LORD COOKE AND THE ACADEMY:  
THE VIEW FROM THE LAW SCHOOLS

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I have one consolation for speaking so early in this conference, and in such an exposed position. It is the pleasure I have, as the first of the academics to present a paper, to join in the words of admiration and warm regard which have been, and will be, tendered to Lord Cooke during the course of our conference. I thoroughly endorse the fine tribute that was paid to him on our behalf by Peter Spiller, in the flagship of New Zealand law reviews.¹

I particular like these words from Spiller's tribute. "As a barrister, judge, academic, family man and friend, Cooke has revealed himself to be a man of many complementary parts". Lord Cooke is indeed a man of many parts, and he has been a great friend to the law schools. I recall his benign leadership during meetings of the Editorial Board of the New Zealand Universities, and his readiness to speak publicly on University occasions. There were some fairly tight time schedules, as he tried to fit as much as he could in between his other engagements. I remember one heart-stopping occasion when, as an anxious young Dean, I (and 200 other people) waited upon his split-second timing. Of course he arrived on time, and gave a brilliant address. More recently, I was privileged to be his lordship's "minder" at the last New Zealand Law Conference, and it was great to see that, despite the march of time, nothing much had changed.

Lord Cooke brought to the Court of Appeal a judicial philosophy, which none of us had seen in his predecessors, illustrious jurists as they were. He is a jurist of no lesser stature than they, but this was something different altogether. Did we academics find it just too congenial, too good to be true? Sharper academic debate about the nature of the judicial office, and the roles a judge can perform, would not have diminished the significance of his insights. But it might have have better informed our own.

Lord Cooke once bravely observed at an academic conference, that there is "certainly no audience with which an Australasian judge should be more ready to show his current thinking, in the hope of learning something from the response . . ." ² This conference gives us academics one more opportunity to redress any omission there may have been. At this stage in the conference, my role is to pull together some fragmented thoughts about techniques and philosophies.

My purpose today is to consider the implications of Lord Cooke's legal philosophy for New Zealand academics. The issues which it raises are of course wider, but they have already been admirably canvassed by your Dean here at Auckland.³ My role is to provide a footnote to that thoughtful piece of work. And even then, though I have tried to make comments of a general nature, I know my examples are heavily weighted towards private law.

Even so, the footnote fully written would a vast one, and my thoughts are an initial foray, based on limited preparation.¹ I have explored some of Lord Cooke's more recent extra-judicial writing,⁴ and have tried to relate what I found there to the methods

² Lord Cooke, address to Association of Australasian Law Teachers, published as "Fairness" (1989) VUW Law Review 421, 421.
of reasoning he adopted in six of his more controversial judgments. I am well aware
that this may give far from sufficient due to the work of the other Court of Appeal
judges, each of whom has had their own independent influence on that court's
direction. Time, occasion, and natural timidity preclude a "compare and contrast"
approach. My purpose rather is to use Lord Cooke's thinking as a starting point for
speculation about the academic legal enterprise in a world inhabited by judges of similar
persuasion to his own.

First, however, I must engage in the customary hand-wringing about the title of my
paper. It showed up somewhere in the mail between me and Paul Rishworth, and I
doit either of us would own it now. But, contrary to what you may expect, the bit
about "the academy" I can live with quite well. Despite the fact that the word is
sometimes used in a pejorative way, for me it recalls the schools of the great Greek
philosophers, who were by no means unaware of contemporary legal wranglings.
Aristotle's writing in particular captures some of the reality of day to day legal
argument, as anyone who has dipped into *Ethics* or *Rhetoric* will agree. Good
philosophy - and, I believe, good law teaching - learns from the day to day practice,
while submitting that practice to the rigours of a more general thinking which holds
across a range of disciplines.

The universities of the past three decades tended to stray a long way from that
fundamental truth. We now have separate faculties and departments and increasingly
remote administrative structures. Because we concentrate on the core activities, we lose
sight of the fact that all thought is cross-disciplinary. That view is hard to recapture
now, but it is becoming increasingly clear that we as academic lawyers must at least try.
I believe that it is vital to the welfare of the law, and of society, that we do so. If we do
not, no-one else - judges, governments, departments, law commissions, law reform
committees - are going to do it for us.

The legal developments of the 1980's and 1990's challenge us to be truer to these
ancient virtues of the "academy" than we as lawyers have ever been before. It is for
this reason that I am honoured and excited, both at the prospect of resuming my place in
a university after a stimulating four and a half years of law reform work, and also at
being invited to say something of what that entails.

But it would be utterly inconsistent with everything universities stand for, to proclaim,
as the title of the paper suggests, that there is "one" view of the challenge. Even if it
existed, I would be troubled if anyone thinks me the right person to present it. And
(while I am disagreeing with my title) I think the term "Law Schools" is far too
exclusive. Thinking about the theory of law is a wider enterprise than that. Some of
the finest and most provocative contributions in our journals come from thoughtful
lawyers who are on the bench, in professional practice, in government service, or in
teaching institutions which do not describe themselves as "Law Schools". A Law
School's task is to encourages these voices to speak.

Judicial Colloquium, Balliol College, Oxford, September 21-24, 1992 ("Empowerment");
"Australasian Equity", paper delivered to the Bar Association of Queensland, Noosa, 30 April - 3
May 1993; "Condition of the Law of Tort", in *2 Frontiers of Legal Liability* (P Birks ed, OUP,
Oxford, 1994), 49 ("Condition of Tort").

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Elders Pastoral Ltd v BNZ [1989] 2 NZLR 180, affirmed on other grounds, [1991] 1 NZLR 385
("Elders"); South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations
sub nom Clark Boyce v Mouat [1993] 3 NZLR 641 ("Mouat"); Liggett v Kensington [1993] 1
NZLR 257, reversed sub nom Re Goldcorp Exchange Ltd, Kensington v Liggett [1994] 3
NZLR 385 "Goldcorp"); Invercargill City Council v Hamlin [1994] 3 NZLR 513, affirmed
667 ("Baigent"). In all these cases, Lord Cooke gave one of the judgments of the Court of
Appeal. In the notes which follow, where these names are used the Court of Appeal, and not the
Privy Council, decision is intended unless the contrary is indicated.
So I shall present my own personal view of the matter. And when I speak of "academic lawyers", I include all of us who would wish to submit law and its processes to thoughtful theoretical scrutiny. In my book, anyone who is prepared to undertake that task is welcome (for better or for worse) to hang the label "academic" around their own necks.

My paper is divided into three parts and an Appendix.

- In the first part, I make some points about recent legal history in New Zealand, going back to the law reform initiatives of the 1960's. I believe these were a more potent signal for legal change, than were the personal legal views of any one judge or group of judges, no matter how influential.

- In the second part I suggest that, with Lord Cooke's guidance, courts have allowed moral and community values to play a much greater role than they previously had in re-shaping the common law. The traditional divide between moral and legal reasoning is no longer valid. I invite academics to speculate on the implications this has for their own work.

- In the third part, I explore the effect of the change on traditional legal approaches to law-making and law-applying. Again, I invite academics to reconsider the purposes for which they study technical matters, and encourage them to look for new ways in which they can usefully contribute to the process of making and critiquing law.

My theme will be that there has been a fundamental change in the balance the judges maintain between, on the one hand, drawing on moral, social and political reasoning, and on the other, engaging in legal tradition and craftsmanship. The extent of this shift is as yet unsettled. But, whatever the outcome, it will have consequences for the nature of our work as academics. Perhaps we will have to look at judicial decisions in much the same way as we do new legislation - with a critical eye to policy, legal technique and the processes used to reach a conclusion. In the Appendix, I offer (with some trepidation, I must admit) four very tentative examples of that critical method.

PART 1: A SEA CHANGE

Anyone who compares recent judgments of the Court of Appeal with those of that higher court to which Lord Cooke now belongs, will have noticed a great difference in "feel" between what happens here and what happens when the same case goes to the Privy Council. That difference would have been much less noticeable thirty years ago. I would like to look at trends in New Zealand legal thought during that period, which may explain the difference. I begin with three of Lord Cooke's own statements.

The first, made in Lord Cooke's judicial capacity is this. "The whole the common law is judicial legislation." The second, made extra-judicially, expands the first "... the great majority of New Zealand judges, perhaps all, now openly recognise (albeit no doubt in varying degrees) that the inevitable duty of the Courts is to make law and that is what all of us do every day ..., a guiding principle in many recent New Zealand developments, however expressed, has been the need to give effect to reasonable expectations." The third and final statement, also extrajudicial, deals with whether

6 Nevertheless, the more recent decisions from the House of Lords referred to later in this paper suggest that the gap may be narrowing.
7 South Pacific at 295, per Cooke P.
8 "Dynamics", p 4. See also "Condition of Tort", 58-59.
Parliament could legally declare New Zealand a republic, severing its links with the Crown. Lord Cooke said, "It is indeed an issue that would fall to be decided by lawyers, namely the Judges, but perforce they would have to decide it, not by defined legal criteria, but by vaguer considerations - largely their own sense of reality and of the public will".9

These statements are, in my view, central to any assessment which can be made of Lord Cooke's contribution to New Zealand jurisprudence. How do they fit in with the surrounding legal developments of his time?

1. The Law Reform Committees

There has been, from the nineteen sixties if not before, a strong movement to make law more accessible, and more acceptable to ordinary people who have no particular interest in abstract theory or historical subtleties. This philosophy may perhaps owe much to the fact that our society is a small one, more given to just decisions than rules designed to pre-determine the outcome for a large number of cases.10 Its present flowering is, in my view, closely linked with the law reform movement of that earlier time.11

It would be interesting to speculate about the underlying causes of the law profession's concern for "simple law of ordinary people". Is it because lawyers recognise something fundamental about the character of New Zealanders, which is not present with (say) English or Australian people? Or is it better explained as a result of the different way in which lawyers - particularly the bar - practice law in New Zealand? Answering this question would take me a long way from my course. But I think it may be worthwhile to reflect briefly on my own experience of the law reform movement in New Zealand, in the hope that a little more may be learned about the state we have now reached.

Governments and lawyers of the 1960's and 1970's were concerned about technical rules which did not make much sense and which the courts felt unable to remove. It seemed to be accepted that society's values and needs changed more rapidly than did the law. To meet this problem, the Government sponsored "law reform", first through the Law Revision Committee, and (in the late 1960's and after) through the Law Reform Committees.12

Not a few who adorned those Committees now adorn the bench.13 Lord Cooke was himself a member of one of these bodies, the Public and Administrative Law Reform Committee, from its inception until appointment to the bench; his name appears on the first five of its reports. The present chairman of The Legal Research Foundation served

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10 "Dynamics", p 5.
11 Lord Cooke acknowledges this in "Legal Identity" (1987) 3 Canta L Rev 171, where he draws on many examples of law reform in the last thirty years, as indications of New Zealand's distinctive legal culture.
13 Including the following current members of the Court of Appeal: McKay J (Torts and General Law Reform Committee, Evidence Law Reform Committee); Henry J (Contracts and Commercial Law Reform Committee); Blanchard J (Property and Equity Law Reform Committee); Thomas and Keith JJ (Public and Administrative Law Reform Committee). In addition, Gault J served as chair of a differently constituted group responsible for considering reform, the Industrial Property Advisory Committee, and Richardson P chaired (among other significant bodies) the Royal Commission on Social Policy, which reported in 1988.
on the same committee, and continues as a member of its successor. Of course, individual members of the committees may not have fully subscribed to the law reform philosophy of that time, nor can each be associated with all the reforms the system produced. But it did involve them in a broader policy-making role than they might have had as practising lawyers or university teachers.

The Committees were commissioned by the Minister of Justice to undertake particular studies and report back to him. They consulted largely with the profession and other interested bodies; public consultation was unusual. Committee reports contained a brief but reasoned case for reform, often accompanied by draft legislation which could be enacted to achieve it. This was passed back to the Minister, who regularly introduced the proposed legislation into Parliament.

There were few political difficulties. A topic was unlikely to reach any of the Committees without the concurrence of both the Minister and the Department of Justice. The Committees were serviced by Departmental officers, and in some cases high-ranking officers sat on the Committees. In the unlikely event that a Committee appeared to be moving out of line with political and administrative realities, sound advice could be given (I do not know whether that ever happened). And the Minister was not obliged to advance law reform proposals with which he disagreed, or saw political problems.14

The Law Reform Committees applied basic commonsense, drawing on the members' combined experience as practitioners, academics and government servants. Sometimes a Committee would gain experience by considering the same problem on several occasions. Almost invariably, there was a fairly strong degree of consensus amongst lawyers that the rules being studied needed attention, before a matter was submitted to a Committee.

Because each reform tended to cover a relatively small area of law, great attention had to be paid to "fitting in" the new proposal to the existing law. It is more difficult to do that when you amend the common law by statute. It will always be difficult to frame legislation so that it covers the territory but does not trespass on other, closely related, matters which are not intended to be reformed.15

For the present purposes, there was one important thing about these Committees. Like judges, they were expected to work in an entirely independent and unpolitical way. Committee members looked beyond the confines of an existing legal system and formed their own views about what society needed (with the aid of very limited consultative techniques, it has to be said). They then provided, with the aid of legislative drafters who were members of the Committees, a complete text for a new law. These laws were often implemented by Parliament without significant alteration.

But were the Committees really necessary? Probably in their day they were. But, reflecting on the reforms I was personally involved in, I think I am now content to admit that most of them could nowadays be done just as well by a court as by the legislature operating through the Law Reform Committee process. A judge will have not dissimilar experience from those who sat around our Committee tables. The courts created the common law. Judges know its wrinkles, and are instructed by counsel of the possible effects and implications of change. They can control and re-interpret the common law from its deepest principles, through to its most particular manifestations. They can learn, too, from academic work, both on the theory of law, and on the practical effect of particular rules. They can take into account the results of

15 The Contractual Mistakes Act 1977 is a particularly good example - see s 5, which had to be very carefully worded.
Commissions of Inquiry and other investigations, and of public surveys if they are available.

Indeed, making new law through judicial decision is in some ways simpler than reform by legislation. A Court which makes changes to part of an existing body of law, will not face the problem of "fitting in" new law into an old (and often unclear) general legal framework. Unless there were specific problems which needed to be addressed, a new judge-made rule slots automatically into the place of the old one.

Of course, some legislative techniques will not be open to judges, unless perhaps there is related legislation which might be applied by analogy. New rules will seldom be clean cut and definitive. But then again, quite a lot of the law reform committees' work consisted of clearing away the legal debris of past centuries. The idea was to allow the court freedom to develop new and more acceptable rules over a period of time. On balance, a system which allows judges to do this, without the need to pass legislation, may well be the preferable course.

2. **The Committees replaced.**

By 1985, the political climate had changed, in a way which ultimately sealed the Committees' fate. The first sign was that topics entrusted to the Committees became harder, more wide ranging, and politically tinged. As early as 1977, the Contracts and Commercial Law Reform Committee had to deal with the issue of moneylenders and disclosure, a topic which was contentious and caused some difficulties for the Committee amongst its practitioner constituency.

The demands increased in the mid 1980's. The Property Law and Equity Law Reform Committee, on which I served, was asked to guide the Housing Corporation in its work on a new Residential Tenancies Act. It also provided members and general guidance to a small working party which undertook a comprehensive reform of the law of trustee investment. These topics had notable economic and social implications. Our tenancy proposals, for example, attracted vigorous criticism from landlord and tenant organisations alike. We were not well placed to further or resolve that debate.

It is not surprising that questions should have arisen, in the mind of the then Minister of Justice, Sir Geoffrey Palmer, whether the Committees were suitable bodies to undertake this sort of work. Institutional law reform could only survive if it were predicated on a need for larger scale work, using material and procedures which were not available to the Courts and which needed resources that could not be assembled by

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17 See eg Contracts and Commercial Law Reform Committee, *Report on the Effect of Mistakes on Contracts* (1976), paras 5-10. By and large I believe this approach has been a successful one. There has been one specific area of contention which arose, in my view, because the courts would not take the full freedom given to them by the words of section 6: see A Beck and R Sutton, "Contractual Mistakes Act 1977", in Law Commission, *Contract Statutes Review* NZLC: R 25 (1988), 127.

18 *Credit Contracts* (1977), resulting in the Credit Contracts Act 1981.

19 *Report on Residential Tenancies* (1985), resulting in the Residential Tenancies Act 1986. In both these cases, there was strong political will to see the substance of the legislation enacted before the reports were issued; though, in the latter case, the Committee had tended independently towards the same result, in informal papers issued before the Labour Government assumed office in 1984.

government departments. The result was the establishment of the Law Commission.\(^\text{21}\)

It was never likely, after that event, that the Committees would remain on the scene to turn out the smaller type of work on which their reputation had been built. The Courts were by now more open to changing the law. And pressure on Parliamentary time was mounting. These thoughts, I suspect, lay behind the despatch, without any great ceremony, of the Law Reform Committees. Only one (the Public and Administrative Law Reform Committee) survived under a new name, but it has retained little of its law reform function.\(^\text{22}\)

The implications of this move for the courts were, I believe, clear. The Law Commission would handle large scale law reform, and matters which had a high political sensitivity, or required skills and techniques beyond the normal abilities of judges. For example, there are times when, before you recommend a law change, you must obtain specialist or detailed knowledge, or undertake public consultation.\(^\text{23}\) The Courts would do the rest.

This was all very well in theory, but looking at the matter ten years on, we now see problems in that approach. Even where the Law Commission has pronounced on a subject, the way to legislation is an uncertain one.\(^\text{24}\) There appears to be no place for the kind of minor, interstitial changes which had been undertaken by the Committees.\(^\text{25}\) Nor is there any structured way of handling recommendations of the Law Commission which (although sensible and non-controversial) cannot make the government's legislative programme.\(^\text{26}\) Such reforms must be implemented by the Courts themselves, if they are to become law at all.

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\(^{21}\) See Law Commission Act 1985. I have explored elsewhere the implications of the choice between this kind of body, and the law reform committee structure: "The English Law Commission: A New Philosophy of Law Reform" (1967) 20 Vanderbilt L Rev 1009. My subsequent experiences have, if anything, confirmed the views I advanced there.

\(^{22}\) The Legislative Advisory Committee's role is now solely to report to Government and Parliament on ongoing legislation. It issues annual and special reports about the standard of law-making and the processes adopted before and after laws are presented to parliament. But it has no originating law reform work. Nevertheless, it has been supported and serviced by the Law Commission. The former President of the Commission, Sir Kenneth Keith, was one of the Committee's leading members during the time of his membership of the Commission.

\(^{23}\) The width of the enquiries to be undertaken by the Commission is apparent from its first five discussion papers (on legislative interpretation, the Accident Compensation scheme, the Limitation Act 1950, the structure of the courts, and a new company law, all published in 1987).

\(^{24}\) It had been accepted by an earlier Minister of Justice, Hon J K McLay, that law reform measures proposed by the Committees would be progressed through Parliament quickly after recommendation, unless the Government saw serious difficulties with them. No such arrangements were made for Law Commission measures. Implementation depends upon the Minister's decision (upon the recommendation of the Department of Justice) to press for legislation to be included at an appropriate level of priority in the government's programme.

\(^{25}\) Compare, for example, the minor (though by no means insignificant) reforms to trustees' powers of investment proposed in earlier times by the Property Law and Equity Reform Committee, Trustees' Statutory Powers of Investment (1970). This recommendation was adopted by the legislature: see Trustee Amendment Act 1974.

\(^{26}\) For recommendations not yet implemented, see Law Commission, Strategic Plan 1996/1997 (1996), 19-20. Ten reports still await implementation. They were completed in 1994 (4), 1993 (2), 1990 (2), 1989 and 1988. Excluding annual reports, in its ten years of existence the Commission has produced 25 reports, only two of which were explicitly rejected by the government as a basis for legislation or other action. Both dealt with the Accident Compensation scheme. The Commission's most recent success (the Arbitration Act 1996) was achieved, not through the regular legislative programme, but because Mr Peter Hilt, MP, took the Commission's proposal up as a private member's bill.
So, although the intention may have been that the Courts were left firmly in control of law-making for interstitial and non-political matters only, the reality may be different. And once the court’s law-making function is accepted, there is no stopping it at the point where those who are not judges feel uncomfortable and threatened by legal developments. As Lord Cooke himself observed of the vexing issue of comparative negligence, "It was a field which the courts should have been able to manage for themselves." As one surveys modern legal issues, one finds that a much wider and potentially more controversial law-making role has been left open for the Courts.

I need hardly labour these issues in the present company. But I mention briefly, as examples, the need to develop more fully the legal protections for the Maori race and its social and legal culture, to give adequate remedies to those relying on the work and integrity of professionals, and to find ways of responding to gender and ethnic issues. There are also concerns about the state of the legal process and the need for new dispute resolution methods, which may also have an impact on the shape of the law. Again, there are the new opportunities and new challenges posed by developing technology; and the widening system of international treaty obligations is having an increasing impact on traditional perceptions of national law. The Law Commission is rightly addressing some of these issues, but without strong political initiatives as well, the country can expect only limited results.

My own personal view is that the law will seriously suffer if the Courts are now discouraged in their efforts to develop and improve it, and if their willingness to make value judgments which require independent and open thought is challenged. A regression to a judicial law-applying system of the 1960's would force the law to march more and more out of step with the perceptions and values of the present. It would leave a gaping hole in our present systems of making and refining law. The law would sooner or later cease to be relevant to what people do and expect from their relationships with each other. While the processes and results are not necessarily perfect, they are considerably better than nothing.

Furthermore, those doctrines of law which are now suspect because of their unpredictable operation, may become frozen in that form for longer than they need be. To take an example which is close to my heart, the law of Family Protection. I fear that the cry of the "wise and just testator" will ring out for centuries hence. That poor tormented character has all the enduring qualities of the Flying Dutchman. It may be a long time before he is given his well-deserved quietus.

27 "Condition of Tort", 55.
28 Where the legislature has itself left open the way for "creative" judicial work, eg by preserving treaty rights in very broad terms. See State Owned Enterprises Act 1986, s 9 ("principles of the Treaty of Waitangi") and the Court of Appeal's acceptance of the invitation in the series of cases beginning with NZ Maori Council v A-G [1987] 1 NZLR 641. See generally R Cooke, "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato L Rev 1. For this and other examples, see Harris, 268.
29 Eg South Pacific.
30 Eg (in England) Factortame Ltd v Secretary of State for Transport [1990] 2 AC 85; R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603; and (in New Zealand) Tavita v Minister of Immigration [1994] 2 NZLR 257.
31 Australian judgments critical of the test include Singer v Berghouse (No 2) (1994) 123 ALR 481, 487; Permanent Trustee Co Ltd v Fraser (1995) 36 NSWLR 24, 29-31 per Kirby P, 46 per Sheppard JA; compare, however, at 32-36 per Handley JA. But the Court of Appeal maintains a different view: see Little v Angus [1981] 1 NZLR 126. Lord Cooke's judgment is still much cited, as a statement of the test to be applied in deciding family protection cases in New Zealand, and (although it added little to the existing law) has lent credence to the present mode of deciding these cases.
So the courts have become much more concerned with law reform and policy than they used to be. One result has been (as I will show) to swing the balance away from lawmakers based on professionalism and a strong emphasis on past legal decisions, to one based on the courts' judgments about the values and needs of society. Some may criticise the Courts for seizing the opportunity in the way they have. But we must remember that it has arisen because of conscious (though silent) decisions and omissions by the elected representatives of the people. Whatever we may think of that development in the abstract, I do not think that it is likely to be reversed for some time to come.

PART 2: ASCERTAINING MORAL AND SOCIAL VALUES

I come now to the way in which the Courts perform their law-making function. In particular, I would like to explore some of the issues which arise when the courts openly accept the freedom to make their own rules, in place of those which have been handed down to it by their predecessors. Useful questions can be asked about the process by which the Courts discern common New Zealand values and aspirations, and shape the law so as to give them effect. A further question then arises: what is the role of legal academics in discussing decisions which rest on such conclusions?

1. The judges' role.

Anyone who undertakes the task of making law for others needs to make sure that they are in touch with basic thinking about what is highly valued and sought after, and what is not. They also need to know (and this is a different point) about the goals which people think should be pursued through law, and the goals which are best left to personal and commercial decision. Clearly courts face difficulties here because they cannot, in the course of making a decision between individuals, solicit the opinions of outsiders on what would be a good outcome. So they must find some proxy for more general consultation and political accountability which is undertaken by politicians. This is a problem which has engaged philosophers for generations. How does Lord Cooke consider that judges should approach it?

Generally accepted norms. The preferred judicial method is that of the hands-on reformer, not the arm-chair philosopher. Lord Cooke has argued that courts should take into account the social context of law, and what people actually think and do. This knowledge may be gleaned from official reports or other studies, and the common experience they will have shared with other lawyers during their time in practice. The Courts may also draw the substance of their policies from the prior common law, and from provisions of enacted legislation, in related areas. This process, however, has its limitations, since it is not always clear whether it is the law under consideration, or the law in the area where comparison is drawn, or both, which require review: see Appendix, Example I.

Even more fundamentally, courts are expected to use their own commonsense, so as to ensure that the rules they apply do not involve distinctions which would be incomprehensible to the ordinary citizen. And the results they come to must not

32 "An Impossible Distinction", 68.
33 Eg South Pacific at 296 (distinction would appeal to "most people"); Elders at 186 ("reasonable persons in the shoes of all three protagonists" would have drawn the same conclusions as the Court does); Goldcorp at 271 (can recipient of a benefit "conscientiously withhold it from another party"). Lord Cooke did not, of course, invent the test in the last case; but he appears to
appear "obviously unjust"; 34 they must be "fair". 35 Where the views of the "person of good will, the reasonable man or woman . . . the right-thinking members of society generally" point in a clear direction, these views should take precedence in law.36

The natural values people possess are not abstract and eternal. Lord Cooke has recognised and encouraged the notion of a "national legal identity" which may have a bearing on how we should go about making law. This frustrates any possibility of having a "uniform common law" to which all countries sharing that tradition can subscribe to. The content of our national identity is elusive. But it includes egalitarianism, a love of practical fairness, and a suspicion of anything too theoretically or abstractly reasoned.37 For New Zealand judges and lawmakers, "commonsense dictates the inevitable result."38 It would be interesting to probe these views, and the assumptions which lie behind them, more closely.

On closer inspection, however, it appears that the judge must not become a mere channel for the popular will. It appears that some discrimination is called for by the judge; popular demand, for example, may call for the enactment of legislation which reflects only the temporary popular will. The Court should not then seek to derive guidance from it.39 "Popular reaction is not totally irrelevant, for the needs and mores of contemporary society require to be weighed, but popularity can be a most dangerous criterion. The judge is supposed to try and take a long-term view reflecting enduring values."40

However, the judge is not required to make a personal calculation, beyond excluding certain types of expression of view which the public may later regret. For example, it is only in marginal situations, where this direction is missing, that the courts should undertake utilitarian calculations based on comparative economic cost, insurance and loss-bearing.41 That apart, it is generally necessary to accept general value assessments in an unmediated way, even though arguments of counsel are sometimes met by the response that they have not been formulated in a principled fashion.42

**Natural law basis.** This is important from a theoretical point of view, because it betrays a disposition towards what legal philosophers have called the "natural law" approach to legal thinking. It is no surprise to find Lord Cooke suggesting, extra-judicially, that in an extreme case Parliamentary legislation itself might be subject to scrutiny and possible avoidance by the courts.43 This is an important and controversial tenet of some natural law theorists.44

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34 Askin v Knox, 256; Hamlin, 517.  
35 "Fairness", 424. From this article it appears that in particular contexts, one may substitute for this term slightly more specific words such as "reasonable", "in good faith", "not culpable", "conscionable" and "fair dealing".  
36 The same impulse to practical justice appears to have seized Lord Goff in White v Jones [1995] 2 AC 207, 256-259. This passage exhibits other qualities common to the judicial style which I attribute to Lord Cooke in this paper.  
37 See "Legal Identity", 182; "Fairness", 422-423.  
38 "Legal Identity", 182.  
39 South Pacific, 298.  
40 "Empowerment", p 18.  
41 "Condition of Tort", 53.  
42 Hamlin, 519.  
43 "Empowerment".  
44 It would be a mistake, therefore, to assign Lord Cooke to what Professor Ronald Dworkin has labelled the "pragmatic" model of a judge (though many of the characteristics of legal technique, described later in this paper, can be associated with that approach). See R Dworkin, Law's Empire (Cambridge, Mass, Bellknap Press, 1986), ch 5, and ch 6 190-216.
One of the well known difficulties of a natural law approach to moral reasoning is that the issues coming before the courts are often too detailed and precise to be informed by the (often amorphous) notions of natural law. The precept "thou shalt not kill", for example, does not tell us much about how the law should deal with mercy-killing. This is no place to probe the contents of an entire natural law system, but some of Lord Cooke's judicial comments, drawn from the few cases I mentioned, suggest there may be difficulties of that kind when applying his theory.

The values, though fundamental, are indeed imprecise. My incomplete review immediately threw up some examples. People must give full effect to what they have promised to do; they must not unconscientiously retain property to which they have no right; they cannot improve their position by pleading their own unlawful action, if the same act done lawfully would still have attracted liability; and they should not be burdened with legal duties which conflict with each other. These are useful as a starting point, but they do not resolve the problems in the examples I have given in the Appendix.

And, as might be expected, not all fundamental values are helpful to a judge. For example, that most obvious duty of all, the duty to act in good faith, may sometimes have to be discarded because its constituent facts can too hard to prove to make it an effective legal approach. This appears to be one case where adopting as law the unmanicured products of a natural awareness of what is unjust, would of itself result in an injustice. It seems that it is sufficient to keep the general objective (prevention of fraud) in view, even if the precise rules of law are differently framed. But this takes us one further step towards mediation and professionalism in constructing values.

*Not all values are equal.* Then there is the question of priority amongst competing values. The judge is expected to emphasise those rights which appear fundamentally important. But which? The preferred rights which I came across in my reading have a legal, rather than populist, tinge. Take, for example, the rights which Lord Cooke appeared to be referring to in his well-known judgement in *Taylor v NZ Poultry Board*, where he tentatively tested the doctrine of Parliamentary sovereignty. He did so in the context of the rights to natural justice, access to the courts and judicial control of a regulatory power. These are not the first things which come into the mind of the layperson discussing notions of right and wrong, though they are very important to lawyers.

Political and historical factors also count, on this view. Consider the rights of Maori under the Treaty of Waitangi, which has, because of its place in our history, a position of special legal importance. This is so despite the fact that the "letters to the editor" pages of our recent newspapers have contained much material, which indicates that the general public distrusts Maori claims to preferred fishing, tourist and dog-licence rights which seem the inevitable outcome of taking the Treaty seriously. So too, the work of the international community on human rights and other matters, though little known to the New Zealand public, is a significant source of priority obligations. It is in this

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45 Goldcorp, 267-268.
46 Goldcorp, 271.
47 South Pacific, 291. Cf Goldcorp, 270.
48 South Pacific, 301.
49 Goldcorp, 274-275; Elders, 186.
50 [1984] 1 NZLR 394, 398, and cases referred to there. See also R v Goodwin [1993] 2 NZLR 153, 171.
51 Though admittedly he gave torture by the State as his first example, that was a purely hypothetical case.
sense only that judges are likely to be assisted by considering an "international common law".  

For my part, I would willingly acknowledge that these rights are extremely important to New Zealand society, and to the quality of its society in the longer term. There are underlying issues which have to be worked out; and in recent times the Courts have done enormous service to the country by slowing up administrative action, and forcing governments to come to terms with deep problems. But the values owe little to heartland New Zealand, and much to the judges' wide reading and international contacts. They are contestible, particularly where there are issues of degree and of relative importance, when compared with other social values. I suspect that resolution of such issues must ultimately come at the political, and not the legal, level.

Nor is it clear that all judges agree on the weight to give these fundamental values. Anna Adams has argued instructively, in a fine article on the Baigent case, that Lord Cooke's view of those fundamental rights which are now found in the Bill of Rights involves a "discourse" about the legal standing of human rights. It appears not to be shared by those members of the Court of Appeal who sat with him in the case and who now remain in the Court. He is firmly in favour of a system of rights which would take precedence in any legal system. They take a more restricted view of the place of the rights referred to in the legislation, and so take a more neutral stance when balancing Bill of Rights considerations against other social and legal concerns.

I am not sure how much comfort her observations give to those who believe that judges should be careful about making pronouncements on morality and social justice. It is reasonable to expect judges to enforce legal values, with whose virtues they are familiar. It is less reasonable to expect them to grapple with contentious social issues. A legislature which knows of the judicial predilections can at least use its legislative supremacy accordingly. Where the judicial leaning is unpredictable, there is more difficulty in allowing for it.

2. The academic role.

I now offer the thought that we as legal academics, following the path of the judges, must go outside our established expertise of reading and analysing decided cases. This prospect will be bewildering to some; to others, I fear, it will betray distinct Napoleonic tendencies on my part even to utter it. My principal concern, however, is to invite my colleagues to consider how we can make sure that we say continues to be worthwhile and relevant to the tasks undertaken by the courts. Writing careful and thoughtful accounts of what the judges have decided is useful when instructing others, and of some value, I hope, for judges. But that value is limited, when seen as part of the wider task of maintaining a large body of New Zealand law and making sure it remains apt as society and its view of what it expects from the law changes.

There is one qualification I must immediately offer. What we teach undergraduates is one thing; and what we write for the benefit of the profession, and what we teach honours and postgraduate students, is another. As a teacher I certainly try to awaken undergraduate students to the policy dimensions of the law they are studying, and to persuade them to read relevant law reform reports and similar material. But that may not be our first and primary role as law teachers, until we are happy that our graduates leave us with strong basic legal skills of law-finding and law-applying. Each law teacher is aware of this tension, and adopts his or her own balance between the two.

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What I have to say in this section relates to research and writing, and less (if at all) to undergraduate teaching.

**Drawing on our strengths.** It is consistent with the spirit of New Zealand as we have come to know it in the 1990's that those of us who are academics look to our existing and potential strengths - our "competitive advantage", to use the jargon - before settling our course. I personally see no difficulty with that because, as I have said, if we are to rise to the task we must become more "academic" than ever before. That is to say, we should test what the courts are doing and saying by using the most powerful critical techniques we can find.

These techniques may not be found in the law schools as we currently know them. We may have to draw, not only on the resources which have always been available to us as law teachers, but also on the help of those who live a few doors down the road. They may be in commerce faculties, economics departments, psychology departments or mathematics departments - or wherever.

Without the engagement of people outside the law, we may not go beyond superficial use of a few alien ideas gleaned at short notice from an isolated legal article or popular work. This is not good enough. We need to see the enterprise as part of a study of the whole field of knowledge, of which the territory academic lawyers have so far inhabited is only a small part. But help is at hand. There are, for example, some very accessible philosophical works dealing with basic values and policy approaches, and there are valuable opportunities to become engaged in current discussions and research about law and economics. These are two of many areas where the literature of two disciplines is coming together.

**Critical methods.** Coming closer to our accustomed level of work, I suggest we may want to consider how we can evaluate a judicial decision which has moved from legal reasoning to the assessment of social values.

Let me take an obvious example. As I worked through my small selection of judgments, I was soon struck with the language used by Lord Cooke to deal with what seemed to me quite difficult issues of policy. I do not think these are peculiar to Lord Cooke's style. Any court which stresses the need for detailed examination of each case, and recognises a great variety of policy factors, will be faced with similar difficulties of expression when it moves from the factual assessment, and the recitation of policy factors, to an ultimate conclusion. But to us they are flags: here is something which needs more thought.

Talk of factors which are "formidable", and factors which "outweigh" some other less formidable factor (without further elaboration) is, of course, well known judge-speak. But we now also encounter principles of law which "outflank" or "cut across" others; we hear of the "balance struck" in the law of liability for defamation being

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56 See eg, on the subject of contribution and the liability of joint tortfeasors, C Blyth and B Sharp, "The Rules of Liability and the Economics of Care" (1996) 26 VUWLR 91; and, for more recent writing along the same lines, see Kratzke, A Case for a Rule of Modified Comparative Negligence" (1996) 65 UMKC L Rev 15 (merits of "modified comparative liability" system of apportionment between plaintiff and defendant in a negligence case).
57 Cf the judgments in the House of Lords in *Spring v Guardian Assurance plc* [1995] 2 AC 296, which appear to rest on the factual assumption (unsupported by evidence) that a duty of care will not unduly limit what people say in their references. But much deeper issues were probably involved, particularly since most of their lordships thought their conclusion consistent with the contrary assessment made in the different circumstances in *South Pacific*.
58 *South Pacific*, at 301, 304; *Mouat*, at 563.
59 *South Pacific*, at 303 (quoting English first instance authority).
"disturbed" by a successful action for "mere" negligence;°0 and we learn of of
"upheavals" in high level precedent (why did not the words "careful re-appraisal" meet
the linguistic need)?61 New Zealand jurisprudence stands at risk of "lagging behind" in
the development of human rights, if New Zealand courts pay only "lip service" to
them.°2 Such statements seem to be used, not as initial rhetorical flourishes, but as an
integral part of the reasoning on which the decision is based. Should we decline to
follow judges down such paths?

Evolving academic techniques. I would argue that we may be missing a lot of we do.
Judges are sometimes assailed by thoughts that are much too deep for words, and they
need language in which to express that fact.°3 I would not for one moment advocate
that all such usages be treated as an abomination, to be rooted out whenever
encountered. I accept, with Lord Cooke, that using further legal techniques and
terminology to explain what is happening may be unhelpful. But such terms then
become a starting point, not an end point, for academic enquiry. If there are no legal
techniques to investigate the matter further, we must find other ways of advancing our
knowledge. I venture to suggest that this will be a vitally important enterprise for the
academic of the next century.

Careful study may show that these rhetorical exercises do cash out into solid policy
argument and sound and consistent decisionmaking - in which case, judges can be
encouraged to be more explicit. It may be, however, that the words are empty, and no
consistent pattern is emerging from repeated "weighings" and grapplingis with
"formidable" considerations. In such cases the exercise is probably not worth the
trouble. An area so afflicted may, with profit both to judges and the general community,
be declared "off-limits" to legal enquiry. With better critical techniques than we have
now (and perhaps by mathematical comparisons with random results) we may be able
to persuade the legislature,°4 and even perhaps the courts themselves, that this is the
case.

Judicial discretions. The development of our critical techniques are especially important
now that both legislatures and courts make extensive use of "discretions".°5 A
discretion is a direction to the courts to do what they think right, having regard to a
range of significant considerations (which may or may not be specified by the
legislature or in earlier decisions). Not all discretions are desirable, or even workable.
To make an assessment about any proposed new discretion (whether statutory or judge-
made), we need to know what to look for. I think we could do with quite sophisticated
tools for making the diagnosis. I was very struck, in recent extra-curricular reading I
have been doing in my new-found leisure, by general theorising which has been done
on chaos.°6

60 South Pacific, 303.
61 Hamlin, 522.
62 Baigent, 676.
63 Lord Cooke seems to be making a plea of this kind in "Tort Illusions", 72-73.
64 The Law Commission has suggested some such move as regards adult children's claims now
brought under the Family Protection Act 1955: Succession Law: Testamentary Claims NZLC:
PP 24 (1996), ch 7. Similarly, Regina Graycar has argued that there are limits on the courts
powers to achieve gender equity in matrimonial property cases, simply by manipulating family
law rules: "Matrimonial Property Law Reform and Equality for Women" in Family Property Law
and Policy (B Atkin, G Austin and V Grainer eds, NZ Institute of Policy Studies, Wellington,
65 I would include, within the concept of a discretion, rules which contain vague, indeterminate
concepts (such as "direct" or "proximity") that judges can manipulate in order to achieve what
appears to them the most desirable result.
It seems that, in the natural world, a series of interlinked reactions may lead one of three states (a) chaos; (b) unchanging, structured existence; or (b) sufficient movement to retain order while still being interesting. Mathematical modelling has predicted the factors which will settle the outcome. If there are only a few variables; if their presence or absence may lead only to a small number of outcomes; or if the set-up as a whole has a tendency to a single overall result (and not a 50/50 chance at each decisive point) the system will be disposed towards stability and predictability. If one or more of these factors is not present, the system will be disposed to chaos.

It seems to me (and this is only a speculative idea) to match up quite closely with what we can expect of judicial discretions. Here again, we may need to get alongside other academic colleagues for more expert guidance.67

*False assumptions.* We need also to be alert for false or outmoded views which can sometimes creep in to judgments, even those of our most distinguished judges. The problem lies partly in the necessary isolation of the judges, which can lead them to exposed assumptions.68 Appellate courts are now, happily, collegial, and their members have diverse legal backgrounds and styles.69 But the opportunity of wider consultation is limited. How could the court which decided *Baigent’s* case70 know what the effect will be, of introducing a remedy in damages for breach of the Bill of Rights? The Law Commission, by contrast, can (as we did, in the course of reviewing the *Baigent* decision) consult every government department to see what effects the change in public law introduced by *Baigent* was likely to have. In cases where public opinion is important, the Commission can if it wishes hold public enquiries, and speak to people by radio or at their own gatherings.

Given the limitations inherent in their role, how can we help judges reach better results in the future? One way is to gather the facts which are necessary for a sensible policy judgement. To take one example, how do we know whether people who are subject to a particular law will find a change helpful or not? The answer is obvious - ask them. An outstanding example is the study conducted by Stewart Macaulay many years ago, into the attitudes and needs of manufacturers and others in relation to the law of contract.71

It is good to see that the study has recently been replicated, with results which once more (in the author's view) point to deficiencies in the received, or "classical", legal theory of contract.72

What surprises me is that legal academics make use of this device so infrequently. Surveys are one obvious technique. But sometimes those we survey are unfamiliar with the legal issues, so they are unlikely to respond helpfully. Why not speak with particular groups, raising issues of concern and gradually networking out through the community in a selected local area?73 Of course these activities require outside expertise, and they cost money. But academic colleagues in appropriate disciplines,

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67 Dr W K Yeap and his team at the Computer Science Department, Otago University, have been making initial studies on acquiring and storing case law information by computer, using Family Protection cases as examples. The Law Foundation has given welcome support to this work.

68 See eg the Australian cases cited by Regina Graycar, at 25 (assumptions about changes in men's household roles when their partners go to work).

69 But see the analysis of the background of the members of the Court of Appeal in 1995 in P Spiller, J Finn and R Boast, *Legal History* (Wellington, Brookers, 1996), 220 which tends to confirm that the Court can hardly be considered a representative body, even of lawyers, let alone the general community. Few would want it to be.

70 Above note 2.


73 I am indebted to Dr Marg Gilling, of BERL, for this suggestion; regretfully we did not find a suitable occasion to use the technique, during my time at the Law Commission.
again, may be interested in joining us. There are public good funds which may support us if we can persuade their keepers that our work will have useful outcomes.

You may ask, surely that is the task of the Law Commission? I am afraid that my experience would suggest not. As a former member of the Commission, I cannot stress too much how helpful it was when others went into the field before us. You will appreciate that a law reform body, or a court, will not be called upon to change law unless a problem has arisen. Sometimes there seems to be a simple "fix", or so one's political masters may think. But the underlying problem may be much more difficult, perhaps requiring what is called a "paradigm shift" in accepted legal values if it is to be solved adequately.

The Commission found this particularly so in its work on succession, and were considerably helped by the divergent views put to us by law faculty members who had previously been working in this area. It has also drawn, on occasion, from forward looking articles in other jurisdictions, though then the work of putting it in a New Zealand context is much more demanding. But it is very difficult to do this type of fundamental re-appraisal within the time and cost constraints of an existing project.

So far, in what I have said, I have shown the court evaluating existing law and developing new rules and practices. I now turn to an equally pressing question: what are the implications for existing legal methods and techniques?

3. LAYING DOWN LEGAL RULES AND DOCTRINES

A fundamental change of the kind I have described leaves no part of the law untouched. We cannot expect that law-making, law applying and interpretative techniques will remain the same in this new environment. There is, in the judgments of Lord Cooke, and in his extra-judicial writing, a very consistent approach to the problems of judicial lawmaking. It foreshadows marked changes in the way in which courts do law and the techniques they use. You may or may not agree with it. But it is open and well articulated.

I doubt whether the same can can be said of that contrary view, which consists largely of vague warnings about the risks of unpredictability and uncertainty in the law. If we need certainty in any particular area, we can always achieve it by statute or by judge-made rule. What makes us cautious about doing so, is another lesson learnt from the 1960's. Certainty can be as much a cause of injustice, as it can be a source of legal relief. I hope, when the history of the present period comes to be written, academics will be seen to have addressed the issue in more constructive ways.

I think that, at the technical level, the changes called for by Lord Cooke's approach are easier to bear than the challenges I described in the previous section of my paper. In this part, I would like to look at the academic philosophy we have inherited; and then to suggest that it has left us a legacy we would be wise to retain, although probably in a somewhat different form, and with a different purpose in mind.

1. Legalist philosophy of law.

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74 Virginia Grainer (Faculty of Law, Victoria University of Wellington), Nicola Peart (Faculty of Law, University of Otago), Rosemary Tobin (Faculty of Law, University of Auckland). We were also much helped by the work of Dr David Thorns (Sociology Department, University of Canterbury) on the expectations of intending will-makers.
I suspect that, as I describe the views of some of my past and present colleagues, I will run the risk of over-stating matters in order to make a point. I hope I will be forgiven, since I speak only in admiration. Anyway, the legal tradition I was brought up in (and I acknowledge my indebtedness to such masters of legal analysis and debate as Professor Brian Coote) held very firm views about the independence of the legal system. It was a self-contained entity. The scholar of law explored lines of cases with assiduous care, drawing from them every nuance the could provide, and gradually building up a picture of a judicial mind-set going deep into legal history.

The insights gained from that pursuit drove the ultimate outcome. Devising policy was not too much of a problem, because you knew what the outcome would be; policy reasons were an adjunct. You explored the justifications judges regarded as important. By tidying them up and throwing in a few ideas of your own, you swiftly reached answers which were both principled, and supportable by a plausible (though by no means non-contestable) policy. When attacked on the grounds that the result was biased towards one of several interest groups in the community, or that it simply did not make sense or could not be reconciled with other more pressing social aims, the answer would be to disclaim personal responsibility. The writer delivered the words, but it was the oracle of the law which spoke.

This approach to the understanding of law has tended to dominate law school practice in New Zealand in the past, as it has elsewhere in the Commonwealth. It should not be under-estimated or despised; its distinguished proponents to have used it to develop ideas of enormous sweep and power. It has given confidence to generations of judges, inculcated early in a student's education, it is associated with high levels of skill in reading, understanding and sensitivity to legal material. And it can inspire a degree of reticence among its devotees, who realise that they understand a very small part of the world well, and the rest of it weakly. Or, at least, it should do so.

Lord Cooke does not doubt the virtues of this approach to law. But he has questioned whether it works as a touchstone for decision. If it works anywhere, it should work in an appellate court. But, drawing on his own experience in in the New Zealand Court of Appeal Lord Cooke has emphasised that the process of generalisation from past

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75 Professor Coote was also a member of one of the law reform committees (Contracts and Commercial Law Reform Committee).

76 For an illustration of a modern approach along similar lines, although with a recognition that the subject is developing, see P Birks, An Introduction to the Law of Restitution (Clarendon Press, Oxford, 1985), ch 1. He there advances the view that words such as "unjust enrichment" have an essentially "downwards-looking quality", that is to say, they can only be validated by reference to the actual decisions of judges: see at 19. So, while the definition of the subject is reached a priori, without reference to the law, its content and fundamental propositions are not. It is the function of the legal writer to show how an assemblage of decided cases falling within the definition, can be ranked according to the fundamental principles or rules identified through the "downward" look. The result is a work of remarkable insight and symmetry, but one whose detailed conclusions may carry little conviction. In New Zealand, I do not detect a strong judicial or professional interest in Birks' carefully worked out series of legal propositions. My BRIEFCASE search indicated that it had 7 recorded "outings" in the last 10 years, only one of those being a Court of Appeal reference. By comparison, the other leading English work on the subject, Goff and Jones, Law of Restitution, (4th ed G Jones, London, Sweet and Maxwell, 1993) and its prior editions had 17 outings, 5 of those in the Court of Appeal. But it may be that restitutionary thinking is under-developed in New Zealand; compare, eg, the way in which the Court of Appeal resolved Goss v Chilcott [1995] 1 NZLR 263, with the disposition of the same case by Lord Goff in the Privy Council, [1996] AC 788.

77 See "Fairness", 421-422.
decisions can be hazardous,\textsuperscript{78} and that the resulting dogmatic formulae\textsuperscript{79} and artificiality\textsuperscript{80} are to be distrusted. As a result, legal theory appears to him as something of very limited value in the work of the appellate court. Courts must look beyond it if they are to provide answers to day-to-day legal issues, in a way which achieves practical commonsense and justice above all else.

It follows that, in cases where there are serious issues about what a law should say, nothing much is to be gained, in Lord Cooke's view, by looking to the notion of a "uniform common law",\textsuperscript{81} comprising the classic decisions so beloved of the academic commentator of old. "The achievements of the common law are often instinctively and greatly over-rated by those who have been nurtured in it."\textsuperscript{82} The law is based more on a series of value-judgments made by the courts of a country in the light of that country's own needs, social aspirations and identity.\textsuperscript{83} Counsel must be prepared, as of course, to engage with the Court in a "direct debate of policy considerations . . . with an eye to interests transcending those of the immediate parties".\textsuperscript{84}

To assist appellate courts to reach the right conclusions, they may consider the "trends of authority",\textsuperscript{85} particularly those of the major Commonwealth and United States courts. There is also an increased willingness to rely on, and acknowledge, academic writings - and I can say, with some feeling, that I am grateful for that. But at the end of the day the community has entrusted to the judge, the task of selecting the most useful rule. The judge does not assess competing models by their intellectual elegance or by how faithful they are to the views of ancient authority.

I do not want now to evaluate the merits of this view, or to analyse the academic reaction there has been to it. It is sufficient for my purposes to regard it as a given, and to consider the consequences.

2. The legacy of legalism.

I do not think our traditional skills and interests as legal academics have, in the space of twenty years, been rendered useless. I believe our experience as teachers and legal

\textsuperscript{78} South Pacific, 297, 301; cf Hamlin, 521. Cf Lord Cooke's refusal to circumscribe the compensation remedy in Baigent, 678, and Ministry of Transport v Noort [1992] 3 NZLR 260, 275. He has also tended to avoid lengthy disquisitions on large quantities of legal authority: eg Mouat, 562; South Pacific, 294. By so doing, he may have sometimes left himself open to the charge of selective use of authority. eg in Elders, 185; Mouat, 562, 565; Goldcorp, 271, 274-275. His response would probably be that an appellate court is entitled to select the lines of authority it wishes to follow. It is at least as logical to do it on policy grounds, as by trying to evaluate overseas court opinions for superior "quality", using elusive and ill-defined criteria. And wider or deeper enquiries may in any event be precluded by "the limits of judicial and professional time": Hamlin, 523.

\textsuperscript{79} South Pacific, 294; Hamlin, 523; Goldcorp, 267.

\textsuperscript{80} Hamlin, 520 (citing Lord Roskill in Junior Books v Veitchi & Co Ltd [1983] 1 AC 520, 545); Mouat, 566 (rejection of "inexorable and extreme" approach to fiduciary liability); South Pacific, 295 (deliberate artificial use of terminology "open" to court, but apparently not embraced with enthusiasm).

\textsuperscript{81} See "Legal Identity", 178 ("hopelessly unreal"), Hamlin, 523 ("unattainable").

\textsuperscript{82} "Dynamics of the Common Law", 1. Examples he gives include the rules about privity of contract, the law of contractual damages, negligence liability, and the law of defamation. These do not stand up to criteria such as "certainty, clarity of principle, intellectual honesty, a confidence that in the general run of cases the basic rules will produce just results."

\textsuperscript{83} This view now appears to have been accepted by the Privy Council: Hamlin, 519-520.

\textsuperscript{84} "Legal Identity", 171.

\textsuperscript{85} South Pacific, 297; Hamlin, 523.
researchers qualifies us to make assessments of about the strengths and weaknesses of particular concepts and methods of reasoning, and they deserve to be heard. Even in cases at the "cutting edge" of new legal development, we should stand up for the proper use of concepts, if we believe the Court has misused them, or taken an impermissible short cut. Perhaps, as the craftsman sees the "grain" in a piece of stone or wood, there is a craftsman in us who sees how particular concepts and principles fit in over a wide range of potential uses - I offer a specific example in the Appendix, Example III. This applies, not only to common law and equitable rules and principles, but also to commonly used statutory provisions, such as the "change of circumstance" defence first used in the Judicature Amendment Act 1958.

That is not to say that academics can dictate the result, or that we must retreat in self-righteous indignation if our arguments do not prevail. A piece of wood can be cut badly, yet still do the particular job required of it. There has to be a trade-off between the imperfections of the material, and the easy access that judges have to old or ill-formulated concepts, as compared with crisp new, but unfamiliar, ones. Our first task is to understand the trade-off.

It is with that thought in mind that I address some of the salient characteristics of the legal techniques and methods which have emerged in Lord Cooke's judgments, and which have been supported in his writings.

Making up for limited input. There is an inescapable question with judicial law-making. How can a Court tackle significant law reform issues when it decides a series of cases one at a time, and must await suitable opportunities for developing law?

One answer, which Lord Cooke rejects, is to develop the law incrementally. The ambit of each new rule is circumscribed, so that the Court knows what it is doing and what it is not. When a new case comes along, the Court will know whether a decision one way or the other will involve an impermissible "great leap" from the existing law, or only a permissible incremental step. Eventually, when other conditions are right, a new step can presumably be made, but by now other parts of the law may have caught up so the whole of the law is not dislocated. Lord Cooke questions the value of this limitation of judicial power. He has suggested extra-judicially that it is a narrow legalistic approach, which "fails to rise to the level of a principle, or an outline of considerations, guiding future advances."

He prefers a different way of dealing with the problem. The general framework of legal principle needs to be broadly constructed so that it does not necessarily disqualify a new set of facts from consideration, just because earlier judges may not have foreseen them. But within that broad framework judges must constantly check each new result to see whether the law "works". The guarantee that a set of rules is adequate lies, not in the wisdom of the Court which propounded the initial rule, but much more in the fact that it has been tested over a period of time and not been found wanting. Once once a set or rules has established itself over time, it is difficult to dislodge.

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86 This view is discussed in "An Impossible Distinction", 52, and traced back to Australian judgments. It has been adopted by members of the House of Lords, especially in Caparo Industries plc v Dickman [1990] 2 AC 605, 618 per Lord Bridge, and still has some influence: see eg White v Jones [1995] 2 AC 207, 275 per Lord Browne-Wilkinson; Spring v Guardian Assurance plc [1995] 2 AC 296, 326 per Lord Lowry, and at 333 per Lord Slynn of Hadley; Marc Rich & Co v Bishop Rock Marine Co Ltd [1996] AC 211, 236 per Lord Steyn.

87 South Pacific, 295-296.

88 "Condition of the Law of Tort", 54; cf "Impossible Distinction", 47. "Incrementalism" as a limiting doctrine is not to be confused with the process, followed by Lord Cooke (eg, in Hamlin, 522) of deciding each case step by step, leaving other issues open to future decision.

89 Eg Hamlin, 522.
It seems to me that the consequences of this tentative, provisional approach to law-making is apparent in the way in which Lord Cooke expresses his conclusions when working an an area which is still developing. Even amongst the few cases I analysed, examples abounded.

- Use of words which empower rather than limit, eg statements that certain facts "can" give rise to liabilities or other legal consequences; and that particular flaws in a case are not automatically fatal to its success.
- Reliance on other judges' obiter statements and invitations to counsel to move down more adventurous lines than they had initially thought appropriate, which are then used to decide the case (see Appendix, Example II).
- Developing alternative grounds for decision which, though not strictly necessary to the decision, help get a potential new doctrine moving.
- Assessments based on the facts of a particular situation, rather than circumstances which have more general features (but this practice is not altogether predictable, since attention may be given to the general features of a case where there is a fear that the law will otherwise become "a wilderness of factual decisions" or where the court considers - for example, on a summary judgment application - that it has no difficulty in identifying the critical factors at a more general level).
- Adopting a rule whose text gives ample scope for later judges to supply their own evaluative techniques; and the use of words (eg "direct" or "proximity") whose content can only be expressed as the outcome of a series of complex enquiries, or which pack a great deal of hidden meaning which requires the application of judgment.

These features of Lord Cooke's jurisprudence are drawn, I suspect, from equity, which was always given to the enunciation of wide principles. The common law, on the other hand, tended to proceed incrementally where it moved at all. But I wonder whether it is sufficient simply to proclaim the equitable method preferable. Equity, after all, always acknowledged the paramountcy of common law policy. One of the most important equitable maxims, "equity follows the law", says just that.

Supposing that limiting factor is lost (because the rule the court is about to adopt superseded the old common law rule) there is a question whether the courts can justify this degree of legal imprecision. It is not enough, of course, simply to denounce a new rule for no better reason than it is uncertain. But we could try to find out whether the degree of uncertainty that follows it is acceptable to the community or not.

Does "testing" really work? The main argument in favour of allowing new rules to be imprecise is that it is usually premature to make a comprehensive law based on the facts...
of one case alone. Rather a new law needs to be tested by the judges over a period of time, in a variety of factual situations.\textsuperscript{99} There is merit in that view, and there is no doubt that the Court can occasionally say with force, as it did in the \textit{Hamlin} case, that experience over time is preferable to following erratic swings in doctrinal development.

But there are limitations in the process. Judges following an earlier decision or line of authority become experienced in applying it widely, and can observe its operation when previously unforeseen consequences arise. They are not likely to test the new rule at a deeper level, or to think laterally about its consequences. I would argue that the law of family protection claims is one area which may work well in the judges’ estimation, but has serious flaws and repercussions which are much more apparent to the general public than they are to lawyers and judges in day-to-day family protection practice.\textsuperscript{100}

\textbf{Susceptibility to political opposition.} The element of imprecision and uncertainty I have described is the feature of Lord Cooke’s jurisprudence which has attracted the most criticism from outside the law, as well as within legal circles. People have not understood why the Court of Appeal has sometimes been willing to allow lower and specialist courts to find salvation in their own somewhat murky jurisprudence, rather than to give them determined guidance and direction.

I refer, for particular examples, to the High Court and Family Courts’ jurisdiction in family protection matters, and the Employment Court’s exercise of its powers under the Employment Contracts Act 1990.\textsuperscript{101} Another area where the Court, having set the wheels in motion, has left matters to run of their own accord is the case of professional negligence.\textsuperscript{102} The results have not yet been clear - take for example the confusion surrounding the Dairy Containers\textsuperscript{103} litigation. This decision is forcefully criticised by John Smillie\textsuperscript{104}, who thinks such cases “reflect badly on our civil justice system”. But it seems to be a necessary consequence of a policy of leaving the law to be improved on a case by case basis.

Uncertainty appears to have inspired, in two of the three examples I have cited (employment and professional liability), a vocal reaction amongst powerful groups in society. It may well be that the decisions of the courts in these areas can and should be more strongly and publicly defended than they have been. But the merits of clear law (if it is attainable) must also weigh in the balance. In all cases there are inevitable costs. One is that lawyers must try and settle their cases without clear guidance on what they should aim for. Another is a measure of public resentment among those who cannot understand why the court has done what it did, and why it had the power to do so.

\textsuperscript{99} South Pacific, at 286.
\textsuperscript{100} I base this statement on what we said in Law Commission, \textit{Succession Law: Testamentary Claims} NZLC: PP 24 (1996), ch 7 and the general public response to those comments.
\textsuperscript{101} See eg Brighouse v Bilderdiek [1995] 1 NZLR 158, 164-165, 167-168 per Cooke P. It is beyond my brief to comment on more recent trends in the law of employment.
\textsuperscript{102} It is apparent from recent House of Lords decisions that a lot of work remains to be done in this area: see Henderson v Merrett Syndicates [1995] 2 AC 145; White v Jones [1995] 2 AC 207. There may well be a growing backlash, because of dissatisfaction with the expense of the process, and also with the way in which one of several defendants can be taken advantage of as a pawn in a wider dispute. The courts’ willingness to protect particular classes of defendant from liability on the grounds of “policy” is also unpredictable; cf Marc Rich & Co v Bishop Rock Marine Co Ltd, 238-242. It is by no means clear whether any group of potential claimants derives much direct benefit from their enhanced rights against professionals, although individual injured claimants probably do, if they have the resources to persist with litigation. The courts have had thirty years to work the principles out - may public patience be wearing thin?
\textsuperscript{103} Dairy Containers Ltd v NZI Bank Ltd [1995] 2 NZLR 30.
Opposition to the family protection jurisdiction would appear to be no less vehement, though offered by a group of people who are not well placed to express their discontent in a public way. But it may nevertheless have merit. It would be facile to confuse well-founded dissatisfaction with the principles judges are applying, with the natural sense of disappointment which any litigant has when they lose their case. Those who suffer from the latter can go away thinking they have had their "day in court".

I think there may be an answer to all of this, which concedes that there are both political and technical dangers when the law is uncertain, but acknowledges the trade-off aspect. Critics should not be opposed for pointing out these dangers. But it is wrong to elevate them into grounds for a more general argument to judicial law-making and the philosophy that lies behind it. The Courts can only develop the law within the limited framework I have described. To require that (when they do move) they always substitute for a coherent but poor set of rules, a new set which is as complete and specific as the old is not realistic. No important common law rule that I know of came into the world with a fully complete set of claws and feathers. Caution in such matters, and a reluctance to stake out clear boundaries, is a mark of commonsense, not of arrogance.

But the judges may need to be politically circumspect when deciding whether or not to open up an area for change. This quality has served law reformers well in the past. Even where a law fails contemporary standards of reasonableness, assessing whether it should be changed and, if so, by what process, requires tactical vision as much as a conviction that somewhere, there is a better law to be found.

The limits of innovation. Another point which may made be favour of judicial lawmaking is that there are natural limits to the adverse consequences of innovation. From a practical perspective, no Court of Appeal, no matter how "active" - if that is the right word for it - can ever keep more than a small portion of the whole law in a state of flux and review at any one point of time. While the Court of Appeal has been busying itself with Bills of Rights and negligence cases, large tracts of law - property law, for example, or the law of contract, or copyright - have gone on largely undisturbed by court decisions (though in the last case, the legislature has had its say instead). The idea that a court should decline to change anything in case the "floodgates" of litigation should open more widely than the courts can control has not proved a realistic one, and is surely now discredited. So too is the suggestion that litigants will go to the Court of Appeal to get a final resolution of every case - the docket of cases awaiting that Court's attention is, I understand, shorter than it has been for a long time.

Are the remedies too loose? Another feature of Lord Cooke's legal reasoning is that the links between the underlying substantive law and the remedies traditionally associate with it, have become loose. This too makes sense, given the underlying trade-off. Later courts can make a doctrine work by offering flexible remedies, in circumstances

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105 Copyright Act 1994.
106 I am aware that this is not a complete answer. Some might argue that a different view is presented by a search of the number of Court of Appeal cases noted by the standard sources, as compared with the number of High Court cases similarly noted. A BRIEFCASE search (inexpertly driven, admittedly) indicates that in the ten years or so since the information has been computerised, the ratio runs at below 1:4 (3521:12220). But over half of the Court of Appeal cases (1888) appear to deal with the criminal law, an area where the Court of Appeal has not been strongly innovative. In areas where the Court of Appeal has been said to be too flexible, such as contracts, negligence, and fiduciary duty, the ratio appears to be about 1:5. The ratio is lower in some areas where the court is known to have taken a special interest, eg Maori (37:114) and the New Zealand Bill of Rights Act 1990 (35:88). But it is also lower where large sums of money are involved, eg securities law (17:66). In very well settled areas, such as landlord and tenant (73:445) the ratio is understandably higher. But the inferences which can be drawn from these figures are elusive.
where an automatic "right-remedy" link would operate harshly. Any remaining restraint comes not from doctrine but from the judge's own sense of what is apt to the occasion. This view, too, has been criticised.\(^{107}\) Again, I think there is merit in the criticism, but it should not be carried too far.

One place where the problem has caused considerable academic concern is in the line of cases on the remedies available under section 9 of the Contractual Remedy Act. These begin with the dicta of the Court of Appeal in Brown v Langwoods Photo Stores Ltd.\(^ {108}\) I think I had better leave these authorities for detailed discussion on another occasion.

But I have one passing comment. There are three fundamentally different ways of dealing with a contract which has broken down
\begin{itemize}
  \item to infer what is to happen from the terms of the contract and make sure that happens, or compensation is paid accordingly;
  \item to ascertain blame, independently of the contract standards, and to allocate losses accordingly; or
  \item to restore what has passed under the contract (or its value) to the parties.
\end{itemize}

It is by no means clear that we can say, a priori, which of these approaches will best suit the particular occasion. The Contract Statutes - the Contractual Remedies Act 1980; the Fair Trading Act 1986, and the Contractual Mistakes Act 1977 - now recognise all three methods of approach. It seems almost inevitable that the choice between the approaches gets pushed down from the substantive level to the remedial one.\(^ {109}\) Perhaps the legislature should have given more thought, and more explicit direction, on how the choice is to be made. But I wonder whether it is realistic to support extensive legislative incursions into the traditional law of contract, while at the same time expecting the courts to maintain historical traditions of contract, tort and restitutory purity when granting the wide remedies those statutes permit. Even at common law, doctrine is giving way to pragmatic realities.\(^ {110}\)

Nevertheless, loosening the links between remedy and substantive law can result in poor argument and weak direction of the remedies available. It is, in my view, very important for courts to be clear and consistent about how they choose the appropriate remedy. Litigants are entitled to know which one (or more) of the three approaches I have described is available, and why. Legal argument, and the resulting remedy, should be appropriately confined. This is especially vital in cases where third parties are involved. (See Appendix, Example IV)

**Some concluding thoughts.** What emerges from this analysis, I suggest, is that the Court of Appeal, particularly its President, has consciously moulded its jurisprudence so that it can align judge-made law with what courts consider to be the values and

\(^ {107}\) Those who enjoy battles of the Titans are referred to Lord Cooke's spirited defence of the process against the strictures of R Meagher, J Gummow and J Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992), paras 259, 504, 4117 and 4127: see "Australasian Equity". But his answer does not raise any issue about the need to find a principled way, in the new legal environment, of relating the substantive claim to the nature of the remedy. Nor, for reasons which will be discussed later in this paper, is it any answer to the criticisms made of the *Elders* case to say that the result was right and was agreed on by all the courts which considered the case: see Appendix, Example II. Another, more recent case where the relation between substance and remedy could have been made more specific is *Baigent*, at 678.

\(^ {108}\) [1991] 1 NZLR 173. The discussion is admirably summarised by Campbell Walker in his article in (1994) 7 AULR 532.

\(^ {109}\) For a fuller discussion of this point, as it affects the law of contractual mistake, see Sutton, "Reform of the Law of Mistake in Contract" (1976) 7 NZU Law Review 40, 52-56.

\(^ {110}\) See eg *Ruxley Electronics and Construction Ltd v Forzith* [1996] AC 345, especially at 368 per Lord Lloyd.
aspirations of today's New Zealanders. This has involved the use of legal techniques which have made the law looser and less predictable in its operation. Perhaps, as each area of law calls for review, this uncertainty is temporary, and eventually a new, clearer pattern will emerge. But then again, perhaps not. The Court of Appeal has been aware that there are costs in the process, and that there are questions about whether the exercise is ultimately viable. But it has been prepared to pay those costs, to take the risks, and to let theoretical doubts be put to the test of actual experience.

For those of us who are academics, evaluating this development in the law is complex. I have suggested that we might begin the evaluation by seriously questioning our own pre-dispositions, and the over-generalisations which too often appear when subjects such as "fairness" and "certainty" are debated. We must learn to explore each difficulty as it arises, and to find ways of describing it and ascertaining its future consequences. We need to know whether particular problems result of the underlying trade-off between the need to develop law, or an infelicitous accident in the courts' execution of the wider plan.

CONCLUSION

To summarise, I believe that the law reform movement of the 1960's began to loosen the grip of doctrine and the over-valuation of the results of traditional historical legal research on the law. It was inevitable - and desirable - that the Courts take over the law reform role, when the process established in the 1960's became politically difficult.

This development is here to stay, and it has implications for how we as academics go about our business. Doctrinal research is still important. But it is even more important to help explore the merits and consequences of the judicial law-making process. In this paper I have outlined some of the likely difficulties, and made suggestions about how we might deal with them. I have also argued that we may do this more effectively if we work in co-operation with academic colleagues in other disciplines. I see space in all of this for exciting and fulfilling academic work. Those with idle time on their hands may wish to amuse themselves further by reading the modest critical examples I have put in the Appendix.

It remains for me to return to the occasion of our gathering. On behalf of all academics, I re-affirm our warm affection and regard for Lord Cooke. We are drawn together here to ask difficult and important questions about his work, rather than to seek re-assuring answers - we know there are none. I believe this is the best compliment academics could pay to any judge. His contributions to legal theory, both on and off the bench, assure of him of no less distinguished a place amongst us, than he holds also amongst his fellow judges.
APPENDIX - FOUR EXAMPLES

This Appendix takes four examples of judicial reasoning, illustrating some of the ways of debating the results when a court has chosen to make new law. The first method is to challenge the evidence in support of a finding of the court when it advances policy reasons which, it supposes, prevent the plaintiff from succeeding. The second is to examine the procedure adopted by the court, suggesting that the court strayed too far from the lines of argument initially presented by counsel. The third argues against the court's expansion of a well-established concept beyond its proper limits. The fourth contends that, had the court concentrated more closely on the underlying basis for the remedy it was granting, it might have produced a more defensible result.

I. THE PERILS OF BEING INTERNALLY CONSISTENT

Can a court, which is developing law in one area, take conclusions in other areas of law as given?

In the South Pacific case,111 a private investigator, employed by the insurer to investigate a fire claim by an insured, suspected arson and recommended that the claim not be paid. After delay and litigation, the insurance company was eventually obliged to withdraw the defence and pay out. The insured then sued the investigator for negligent advice to the insurance company, seeking damages for all the losses caused by the litigation and delay in payment. It was clear to Lord Cooke and a majority of the other judges112 that the insured was well within the privity standards required for a negligence action, the only question being whether, as a matter of policy, such a claim should succeed.

In coming to the conclusion that it should not, Lord Cooke drew extensively on the law of defamation.113 This was a fixed point in the law, which showed that the law of negligence would be going too far if it imposed a duty of care on the insurer. But which was out of step, the law of negligence or the law of defamation? There was scarcely time to inquire into the law of defamation, in the same deep way as the court was looking at the law of negligence, to see just where the comparative strengths of the two policies lay.

But it was subsequently held by the House of Lords that the giving of a negligent reference (which would also come within the law of defamation as well as of negligence) is actionable.114 Now, it is true that some members of the House indicated that the South Pacific case could be distinguished. But my point is that (if the House of Lords is right) then the mere presence of the "malice" rule in the law of defamation is not of itself a justification for refusing a remedy in South Pacific. So it cannot be seen as a "given", superior law. Future courts will need explore deeply both the law of negligence and the law of defamation. They may even have to point to some meta-law, by reference to which it can be said that the defamation rule has to give way to the negligence rule, or vice versa.

Also in the South Pacific case, Lord Cooke referred to the law of privilege. Since legal privilege might have applied to the investigator's advice, it appeared to Lord Cooke that the law could not countenance an action which where production of the privileged

112 Though not Casey J: see at 314.
113 At 302-304.
document would be necessary. I have a close personal interest in that proposition, since the Law Commission did work on this and expressed serious reservations about the "absolute" nature of privilege for documents prepared in anticipation of litigation. They should be made available in the courts' discretion, especially if they are essential to the proof of some cause of dispute other than the one for which they are prepared. I do not think that too many people dispute that assessment now.

Conclusion. It was probably a lot to ask of counsel, and the court, to look in depth at the policies not only of the law of negligence, but also the law of defamation and the law of privilege at the one time. But subsequent developments have shown that the lawmaking process was the weaker because that did not happen.

II. MAKING LAW FROM AN INSUFFICIENT BASE

Who controls the speed of the law-making process - the parties and their counsel, or the courts?

In *Elders Pastoral*, a farmer refinanced his loan from a stock firm, by taking out a chattels security over stock in favour of a bank. The instrument included a clause which said that if the farmer ever sold any of the stock, he would direct payment of the proceeds to the bank. The stock firm helped make the loan arrangements, but did not see what documents were actually signed. Subsequently, the same stock firm conducted the sale, and pocketed nearly all the proceeds on the ground that the liability to account could be set-off against other indebtedness owed by the farmer to the firm. Both the Court of Appeal and the Privy Council found in favour of the bank.

The first point I want to make about the case was that, because the action was fought as an application for summary judgment, there was no cross-examination on what the stock firm knew or did not know about the bank's rights. This would have been critical to the outcome of the case. It seems that representatives of the stock firm might have found themselves in a cleft stick.

They could testify that they did not give any thought to whether they would get a set-off or not. But that would have led their case into conflict with a line of authority dealing with the right of the bank, as undisclosed principal, to resist such a set-off. These cases say that if someone in the position of the stock firm acted in a state of indifference about whether the farmer was selling personally, or as agent for the bank, they could not (as bona fide purchasers) assert the priority of their set-off.

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116 The Commission's companion proposal, that communications made between lawyer and client *where litigation is not contemplated* are given only a qualified privilege, has been much more vigorously opposed, although it is logical and has its supporters.
118 I am indebted, in offering the following account, to opposing counsel in both courts (His Honour Judge Colin Doherty and Mr Paul Heath) whom I approached for personal interviews. Their comments about the course of argument in the case have been very helpful. However, the assessment I have made in the text is mine and not theirs.
But if, on the other hand, they said that they had intended to acquire priority through the set off, they might have had to answer some very awkward questions about their bona fides. If they knew the mortgage existed and was likely to have provisions on the subject, why did they make no enquiry about those terms of a mortgage? If they arranged it, and the Bank form was a familiar one, how come they thought they could get the benefits of the set-off?

The Bank’s initial argument took a different route, which made the stock firm’s state of mind irrelevant. Its counsel said that the Bank's security expressly conferred a right to the proceeds by way of assignment, and the stock firm had constructive notice of that right by reason of registration of the security under the Chattels Transfer Act 1924. But during argument in the Court of Appeal, the Court indicated that this line of argument was likely to fail because (as it subsequently held) the clause did not amount to an assignment.

Faced with that difficulty, Counsel moved down a more adventurous line. They did so, arguing that because of the stock firm's involvement in obtaining the bank loan, it was inequitable for the stock firm to rely on the set-off (even though their bona fides were not in question). The line of cases I have mentioned, which appeared to be directly relevant to such an argument, were not cited. Nevertheless, the Court accepted the argument, thereby considerably widening the concept of constructive notice and unfair dealing. This was unfortunate because it is difficult to see how any such conclusion could be reached without evidence about the stock firm's knowledge and intentions when making the sale arrangements.

It was unlikely that such a broad view of their liability would commend itself to stock agents. The case went to the Privy Council where, however, the results were even worse for them. The Board adopted the argument the Bank originally presented in the Court of Appeal, that is, the relevant clause in the security validly assigned the proceeds to the Bank. But it did not expressly over-rule the principle of inequitable conduct adopted in the Court of Appeal.

There was, however, a problem with the argument adopted by the Board. If there was an assignment, it was one of after-acquired property (the proceeds of sale, which came into existence after the stock mortgage was signed) and so void as against subsequent purchase under section 24 of the Chattels Transfer Act. The Court of Appeal had not addressed that point. The Privy Council's reported opinion makes no reference to the difficulty, although I understand the question whether the sale proceeds were “book debts” (and therefore ‘chattels’ within the meaning of the Act) was discussed. But even assuming the right to the sale proceeds was not a ‘chattel’ it would be very curious that purchasers should have notice of the Bank’s right when (if it were a right to which the Act applied) it would be void. The Privy Council, having no familiarity with New Zealand Chattels Transfer matters, had to take up the matter without the benefit of the views of the local court, and with very limited time for argument.

120 According to Cooke P at 184, this was an argument which was “included in the Master's reasons though not fully developed there, which assumed increasing prominence as the argument in this Court went on. Counsel had not prepared full argument on it.” (my italics).

121 At 186, per Cooke P. Nevertheless, written submissions were subsequently put to the court, although the matter was not futher argued orally.

122 Nor do they appear to have occupied the Privy Council. The report of the Privy Council decision in [1991] NZLR 385 does not indicate what cases were cited in argument. The Privy Council mentioned the Court of Appeal's basis for decision, and did not express any disagreement with any part of it except that relating to the interpretation of the relevant clause. So the legal ruling would continue to apply in any cases where a direction as to proceeds, on its proper construction, did not constitute an assignment.
One of the counsel present endeavoured to replicate their Lordships' *arguendo* reasoning in *Laws of New Zealand*.\(^{123}\): it was to the effect that, because the formalities provisions could not be complied with as regards future debts, they were "chooses and action" and therefore not "book debts" or "chattels" within the meaning of section 2 of the Act. It is not clear how this holding fits in with the policy of the legislature, and it seems to be a very doubtful reading of the words the statute, given its history.\(^{124}\)

Returning to the Court of Appeal's decision, I accept that it displayed sound instincts in saying that the stock firm should not benefit from its arrangements with the farmer. But it was drawn into an adventurous and suspect line of legal reasoning without a sufficient basis. The decision in the Court of Appeal depended upon quite different propositions from those argued before the Masters. The decision in the Privy Council was based on different material again.

**Conclusion.** There are risks when an appellate court follows counsel down an unfamiliar line without extensive testing of the proposition being advanced. The result in this instance was two decisions, each of which still stands on the books as authority, and each of which seems likely to cause trouble.

**III. THE USE AND MISUSE OF LEGAL CONCEPTS**

Legislatures, like Humpty Dumpty, can assign to words any meaning they wish - but should the courts?

*Mouat v Clark Boyce* came twice before the Court of Appeal, first on the question of liability,\(^{125}\) and then on the question of the quantum of damages.\(^{126}\) The decision was subsequently over-turned by the Privy Council.\(^{127}\)

The facts were simple. An elderly woman wanted to support her son's application for a loan, which she would guarantee. This was a very unwise transaction, and one which would most likely have been exposed as such if proper investigations had been made by a knowledgeable solicitor on her behalf. But when she was offered that assistance she declined it. She was content that her son's solicitor, the defendant, act for her as well. She asked only that he explain the transaction to her, and give effect to the transaction as she understood it. The defendant performed both these tasks on her behalf. Subsequently, however, when her guarantee was called upon, she sued the solicitor for negligence and breach of fiduciary obligation.

As far as breach of fiduciary obligation was concerned, there was a very short and correct answer to this claim, which the Privy Council gave. Having been expressly discharged of any obligation to investigate the wisdom of the transaction on her behalf, the solicitor could not be in breach of fiduciary obligation for failing to do so. As Lord Jauncey, delivering the opinion of the Privy Council, pointed out, "...[a] fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party..."

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\(^{123}\) *Laws of New Zealand* Tit "Agriculture" (1995), para 331, p 216.

\(^{124}\) The legislative history appears to be contrary to the view so expressed: see the difference of opinion between Callan J and Quillinan J in *In re Burton, Smith v Montgomery* [1938] NZLR 637, 641-642 (where the earlier legislative history is discussed) and *In re Mooney and Hide, OA v Martin* [1938] NZLR 766, 771-772. The difference of opinion was then resolved by the introduction of a new section dealing with the points, and by an amendment to the wording of s 2 of the Act (see Statutes Amendment Act 1939, ss 6(3)(a) and (b)). These provisions (which followed Callan J's view) have not been amended since.

\(^{125}\) (1991) 1 NZ ConvC 190,917.

\(^{126}\) [1992] 2 NZLR 559.

\(^{127}\) [1993] 3 NZLR 641.
who has such an interest. It cannot be prayed in aid to enlarge the scope of contractual duties". \(^{128}\)

I was delighted to see that statement. When I had the privilege of writing a book with the late Sir Alexander Turner, we said the same thing, if not with quite the same brevity and crispness: ". . .the existence of the duty of disclosure, and its extent, depends in large measure on the relationship between the parties, the question being whether failure to disclose will allow the fiduciary to profit unfairly from a position of trust, arising from confidence reposed by the other party to the transaction". \(^{129}\) "The better view appears to be that the nature and extent of the duty of disclosure depends on the nature of the relationship between the parties, and the legitimate expectations of the principal in the particular circumstances of the case." \(^{130}\)

The Court of Appeal, however, had decided otherwise. On the first occasion the matter came before it, it stressed the fact that the solicitor was in dual position, and that he should have insisted that plaintiff see an independent adviser. The solicitor should have argued with her; he should have insisted on a "cooling-off period"; he should have insisted on seeing her alone, without her son; and he should have made further enquiries of the son's own personal solicitors as to why they had refused to act in the matter. \(^{131}\) Although on that occasion Lord Cooke was not a member of the presiding Court, \(^{132}\) he appears to have supported the decision in the second of the Court's judgments. \(^{133}\)

Now it may be - I do not say - a solicitor who is approached by a person who is obviously in need of independent advice on the wisdom of a transaction should refuse to act if that person declines to take it. And it may be good policy that this practice should be observed, not merely as a matter of personal conduct or common prudence for the solicitor, \(^{134}\) but more strongly as a matter of duty to the client. It is not altogether clear, of course, whether the position of someone such as the plaintiff in this case would be better or worse off if such a rule were recognised. Some would no doubt argue that limited advice is better than none at all, and if the solicitor acts, at least there will be a clear record of just what happened, and whether the person knew what they were doing or not. \(^{135}\)

However, assuming solicitors should be gatekeepers whenever a mortgage is guaranteed, then this should be achieved under the law of negligence, or some other rule of law. The law of fiduciary care does not help. \(^{136}\) It only distorts the concept of

\(^{128}\) At 648. Lord Browne-Wilkinson has taken up this theme on a number of occasions: see Henderson v Merrett Syndicates Ltd, 205; White v Jones, 271-274; Target Holdings Ltd v Redforns [1996] AC 421, 433-434.


\(^{130}\) Ibid, para 16.17, p 316.

\(^{131}\) (1991) 1 NZ ConvC at 190,934 per McGechan J. Sir Gordon Bisson, at 190,949, offers a somewhat shorter list of the things the solicitor should have done.

\(^{132}\) The decision was that of McGechan J and Sir Gordon Bisson. Gault J dissented.

\(^{133}\) [1992] 2 NZLR at 562, 563.

\(^{134}\) Lord Cooke has said, extra-judicially, that "it is no part of the business of the Court to impose a code of ethics" ("Condition of Tort", 53).

\(^{135}\) These considerations are not referred to in the judgments.

\(^{136}\) The judgment of Richardson J does not specifically deal with breach of fiduciary duty, but it contains comments, at 571, which indicate he may have some sympathy with that view. Clearly and sadly, however, Lord Cooke does not: see "Condition of Tort", 61-63, where he supports two Canadian cases which use the notion of fiduciary duty to extend ordinary rights and remedies. I would argue that, at least in the second of these two cases (KM v HM (1992) 96 DLR (4th) 289, a case based on the statute of limitations) the concept of fiduciary duty had very little to offer in
a fiduciary, and confuses the law, to try and use the fluid conceptions of the fiduciary principle to achieve something which is so clearly beyond its boundaries.

The strength of the fiduciary principle lies where there is a conflict between the demands of the trust undertaken by a person, and that person's own interests, or the interests of that person's other clients. When it applies, it casts a very strong onus on the fiduciary to show that everything has been carried out properly. It cannot, however, help to identify what the nature of a relationship is. Nor should it specify, in a case where no trust has been imposed in respect of the matter complained of, what the outcome of the case should be.

**Conclusion.** The term "fiduciary" has an established meaning, and a context in which it is known and used. Taking the concept to achieve goals which (though desirable) go well outside that range, is likely to have an unsettling effect on the law. This is because the word is so widely used in its narrower meaning. Unlike a legislature, the court cannot confine the wider meaning to particular classes of case. The meaning of the term becomes confused, and the consequences of misuse are widespread and unforeseeable.

**IV. ARE REMEDIES TOO LOOSE?**

Once liability is established, has the conceptual hard work been done? Or do courts need to be intellectually precise in awarding remedies?

A leading example of imprecision in the grant of remedies is the *Goldcorp* case. There, the claimants believed reasonably that they were purchasing gold, to be acquired as an exclusive holding for them (as a group, not individually). The seller had no such intention, but since it was insolvent, any personal remedy that might be granted against the seller was of little interest to the claimants. So the claimants sought a "tracing" remedy, which would allow them to take a sufficient part of the seller’s assets to satisfy their losses. The party most affected by this was a bank, which held a floating charge over all the company’s assets.

Admittedly the claimants' supposed holdings of gold were quite small, relative to the very large general trading undertaken by the seller in its own right. But that need not necessarily tell against the claimant, if the existence of this class of claim was generally known and the company was apparently conducting its business on that basis. There is a converse argument, that had a lot more been at stake, the remedy might have had much more disruptive effects.

Now tracing is often possible where the person who would otherwise be entitled to the property has committed fraud, or has acquired their interest with actual or constructive notice of the claim. But otherwise, when it is available, tracing is a purely restitutionary remedy. The claimants needed to show that the bank (rather than the seller) would, even though innocent, be unjustly enriched if it asserted the equitable title deriving from the crystallisation of its floating charge.

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137 *Liggett v Kensington* [1993] 1 NZLR 257, reversed sub nom *Re Goldcorp Exchange Ltd*, *Kensington v Liggett* [1994] 3 NZLR 385. I note that Lord Cooke insisted, in his judgment at 275, that the process of reasoning used to reach the decision was "rigorous"; but it evidently needed to be more so to survive scrutiny in the Privy Council.

138 See McKay J at 301 (dissenting).

139 It would appear that this is the critical time from which the conscience of the bank might become affected, as a result of its learning that the seller had not set aside any fund of gold for the claimants. According to obiter statements of Lord Browne-Wilkinson in *Westdeutsche*
One would have thought that (by analogy to property law) the most reliable way of attacking the bank’s priority would be to show that the bank knew, or ought to have known, that the floating charge would defeat the buyers’ lawful claims. That would open up the possibility of making the bank liable to make good a loss. But for some reason which does not appear in the judgment, the bank’s bona fides were not tested in the Court below. So the Court had to decide the case on the basis that the bank did not know of the inconsistency between what the seller did and what it had told the claimants it would do. Loss-bearing considerations were - or rather, should have been - excluded from the case at that point.

The court nevertheless held that in the circumstances the claimants should still have priority over the bank. This was either because they paid their money under a fundamental mistake; because the seller was obliged as fiduciary to retain the money they paid on trust for the purchase of the gold until it was actually set aside for them; or because they had a fundamental mistake; because the seller was obliged as fiduciary to retain the money they paid on trust for the purchase of the gold until it was actually set aside for them. This fact (along with certain other factors which I shall argue presently were irrelevant) were apparently enough to give the claimants their priority. The bank’s innocence provided no defence.

This is a deeply difficult case and there was much to be said on both sides. The sequel in the Privy Council establishes what the current “correct” legal answer is. But a study of the Privy Council opinion, and of the equally difficult decision of the House of Lords in the Westdeutsche case, leaves me perplexed about the policies and legal principles involved. One cannot help feeling that, had the case been able to go to a fourth appellate tier, the result might have been different again.

There was, of course, an obvious problem with the claimants’ case, because by the time of the insolvency nothing was left that was plainly identifiable as their asset. The seller had said it would set gold aside in bulk, but it never did so. The money paid by the claimants had gone immediately into the seller’s overdrawn bank account, so that could

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Landesbank Girozentrale v Islington Borough Council [1996] AC 669, 715, a constructive remedial trust might be available (or, at least, is not out of the question). The claimants would not in this theory be required to establish a “persistent equitable proprietary interest” (which Cooke P had found, at 272) as from the date of their respective payments. Westdeutsche is one of those few very unusual cases where it actually mattered whether there was or was not a “persistent equitable proprietary interest”: as their Lordships pointed out, in the earlier case of Sinclair v Brougham (referred to below) the matter was simply one of administering a fund, so we may infer that the House needed to make no finding to that effect in the earlier case.

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Westdeutsche Landesbank Girozentrale v Islington Borough Council [1996] AC 669
not be identified either. No doubt many other people lost money in Goldcorp as well; but the loss alone could not justify a tracing claim.

What made the claimants' case different was the Goldcorp's promise to reserve gold for them. But it never did, although that was not discovered until it became insolvent. So, there being no clearly identifiable trust fund, must it follow that there could be no tracing?

Now it is true that (at least up until the Westdeutsche case) neither the absence of a clearly traceable corpus, nor the use of the money to payment the insolvent's debts, was necessarily a bar to obtaining the tracing remedy. However, claims often failed on that ground. That is because there is usually no justice in giving some claimants priority over others, unless the money or efforts of the original claimants enlarged the fund which was available to everyone else on an insolvency. There are some exceptional cases, however, where the individual assets have been lost without trace, yet the requisite superfluity can still be shown in the assets of the recipient at large.

I think that there is a good argument that Goldcorp is one of them. That might have been demonstrated by the Court of Appeal, which was well-disposed towards the claimant's case, had it held tightly on to the restitutionary concept. It appears that the seller received property over a period of time, by holding out (through its continued representations, and through its accounts and audits which apparently confirmed the position) that there was a fixed and known block of gold set aside for buyers such as the claimants. Disclosure of the true facts would probably have resulted in people in that class withdrawing their funds much earlier, and would have deterred other investors from entering into the scheme. So, when the seller did eventually collapse, the total fund available to the other participants would have been that much smaller. As it was, the claimants remained in the fund, and the other participants were able to spread their losses by calling on assets which should not have been there.

Would tracing have been unfair to the other participants, including the bank? No, because either they did not inquire about the seller's funding arrangements; or, if they did, the accounts would have told them that the company acknowledged other proprietary obligations which took precedence to their own. There was nothing hidden, except the fact that the company had not taken the steps that they had undertaken to do to achieve that purpose.

The standing of this principle is presently unclear, because (as already indicated in an earlier footnote) the House left open the possibility of a remedial constructive trust in cases such as this. Such a trust would not require any persisting equitable interest, but it would presumably require that there was an indication that the tracing claimant's money still remained in the confused mass. The common law evidently had some difficulty with that, but not equity. What I understand Viscount Haldane to be saying in Sinclair v Brougham is that a court of equity (or nowadays, a court of general jurisdiction with power to adopt equitable procedures) could come to the aid of the court of law and recognise the identity. This is classically a function of the court of equity's "auxiliary" jurisdiction: see Snell's Equity. (15th ed, P Baker and P St J Langan eds, London, Sweet and Maxwell 1990), 28; 1 Story, 82; J Fonblanque, A Treatise on Equity (5th ed, London, J & WT Clarke) 1820, 9-11. When invoking the auxiliary jurisdiction, it should not be necessary to establish any characteristically equitable relationship (such as a prior fiduciary duty).

Sinclair v Brougham [1914] AC 398, especially at 444 per Lord Parker. The decision was "over-ruled" in Westdeutsche; see at 713 per Lord Browne-Wilkinson, and cf at 738 per Lord Lloyd. The ground appears to be that the fact that the depositors in Sinclair v Brougham paid their money under mistake, or in anticipation of a consideration which failed, could not automatically sever legal ownership (held by the bank, which is taken to have "received" the money notwithstanding that it was acting ultra vires) and equitable ownership (which the depositors claimed). Similarly, in Westdeutsche itself, payment by the bank under a similar misapprehension did not give it an equitable title; the recipient borough acquired full legal and equitable title.
Is such a result correct in principle? Yes, because the promise made was capable of being specifically enforced. It was, in effect, an undertaking to hold a specified part of the existing gold stock subject to a charge in favour of the claimants. With all due respect to the contrary view adopted by the Privy Council, the fact that one could not tell which part of the gold was subject to the charge, is no more relevant than (when a person owns land, and agrees to sell a certain amount of the land to another) it is not possible to say which part of the land will eventually be used to meet the obligation. It would be no defence for the seller to say, "well, I agreed only to hold enough to meet the obligation; one section would have been enough; so, because I selected no section at all, you have no property rights even though I promised you that you would have, and indeed told you that you already did."

The fact that the present case concerned chattels does not affect the general principle. Specific performance can be awarded if other remedies are valueless to the claimants (as they were in this case) and third parties were not unfairly affected (as I have suggested they were not). This seems to me to be well within the general equitable principle that "equity looks on that as being done which ought to be done".

But the Court did not stick to the restitutionary plot. In my respectful view, because it drew on arguments drawn from other conceptual bases for liability, it was led astray. The fact that one of the potential participants in the insolvent fund might have known more, or have taken greater steps to assess the risk of insolvency and deal with it, does not fundamentally alter that assessment against them. Nor does the fact that they did not "voluntarily accepted the risk" of an insolvency when others (such as the ordinary creditors) did. The element of swollen assets marks the outer limits of any tracing process, in the absence of fault on the part of the person who would otherwise participate in the fund. In this case it should have been the decisive element.

Conclusion. Sound theoretical reasoning about the appropriate remedy does make a difference!

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147 At 396-397, 400.
149 As their Lordships in the Privy Council appear to acknowledge by their citation of cases at 393-395. Their basic objection (that no equitable interest could attach "in the very nature of things"; 395) is artificial, since as they accept, the bulk could have been charged with an equitable lien for the gold promised (394). So is the assertion that the wording of the certificates did not specify a declaration of trust, but mentioned only delivery within seven days notice (394). A robust court of equity could not stick at the letter of a contract prepared by one side, with the intention of encouraging a mistaken perception in the mind of the other. It would enforce the substance of the promise.
150 Snell, 40; 1 Story, 68.
151 Possibly because the arguments were wide-ranging rather than focussed: see at 268 per Cooke P.
152 See at 274-275 per Cooke P.
153 See Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 3 All ER 75, 77 per Lord Templeman, cited by Cooke P at 273. Nor was much to be gained, in the circumstances of the case, by Cooke P's holding (at 267) that Goldcorp were fiduciaries. As in Mouat, the fiduciary idea was a red herring.