relevant to the views of both Thomas J and Professor Watts.

- a) First, although they critique the opposing view with vigour, their criticisms are also expressed with rigour. The blunt expression of considered views can often be helpful in identifying precisely why people disagree on a given topic.
- b) Second, while the “formalist” Judge is attacked by Thomas J because of a perceived “uncritical” application of precedent to new facts,<sup>40</sup> Professor Watts criticises the use of personal views to inform the more objective judicial task.<sup>41</sup> Assuming a *critical application* of precedent *and an impartial and dispassionate* approach to the judicial role, I consider their differences are reflected in the approaches of Lord Cooke and Sir Ivor Richardson, to which I have already referred.

### **Some aspects of “Parliamentary Sovereignty”**

[36] The differing views of Thomas J and Professor Watts can, at least in part, be seen as turning on the firm opinion each holds about the roles of Parliament and the judiciary as “lawmakers”.

[37] To what extent is a particular Judge’s approach to the judicial role informed by his or her view of Parliament’s legislative function? New Zealand Courts, unlike their counterparts in Australia and Canada, have no power to review primary legislation or to strike it down as invalid. While there is a power to make a declaration that specific legislation is inconsistent with the terms of the New Zealand

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<sup>39</sup> Ekins, R “Book Review: The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles” [2006] Public Law 870

<sup>40</sup> Thomas, E W *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) at 140

<sup>41</sup> Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) at 210

Bill of Rights Act 1990 (the Bill of Rights),<sup>42</sup> it has been held that the High Court cannot entertain an application for judicial review of the Attorney-General's decision not to bring to the attention of the House of Representatives (pursuant to s 7 of the Bill of Rights) provisions of a Bill which are said to be inconsistent with rights and freedoms contained in the Bill of Rights.<sup>43</sup> The rationale for that view is the non-justiciability of Parliamentary processes.

[38] When the Supreme Court of New Zealand replaced the Privy Council as New Zealand's final court of appeal, in 2003, a curious provision was inserted into the legislation. Section 3(2) of the Supreme Court Act 2003 provides:

### 3 Purpose

(2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law *and the sovereignty of Parliament*. (my emphasis)

[39] In an article published after the Supreme Court Act was passed, Petra Butler asked two obvious questions:

- a) Why did Parliament feel compelled to state the obvious?
- b) How could the Supreme Court Act curtail Parliamentary sovereignty?<sup>44</sup>

[40] The answers to those questions can be found in the Select Committee report that led to enactment of the Supreme Court Act, about which Petra Butler wrote:

The Justice and Electoral Committee proposed section 3(2) as a response to concerns National and ACT Party members of the Committee held about *judicial activism*. What is the basis for this fear of judicial activism as an alleged threat to parliamentary sovereignty? *Recent judicial decisions on Treaty of Waitangi issues have drawn critical reaction from Members of Parliament alleging judicial activism*. Some court decisions and academic writing in recent years questioning the ambit and the state of the doctrine of parliamentary sovereignty might also have disturbed some Members of

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<sup>42</sup> Rishworth Huscroft Optican and Mahoney, *The New Zealand Bill of Rights* (Oxford University Press 2003) at 833-837

<sup>43</sup> *Boscawen v Attorney-General* (High Court Wellington, CIV 2007-485-2418, 20 June 2008, Clifford J). Note: this judgment is under appeal.

<sup>44</sup> Petra Butler, *Human Rights and Parliamentary Sovereignty in New Zealand* (2004) 35 VUWLR 341

Parliament. *The area of human rights is an area traditionally associated with an activist court.*<sup>45</sup> (emphasis added; footnotes omitted)

[41] What were the issues that concerned the relevant Members of Parliament? I suggest that (in no particular order) three sources of concern can be identified.

[42] The first springs from a line of cases in which Lord Cooke had expressed the opinion that there may be some rights which are so fundamental that not even Parliament could abrogate them.<sup>46</sup> Lord Cooke said:

Nor is it in dispute that, if the meaning of the statutory language is sufficiently clear, the New Zealand Parliament can make a person compellable to answer questions on certain subjects from an official - again in the sense that a refusal to answer may result in penalties. *I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.* The subject has been touched on in *Fraser v State Services Commission* [1984] 1 NZLR 116; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *L v M* [1979] 2 NZLR 519, 527. And see F A Mann, "*Britain's Bill of Rights*", (1978) 94 LQR 512. There is of course no suggestion of literal compulsion in the present case. (my emphasis)

[43] The second arose out of comments made by Stephen Franks MP that the Chief Justice ought to have recused herself from hearing *Attorney-General v Ngati Apa*<sup>47</sup> (the "Foreshore and Seabed case") because she had previously shown professional interest in the subject matter of the case "and the boldness of the decision".<sup>48</sup> If Mr Franks were right, any Judge who has shown an interest or expertise in a particular area of law might be required to disqualify himself or herself from sitting on a specific case; particularly if a "bold" decision were likely! Plainly, the proposition that a Judge who knows a good deal about the area of law with which he or she is dealing must be disqualified from hearing such a case cannot be sustained.

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<sup>45</sup> Ibid at 342

<sup>46</sup> For example, see *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 (CA) at 398, in the context of statutory limits placed on the privilege against self-incrimination.

<sup>47</sup> [2003] 3 NZLR 643 (CA)

<sup>48</sup> 36 NZPD 8549-8550 10 September 2003

[44] The third was a speech given by the Chief Justice, Dame Sian Elias, at the University of Melbourne on 19 March 2003,<sup>49</sup> around the time the Supreme Court Act was making its way through the Parliamentary processes. The speech does not purport to express a firm view on the application of the doctrine of Parliamentary Sovereignty in New Zealand. Rather, it raises questions over whether, and if so to what extent, the principle was adopted when rights and powers of “sovereignty” (“Kawanatanga”) were granted when the Treaty of Waitangi was signed in 1840. I suspect that, to the extent that this speech influenced the thinking of Members of Parliament, it is an unfortunate example of assuming that comments made while thinking aloud equate to the expression of a considered opinion.

[45] Dame Sian, in exploring those issues, said:

... the elements of our unwritten constitution have never been fully explored to date. We have assumed the application of the doctrine of parliamentary sovereignty in New Zealand. Why, is not clear. It is not a necessary feature of the possession of territorial sovereignty as the limitations based by written constitutions on the powers of representative assemblies in many commonwealth countries makes clear. The doctrine is a “distinctively English principle which has no counterpart in Scottish constitutional law.”

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The question whether the sovereignty of the New Zealand Parliament is limited by our history is therefore a topic of more than academic interest. Māori claims are currently being managed through a political process of settlements. They may avoid the need for such questions to be explored through the courts. In the political process the government has been assisted by reports of the Waitangi Tribunal, a body set up in 1975 to advise the Crown on claims of Treaty breach and on the “practical application” of the Treaty. ....

## **Parliament and the Courts**

[46] Some members of society accuse Judges of being out of touch with prevailing community values in deciding cases that come before them. There are equally resonant criticisms if a judge were thought to be usurping the legislative role of Parliament. What is the proper function of a Judge?

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<sup>49</sup> Sovereignty in the 21st Century: “Another Spin on the Merry-Go-Round” (2003) 14 PLR 148

[47] The starting point for determining the proper scope of the judicial function is the judicial oath every Judge swears on his or her appointment to the Bench. The judicial oath is prescribed by s 18 of the Oaths and Declarations Act 1957:

### **18 Judicial oath**

The oath in this Act referred to as the Judicial Oath shall be in the form following, that is to say:

I, \_\_\_\_\_, swear that I will well and truly serve Her [or His] Majesty [specify as above], Her [or His] heirs and successors, according to law, in the office of \_\_\_\_\_; and I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will. So help me God.

[48] The “law” to which s 18 refers must include statute, common law and principles of equity. So, the starting point is an acknowledgement that Judges will “do right to all manner of people after the laws and usages of New Zealand”.

[49] In addition, at least so far as the High Court is concerned, all jurisdiction necessary to administer the laws of New Zealand is conferred upon it.<sup>50</sup> This includes the Court’s inherent jurisdiction, something that may be exercised if not inconsistent with the terms of any statute or subordinate legislation.<sup>51</sup>

[50] The next point to consider involves Parliamentary directions to the Court on how statutes are to be interpreted. The literal approach to statutory interpretation gave way, long ago, to one designed to find the “mischief” at which the provision was aimed and to interpret the statute in a manner that would give effect to its underlying policy.<sup>52</sup> That approach was reinforced in the Interpretation Act 1999, s 5:

### **5 Ascertaining meaning of legislation**

- (1) Enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

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<sup>50</sup> Judicature Act 1908, s 16

<sup>51</sup> For example, see *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [35] and [36]

<sup>52</sup> Acts Interpretation Act 1924, s 5(j)

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[51] The Court is also required, where appropriate, to give a meaning to a statute that is consistent with the fundamental rights and freedoms conferred by the Bill of Rights Act. Section 6 of the Bill of Rights provides:

**6. Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[52] The Bill of Rights contains other directions to the courts that, necessarily, require the courts to make policy judgments on (usually) incomplete information. For example, s 4 of the Bill of Rights prevents a Court from declining to apply a statutory provision “by reason only that the provision is inconsistent with any provision of” the Bill of Rights but s 5 entitles the Court to embark upon consideration of whether the rights and freedoms contained in the Bill of Rights are limited through legal provisions that can be “demonstrably justified in a free and democratic society”.

[53] Short of an ability to strike down legislation, it is difficult to imagine a more far reaching power being conferred on a court than to determine what limitations on rights can be regarded as “demonstrably justified in a free and democratic society”.<sup>53</sup> Such a decision could never be much more than an individual Judge’s value judgment. It is not an issue readily capable of explanation through empirical research.

[54] The principle of Parliamentary Sovereignty is not one that requires extensive discussion today. Its relevance is in providing context for the inter-relationship among the three branches of government: Parliament, the Executive and the Judiciary. In *Hobson v Attorney-General*,<sup>54</sup> I expressed the following thoughts:

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<sup>53</sup> See *R v Hansen* [2007] 3 NZLR 1 (SC) for a detailed discussion on this issue

<sup>54</sup> [2005] 2 NZLR 220 at [123]-[125]

- a) The Constitution Act 1986 recognises the three branches of government: Parliament, the Executive and the judiciary: see Parts 2, 3 and 4 of that Act.
- b) Each branch of government ought to defer to the proper role of another in appropriate circumstances. For that reason, generally the Courts will not embark on inquiries into decisions of the Executive in cases involving such issues as national security (see *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at pp 403 – 406; cf the dissenting view of Thomas J at pp 410 – 412) or areas properly within the purview of Parliament (see Article 9 of the Bill of Rights 1688 (UK)) and *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC)).
- c) The proper deference shown by one branch of government to another is, itself, part of a dynamic process by which the constitutional institutions each act to check and balance the actions of others. In some ways it is the perceived likely response of one branch of government to the actions of another that provides the constraint that inhibits one branch from straying into the proper arena of another.

[55] The interaction between the Parliamentary and Judicial branches of Government must be viewed in the light of experience of the way in which the Mixed Member Proportional (MMP) Parliamentary system works. I raise two issues for consideration:

- a) First, in contentious legislation there will be a temptation to fudge the words of a statutory provision to achieve enactment, particularly if aligned political parties have different views on the policy underlying the particular provision. This phenomenon is not too different from the commercial negotiation of a contract, where a key term is not stated with clarity because, while each party is seeking different things, each wants the “deal” to proceed.

- b) Second, if the Courts were to leave an issue to Parliament to resolve, the likelihood of that happening quickly will turn more on the political urgency of solving the problem than on the need for a solution. That makes the decision about what to leave to Parliament a more difficult one to make.

[56] Is Lord Cooke right when he suggests that, in extreme situations, a Court might lawfully over-ride the will of Parliament? My natural instinct is to say “no”. But, I wonder if the door to that possibility should be closed.

[57] Let us assume, many years into the future, a General Election is held. One party, for reasons associated with particular issues of the day, obtains 80% of the popular vote, putting it in a position to repeal provisions of the Electoral Act 1956 that are entrenched. The new government convenes Parliament and passes a statute which repeals the Electoral Act 1956 and replaces it with one that states that that political party shall govern the country in perpetuity, with no further elections being held.

[58] The serious question I pose for you is this: if that were to occur would you expect the courts to apply that legislation uncritically? Or, would you expect the Court to intervene to protect our democracy? If the answer to the first question were “yes”, the effect would be to leave any attempt to reclaim democratic structures to an insurgency. In an extreme situation such as that, it may be necessary to consider very carefully whether the doctrine of Parliamentary Sovereignty has outer limits.

### **Finding one’s own judicial approach**

[59] What is clear from the discussion so far is that there are a series of competing values, all of which may, in appropriate cases, be drawn upon to justify differing views as to the role of judges.

[60] I now try to draw together the various themes and views I have expressed to ask myself whether, after six and a half years on the Bench, I adhere to my original views on the importance of predictability in the law.

[61] In the District Court the great majority of judicial work is undertaken by applying settled law to facts found by a judge or jury. There are few cases in which a District Court Judge will not be bound by authority. However, because of the nature of much of its summary jurisdiction, it is often possible for District Court Judges to “do justice” more readily, in an individualised sense, for the very reason that their decisions are not generally cited as precedent in future cases.

[62] In the High Court, one faces the practical application of settled law to the facts in the vast majority of cases with which one deals each year. As an educated guess, I would doubt whether more than 2%-3% of cases in any given year involve any consideration of whether to develop the law. And, it may be surprising to you to learn that in just over six and a half years I can point to over 1200 decisions which I have written or to which I have been party which were noted on LexisNexis’ LINX Plus when I searched on 30 September 2008. That demonstrates the volume of cases with which High Court Judges are dealing.

[63] When one sits as a first instance judge there can be a temptation to mould legal principles to fit the needs of individual cases, even to the extent of distinguishing authorities because of what one might call a very special set of facts. On appeal, that is much more difficult to do. Sitting as an appellate judge in the High Court (or, occasionally, on the Court of Appeal), I have found consistency and predictability to be the most important values in the majority of cases.

[64] An appellate Court has two discrete functions. The first is that of “error correction”. In other words, did the lower Court err in the law it applied, in determining facts or in applying the law to the facts. The second is development of the law, a much rarer species of case, even in the Court of Appeal.

[65] Particularly when sitting as an appellate judge, one is conscious that the principles expressed will be relied upon by practitioners in advising clients how to behave in the future. In cases such as that, the observations made by both Sir Ivor Richardson and Professor Watts about constraints on judicial development of the law are apposite.

[66] By way of example, when dealing with an appeal from the Family Court or the Environment Court, a High Court Judge must accept that, for most practical purposes, he or she is providing binding authority to be applied in the relevant court. That is because, in percentage terms, very few of the appeals to the High Court go on to be considered in either the Court of Appeal or the Supreme Court.

[67] One of the problems with an individualised approach to judging civil cases is that lawyers find it difficult to advise confidently on settlement because so much turns on what facts will be found and on what legal basis the Court may respond to them. I recall appearing in an appeal in the Court of Appeal in the late 1980s in which my client had been faced with 18 causes of action. One of the Judges (neither Lord Cooke nor Sir Ivor Richardson) asked me to put that to one side and suggested we look at the case “in the round”. Sounding (I suspect) rather terse and exasperated, my response was “What do you mean: ‘in the round?’ My client has responded specifically to 18 causes of action, what do you mean: ‘in the round?’ I never got an answer.

[68] The individualised approach often leads to longer and more expensive hearings and can offer a false hope to the party with the less stable argument that it will succeed. Rightly or wrongly, I know that was the view of many in the commercial Bar in the late 1980s and early 1990s, when the Court of Appeal began to apply more readily equitable principles (particularly the constructive trust) to commercial arrangements.<sup>55</sup>

[69] A particular problem arising from the introduction of equitable remedies into commercial arrangements (specifically when the remedial constructive trust is involved) is that the priorities on insolvency are skewed in favour of someone whose merit seems high but without the Court having any information about the merits of all others who participate in the insolvent entity’s assets. On hearing evidence from Claimant A, a Court may well consider that fairness and good conscience requires a proprietary remedy. But, if granted, that removes Claimant A from the creditors to participate in the distribution of the insolvent entity’s assets on a rateable basis.

Claimants B, C, D and E may have even more compelling cases, but the Court does not have their stories to compare with Claimant A.

[70] There are three other factors that impinge on the ability of Courts to develop the law:

- a) The quality of counsel appearing in the particular case.
- b) Any tactical objectives of the parties involved; neither may be prepared to argue in favour of logical development for reasons of self-interest.
- c) Development of the law, based on contemporary social values, becomes more difficult as New Zealand becomes, increasingly, a multi-cultural society. For example, in Auckland, a not insignificant number of High Court civil proceedings involve parties from China or Korea.

[71] There will be occasions when development of the law is not only unavoidable, but desirable. Novel cases can and do arise. The further the case goes up the judicial hierarchy, the more refined the arguments get and the greater the element of policy involved. That is why, in important cases in the Court of Appeal and in decisions of the Supreme Court, senior appellate judges differ on appropriate outcomes. Generally, it is the choice of one policy solution over another that leads to a parting of the ways.

[72] A useful case study on this topic is *R v Hines*.<sup>56</sup> That case involved a question of witness anonymity. The Crown intended to call a person to give eye witness evidence of an event that led to the accused being charged with attempted murder and wounding with intent to cause grievous bodily harm. Those involved in the incident were members of a gang. Mr Hines was, in fact, its President.

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<sup>55</sup> As examples of the "constructive trust" issue, see *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA) and [1991] 385 (PC) and *Liggett v Kensington* [1993] 1 NZLR 257 (CA), reversed at [1994] 3 NZLR 385 (PC)

<sup>56</sup> [1997] 3 NZLR 529 (CA)

[73] The witness was, understandably, concerned about retribution and was only prepared to give evidence if his name and identifying particulars were suppressed. Equally unsurprisingly, counsel for Mr Hines would not agree to that being done because of the constraints on the ability to mount a defence to the charge, based on an inability to obtain information about the witness' likely credibility or reliability.

[74] At the time *Hines* was decided, there was no statute dealing with witness anonymity. The issue in *Hines* was whether the Court of Appeal should develop the law to provide a basis for a witness to give evidence anonymously, or whether it should be left for a recommendation by the Law Commission (then seized of the issue) or legislation through Parliament. Since *Hines* the law has changed. Relevant provisions are contained in ss 110-119 of the Evidence Act 2006, in part, as a result of the Law Commission's recommendations.

[75] By a majority of three to two, the Court of Appeal declined to develop the law judicially. What follows is a brief summary of the reasons why the majority took that view and the opposing reasons articulated by the two dissenting judges.

[76] The majority views were expressed by Richardson P (on behalf of himself and Keith J) and Blanchard J.

[77] Richardson P and Keith J gave three reasons why the court should not develop a new common law rule:

- a) The empirical material before the court did not provide "a clear picture of the gravity and extent of the social problem that the rule would address" and there was "no analysis of the number or proportion of such cases where the identity of the witness was not known to the defence". Without that material it was not possible to determine the extent to which witness identity was a real issue, to assess the gravity and extent of any problem and to determine an appropriate response.<sup>57</sup>

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<sup>57</sup> Ibid at 550

- b) The difficulties in fashioning a new common law rule, particularly in light of an existing statutory provision relating to anonymous evidence from undercover police officers, militated against curial development, of the law.<sup>58</sup>
- c) Because the Law Commission had already issued a discussion paper it was preferable that the public interest questions were determined through an appropriate policy development process.

[78] Blanchard J concluded that it was premature for the courts to make a fundamental change to the law. In his view, the Court “should not be driven by a particularly hard case ... into pre-empting the consideration of the problem by the Law Commission as part of its general study of the laws of evidence and criminal procedure”.<sup>59</sup> The Judge was also concerned about the inadequacy of information provided by counsel and the lack of empirical information of the type to which Richardson P had referred.<sup>60</sup>

[79] Gault and Thomas JJ dissented.

[80] Gault J was prepared to review earlier decisions to develop the law. His Honour emphasised that this was not an area of the law where conduct can be said to have been undertaken in reliance on certainty in the law. Nor, did Gault J consider that the court should “abdicate responsibility” for addressing the issue if “there is injustice capable of being alleviated”.<sup>61</sup> His Honour would not have waited for the Law Commission because he considered “the policy issues identified in the draft [Law Commission] report seem to me no less appropriate for consideration by judges experienced in trial and appellate work than for the processes of the Law Commission”.<sup>62</sup>

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<sup>58</sup> Ibid

<sup>59</sup> Ibid at 588

<sup>60</sup> Ibid

<sup>61</sup> Ibid at 553

<sup>62</sup> Ibid

[81] Thomas J wrote at length. His judgment, on the issue of when an appellate court should act in circumstances such as this, is instructive and repays study.<sup>63</sup> The essence of Thomas J's judgment can be found in two paragraphs which I set out below.<sup>64</sup>

I entertain no doubt that this is an appropriate occasion for the Court to rule on the issue of witness anonymity. It would be an abrogation of its traditional responsibility to leave it to Parliament when the Courts have retained an inherent jurisdiction to guard and promote the due administration of justice according to law. When, as is the case with Witness A, witnesses are intimidated and genuinely fearful of being exposed to the risk of serious physical harm and will not, and cannot be expected to, give evidence without their identity being withheld from the accused, the due administration of justice is in jeopardy. A situation has been created which calls for a response from the Court if it is to fulfil its function of guarding and promoting the due administration of criminal justice.

...

For the most part the willingness of the Courts to effect a change in the law when required rather than leaving it to Parliament will or should follow from a pragmatic appreciation of which institution is the appropriate body to effect the change and not simply be a response conditioned by the doctrine of precedent or an understated perception of the role of the Courts. But I do not consider that any difficult question of where to draw the line between Parliament and the Court's responsibilities arises in this case. *The Courts have traditionally defined and redefined the criminal law, more particularly the rules of procedure and evidence relating to the administration of criminal justice. No area of the law might be thought to be more squarely within the Court's province. What other institution is better equipped to define the requirements of a fair trial? Or what other body is better appointed to prescribe the scope and limits of individual rights in the area of criminal law? In enacting the Bill of Rights, Parliament has effectively acknowledged this to be so. Moreover, it must rank as an unacceptably stilted view of the Court's traditional role in this area of the law to restrict it to the ingrained defence of the criminal law's historical safeguards and not their greater definition or redefinition to ensure the law is kept abreast of the times and serves the interests of justice.* (my emphasis)

Those two paragraphs do not do justice to the views expressed in Thomas J's judgment, but time does not enable me to set them out in more detail.

[82] Development of the law, in my view, is permissible if there are two or more policy choices open to solve a particular problem *and* there is uncertainty in the law that needs clarification.

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<sup>63</sup> *ibid* at 577-583

<sup>64</sup> *ibid* at 579-580

[83] To develop the law, I think it is necessary, first, to be satisfied that to do so will not put someone at risk of a retrospective liability, particularly if any risk could have been covered by insurance. In other words, in cases where people have not ordered their lives based on existing principles or rules there is greater latitude for judicial development of the law. But there will always be a need for caution; to ensure that the policy-maker's fear of "unintended consequences" does not materialise.

[84] Some of you may ask, why should unelected Judges be entitled to develop the law in that way. There are two answers. First, someone has to, if Parliament has not and is unlikely to in the near future. Second, the Judges are appointed by the Attorney-General (almost invariably a member of the Executive) to make decisions on such issues. The Attorney, in appointing the Judges, is well aware of the Court's role in developing the common law and in addressing some of the interpretation issues to which I have referred.

[85] I return to my own position. Predictability is, in my view, the most important factor in cases where a particular branch of the civil law affects the lives of many and advice to act in a particular way is likely to have been given based on existing law. If no proper point of distinction can be made from a binding precedent after critical analysis of it, any change in the law is likely to result in a hard case making bad law. The criminal law is another area in which predictability will be prized.

[86] On the other hand, where Parliament leaves quasi-political decisions to the Courts (eg s 5 of the Bill of Rights) or has enacted legislation in an ambiguous manner (requiring interpretation by text, in light of purpose: s 5 Interpretation Act), judicial development is unavoidable. The Judges have always had responsibility for developing the common law. In addition, the inherent jurisdiction is often invoked to deal with novel situations when they arise.

[87] It follows that, in general terms, I adhere to the "hard cases make bad law" maxim, while acknowledging that there are times when a Court can develop the law judicially. I suppose my approach to judging is closer to Sir Ivor Richardson's than Lord Cooke's, mainly because I do not have the same confidence in Lord Cooke's

belief that “fairness”, as a criterion, may deliver “more certainty”.<sup>65</sup> In saying that I am attracted to a simple expression of legal principle: I am a firm believer that if one cannot explain a proposition of law in simple terms to an intelligent lay person, the proposition is probably bad law.

[88] Simplicity of expression was something Lord Cooke prized,<sup>66</sup> but it is easier to achieve in a “fairness” based approach to judging. In my view, a synthesis of the Cooke/Richardson approaches is the ideal. Lord Cooke spoke of “the struggle for simplicity”.<sup>67</sup> I suggest the real quest is for *both* simplicity *and* predictability.

### **Two practical examples: hard cases or bad law?**

[89] There are two decisions in which I have been involved that demonstrate the difficulties in dealing with issues of this type. The first was *P v K*,<sup>68</sup> in which Priestley J and I sat as a Full Court. The second is my recent judgment in *Body Corporate 188529 v North Shore City Council*,<sup>69</sup> in which I considered the applicability of the principle derived from *Invercargill City Council v Hamlin*, in the context of a multi-unit development.

[90] *P v K* involved the interpretation of s 5 of the Status of Children Amendment Act 1987. Section 5(2) provided:

(2) Where a woman becomes pregnant as a result of artificial insemination and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—

(a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and

(b) *The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the*

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<sup>65</sup> Sir Robin Cooke, “Fairness” (1989) 19 VUWLR 421 at 423; set out at para [17] above

<sup>66</sup> Spiller P, *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers 2002) at 123

<sup>67</sup> Sir Robin Cooke “*The Struggle for Simplicity in Administrative Law*” in M Taggart (ed) *Judicial Review of Administrative Action in the 1980’s* (Oxford, Auckland, 1986)

<sup>68</sup> [2003] 2 NZLR 787

<sup>69</sup> (High Court Auckland, CIV 2004-404-3230, 30 April 2008)

*pregnancy*, whether born or unborn, unless at any time that man becomes the husband of the woman. (my emphasis)

[91] *P v K* was an appeal from the Family Court. It involved a child whose mother was in a stable lesbian relationship. The mother had been inseminated artificially from semen donated by a man whom she knew. He was living in a stable gay relationship.

[92] The women had approached the donor, seeking his sperm to conceive a child. An agreement was drawn up in an endeavour to define the role that each of the four would play in the child's life. Sadly, the two couples fell out and the "father" brought proceedings seeking access to the child. His application was dismissed by the Family Court on the basis that he had no parental rights because of s 5(2).

[93] The High Court was asked to interpret the statute in a manner that would permit the "father" to make application to the Family Court in that capacity. We held that the statutory provision was clear and there was no warrant for the Court to invoke a strained interpretation in an endeavour to do justice in the particular case. We were able, however, to point to the possibility of the "father" applying for leave to apply for access under a provision of the Guardianship Act 1968 that enabled people, other than parents, to seek such benefits.

[94] Priestley J and I concluded that there was an urgent need for review of this area of the law. I made a number of comments on the reasons why such a review was best left to Parliament. As it happens, the provision in issue has now been repealed and rights would now be determined under the Care of Children Act 2004.

[95] I prefaced my general comments on the desirability of Parliamentary reform by referring to a number of issues that had arisen. Priestley J endorsed the observations I made.<sup>70</sup>

[96] I started my judgment by expressing the view that when Parliament enacted the Guardianship Act in 1968, I was sure that all Members of Parliament would have regarded the terms "father" and "parent" as two of the words least likely to give rise

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<sup>70</sup> *P v K* [2003] 2 NZLR 787 (HC) at [176]

to problems of interpretation. I expressed surprise that in my first year on the Bench, I had been faced with the challenge of interpreting the terms “parent” and “father”, as well as the word “child”.<sup>71</sup>

[97] I noted that New Zealand society had changed significantly since 1968. Traditional concepts of a “nuclear” family and “legitimate” children had been challenged by the prevalence of *de facto* relationships, same sex relationships, reconstituted families after relationship breakdowns, “single” parenthood and the rapid advancement of artificial reproductive technologies. I also noted that in 1987, Parliament was hardly likely to have had in mind the type of situation that arose in *P v K*; the Homosexual Law Reform Act was only passed in 1986; until then homosexual conduct between males was illegal in New Zealand.<sup>72</sup>

[98] I expressed my views on the need for legislative reform as follows:

[204] When legislation is clearly out of step with contemporary societal trends the Court has two choices. First, the Court can choose to interpret legislation on the basis indicated in s 6 of the Interpretation Act 1999 which provides:

... an enactment applies to circumstances as they arise.

Secondly, if the Court is concerned that any decision which it may make in an endeavour to apply old legislation to contemporary circumstances may have unintended consequences, the Court can leave the societal problem for Parliament to resolve (after appropriate consultation) by legislation.

[205] Policy is properly made by elected governments. Elected governments are responsible to the electors who, every three years, vote on the composition of Parliament. It is that direct constitutional responsibility which parliamentarians, and the Cabinet Ministers appointed from the ranks of Members of Parliament, have to the electorate which renders it more appropriate for Parliament to make policy choices for difficult societal problems. The Courts are not equipped with evidence of the extent of particular problems and must, where appropriate, limit their consideration of issues to the particular facts put before the Court on any particular case.

[99] *P v K* raised issues involving contemporary society which, in my view, were so stark that the Court could not respond to the problem in the manner sought by the “father”. Policy issues were too difficult to assess in a vacuum. That was the type of

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<sup>71</sup> Ibid at [182]. As to the need to interpret the term “child” see *Re an unborn child* [2003] 1 NZLR 115

<sup>72</sup> Ibid at [183] and [195]

case which, in my view, the need for the statute to be given clear meaning, despite the obvious problems that were caused to the four individuals whose collaborative efforts had brought the child into the world.

[100] The second example is *Body Corporate 188529 v North Shore City Council*. This case is an interesting study in whether to adapt the law to meet modern conditions, primarily because the law that the plaintiffs were seeking to adapt to new circumstances was set out in *Invercargill City Council v Hamlin*<sup>73</sup> a case much criticised by Professor Watts on the basis that the “community consensus” on which the Court relied had not been established.<sup>74</sup>

[101] Some background is necessary. *Invercargill City Council v Hamlin* followed earlier New Zealand authority in holding that a territorial authority owed a duty of care to an actual or potential homeowner to take reasonable care in issuing a building permit. The cases up to and including *Hamlin* had dealt with inadequate foundations. Declining to follow a judgment of the House of Lords to the contrary, the Court of Appeal decided that the duty continued to exist and was sustainable on the grounds that New Zealand conditions were different from those in England. The relevance of local conditions is something on which Professor Watts takes a different view.

[102] The Court of Appeal’s decision was, in fact, upheld by the Privy Council.<sup>75</sup> In the course of its decision, the Privy Council acknowledged the right of the New Zealand Court to develop this area of law in a manner different from that prevailing in England, due to local conditions. Notwithstanding Professor Watts observations that one does not know whether English conditions differed from New Zealand, it is highly likely that those Law Lords who sat on appeal would have been able to discern relevant differences.

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<sup>73</sup> [1994] 3 NZLR 513 (CA)

<sup>74</sup> Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) at 210

<sup>75</sup> *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); the decision of the House of Lords which was not followed was *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL), an appeal heard by a Bench of seven Law Lords

[103] The fact that the Privy Council was prepared to allow New Zealand to develop its own rules in this area confirmed the decision of the Court of Appeal to retain the duty. My task, in *Body Corporate 188529* was to determine whether the duty to homeowners identified in *Hamlin* was applicable to a dwelling for which a stratum title was held by an owner, within a development under the Unit Titles Act 1972.

[104] I held that the duty did exist but needed to be adapted to meet the needs of the Building Act 1991 and the Unit Titles Act 1972. The real difficulty was in expressing the scope of any duty with sufficient definition or particularity. I took the view, consistent with my primary view that the law should be predictable, that:<sup>76</sup>

- a) The nature and scope of the duty of care imposed on a territorial authority must be principled, capable of being expressed simply, predictable in its future application and result in a just and reasonable allocation of risk between parties who are not in any contractual relationship.
- b) “Vulnerability” was not an appropriate touchstone for liability to attach. “Vulnerability” (while a factor to be taken into account in determining whether a duty exists or ought to be created) is too uncertain a concept to be the ultimate test.
- c) There is a need for predictability. I use the word “predictability” (in preference to “certainty”) deliberately because, however the test is articulated, there will remain grey areas which will need to be determined on a case by case basis. Certainty is too much to expect. Predictability provides a level of assurance that is needed by the Council to determine the extent of its potential liability and to take steps to guard against risks. As any Judge knows, even with legal principles that are well settled, the difficulty lies in applying them to the facts of particular cases.

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<sup>76</sup> *Body Corporate 188529 v North Shore City Council* (High Court Auckland, CIV 2004-404-3230, 30 April 2008) at [205]-[208]

- d) It is equally important that both advisers for those who are buying a home and Council officers understand clearly the category of persons to whom the duty is owed. A relatively simple articulation of the extent of the duty in a predictable manner should discourage claims by those who fall outside its ambit, particularly where it is possible for an adviser to make inquiries, yet provide an incentive for the Council to ensure its functions are performed to an acceptable standard.

[105] I concluded that there was a need to develop the law cautiously and, unusually, I took the view that the duty of care should be articulated in a fairly rigid way. I said:

[217] I am conscious of the many appellate warnings against articulating a duty of care in too rigid a fashion. However, in this case I see the need to retain the integrity of the original basis of the *Hamlin* duty, coupled with an emphasis on simplicity of expression and predictability in outcome, as justifying my approach. From a policy perspective, in this very narrow part of the law of negligence, a greater degree of precision is required. That approach is consistent with the way in which *Hamlin* limited the Council's duty to homeowners.

[218] I do not exclude the possibility that there may be some circumstances in which a territorial authority assumes a duty of care to a particular purchaser as a result of proved conduct. My approach is not intended to limit the ability of the Court to find an assumption of a duty of care of a type akin to that discussed by the Privy Council in *Brown v Heathcote County Council*.<sup>77</sup> Nor do I intend to exclude circumstances in which, despite what is disclosed on an application for a building consent or in the plans, it is so obvious that units are being constructed for residential purposes that a duty must attach. In both types of cases, however, there would need to be a clear focus on the facts said to give rise to the alleged duty. (footnotes omitted)

[106] I left open expressly whether a duty would attach to a mixed use development and did not exclude the possibility of an assumption of a duty of care independent of the type of duty to which I had referred.

[107] I was dealing in *Body Corporate 188529* with a novel situation which required an exhaustive analysis of the Unit Titles Act 1972 (particularly the respective rights and obligations of body corporates and individual owners) as well as the applicability of *Hamlin*. But I was dealing with development of a tortious

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<sup>77</sup> [1987] 2 NZLR 720 (PC)

remedy, something that has always been regarded as within the powers of the Judges.

[108] It seemed to me to be necessary to extend the duty, not because I wanted to make law but, rather, it was, in principle, right to apply the *Hamlin* duty to what, in my view, was plainly an analogous fact situation. The difficulty arose out of the need to differentiate the commercial from residential, a difference on which the Court of Appeal had acted in *Hamlin*.

[109] My answer, rightly or wrongly, was to focus on intended end use rather than actual end use. Whether I was right or wrong may be for the Court of Appeal or the Supreme Court to determine ultimately.

[110] Are *P v K* and *Body Corporate 188529* hard cases that make bad law? Or, was the law bad to begin with? You be the Judge.