THE NEW ZEALAND NATIONAL LEGAL IDENTITY

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Associate Professor Jeffrey Berryman has described New Zealand courts as "benevolent amateurs". I would not repudiate this. It would be rather gratifying to think that, however inexpert and naive the New Zealand Courts may be found to be, they are at least seen to be kindly to all. There have been many worse epitaphs.

From the point of view of an appellate judge hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned and much more open emphasis began to be placed on working out a philosophical approach — to use a somewhat pompous term to describe conscious value judgments.

Without implying that it marked a beginning of a new era, for the era had already begun, one's mind goes to *Bowen* v. *Paramount Builders Ltd.*[1] in 1976. Mr. David Tompkins Q.C. (as he then was) and Mr. John McLinden will remember that the Court of Appeal adjourned the hearing of that case specifically to enable arguments to be prepared on the policy considerations that should influence a New Zealand Court in deciding whether or not a builder owes a duty of care respecting foundations to subsequent purchasers of a house.

Direct debate of policy considerations, and with an eye to interests transcending those of the immediate parties, has become commonplace. Without exaggeration it may be said to be regular fare in the Court of Appeal. The only caution I would benevolently add for the benefit of counsel is that it is not a substitute for analysis. You need to analyse and understand the lines of authority, quite often competing, to expose the policy options. You may find that the wisdom of the past has in truth adequately reconciled a clash of interests, bequeathing a workable and just rule for the present. But if, properly appreciating what has been evolved by our predecessors, you can still identify a weakness in the law, you will be listened to. If you are in a case where we sit as a full court, which happens about once a month, you may think it especially prudent to be ready to argue policy.

It is very hard to form a reliable picture of what is actually happening in our courts without an adequate system of law reporting. The basic problem is that the output of judgments from all courts has increased enormously, far out of proportion to the limited increased space allowed by the division of the New Zealand Law Reports into two annual volumes. The Court of Appeal now disposes of some 500 cases a year. Of course only a fairly small minority of the judgments are worth preserving in the official reports. But the fact is that a smaller percentage of the judgments is being reported there than ever before; and then reported tardily, although well.

As at late September 1987 no decision given this year had appeared in the New Zealand Law Reports, and only a handful of last year's. Collateral specialist series with more limited circulations are no substitute. Still less are

[1] [1977] 1 N.Z.L.R. 394.

loose copies. Most contemporary case notes are published while the judgment is unreported, so the serious reader would have little chance of perceiving whether or not the commentator was riding a hobby horse.

More importantly, the themes and approach being developed in the appellate court tend to be obscured by the present reporting system. Amateurish though its way may be, the Court of Appeal is necessarily the main precedent-making court in the country. One change needed now is the establishment of a series of New Zealand Appeal Reports, possibly as part of the New Zealand Law Reports service, but ensuring that decisions of the court which ought to be reported are reported timeously and so that their patterns may be seen more clearly, just as the Australian Law Journal Reports ensure this for the High Court of Australia. They have the Commonwealth Law Reports as well. I am not suggesting that the reporting of New Zealand High Court judgments should be cut into. On the contrary, they should be reported as far as reasonably practicable. But it is wrong that there should be some form of competition for space between the two courts.

So much by way of well-wishing opening shots. I am going to divide this paper into two parts. The first is the easy part — demonstrating that there is a distinct New Zealand national legal identity. The second is the hard bit, and its akwardness may go far to explain why the Organising Committee have engineered me on to this platform. What should we do about the Privy Council?

I. THE CORE SUBJECTS

At one time this session was advertised as the search for a national legal identity. This was rightly abandoned, for there has been nothing self-conscious or strained about what has gone one. Developments have come naturally and on all the major fronts, as a brief sketch will show. Autochthonous is probably the accurate word.

No apology should be needed for mentioning first *the criminal law.* If viewed by numbers of practitioners and academics as something of a poor and disreputable relation, lacking in intellectual content and social status, it epitomises the law for most of the population, and on the sentencing side it excites politicians as no other legal subject does.

Our criminal law began on a solid British base, albeit quite avant-garde in its day, in the form of a statutory code largely taken from the 1879 Report in the United Kingdom of the Royal Commission on Indictable Offences. Paradoxically that code, with amendments found necessary over the years, has enabled us to avoid what most writers on the modern criminal law of England would regard as the excesses and distortions there of recent years. For instance, in England objective tests of liability for major crimes have been introduced by the House of Lords and have only partly been rectified by legislation — see *Director of Public Prosecutions* v. *Smith*[2] as to murder (overturned by legislation) and *R.* v. *Caldwell*[3] as to recklessness (still surviving[4]). In New Zealand it is established that a man cannot be convicted of for being stupid and that, at least in the context of the definition of murder in the Crimes Act 1961, recklessness requires a conscious taking of the risk of causing death; but if the accused kills, taking for criminal purposes what he or she

[2] [1961] A.C. 290.
[3] [1982] A.C. 341.
[4] *Elliott* v. *C.* [1983] 1 W.L.R. 939.

knows to be a serious risk of killing, that is murder. The subject has been discussed recently in two unreported cases, building on earlier New Zealand authorities, *R.* v. *Piri and Carter*[5] in March 1987 and *R.* v. *Harney*[6] last month.

Another quite major development has been purely judicial and partly inspired by the decision of the Supreme Court of Canada in *R.* v. *City of Sault St. Marie*[7] in 1978, although the New Zealand origins go back earlier. The fundamental principle that normally there is no criminal liability without a guilty mind has been strongly affirmed[8], but we have tried to steer a course between Scylla and Charybdis. On the one hand a remorseless extension to all criminal legislation of the 'golden thread' principle of *Woolmington* v. *Director of Public Prosecutions*[9], which would frustrate the social object of some statutes. On the other the obnoxious doctrine of truly absolute criminal liability, still given considerable rein in England[10].

The path of this via media was charted broadly in 1983 in *Civil Aviation Department* v. *Mackenzie*[11] and in more detail in 1986 in *Millar* v. *Ministry of Transport*[12]. In short it has involved acceptance, as regards essentially regulatory social legislation, of a defence of total absence of fault, the onus being on the defendant. In time this is hoped to work a big simplification of the confused law about mens rea. We have felt constrained in continuing on this path to part company with the High Court of Australia[13]. It is an alternative path not even adverted to by the House of Lords in a recent decision in the field[14].

Recodification of our substantive criminal law is in the offing and, given current Parliamentary and departmental attitudes to law reform, it would not be surprising if further distinctiveness were the result. As for procedure, a striking inroad into the traditional faith in the jury as the natural tribunal for major crime is the now established use of trial, on indictment, by judge alone at the instance of the accused[15]. In sentencing, again there is a full and to some extent original (if mainly declaratory) statutory code in the Criminal Justice Act 1985. The country has its own manifestations of sentencing problems currently experienced in many other jurisdictions, for instance as to collective rape and as to child abuse, but they can be complicated here by racial aspects, as indeed is too much of criminal sentencing. The courts are trying to work out New Zealand solutions, though thanks to the compilations of Mr. D.A. Thomas and his emulators in other countries we now have much readier access to and benefit more from overseas experience[16]. The ability of the Solicitor-

[5] C.A. 126/86; judgment 13 March 1987.

[6] C.A. 87/87; judgment 7 September 1987.

[7] 85 D.L.R. (3d) 161.

[8] Thus *Waaka* v. *Police* (C.A. 243/85; judgment 21 July 1987) favours the application of the principle to both limbs of the offence of obstructing a constable in the execution of his duty; so going further than the presently prevailing English and Australian decisions.

[9] [1935] A.C. 462.

[10] See for instance *R.* v. *Wells Street Magistrate, ex parte Westminster City Council* [1986] 3 All E.R. 4.

[11] [1983] N.Z.L.R. 78.

[12] 2 C.R.N.Z. 216.

[13] *He Kaw Teh* v. *R.* (1985) 60 A.L.R. 449.

[14] *Pharmaceutical Society of Great Britain* v. *Storkwain Ltd.* [1986] 2 All E.R. 635.

[15] See *R.* v. *Connell* [1985] 2 N.Z.L.R. 233.

[16] See for instance *R.* v. *Villicky Clark* (C.A. 50/87; judgment 26 May 1987; *R.* v. *Misitea* (C.A. 165/87; judgment 24 September 1987); *R.* v. *B.* [1984] 1 N.Z.L.R. 261; *Re Wickliffe* (1986) 2 C.R.N.Z. 310.

General to apply for leave to appeal against a sentence, introduced more than 20 years ago, undoubtedly helps to eliminate glaring disparities and sometimes to reduce public concern. They have not yet taken the plunge in England.

A package of recent legislative reforms of particular aspects of criminal law and practice reflect a social philosophy more equal as between the sexes. The Homosexual Law Reform Act 1986 removed criminal sanctions against consensual homosexual conduct between males over 16. A Crimes Amendment Act in 1985 enacted a new comprehensive code for offences of sexual violation, heterosexual or homosexual. It was accompanied by amendments to the Evidence Act dispensing with the need for a warning to the jury if there is no corroboration of a complainant's evidence in sexual cases[17]; and by an updating of legislation of the nineteen-seventies designed, by limiting cross-examination and reporting, to make the giving of evidence in such cases less of an ordeal for complainants. The New Zealand legislation represents a wave that arrived at much the same time in England and Australia, but ours is not a copy and possibly more restrictive of the latitude of the defence than the overseas counterparts[18].

The recent Act emphasising that violent offenders should be imprisoned except in special circumstances[19] may be said to state the obvious; and the one establishing a Victims Task Force concerned with better provision for the treatment of victims of criminal offences[20] has a rather abstract look; but neither should be dismissed as window dressing. Formal affirmations of principle and national commitments to goals have their own value.

If crime is the first thing that most people think about when the law is mentioned, *family law* is not far behind. The Matrimonial Property Act 1976, a much more detailed measure than the 1963 Act (which the courts did not handle well), was described by the author of the leading textbook[21] as "revolutionary" and at least showing "that we can foot it with the French in producing complexity". Understandably the Privy Council showed not a great deal of disposition to become enmeshed in it in *Reid* v. *Reid*[22]. New Zealand was the first of the Commonwealth jurisdictions, too, to enact family protection legislation concerning succession on death, as long ago as 1900[23], and a long line of essentially indigenous precedents has settled the main principles on which it is administered[24].

I say the main principles deliberately, for it is necessary to notice a peculiarity of legal history. The bearing of the Act on contracts to leave property by will arises sufficiently seldom not to be a mainstream subject. Otherwise the matter might be of more concern. In 1941 the Privy Council, after an even division of judicial opinion in New Zealand, appeared to have settled our law to the effect that the Act prevailed over a contract. That was *Dillon* v. *Public Trustee*[25], a judgment delivered by Viscount Simon L.C. But a

[17] Considered in *R.* v. *Daniels and Tihi* (1986) 2 C.R.N.Z. 164.
[18] *R.* v. *McLintock* (1986) 2 C.R.N.Z. 158.
[19] Criminal Justice Amendment Act (no.3) 1987.
[20] Victims of Offences Act 1987.
[21] *Fisher on Matrimonial Property*, 2nd ed. vii.
[22] [1982] 1 N.Z.L.R. 147.
[23] Testator's Family Maintenance Act 1900. Now Family Protection Act 1955.
[24] They are briefly summarised in *Little* v. *Angus* [1981] 1 N.Z.L.R. 126.
[25] [1941] N.Z.L.R. 557.

generation later their Lordships reversed course in *Schaefer* v. *Schuhmann*[26], the Lord Simon of the day dissenting. The remarkable thing is that this was in a New South Wales case, so no New Zealand voice was heard, nor was any consideration given to whether the previous view did not accord better with current New Zealand philosophy, though probably most New Zealanders would think that it did. Possibly just as remarkably, a court of three in the Court of Appeal then held in *Breuer* v. *Wright*[27] that they were not free to consider the policy and social questions in a New Zealand setting, but were absolutely bound to apply the Privy Council New South Wales decision in New Zealand.

In between the two Privy Council decisions our Parliament had enacted in 1944 another piece of pioneering legislation, giving the courts jurisdiction to enforce testamentary promises which would be without contractual effect but have been made in return for services. That Act[28], now the Law Reform (Testamentary Promises) Act 1949, appeared to reflect the same philosophy as had prevailed in *Dillon*; and in *McCormack* v. *Foley* in 1983[29] it proved possible on the statutory wording to give effect thereto as regards testamentary promises, distinguishing *Schaefer*. Mere words apart, though, it might be difficult to conceive that, starting with a clean slate, radically different rules would be selected in the twin statutes.

Parliament has not yet tackled de facto relationships; the law here is being purely judge-made. Progress has been cautious, on a case-by-case basis, with significant help again from Canada[30] and also from opinions of Lord Reid and Lord Diplock in *Pettit* v *Pettit*[31] and *Gissing* v. *Gissing*[32], in this particular field prophets less honoured in their own country. The rationale of the modern constructive trust can be variously formulated. No more certainty could be claimed for it than for sundry other equitable concepts that have evolved over the centuries (e.g. charity; equitable fraud; equitable estoppel). What we are working towards in the Court of Appeal, have perhaps now reached, is endorsement of an approach found in substance in numbers of judgments at first instance, for instance by Jeffries J. and Bisson J. (now a member of our own court), namely that such a trust arises where, as the result of either common intention or individual contributions to the partnership, reasonable persons in the shoes of the parties would naturally have expected that result[33].

One should not leave family law without underlining that much of it is administered by our successful Family Courts, with specialist District Court judges, and proceeding in a comparatively informal way with emphasis on a conciliatory and inquisitorial approach rather than a purely adversarial one.

While *real property law* is certainly a basic subject, to spend much time on it in the present context would be superfluous, as the point is so obvious that the heart of all our land dealings is the Land Transfer Act 1952, the New Zealand version of the registration of title system devised in South Australia

[26] [1972] A.C. 572.
[27] [1982] 2 N.Z.L.R. 77.
[28] Law Reform Act 1944, s.3.
[29] [1983] N.Z.L.R. 57.
[30] *Pettkus* v. *Bekker* (1980) 117 D.L.R. (3d) 257.
[31] [1970] A.C. 777.
[32] [1971] A.C. 886.
[33] *Hayward* v. *Giordani* [1983] N.Z.L.R. 140; *Pasi* v. *Kamana* (C.A. 68/85; judgment 28 October 1986); *Oliver* v. *Bradley* (C.A. 51/87; judgment 24 July 1987).

by the English emigrant, South Australian Premier, and later, on return to England, Member of Parliament there, Sir Robert Torrens. Title is guaranteed by the state — though, curiously, this does not seem to be a noticeably costly form of insurance — and, actual fraud and some in personam rights aside, the register is everything. It is true that some of our leading cases on the Act, including the most important one of recent years, *Frazer* v. *Walker*[34], are decisions of the Privy Council; but Lord Wilberforce's highly valued judgment in that case was essentially an approval of what had been decided nearly half a century earlier by our Court of Appeal in *Boyd* v. *Mayor of Wellington*[35] (where, incidentally but interestingly, Salmond J. was one of the dissentients). The earliest Bill in England for the introduction of a similar system is said to have been in 1656[36], when Oliver Cromwell was Lord Protector, but it was dropped and they have not yet completely caught on to the idea.

As for *personal property*, perhaps the Chattels Transfer Act 1924 and its system of registration is not grand enough to be mentioned in the same breath as the Land Transfer Act, but many of the modern restrictive rules and discretionary judicial powers that are important in practice are to be found in more-or-less indigenous statutes, such as the Credit Contracts Act 1981 and the Hire Purchase Act 1971[37]. The subject shades into that of consumer protection and measures for promoting competition. A new litigation industry could well grow out of the Commerce Act 1986, particularly the provisions enabling injunctions or damages to be granted to any person damnified by conduct contravening Part II, which outlaws inter alia practices substantially lessening competition, and various pricing practices, and the exploitation of a dominant position in a market; subject to certain limited authorising powers vested in the Commerce Commission. The legislation has been much influenced by the Trade Practices Act 1974 of the Commonwealth of Australia; it may be said to represent a specifically Australasian approach, although we are aware that the present United Kingdom Government is also a full subscriber to the cause of competition. The Fair Trading Act 1986 is in the same category in New Zealand as the Commerce Act.

That leads to straight *contract law*, where the face of general New Zealand law has been quite dramatically changed by a string of statutes passed on the recommendation of the former Contracts and General Law Reform Committee. First came the Illegal Contracts Act 1970, a successful reform with its conferment on the courts of sufficient discretionary powers to overcome the Draconian and artificial effects of the old common law illegality rules[38]. The great merit of this statute is that it enables a court to excuse technical illegalities in cases where it is demonstrated that there has been no real violation of the policy underlying Parliamentary enactments which have been in terms transgressed. The later general reforming statutes have been less fully tested in litigation so far — a fact surprising as regards the ambitious Contractual Remedies Act 1979, less so as regards the more restricted Contractual Mistakes

[34] [1967] N.Z.L.R. 1069.
[35] [1924] N.Z.L.R. 1174.
[36] R.R.A. Walker in 55 L.Q.R. 547.
[37] *Industrial Steel and Plant Ltd.* v. *Smith* [1980] 1 N.Z.L.R. 545; *Clyde Engineering Ltd.* v. *Russell Walker Ltd.* [1984] 2 N.Z.L.R. 343.
[38] The line of cases, in most of which the validating power has been used, runs at present from *Harding* v. *Coburn* [1976] 2 N.Z.L.R. 557 to *Cameron and French* v. *Brett Wotton Properties Ltd.* (C.A. 221/86; judgment 24 July 1987).

Act 1977 and Contracts (Privity) Act 1982. The existence of those four statutes alone is enough to make the sixth New Zealand edition of Cheshire and Fifoot (1984) of much more practical utility in this country than any other contract textbook now available.

Judicial initiatives in contract law have been less noticeable than those of the legislature, but on reflection about what has been done over the last decade or so I have realised that, in a low-key way, there has been more than I thought at first that may be at least worth mentioning. The hope may be permissible that the attempt made in *Hunt* v. *Wilson*[39] in 1978 to reduce the confusion caused by textbook and curial throwing about of the terms "precedent" and "subsequent" in relation to contracts is of some use; the hallowed English work, *Williams on Vendor and Purchaser*, is a typical culprit. If they are anything, they are all conditions *in* contracts. Of more practical importance, the line of cases represented by *Provost Developments Ltd.* v. *Collingwood Towers Ltd.*[40] (1980) has brought out or established a cardinal difference between New Zealand and English conveyancing practices. Their traditional "subject to contract" clauses mean that there is no legal obligation of any kind on either party: hence gazumping. Our "subject to solicitor's approval" means that a contract does exist: in effect withdrawal from the bargain can be only on grounds reasonable inter partes.

Similar steps in the direction of importing a little equity into contract law have been taken in *Canterbury Pipe Lines Ltd.* v. *Christchurch Drainage Board*[41] where it was held that an engineer certifying under a building contract was bound to act fairly in a sense not confined to procedure; and in cases where it has been recognised that a mechanical offer-and-acceptance analysis is not the only criterion of the existence of a contract[42].

It has to be said that we have not been greatly helped by the Privy Council in evolving a reasonable New Zealand contract law. Not having sat in *O'Connor* v. *Hart*[43], I perhaps find the actual decision of their Lordships there easier to live with than do some others. On the particular facts there does not seem to have been an unfairness or imbalance sufficient to fall within the fairly elastic equitable doctrine of unconscionability, whose existence was of course not disavowed by Lord Brightman; at all events it has since been applied in New Zealand in *Nichols* v. *Jessup*[44]. What does seem of concern is the concentration by the Judicial Committee in *O'Connor* v. *Hart* on finding the answer by analysis of some nineteenth century English cases and two Australian decisions of 1892 and 1904 which followed them. Despite Professor Atiyah's well-known work, little or no attention was specifically devoted to the issue of desirable philosophical limits on freedom of contract. It was even said[45] that if the principle stated in the New Zealand decision of *Archer* v. *Cutler*[46] was correct, it "must be regarded as having general application throughout all jurisdictions based on the common law". With the greatest respect, I should have thought that the proposition that, subject only to special

[39] [1978] 2 N.Z.L.R. 261.
[40] [1980] 2 N.Z.L.R. 205.
[41] [1979] 2 N.Z.L.R. 347.
[42] *Boulder Consolidated Ltd.* v. *Tangaere* [1980] 1 N.Z.L.R. 560; *Powierza* v. *Daley* [1985] 1 N.Z.L.R. 558.
[43] [1985] 1 N.Z.L.R. 159.
[44] [1986] 1 N.Z.L.R. 226 and 237.
[45] [1985] 1 N.Z.L.R. at 165.
[46] [1980] 1 N.Z.L.R. 386.

"local considerations" (whatever that may mean), the common law today must necessarily be the same in all jurisdictions which started with it is really hopelessly unreal.

A brief companion reference may be added to the lesser known case of *Aotearoa International Ltd.* v. *Scancarriers A/S*[47], where the Privy Council held that a shipping agent's telex, which was expressed to be a definite agreement to hold a promotional freight rate for a certain specification of cargo until a specified date and which had been acted on by the client, created no contractual obligation. The decision speaks for itself.

Between contract and status there is a centuries' old oscillation and probably nowhere has this been more apparent then in *employment law*. It is another way wherein truly major and distinctive changes are under way in New Zealand. Some are being brought about by judicial decision. For example, it has been found possible to say that there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever[48]. And that the relationship of trust and confidence that ought to exist between employer and employee imports duties on both sides[49]. The right to a hearing or at least reasonable treatment before dismissal is now deeply ingrained by a combination of statutory and common law requirements[50]. The concept of constructive dismissal is also well established. In these matters it is right to acknowledge the stimulation that has been received from some creative English judgments, notably by Lord Wilberforce, Lord Denning and Browne-Wilkinson J., as the Vice-Chancellor then was.

In relation to effective remedies in a domain overlapping the same area, it may be added that our courts, while accepting to the full the usefulness of the *university visitor's jurisdiction*, are less prepared than some overseas courts to wash their hands of a residual control. Contrast the decision of the House of Lords in *Thomas* v. *University of Bradford*[51], where delivering the principal speech Lord Griffiths regarded the precedents as too strong to enable an English court to adopt the New Zealand solution, with *Norrie* v. *Senate of the University of Auckland*[52].

But the most apparently radical change has been brought about by legislation, the Labour Relations Act 1987, which has now been in force for two months. Out of the ashes of the Arbitration Court has arisen the Labour Court and to it has been given full and exclusive jurisdiction (though subject to appeal to the Court of Appeal) over industrial torts such as conspiracy, intimidation, inducement of breach of contract and interference by unlawful means with trade, business or employment. This extends to injunctions. At the same time the personal grievance provisions, doing away with the limitations on damages for wrongful dismissal laid down by the House of Lords in 1909[53], have been re-enacted. The conferment of first instance jurisdiction on the Labour Court instead of the High Court was not in fact attributable to the decision of the Court of Appeal in *New Zealand Baking Trades Union* v. *General Foods Corporation*[54]; its roots lie somewhat earlier; but it is in harmony with our

[47] [1985] 1 N.Z.L.R. 513.
[48] *Marlborough Harbour Board* v. *Goulden* [1985] 2 N.Z.L.R. 378, 383.
[49] *Auckland Shop Employees Union* v. *Woolworths (N.Z.) Ltd.* [1985] 2 N.Z.L.R. 372.
[50] See for instance *Poananga* v. *State Services Commission* [1985] 2 N.Z.L.R. 385.
[51] [1987] 1 All E.R. 834.
[52] [1984] 1 N.Z.L.R. 129.
[53] *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488.
[54] [1985] 2 N.Z.L.R. 110.

view there that issues of industrial law should be determined in the first instance by the Arbitration Court, with the general courts having a reserve or supporting role and the ultimate jurisdiction on questions of law.

Taken together these developments mean that current employment law in this country is virtually a new deal.

In some significant respects it could be said without exaggeration that the same is true even of *general tort law*. I refer not so much to negligence liability, though it is true that there is now quite a long line of New Zealand cases, a number of them collected in *Brown* v. *Heathcote County Council*[55], which sound a different note from that currently struck in England, and, more specifically, that there is a clash between the House of Lords ruling in *Pirelli General Cable Works Ltd.* v. *Oscar Faber & Partners*[56] that the sole cause of action in negligence can arise before anyone could reasonably know about it and the approach favoured some years previously in our Court of Appeal in *Mt. Albert Borough* v. *Johnson*[57] that, as to negligent construction of a building, the material time is when the defect becomes apparent or manifest. However, these New Zealand decisions were seen as according with the thinking of English Judges — Atkin, Reid, Denning, Morris, Pearce, Wilberforce, Pearson. It is doubtful whether any New Zealand case has actually been decided differently because of Lord Wilberforce's speech in *Anns* v. *Merton London Borough Council*[58]; it gave us rather a guiding spirit and a focus; the retreat from *Anns* in the country of its birth has been a sadness for us.

What I have in mind more is the impact of the Accident Compensation Act[59] in precluding, in favour of certain insurance benefits, actions for damages arising out of personal injury by accident. It was found that the statutory scheme cannot have been meant to do away altogether with the salutary exemplary damages jurisdiction[60], for high-handed official actions for instance; and the problem has to be faced of working out principles governing the award of such damages in a setting where the normal partly punitive effects of compensatory and aggravated damages cannot operate. This is a course quite foreign to anything hitherto contemplated in England. The main cases so far are *Donselaar* v. *Donselaar*[61] in 1982 and *Auckland City Council* v. *Blundell* in 1987[62]. Judgment is at present reserved in *Chase* v. *Attorney-General*[63] on whether the personal representative of a deceased victim of tort can make such a claim. It is not as simple as it sounds.

Another novel point that has called for consideration this year, although this one does not turn on New Zealand legislation and we were much helped in dealing with it by Canadian authority, is whether equitable compensation or damages for breach of a fiduciary obligation — arising in contract and probably concurrently in tort — can be reduced for contributory negligence, even if the case be outside the Contributory Negligence Act. The answer favoured in *Day* v. *Mead*[64] was Yes.

[55] [1986] 1 N.Z.L.R. 76.
[56] [1983] 2 A.C. 1.
[57] [1979] 2 N.Z.L.R. 234, 239.
[58] [1978] A.C. 728.
[59] Currently the Accident Compensation Act 1982.
[60] *Taylor* v. *Beere* [1982] 1 N.Z.L.R. 81.
[61] [1982] 1 N.Z.L.R. 97.
[62] C.A. 182/85; judgment 2 October 1986.
[63] C.A. 158/86.
[64] C.A. 90/86; judgment 31 July 1987.

About *administrative law* I have really nothing to add to what was debated at an Auckland seminar last year and is available in book form[65]. In a nutshell, if *the administrator must act fairly, reasonably and lawfully* is not all ye know on earth and all ye need to know, it is pretty close to it; and New Zealand statutory judicial review precedes the English and Australian models and has been free of the complications that have been created under Order 53.

Constraints rule out more than an omnibus reference to other subjects. It must suffice to say that one could go on in similar vein for an even longer time, covering other fields. *Environmental law* (clearly of major public impact) where the Town and Country Planning and Water and Soil Conservations Acts are elaborate and sui generis codes, adjudicated upon by the Planning Tribunals, subject to rights of appeal on law. *Intellectual property law*, where the principles are being moulded to recognise something akin to a New Zealand-Australia common market[66]. *Evidence*, where there has been a host of statutory innovations and the pioneering independent decision in 1969 that a criminal conviction is prima facie evidence of the crime in civil proceedings[67]. *Statutory interpretation*, where there has been judicial willingness to consider Parliamentary debates[68] . . .

And over and above all that, in many ways more important, certainly too important to be covered here except by this general affirmation, is the ever-increasing judicial recognition of the Maori dimension and the principles of the Treaty[69].

But even if space, time and patience did permit, there would be no good purpose in continuing in this vein. If what has been dealt with in this sketch is not enough to bring out that there is a distinct national legal identity, further labouring on the same lines will not do so. It is time to turn to the looming question about the consequences.

II. The Privy Council

At the last Christchurch Conference Mr. Justice Haslam, Sir Alec as he was soon to become, gave a paper[70] pointing out that the Court of Appeal then comprised only three full-time members and arguing that there was therefore an inherent risk of undue domination by one of them. He did not say that he was only speaking hypothetically. Remember that it was 1972. Until the day arrived when the numbers expanded, he favoured retention of the appeal to the Privy Council. During the reported discussion, a barrister said that the Judicial Committee was a valuable part of the system of checks and balances making up our constitution and that, rather than denigrating the appeal, we should take pride in this part of our heritage[71]. I have repeated that view on other occasions since, most recently at a seminar on the draft

[65] *Judicial Review of Administrative Action in the 1980's*, edited by Michael Taggart, Oxford University Press, Auckland 1986.

[66] *Dominion Rent A Car Ltd.* v. *Budget Rent A Car Systems (1970) Ltd.* (C.A. 70/83; judgment 27 March 1987).

[67] *Jorgensen* v. *News Media (Auckland)* [1969] N.Z.L.R. 961.

[68] One example among a number of cases that could be cited is *Marac Life Assurance Ltd.* v. *Commissioner of Inland Revenue* (1986) 9 T.R.N.Z. 331.

[69] *New Zealand Maori Council* v. *Attorney-General* (1987) 6 N.Z.A.R. 353.

[70] [1972] N.Z.L.J. 542, 548.

[71] Ibid. 553.

Bill of Rights, when drawing attention to the experience of the Privy Council since the Second World War in interpreting constitutions containing guaranteed rights in newly-independent countries.

It is a view from which I have not been deflected by the incredulity of Americans and Canadians that we should retain this quaint old survival and the teasing of Australian colleagues, subtle sometimes, about our failure to grow up. But preparing a conference paper, though not necessarily a welcome task when there are pressing cases to decide, can be a valuable discipline. It can compel one to try to take a broader perspective than may be enough for some day-to-day work. It can force, in all honesty, a frank articulation of changing thoughts previously disorganised and tentative. Truth is usually many-sided and there is a lot of it. The selection which follows is that which I have gradually, and previously almost subconsciously, come to see as paramount in this field.

Personal experience of Privy Council work has taught some lessons. I have been a member of the Judicial Committee for ten years and have sat there from time to time, probably in thirty or so cases in all. Like other New Zealand colleagues who have had the experience, I have valued it highly and gratefully. Enduring friendships have been formed; generous hospitality has been enjoyed; one's views after hearing the arguments have been listened to usually with courtesy and sometimes with agreement. I have had the privilege of sitting with a great Judge, perhaps more than one. There have been many changes of personnel over the period and it has been instructive to observe their effect. Of course, despite the changes as English and Scottish judges succeed one another, the peerage system means that the members from other Commonwealth countries are permanently junior.

The seniority point is a very small one, but it is symptomatic of a more general state of affairs. Naturally there are considerable differences in thinking between the Law Lords, as the *Spycatcher* case has now brought home to the world; but, also naturally, they are very often collectively closer to one another in their assumptions and approach than to any Commonwealth member who happens to be sitting with them — the House of Lords sparing time for some colonial chores (admittedly some of the appeals are not very demanding or absorbing work). And, although there have been occasional breaks in the pattern, the underlying instinct can appear to be that, as far as common law and equitable doctrines are concerned, the only truly authentic sources are in British jurisprudence. Even the leading exceptional decision, *Australian Consolidated Press Ltd.* v. *Uren*[72] in 1967, could perhaps be partly explained in terms of English judicial politics.

Privy Council appeals from New Zealand have been too sporadic to have had much influence on the march of our law. In special circumstances there can seem at the time to be advantages in having an extremely distant final tribunal, manifestly detached and independent of the local atmosphere, the *Erebus*[73] case being the obvious example. That, though, was a one-off case if ever there was one. More often it is desirable that there should be a grasp of local realities, including probabilities as to Parliamentary and drafting intentions. *Lesa* v. *Attorney-General*[74], where it was held that the New Zealand

[72] [1969] 1 A.C. 590. The Board was Lord Morris of Borth-y-Gest, Lord Pearce, Lord Upjohn, Lord Wilberforce and Sir Alfred North.

[73] *Re Erebus Royal Commission: Air New Zealand Ltd.* v. *Mahon* [1983] N.Z.L.R. 662.

[74] [1982] 1 N.Z.L.R. 165.

legislators of the nineteen-twenties had made the latter-day Western Samoans New Zealand citizens, by mistake, may be benevolently described as an oddity, albeit troublesome.

Nevertheless, a reluctance to sever traditional ties and an appreciation of the value for a small country of sharing in some degree in the judicial resources of a vastly bigger legal system are considerations that hitherto have carried most weight with many New Zealand lawyers. It is a preference that I have shared. Another factor is that some practitioners, and even some of their clients not deterred by costs, naturally enjoy the opportunity of an appeal to London. Deliberately I refrain at this moment from tiers. How many appeals there should be is not directly relevant to the theme.

What has caused me to undertake an almost agonising reappraisal is ever-increasing awareness of the gulf in modern legal thinking between England and this South Pacific country, much smaller in population and with different problems, more egalitarian, probably more questioning, just possibly on some public and legal issues more objective.

That there is quite a wide gulf I am certain. The press reports of the course of the argument in the recent *Takaro* case[75] are again evidence of symptoms. The rather juvenile level of some of the comments could hardly have been reasonably expected to go unnoticed in this country.

To allow that sort of thing in itself to cloud one's opinion about the future of the Privy Council appeal would be petty. The underlying cause is a different matter. The inference is hard to resist that the idea that a Cabinet Minister may be under a duty of care to persons with whose applications he has to deal, with liability in damages for failure to exercise reasonable care, has nil attraction for some lawyers, even very eminent lawyers, of a certain background or cast of mind. It seems to be an idea provocative enough to lead to departures from ordinary judicial standards. But it would be wrong to see *Takaro* as more than a straw in the wind; its significance should not be magnified.

What does impress me as overwhelming is the evidence of our country's separate legal identity briefly sketched in the first part of this paper. We will always look with affection on the country of origin of so many of our people, and we will continue to learn from there, while looking round widely. Australian developments are automatically of close interest and usually influential. In this paper I have had occasion to mention Canada more than once; our Court of Appeal has been increasingly conscious of the value of current judgments of the Supreme Court of Canada and other Canadian appellate courts. When the case seems to call for it, we consult American decisions also, especially on problems novel to us[76], and it is a trend likely to grow. Nor should or do we close our eyes to what can be learnt from radically different legal systems elsewhere.

Those things said, it is nevertheless true that New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook. Common sense dictates the inevitable result. The differences have reached the stage when the last say in the decisions of our case law, even if only resorted to in a very small percentage of litigation, cannot sensibly

[75] An appeal from *Takaro Properties Ltd.* v. *Rowling* [1986] 1 N.Z.L.R. 22.

[76] Examples are *R.* v. *McFelin* [1985] 2 N.Z.L.R. 750 (hypnothically-induced testimony) and *R.* v. *Hughes* (1986) 2 C.R.N.Z. 18 (disclosure of true identity of undercover police officers).

be left to a remote body with little real connection with New Zealand or touch for New Zealand issues. In the past I would claim to have felt the weight of the contrary arguments as strongly as anyone, but now I am clear that the point of no return has come. We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood.