## F W GUEST MEMORIAL LECTURE

# THE ROLE OF THE COURTS IN MODERN SOCIETY

THE RIGHT HONOURABLE SIR RONALD DAVISON,
CHIEF JUSTICE OF NEW ZEALAND*

*The F W Guest Memorial Trust was established to honour the memory of Francis William Guest, MA, LLM, who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.*

*It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.*

Francis William Guest, the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, died in November 1967. In each year since his death it has been the practice of the University to invite a speaker to deliver the F W Guest Memorial Lecture in his memory. I did not have the honour or pleasure of having more than a passing acquaintance with Professor Guest. I did not experience those qualities of learning and humanity which endeared him to so many people both within the University and beyond. It is, however, my great privilege to deliver this memorial lecture tonight.

A survey of the subjects chosen by speakers in previous years has shown that varied topics covering the practice and application of the law in diverse fields have been dealt with. Quite recently, Sir Alexander Turner spoke on "The Quest for Justice in the Welfare State".[1] In doing so he raised briefly, throughout his address, questions as to how the courts will operate to deal with the increasing number of cases flooding them for decision and what will be the role of the courts following the 1978 *Report of the Royal Commission on the Courts* chaired by Mr Justice Beattie. It seems to me that the time is ripe to consider that role.

I have adopted as my subject "The Role of the Courts in Modern Society". I do not intend to make this a technical, legalistic lecture. Rather it is to be a practical, philosophical consideration of the role of the courts.

I propose to address you under these headings:

1 A sketch of the historical development of the courts.

2 The changing role of the courts through the last quarter century—1950 onwards.

3 The future role.

### THE HISTORICAL DEVELOPMENT OF THE COURTS

From earliest times man instituted some form of authority and procedure for controlling the actions of tribal members and for settling dis-

* GBE, CMG. The above text is the substance of the Guest Memorial Lecture delivered at the University of Otago by Sir Ronald Davison on 21 June 1979.

1 Published in (1977) 4 Otago LR 1.

sitting time. During the 1960s there were stirrings on the part of law reformers to introduce a form of absolute liability to replace fault liability in personal injury cases. The *Woodhouse Report* was followed by the Accident Compensation Act 1972 which abolished claims for personal injury by accident in respect of any accident occurring after 1 April 1974. This marked the beginning of the phasing out of such cases from our courts. Over subsequent years the backlog of personal injury cases which existed as at 1 April 1974 has been virtually eliminated.

*The Criminal Legal Aid Cases*

The Offenders Legal Aid Act 1954 has been responsible, more than any other enactment, for the swelling flood of criminal cases which has inundated our courts—both the Magistrate's Court and the Supreme Court. The serious situation created was clearly evident by 1975. It is so much more evident at the present day.

Criminal cases are squeezing out the hearing of civil cases from our courts and causing the delays which we all deplore. No one will deny the right of an accused person to be competently represented when facing a criminal charge, or when conducting an appeal to a higher court. The ready availability of legal aid, however, is causing many cases to proceed to a trial either in the Magistrate's Court or the Supreme Court which, in the absence of legal aid, might not result in trial. This state of affairs arises for two reasons:

First, if an offender is not paying for his trial he is more inclined to "give it a go" especially before a jury in the hope of a possible acquittal rather than to enter a plea of guilty, which a sober consideration of the circumstances of the case might dictate.

Second, a large number of criminal legal aid cases are conducted by very junior counsel whose inexperience may not enable them to exercise a discerning judgement as to whether there is any prospect of success at a trial or to enable them to exercise a strong control over a client in the manner in which he advises a particular course of action. I do not blame the counsel. They are young: they operate under the system as it exists. But, in cases where on conviction severe penalties may result, an offender is more likely to press for trial even in a hopeless case on the off chance that he may escape conviction. Such is the case with the drug offences.

The influence of legal aid is also to be found in the number of offences of disorderly behaviour and unlawful assembly which appear in the courts for trial. It is not unknown that cases involving gang members with upwards of ten, twenty or even thirty defendants appear in our court lists for trial. Such trials are very time-consuming for our courts.

*The Civil Legal Aid Cases*

In the civil field it is matrimonial cases more than any others which have been most affected by the availability of legal aid in terms of the Legal Aid Act 1969. Since that Act came into force there has been an increasing number of matrimonial cases involving property, maintenance, separation and custody before our courts. Wives, who previously might have been reluctant to take court proceedings, are now with the assistance of legal aid vigorously enforcing their rights.

*The Administrative Law Cases*

Who had ever heard or read of administrative law before the middle of this century? It made its impact upon our legal system with the pro-

liferation of tribunals which have been established over the last thirty years. These tribunals, because they act in a restricted field and are comprised of members chosen for their expertise in that field, were given a large measure of autonomy over their methods of operation and over their powers of decision. Examples of such tribunals are: licensing committees, the Licensing Control Commission, local authorities acting in the administration of district planning schemes, the Planning Tribunal, the Milk Board.

It had long been recognised that the courts of law could intervene to prevent a statutory tribunal from exceeding the jurisdiction that parliament conferred upon it, but it was quite another thing to say that the courts could intervene when a tribunal made a mistake of law. However, in the *Northumberland Compensation Appeal Tribunal* case[2] the English Court of Appeal held that a court can correct such a mistake of law. Subsequent decisions have given a wide interpretation as to what is a mistake of law. Clauses ousting the jurisdiction of courts have been closely examined. The view recently expressed by that irrepressible judicial reformer, Lord Denning, in his recent book, *The Discipline of Law,* indicates the current trend:[3]

> The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right.... The way to get things right is to hold thus: No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

In the face of such trends is it little wonder that recourse has been had more and more frequently to our Supreme Court, particularly in its Administrative Division (established in 1968), to exercise judicial control over the decisions of administrative tribunals?

Also in the administrative law field the Administrative Division has been given the duty of hearing and determining appeals from various tribunals operating in many and diverse fields.

*The Industrial Cases*

There have over the years been attempts by means of Supreme Court proceedings to exercise controls in one form or another over the actions of industrial unions and actions by unions to control actions of employers.

In 1959 there was the case of the *NZ Dairy Factories and Related Trades Employees' Industrial Union of Workers* v *NZ Co-operative Dairy Co Ltd*[4] where the plaintiff union endeavoured to compel the dairy company to reinstate dismissed workers. The action failed. In 1969 in *Pete's Towing Services Ltd* v *Northern Industrial Union of Workers,*[5] a commercial firm sought a remedy against the union for an industrial stoppage. In 1977, in *Harder* v *NZ Tramways and Public Passenger Transport Authorities Industrial Union of Workers,*[6] a private citizen

2 [1952] 1 KB 338.
3 Lord Denning, *The Discipline of Law* (1979) 76, citing his own judgment in *Pearlman* v *Keepers and Governors of Harrow School* [1979] QB 56, 70.
4 [1959] NZLR 910.
5 [1970] NZLR 32.
6 [1977] 2 NZLR 162.

sought the assistance of the court to enforce compliance by the union with the provisions of the Industrial Relations Act 1973. He succeeded. The action raised a storm in the industrial union camp. More recently, the Labour Department prosecuted a large number of workers—members of a freezing workers' union in Southland—but later withdrew those prosecutions following negotiations for an industrial settlement.

I refer to these cases as examples of attempts to use the courts in resolution of industrial disputes with varying success. The Industrial Relations Amendment Act 1977 has now established an Arbitration Court consisting of a Chief Judge, two other judges and four appointed members, and has given it a wide jurisdiction in industrial affairs. Only time can tell how successful it will be.

*The Matrimonial Cases*

The Matrimonial Property Act 1976 has produced a proliferation of cases. The equal-sharing philosophy pervading the Act has caused spouses—particularly husbands—to endeavour to avail themselves of discretionary provisions to avoid the application of equal sharing. The provisions of the Act were not altogether clear. Conflicts of opinion arose between judges. The Court of Appeal has now delivered decisions in some five cases on more disputed points of interpretation. More settlements between parties may result.

And so, as a brief survey of developments over the last 25 to 30 years has indicated, the type of cases dealt with by our courts is changing. But, more significantly, I believe the role of our courts is changing. This change of role will be accelerated if recommendations of the Royal Commission on the Courts are implemented. What then is the future role?

## The Future Role

The role of the Court of Appeal will not change significantly. The mixture of cases coming before it for decision will vary. The number of permanent members will be increased to five. The addition of a judge of the High Court to sit on criminal appeals will enable the Court of Appeal to sit in two divisions and there is no reason why from time to time the division so appointed should not be peripatetic and sit in other centres to dispose of cases. The ability to sit in two divisions will speed up the dispatch of civil business with consequent advantage to litigants.

It is in the Supreme Court (High Court) and Magistrate's Court (District Court) that the greatest changes in role are likely to result. The extent of these changes will be a matter for government. If the recommendations of the Commission are substantially implemented then over the next quarter century we shall see in the District Court a move to greater original jurisdiction, and in the Supreme Court a move to greater appellate jurisdiction and the exercising of controls in the administrative, public law fields whilst that Court retains the trial of major criminal cases and major civil litigation.

The District Courts will preside over jury trials of electable criminal offences. They will exercise expanded civil jurisdiction to $10,000. The Family Division of the District Court, if constituted, will assume jurisdiction for all family matters. This will take away from the Supreme Court such matters as divorce, custody of children, a large portion of matrimonial cases and many others.

It is, however, in the High Court that the major changes will occur. It will lose up to two-thirds of the criminal trials now conducted there. It will retain the serious crime: murder, rape, aggravated assaults and major drug offences. Family matters will disappear except for complex matters transferred to the High Court with leave. Appeals — except criminal appeals from District Courts sitting with a jury which will go direct to the Court of Appeal—will go to the High Court. Civil claims below $10,000 will largely disappear.

The impact of legal aid on High Court lists will be substantially reduced with the transfer of family cases to the District Court. Appeals from that division will, however, continue to go to the High Court.

The administrative law cases will increase and the High Court will exercise wider judicial controls over administrative tribunals. It will exercise more of a supervisory function to keep them within the law and to require that their decisions be in accord with the law.

The changing pattern will show a move away from the role which the Supreme Court (High Court) played up until the middle of this century when it dealt largely with the *enforcement* of the criminal law, the adjudication upon the rights of citizens inter se in the civil field, and a limited involvement with administrative action in the government and local government fields.

The move will be more to what I might term for comparison—public law. The law affecting the interests of the individual in his dealings with government, with local government, and tribunals; the impact of social policies upon the community with rights and controls in the environmental fields of preservation, conservation and permitted activities; the impact of energy policies on resources, exploration and developmental activities.

We are entering a new age in this country, and indeed throughout the world. The last quarter of this century is already experiencing the effects of depletive policies on national and international resources. The right of the individual so zealously proclaimed and guarded by our courts over previous centuries must now give way to the needs of the community, to the needs of the nation, to the needs of the world. There must be a change towards collective responsibility and support, and a restriction upon individual rights. Such policies will be forced upon us by measures required for the maintenance of a reasonable standard of living and, in some respects it may not be too much to say, for our self-preservation.

The more a society moves toward policies of collective benefit as distinct from policies upholding the rights of the individual the greater is the need for the courts to keep a proper balance between executive action on the part of governments and administrative action in its various fields on the one hand, and the rights of the individual on the other. Certain individual rights may need to be limited or curtailed for the benefit of the community. The courts must be vigilant to see that such rights are never extinguished.

There are four aspects of the future role of the courts I wish briefly to touch upon, not because I foresee any clear development along the lines to be discussed but because I discern trends which may well, if allowed to materialise, considerably affect the future role of the courts.

1 *Criminal Punishments*

Since capital punishment, corporal punishment and deportation have been abolished, imprisonment has commonly been accepted as the most

severe punishment available for dealing with offenders. There may be those who would abolish imprisonment altogether. There are others who take the view that imprisonment beyond a certain term ceases to have any effect and can indeed be counter-productive. I subscribe to the view that, at this stage of our social development, imprisonment—and substantial terms of imprisonment—are the only acceptable punishments for violent crime: murder, aggravated robbery, aggravated assaults, and for offences of dealing in hard drugs.

For the lesser crime, to imprison offenders incurs heavy maintenance costs for the state. It takes offenders out of the community and reduces productive effort: it throws dependants on to social welfare assistance. For such lesser crime it is said the interests of the community lie strongly in favour of reforming the offender and keeping him within the community. It is suggested that for such cases, sentencing should be carried out by sentencing tribunals staffed by persons suitably qualified in various fields to ensure that reformation and rehabilitation can be effectively planned and supervised.

Courts already, of course, have the benefit of probation reports and medical reports when sentencing. There are those, however, who take the view that tribunals could be more effective. I reserve my decision upon that point. It is clear, however, that if a move is made toward sentencing tribunals then a considerable part of the work of the courts in this field will be eliminated and sentencing in this area would become almost a social service.

### 2 *Custody of Children*

The courts' injunction as contained in the statute in determining matters of custody is "to regard the welfare of the child as the first and paramount consideration." There are those who believe that what has been traditionally a matter for decision of the courts can best be performed in this age by a panel of persons qualified in various fields. I do not agree. Yet who is to say that reformers may not produce changes! The social trend of the community seems in line with such concepts. Will the function pass from the courts?

### 3 *The Field of Industrial Law*

The control of industrial action on the part of unions of employees and of employers has long been a problem with which successive governments have had to grapple, not only in New Zealand but in many other parts of the world. There have been attempts to control unjustifiable action causing disruption and hardship to the community. The Industrial Relations Act 1973 is the most recent attempt in this country to exercise some form of control through a separately constituted Court—the Arbitration Court. How effective this control will be is too early to determine.

The fundamental problem in this area is to enforce compliance with statutory provisions or with court decisions. Attempts to impose penalties appear likely, in the face of past experience, to lead to strike action. The attempt to enforce unfavourable decisions may be likewise met with resistance. The acceptance of the rule of law in industrial matters is more a matter of social responsibility than of law enforcement. I wonder whether we will ever develop in this country that social responsibility which will create an orderly and harmonious industrial environment and

enable matters of dispute to be ruled upon by the courts. Perhaps it is not only a matter of social responsibility but also a matter of confidence in the courts. Can the industrial courts create that confidence and fulfil the role which the legislators have imposed upon them?

4 *The Administrative Tribunals and Technical Cases*

In so far as our courts may be required more frequently to deal with matters highly technical in nature, either in the course of supervising the proceedings of administrative tribunals or in dealing with cases of original jurisdiction, it seems that assistance could be gained from bringing into court in appropriate cases experts in a particular field to inform or advise the courts. This is, of course, already done in matters of land compensation when assessors are available to the courts.

The bringing of expertise into the courts in this way as contrasted with the introduction of expert evidence through the mouths of witnesses would provide courts with that measure of technical assistance now to be found in administrative tribunals, the members of which are commonly chosen for their knowledge in a particular field. If there is benefit to be gained from appointing experts to such tribunals, there is surely benefit to be gained from appointing such experts to assist the courts. The division between the courts and the expert tribunals would be narrowed. There may be less need to remove decisions in technical matters from the courts. The courts may be given more original jurisdiction in the area of administrative law. Would this not be a good thing?

## Conclusion

The role of the courts in modern society is a changing role. It is now changing more rapidly than at any stage in our judicial history.

In the constitution of the state it has been accepted by constitutional lawyers that the powers of the state are reposed in the executive, the legislature and the judiciary. It is for the judiciary to ensure that the powers of the executive and the legislature are contained within their respective spheres and that the rights of the citizens are not overborne by the powers of the state.

The rule of law must be preserved. Justice must be administered fairly and impartially between citizen and citizen, and citizen and the state. Confidence in, and respect for, the courts and for the judiciary must be retained. They must act fearlessly, impartially, and with humanity: and, correspondingly, when they do so act their decisions, after any rights of appeal have been exhausted, must be accepted even by those who personally disagree with them. Only by so doing can citizens of this land ensure that we live under the rule of law and ensure that freedom under the law does not descend to anarchy.