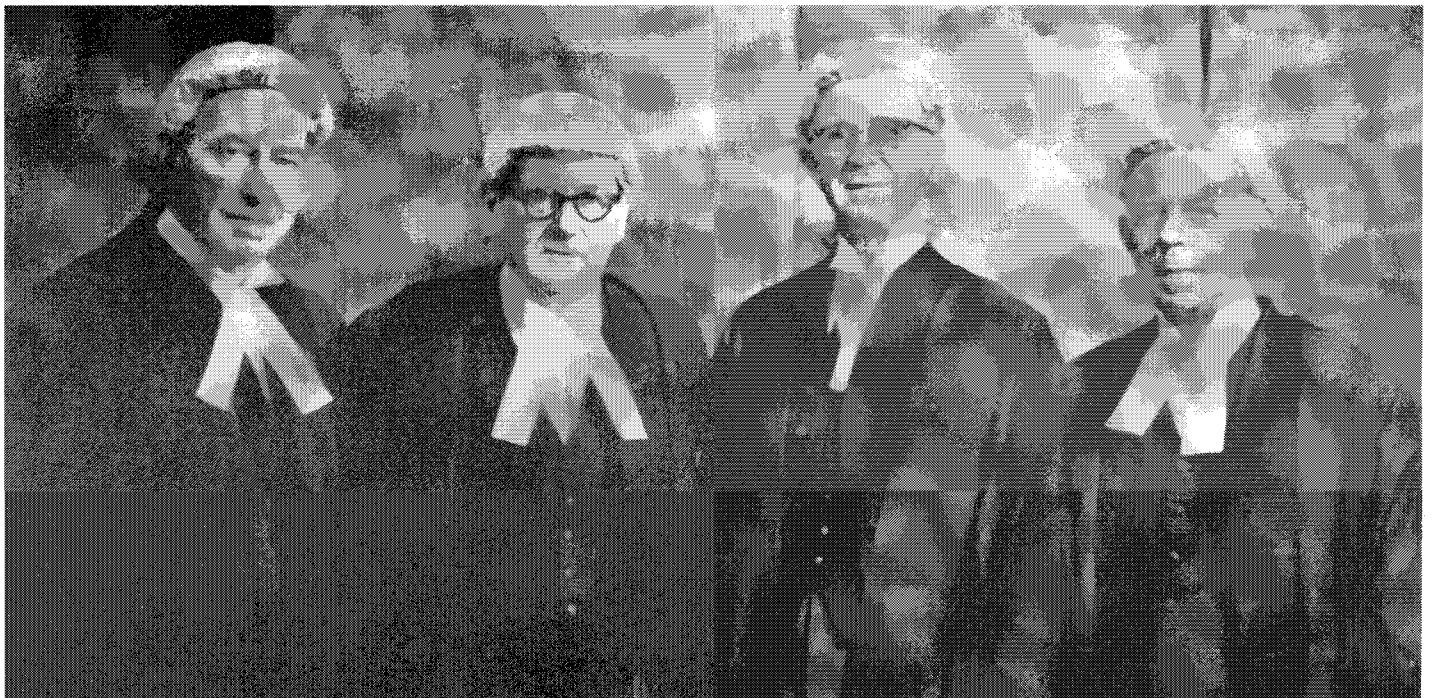
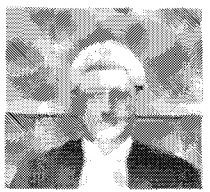
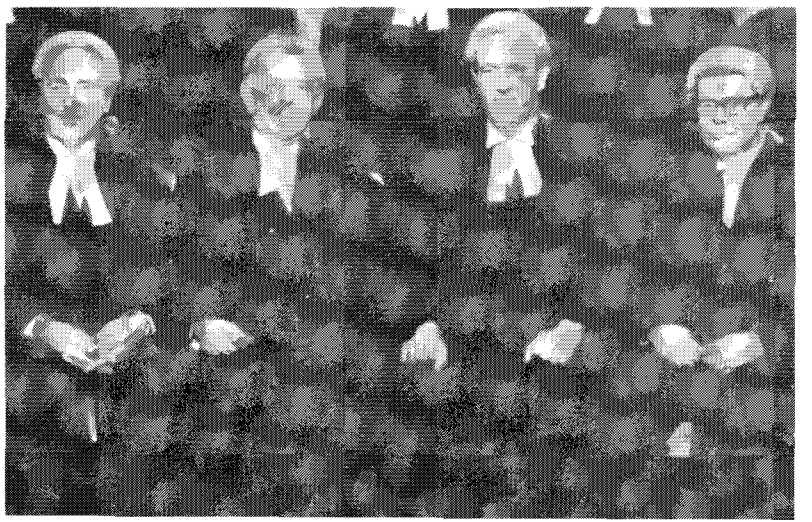


The Court of Appeal, 1958 (from left)
JUSTICE CLEARY; JUSTICE GRESSON, President; JUSTICE BARROWCLOUGH, Chief Justice; JUSTICE NORTH





The Court of Appeal, 1968 (from left)
JUSTICE McCARTHY; JUSTICE NORTH, President; JUSTICE WILD, Chief Justice; JUSTICE TURNER.

Inset: Temporary judges of the Court of Appeal (left) JUSTICE WOODHOUSE; (right) JUSTICE RICHMOND.

JUDGES AT WORK: THE NEW ZEALAND COURT OF APPEAL (1958-1976)

BY PETER SPILLER*

I. INTRODUCTION

On 11 September 1957, the New Zealand Attorney-General, the Hon John Marshall, moved the second reading of the Bill for the establishment of a "permanent and separate" Court of Appeal. He declared that this was "a notable landmark in our judicial history and a significant advance in the administration of justice in New Zealand".[1] The Bill was duly passed and the Court commenced sitting in February 1958.

In this article I shall analyse the reasons for the creation of the so-called "permanent and separate" Court of Appeal. I shall then examine the Court of Appeal judiciary, the relationship between the Court of Appeal and the Supreme Court, and the work of the Court of Appeal, during the tenures of the first four Presidents of the Court. I shall conclude by assessing the extent to which the expectations of the Court at its outset were realised in the period under review. The aim of this article is to provide insight into the personalities and processes that have shaped the development of the law in the highest local Court in New Zealand.

II. GENESIS OF THE "PERMANENT AND SEPARATE" COURT OF APPEAL

The New Zealand Court of Appeal existed as an effective entity from February 1863, when it commenced sitting in terms of the Court of Appeal Act 1862.[2] The Court had been established in response to requests by the judges for a Court within New Zealand which would provide a level of appeal more accessible than that which lay to the Judicial Committee of the Privy Council in London.[3] The Court was composed of all the judges of the Supreme Court. It has been observed that New Zealand judges were required to be judges of first instance and of the Court of Appeal because "in the early stages of our history one man had to play many parts".[4]

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1 NZPD Vol 313, 1957: 2373.

2 Officially, the first "Court of Appeals" was created by the Supreme Court Amendment Ordinance 1846, and comprised the Governor and members of the Executive Council, other than the Attorney-General. George Barton comments that this Court was convened once before it was abolished in 1860 (letter 5 November 1993).

3 *Lyttelton Times*, 14 February 1863.

4 Supra note 1, at 2377. See also Judicature Amendment Act 1913, s 5.

The policy of drawing the Appeal Court from the ranks of the Supreme Court judiciary was essentially a pragmatic solution in a thinly-populated country and could operate effectively only with a small volume of litigation. By the early twentieth century, in the face of an increase in population and litigation, there was pressure for the establishment of a separate Court of Appeal, and by the 1950's this pressure had become irresistible. There were two major complaints levelled at the Court of Appeal. First, not all Supreme Court Judges were suited to Court of Appeal work and so the performance of judges acting in an appellate capacity was inevitably uneven.[5] It has been said that the Supreme Court, during the course of its history, had a "very mixed bag of judges, including some of limited experience and capacity and who were not up to the mark of appellate work".[6] Secondly, the process of repeatedly switching Judges from the Supreme Court to the Court of Appeal and back again (referred to as "a game of shuttlecock and battledore") increasingly undermined the effective functioning of the Court of Appeal. This process resulted in lengthy delays in obtaining hearings, "appalling pressure" on the judges, and further delays and limited time in producing reserved judgments.[7] Furthermore, the competing demands of Supreme Court duties meant that judges who heard appeal cases had little chance to confer with each other on their ideas and views at the conclusion of Court of Appeal sessions, and were left with the task of "having to work on and exchange drafts of judgments in the midst of their Supreme Court duties".[8] Not surprisingly, without opportunity for calm, detached and collegial deliberation, the Court was largely content to draw upon established legal precedents, notably from English law.[9]

Nevertheless, until the mid-1950's, attempts to establish a separate and permanent Court of Appeal foundered in the face of resistance from many of the judges.[10] Their opposition centred on a reluctance to lose their automatic Court of Appeal status and the advantage of meeting with other judges in appeal sessions, their fear that the prestige of the Supreme Court would be lowered by a separate Court of Appeal, and their suggestion that a small Court of Appeal could be dominated by a strong judge and lose touch with public sentiment.[11] However, the members of the bar continued to press for change, and by the mid-1950's several of those who had actively

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5 Editorial, "A Separate Court of Appeal" (1947) 23 NZLJ 29.
6 Interview, Sir Alexander Turner, 16 May 1993.
7 Supra note 1, at 2377 and 2384.
8 Interview, Sir Robin Cooke, 28 May 1993.
9 "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 235.
10 See (1934) 10 NZLJ 180, (1946) 22 NZLJ 192, and (1947) 23 NZLJ 61.
11 Leary, "A Permanent Court of Appeal" (1954) 30 NZLJ 109, 110-1.

advocated the advantages of a separate Court of Appeal had been appointed to the bench.[12] Finally, in 1956, the Chief Justice, Sir Harold Barrowclough, reported to the Government that the Judges had come round to supporting a permanent Court of Appeal, chiefly because of the difficulty and inconvenience of preparing reserved judgments "without conference".[13]

The aim of reconstituting the Court of Appeal was thus to replace a system in which all Supreme Court judges periodically exercised appellate functions with a system whereby only certain judges with particular aptitude for appellate work were appointed as Court of Appeal judges. It was hoped that, as the Court of Appeal judges worked in combined and consistent operation, the work of the Court would be despatched with heightened expertise and efficiency, and greater harmony and certainty would be brought to the New Zealand legal system.[14] Ronald Algie MP, during the second reading debate of the Judicature Amendment Bill, declared that through the passing of this Bill "our work will be done better, by men better qualified to do it".[15]

III. THE COURT OF APPEAL JUDGES

The Judicature Amendment Act 1957 provided that three judges of the Supreme Court would be appointed as judges of the Court of Appeal, and that one of them would hold the office of President of the Court.[16] The judges so appointed had seniority over all the judges of the Supreme Court except the Chief Justice or the acting Chief Justice.[17] The Attorney-General, in introducing the Amendment Bill, acknowledged that five judges "would certainly give greater strength to a Court of Appeal as a separate Court", but he believed that a Court of three could "deal satisfactorily with the majority of cases".[18]

The Act further provided that a judge might be appointed as a judge of the Court of Appeal "either at the time of his appointment as a Judge of the Supreme Court or at any time thereafter".[19] This allowed for members of the Court to be appointed directly from the bar or from the ranks of Supreme

12 [1972] NZLJ 109, per North P.
13 Supra note 1, at 2374.
14 "Court Structure" [1976] NZLJ 122, 126-7.
15 Supra note 1, at 2382. In like fashion Sir Robin Cooke stated that the new Court of Appeal was meant to be a "more efficient and a better equipped Court than its predecessor" (supra note 8).
16 See Judicature Act 1908, s 57(2).
17 See Judicature Act 1908, s 57(2, 3 & 6).
18 Supra note 1, at 2376.
19 See Judicature Act 1908, s 57(3).

Court judges. Attorney-General John Marshall indicated that it would be the rule for judges of the Court of Appeal to be appointed from the Supreme Court bench, as there was "much to be said for an appeal Judge having the experience of a Judge of first instance behind him". However, he noted that there might "from time to time be members of the Bar who would be unwilling and perhaps less suited for the work of a Supreme Court Judge, but who would be eminently qualified for an appointment to the Court of Appeal".[20] In the event, during the period 1958-1976, of the seven men appointed as permanent members of the Court of Appeal, only one (Cleary J) was appointed directly from the bar.

The first President was Kenneth Gresson (1891-1974), who was in office from February 1958 to March 1963. Gresson P served in the First World War and qualified LLB at Canterbury University College in 1917. He practised in Christchurch for nearly thirty years, during which time he was also a lecturer and later the Dean of the Law Faculty at Canterbury University College.[21] In 1947 he was appointed to the Supreme Court bench, and at the time of the constitution of the separate Court of Appeal he was the most senior Supreme Court judge after the Chief Justice.[22]

During his time as President of the Court of Appeal, Gresson P won respect for his leadership and judicial qualities. He exercised a "firm presence on the bench" and was a tireless worker.[23] The soundness and quality of his judgments were reflected in fields as diverse as automatism and estoppel.[24] Gresson P was described as "a down-to-earth, no-nonsense Judge - a plain man of the law".[25] He was more conservative than his colleagues in his approach to legal precedent, particularly that emanating from England. In *Corbett v Social Security Commission*, Gresson P (in a minority decision) "regretfully" felt bound by a standing decision of the House of Lords, notwithstanding his strong reservations about the precedent.[26] Yet, in cases where he did not consider himself bound by legal precedent, he showed an independent-minded and at times liberal spirit. In *Re Lolita*, he declined in a

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20 Supra note 1, at 2377.

21 Cooke P described Gresson P as "essentially an equity lawyer from Christchurch with a robust Canterbury outlook" ("Court of Appeal President" [1986] NZLJ 170, 177).

22 "Tributes to Sir Kenneth Gresson" [1974] NZLJ 511.

23 Supra note 6, and interview Sir Clifford Richmond, 24 March 1993.

24 *R v Cottle* [1958] NZLR 999 and *Auckland Harbour Board v Kaihe* [1962] NZLR 68. Gresson P's views on automatism were adopted by the House of Lords as correctly stating the law (*Bratty v Attorney-General for Northern Ireland* [1963] AC 386).

25 Supra note 22, at 513.

26 [1962] NZLR 878, 896 and 898. George Barton writes: "I have a vivid recollection of the argument in *Corbett* when I was criticising the judgment of the House of Lords... Gresson said to me, rather pugnaciously: 'Are you saying that the House of Lords was wrong?' I said: 'Yes, it was'. He said: 'We can't have that'" (supra note 2).

minority judgment to hold that a publication was indecent for "unduly emphasising matters of sex". He declared that "liberty of expression is too precious a thing to be lightly interfered with", that it should "extend to every field of human conduct, including sexual behaviour", and that he saw "no reason why the generation growing up should not be permitted to learn from their reading something of the vagaries of sexual behaviour".[27]

Whereas seniority on the Supreme Court Bench was recognised with the appointment of Gresson P it was not with the appointment of the other two permanent members of the new Court of Appeal.[28] Alfred North (1900-1981) was at the time of his appointment the fifth-ranking Supreme Court judge (after the Chief Justice), having served for six years on the bench. North had come to the Supreme Court bench in 1951 after graduating LLM from Canterbury University College and practising for over twenty-five years, the last sixteen in Auckland. His career in practice was noted for the width of the field that it covered, and in conducting his colossal Auckland practice he was regarded as a formidable lawyer "no specialist but a general practitioner worthy of any brief".[29] North J served as a judge of the Court of Appeal for fourteen years, and during the last nine years he was President. Thus, his personality and contribution had a decisive influence on the Court in its foundation years.

North J's great strength was an intuitive legal logic grounded in practical reality: his colleague Turner J commented that he had "the best legal bones in New Zealand".[30] North J remarked that he had had the "considerable advantage of living in a family where discussion and indeed argument was the order of the day and views were freely exchanged between my father [a Baptist minister] and his four sons", and his subsequent wide legal practice gave him self-reliance and broad exposure to human affairs and court work.[31] North J's clear understanding of "the ordinary run of cases" and "the nature of things" in jury trials, and his exposure of arguments that involved "results both surprising and anomalous" characterised the judgments which won him renown.[32] In *Corbett v Social Security*

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27 [1961] NZLR 542, 551. See the reference to Gresson's judgment in Blom Cooper, L J *The Language of the Law* (1965) 261.

28 North P remarked that "seniority could have no predominant place when it came to the selection of members of [the Court of Appeal]" ("Sir Alfred North Retires" [1972] NZLJ 107, 109).

29 "Court of Appeal: The New President" [1963] NZLJ 447.

30 Supra note 6.

31 Supra note 28, at 108.

32 See eg *R v Cottle* [1958] NZLR 999, 1029 (approved by the House of Lords in *Bratty v Attorney-General for Northern Ireland* [supra note 24); and *Truth (NZ) Ltd v Avery* [1959] NZLR 274, 290 (approved by the English Court of Appeal in *Broadway Approvals v Odhams Press* [1965] 2 All ER 523, 535).

Commission, he refused to accept as conclusive an objection by a Minister of the Crown to the production of documents: he declared that "it is all very well to say that it is the Judge who is in control of the trial, not the executive, and that the decision ruling out the documents is the decision of the Judge, but this statement has a somewhat hollow ring if the Judge has no power to overrule an objection made [by the Minister]".[33] North P's insight into human behaviour buttressed his judgment in *Atkinson v Brown*, where he decided that a statutory tribunal was entitled to deliver a majority decision. He commented that the Legislature must have intended the statute to work smoothly, and that to hold otherwise "one member, by adopting an obstructionist attitude, could impede the whole system of appeal".[34]

North J's logical, practical insight enabled him quickly to discern the essence of legal issues.[35] In *Jeffs v NZ Dairy Board*, North P noted that "the interesting argument we heard from counsel ranged over a wide field, but I am of opinion that at the end of the day the case for the appellants really narrowed down to one point, namely whether they were given an adequate opportunity to present their case to the deciding body, namely to the board".[36] North P's insight led him to decisions which he considered were most in accordance with logic and the climate of New Zealand law, even, on occasions, where these conflicted with authority.[37] At the same time, North P was enough of a traditional lawyer to be constrained by established precedent and norms. In *Loan Investment Corporation Ltd v Bonner*, he reversed a decision of Wild CJ on the basis that it is "all very well to speak of the substance of an agreement such as this, but, in my view, the parties are bound by the form in which they expressed their contract". He declared that he was "content to follow" the judgment of Sir Joshua Williams "one of our most distinguished jurists" in the absence of "any compelling authority to the contrary".[38] While North J was apt to express his judgments in clear, bold and at times forthright language,[39] he was open to admitting when issues presented difficulty, was sensitive to the needs of

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33 [1962] NZLR 911. But cf North J's judgment in *Hinton v Campbell* [1953] NZLR 573.

34 [1963] NZLR 755, 768.

35 Cooke P believed that North P's "speed and depth of thought were unique" ([1981] NZLJ 337).

36 [1966] NZLR 73, 86 (dissenting judgment upheld by the Privy Council [1967] NZLR 1057).

37 *R v Naidanovici* [1962] NZLR 334, 339 and *Dragicevich v Dragicevich* [1969] NZLR 306, 308.

38 [1968] NZLR 1030, 1034 (upheld by the Privy Council [1970] NZLR 724).

39 See eg *Chemists' Service Guild v Stilwell* [1966] NZLR 654, 663 (dissenting judgment upheld by the Privy Council [1969] NZLR 78). Dugdale recalled North P's "marked acerbity of manner" ([1993] NZLJ 300).

litigants, and was gracious in his acknowledgement of the help and support he received from his colleagues on the bench.[40]

The third foundation member of the Court of Appeal was Timothy Cleary (1900-1962). Cleary had qualified in law at Victoria University College in 1920, and over the ensuing thirty-seven years established an enormous practice centred in Wellington. During his legal career at the bar, Cleary won the respect and great affection of the legal profession as an industrious, knowledgeable, self-effacing man of formidable intellectual equipment and of the highest integrity. From 1954 until his elevation to the Court of Appeal, Cleary served as President of the New Zealand Law Society, and he was seen as a logical choice to accompany Gresson P and North J on the Court of Appeal bench.

Cleary J's long-term impact on the Court of Appeal proved to be limited, because of the shortness of his tenure on the bench (which ended with his death in August 1962) and his lack of previous judicial experience.[41] However, Cleary J's clear-thinking and industrious approach left its mark in judgments which are still relied upon today. In *Heard v NZ Forest Products*, he displayed a knowledge of legal principle and lucidity of expression in terms which also showed his characteristic kindliness. In the face of argument which showed that counsel "had not quite appreciated the rather confusing line of authority which distinguishes the position of a plaintiff who is truly *volens* and a plaintiff who is only guilty of contributory negligence", he provided a classic outline of the distinction between the two concepts.[42] Further, he played a behind-the-scenes role which gave support and strength to the bench in its early years. Significantly, in *Wood v Attorney-General*, where argument had been heard in May 1962 but judgment was delivered in September 1962, Gresson P reported that a draft of the judgment of the Court had been prepared by Cleary J before his death and that this had later been settled in its final form by the remaining members of the Court.[43] Following Cleary J's death, his successor Turner J remarked that "the country has lost one of the chief supports of its judicial structure" and that the judges of the Court of Appeal mourned the death of their "daily associate and helper".[44]

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40 See eg [1970] NZLR 590, and [1971] NZLR 312, 347 and 873.

41 It has been suggested that, had Cleary J had the experience and confidence of having been a Supreme Court judge, he "would have been remembered as an outstanding appellate Judge rather than an extremely competent one" (Pope, "Whither the Court of Appeal?" [1973] NZLJ 329).

42 [1960] NZLR 329, 356-7.

43 [1963] NZLR 44.

44 "Mr Justice Cleary: Tributes in Court" [1962] NZLJ 370, 372.

Alexander Turner (1901-1993) was a judge of the Court of Appeal from 1962 to 1973 and during his last eighteen months served as President. He had graduated MA (in economics) and LLB at Auckland University College, and then practised in Auckland for thirty years. In 1953 he was made a Supreme Court judge, and at the time of his appointment to the Court of Appeal was second in seniority on the Supreme Court bench. During the four years prior to his permanent appointment to the Court of Appeal, Turner J served periodically in the Court in a temporary capacity and was involved in key judgments.[45]

Turner J's judicial attributes stood in marked contrast with those of his colleague North P: it has been said that "Turner was more scholarly, more patient, more serene, less impulsive".[46] Turner J acquired a reputation as one of New Zealand's most distinguished jurists by virtue of his wide knowledge (including economic theory), painstaking research, analytical ability and lucid exposition.[47] On numerous occasions North P would pay tribute to the detailed and careful analysis which Turner J conducted of the issues before the Court and which added great weight to the Court's findings. In *Morrison v USS Co*, North P noted that Turner J had "endeavoured to rationalise the plea *volenti non fit injuria* in the field of negligence" and had "no doubt that his judgment will be closely studied".[48] Turner J was regarded as a great expositor of the law, as reflected in his publications and in his judgments, and readers shared the delight with which Turner J grappled with ideas and words in written form.[49] His statements were quoted with approval by the Privy Council,[50] and a number of his judgments were to be highly influential in New Zealand law.[51]

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45 The Law Reports reveal that Turner J was an additional judge of the Court of Appeal in June-July 1958, July-August 1960, and July 1961. See eg *In Re the Bed of the Wanganui River* [1962] NZLR 600.

46 "Obituary. The Right Honourable Sir Alexander Kingcome Turner" [1993] NZLJ 299, 303 (per Cooke P).

47 Ibid, 301 (per Barker J). For evidence of Turner J's economic theory, see *Wellington City Council v National Bank* [1970] NZLR 660, 678 and *Holden v CIR* [1973] 2 NZLR 523.

48 [1964] NZLR 468, 482.

49 See eg *J T Coltman Ltd v Police* [1971] NZLR 203, 212 ("So much for logical relevance. Now for legal relevance"). Turner P's writing skills were evident also in his second edition of G S Bower's *The Doctrine of Res Judicata* (1969), which was characterised by "exact legal scholarship" and "lucid elegance of style" ([1970] NZLJ 53).

50 See eg *Mangin v CIR* [1971] NZLR 591, 597-8 and *Holden v CIR* [1974] 2 NZLR 52, 57.

51 See eg *R v Convery* [1968] NZLR 426, 436 and *Naniseni v The Queen* [1971] NZLR 269, 270.

Turner J was a cautious judge, who repeatedly warned against judicial legislation and against "lightly changing" settled rules of law and practice, as he believed that it was "better that the law should be certain".[52] In *Ross v McCarthy*, Turner J upheld an archaic rule of English law preventing liability of farmers for stock trespassing on highways, on the basis that it was not proper to overturn such a long-standing rule, especially in the light of "the established interests of the farming community in a country like this".[53] However, Turner J had a keen sense of justice, and was certainly open to the modification of rules of procedure where appropriate.[54] This reflected Turner J's much-respected integrity and his concern for individual human rights. In *Blackie v Police*, the point at issue was whether the prosecutor (an experienced traffic officer) should be allowed to give in evidence his opinion as an expert that the accused was guilty. Turner J emphatically declared that "if such a procedure is to be held acceptable it will not be with my assent", and directed that the conviction be quashed and the matter remitted to the Magistrate's Court.[55]

In 1963, North and Turner JJ were joined on the Court of Appeal bench by Thaddeus McCarthy (1907-), who served for thirteen years, the last three as President. He qualified in law at Victoria University College in 1928, and during the ensuing twenty-nine years he practised at the Wellington bar, completed the LLM degree (in 1930), and went on active service overseas during World War Two. McCarthy acknowledged that he and his colleagues did not have the advantage of postgraduate educational training and so missed out on the intellectual side. But he believed that the learning of the law through self-help, the experience of practice in "minor human problem type matters", and service in the fighting units gave him a "wide experience of human nature and knowledge of the things that make people work".[56] In 1957 McCarthy was appointed to the Supreme Court bench, from 1958 onwards he served periodically as a temporary judge of the Court of Appeal, and at the time of his permanent appointment to the Court of Appeal he was fifth senior Supreme Court judge.[57]

McCarthy J was respected as an industrious and humane judge, who had a fund of common sense and sound practical judgment. He believed that "the great function of the law is not the building of strange castles for people who

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52 *E v E* [1972] NZLR 932, 935.

53 [1970] NZLR 449, 455-6 (Turner himself never learned to drive).

54 [1968] NZLR 1164, 1170.

55 [1966] NZLR 910, 921.

56 Letter, Sir Thaddeus McCarthy, 24 March 1993, and interview, Sir Thaddeus McCarthy, 28 May 1993.

57 The New Zealand Law Reports show that McCarthy J was an additional judge of the Court of Appeal in June 1958, October 1959, and February 1963.

do not exist, but rather labouring amongst those who do exist in order to meet their problems and to serve them".[58] In *Attorney-General v Lower Hutt City*, where an injunction was sought restraining a corporation from adding fluoride to the water supply, McCarthy J concluded that "pure water" did not require the absence of all other substances, as "the Legislature was not speaking in a scientific context, but was dealing with a practical matter touching the everyday life of the people".[59] McCarthy J recognised that judges should take heed of changing community attitudes, and in *Re Wilson (Deceased)* declared that "the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time".[60] McCarthy J's desire to serve the needs of "real people" carried with it a commitment to obviate delay and dispose of litigation at the "earliest possible moment".[61] In *Rees v Sinclair*, he upheld the immunity of barristers from negligence actions for court work partly on the basis that it was "very much in the public interest that justice be administered with reasonable despatch".[62] McCarthy J tended to write short and succinct judgments, focussed on the central issues in the cases before him. In *Campbell Motors v Storey*, Hardie Boys J noted that McCarthy J "has put in such a concise way the reasons which led me to the same conclusion as he has expressed, that no purpose would be served by my delivering a separate full judgment".[63]

McCarthy J repeatedly demonstrated a determination to maintain the rights of individuals against state action or prosecution.[64] At the same time, he was alive to the "limitations which our society, for its social health," put on individual freedoms and the need for the law to define such limitations. In *Melser v Police*, he dismissed an appeal against conviction for disorderly behaviour at Parliament on the basis that "the purposes of a democratic society are only made practicable by accepting some limitations on absolute individual freedoms".[65] Furthermore, McCarthy J was (like North P) enough of a traditional lawyer to stress the need for the courts to decide "according to the law" and evidence, and refused to "take large steps in proof" or to modify the law in the face of statute or long-established judicial

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58 "Sir Thaddeus McCarthy Retires" [1976] NZLJ 377.

59 [1964] NZLR 450, 463 (upheld by the Privy Council [1965] NZLR 116).

60 [1973] 2 NZLR 359, 362.

61 *Hunyady v Attorney-General* [1968] NZLR 1172, 1176.

62 [1974] 1 NZLR 180, 185.

63 [1966] NZLR 584, 597.

64 *Buckley v Transport Department* [1964] NZLR 334, 339 and *Credit Services Investment Ltd v Carroll* [1973] 1 NZLR 246, 262.

65 [1967] NZLR 437, 445 (cf *Cozens v Brutus* [1973] AC 854, 859). See also McCarthy J's "The Role of the Police in the Administration of Justice" in Clark, R S (ed) *Essays on Criminal Law in New Zealand* (1971) 170, 188.

authority.[66] McCarthy J would however not refrain from calling for statutory amendment where he considered this appropriate. In *Carey v Hastie*, he declared that "there are few areas in the law of contract which cause more trouble than that of illegality, and it may be ... that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require".[67]

Following the retirement of North P in December 1971, Clifford Richmond (1914-) was appointed to the Court of Appeal and he was to remain a member of the Court until 1981. Richmond had graduated LLM from Auckland University College in 1936, and over the ensuing years (apart from his time in service in World War Two) practised in Auckland. He was appointed to the Supreme Court in 1960, temporarily served in the Court of Appeal at intervals from 1968, and was at the time of his permanent appointment fourth in seniority in the Supreme Court.[68] Richmond J was a painstakingly careful judge, who earned the appreciation of his colleagues for his meticulous analyses of the relevant facts and law.[69] Richmond J's analytical and scholarly ability was reflected in judgments such as that in *Stephenson v Waite Tileman Ltd.* In this judgment, of which Macarthur J observed that he had "had the very real advantage of reading", Richmond J thoroughly examined the "very strong body of opinion both in England and in Commonwealth jurisdictions in favour of the view that the eggshell skull rule remains a part of our law notwithstanding the [Privy Council] decisions in *The Wagon Mound (No) 1*".[70] As this judgment also shows, Richmond J generally took a cautious approach which was securely grounded in established English and New Zealand legal authority, but he was not unaware of the social changes evident by the 1970's and the need for reform of certain areas of the law.[71]

Joining Richmond J in the Court of Appeal was Owen Woodhouse (1916-) who was appointed to succeed Turner P in 1974 and who remained a judge

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66 *Spence v Relph* [1969] NZLR 713, 731, *Ross v McCarthy* [1970] NZLR 449, 457, and *Haldane v Haldane* [1975] 1 NZLR 672, 676

67 [1968] NZLR 276, 282.

68 The New Zealand Law Reports show that Richmond J sat in the Court of Appeal in June-July 1968 and July-December 1970.

69 *Engineers Union v Arbitration Court* [1976] 2 NZLR 283, 284-5.

70 [1973] 1 NZLR 152, 168 & 170.

71 Richmond J saw himself as the type of judge who dealt with each case as it cropped up, and who would try to see that folk obtained a fair answer within proper principles (supra note 23). See *Haldane v Haldane* [1975] 1 NZLR 672, 681, *R v Johnston* [1974] 2 NZLR 660, 668, and *Police v Creedon* [1976] 1 NZLR 582.

of the Court until 1986. Woodhouse graduated LLB from Victoria University College and then practised in Napier for fifteen years, the last seven as Crown Solicitor. In 1961 he was appointed to the Supreme Court, served as a temporary judge of the Court of Appeal at intervals from 1968, and at the time of his appointment was fourth senior judge in the Supreme Court.[72] By virtue of his imaginative judgments in matrimonial property cases and his central involvement in the momentous accident compensation reform, Woodhouse J had come to the Court in 1974 as "an inventive Judge whose name has throughout the world become identified with enlightened reform".[73] He attributed much of his attitude to the knock-about experience in the Navy during World War Two, which involved meeting many different people and making decisions in conditions of emergency, and which meant that he returned to New Zealand with a more independent outlook and a greater readiness to strike out.[74] In the short period that he was in the Court of Appeal up to 1976, Woodhouse J gave notice of his disdain for archaic and "quaintly labelled legal doctrines", his commitment to "decide cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions", and his opposition to "the deprivation of individual liberty".[75] In *Haldane v Haldane*, he dissented from the majority view of the Court on the Matrimonial Property Act 1963, and argued against "technical legal grounds" and in favour of recognition of the wife's domestic contribution to the matrimonial home.[76]

Woodhouse J and his six predecessors in the permanent Court of Appeal together brought to the Court a variety of personal attributes and abilities. However, it is important not to lose sight of the fact that they had a number of characteristics in common: all were pakeha males, born in New Zealand, who studied part-time and graduated in law from New Zealand University colleges, and who practised for a considerable period at the bar before their appointment to the bench. A high proportion came from professional families and went to private or church schools, and all but one had post-

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72 The New Zealand Law Reports show that Woodhouse J sat in the Court in September 1968 and September-November 1971.

73 [1973] NZLJ 505. North P paid tribute to the "thoughtful and imaginative judgment" of Woodhouse J in *Hofman v Hofman* [1967] NZLR 9 ([1971] NZLR 873), and Cooke J remarked that Woodhouse J's "contribution to matrimonial property law is unrivalled in New Zealand" (*Meikle v Meikle* [1979] 1 NZLR 154).

74 [1973] NZLJ 505, and interview, Sir Owen Woodhouse, 25 March 1993. Woodhouse J declared that the qualities he valued in a good judge included "good instinctive judgment, common sense, a feeling for people, and regard for the human factor" (idem).

75 *Bannerman & Co v Murray* [1972] NZLR 411, 429, *Bognuda v Upton & Shearer* [1972] NZLR 741, 771, and *Taylor v Attorney-General* [1975] 2 NZLR 675, 690.

76 [1975] 1 NZLR 672, 686. Woodhouse J's approach was preferred by the Privy Council (see [1976] 2 NZLR 715).

graduate involvement in University education (in Masters' study or as part-time lecturers). All but one studied and/or practised in Wellington or Auckland and were involved in District Law Society affairs while in practice, and their combined pre-judicial careers spanned the period from the end of World War One to the early 1960's. These common features no doubt helped to weld the judges of the Court of Appeal into a homogeneous unit and to bridge differences in personality and experience.

IV. THE RELATIONSHIP BETWEEN THE COURT OF APPEAL AND THE SUPREME COURT

The entrusting of appellate work to judges especially appointed for this purpose was designed to establish a Court of Appeal as a separate institution with a distinctive identity. However, it was important for the Government of the late 1950's to make the new system acceptable to the Supreme Court judiciary (particularly those judges who were not in line for appointment to the Court of Appeal), and minimise the perception of appointment to the Court of Appeal as promotion. The result was that the Judicature Amendment Act 1957 maintained important links between the Supreme Court and the new Court of Appeal, and these ties significantly qualified the notion of a "permanent and separate" Court of Appeal.

First, the new legislation specifically provided that "every Judge of the Court of Appeal shall continue to be a Judge of the Supreme Court, and may from time to time sit as or exercise any of the powers of a Judge of the Supreme Court".[77] Secondly, the Chief Justice was retained as a member of the Court of Appeal "by virtue of his office as the head of the Judiciary".[78] Thus, from the outset, the permanent Court of Appeal had two chief judges: the Chief Justice, who continued as administrative head of the superior Courts and who was legally entitled to attend and preside over the Court of Appeal, and the President of the Court of Appeal, who was the most senior permanent appellate judge and who would preside unless the Chief Justice was also present.[79] The position afforded to the Chief Justice in the Court of Appeal was an obvious concession to the office of Chief Justice, and no doubt helped to overcome the traditional opposition of the judiciary. Furthermore, the Chief Justice was seen to be an important link between the Supreme Court and the Court of Appeal especially in criminal cases (where it was claimed that the Supreme Court had a better appreciation of the reality of criminal trials).[80] Nevertheless, the situation of having a Chief

77 Judicature Act, s 57(4).
78 Judicature Act 1908, s 57(2)(a).
79 Judicature Act 1908, s 60(2).
80 Supra note 1, at 2376.

Justice alongside a permanent President of the Court of Appeal was evidently "an awkward one calling for tact by the holders of the respective offices".[81]

During the first eight years of the permanent Court of Appeal, the Chief Justice was Sir Harold Barrowclough. Barrowclough CJ was much admired and liked by his team of judges for his kind, generous, upright and obliging nature, and relations between the Court of Appeal and Barrowclough CJ were generally cordial and co-operative. Barrowclough CJ himself expressed the desire to sit on the Court of Appeal, but this was resisted by the Appeal Court judges largely on the ground that his experience and capabilities were better suited to work in the Supreme Court.[82] It was ultimately agreed that, while the Chief Justice was certainly entitled to sit and preside in the Court of Appeal, this would be on the understanding that it was open for the President to indicate to the Chief Justice when it was not appropriate for him to sit. In the event, Barrowclough CJ sat only on rare occasions, mainly in criminal cases.[83]

However, in January 1966 Sir Richard Wild became Chief Justice, and during his period of office (which lasted until 1978) the problems inherent in the Chief Justice's role in the Court of Appeal came to the fore. Wild CJ was a forceful and assertive man, a highly able and incisive lawyer, and a Chief Justice who had a capacity for sustained and concentrated work and a concern for efficient administration.[84] His view was that the Court of Appeal judges formed part of a coherent team of people subject to the direction of the Chief Justice. Thus, he wished to (and did) sit in the Court of Appeal more often than had been the convention, and believed that Court of Appeal judges could be ordered to do Supreme Court work when the need arose.[85] For its part, an increasingly self-confident Court of Appeal bench believed that the role of the Chief Justice in the Court of Appeal should be a limited one and confined to sitting on "comparatively rare selected

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81 Supra note 8.

82 Supra note 6. See *Petrie v Ashburton Electric Power Board* [1961] NZLR 762 and *Levin & Co v CIR* [1963] NZLR 801.

83 The New Zealand Law Reports show that Barrowclough CJ sat in Court of Appeal cases in June and October 1958, June 1960, November and December 1961, June, August and October 1962, and June 1964. See eg *R v Halliday* [1958] NZLR 1036.

84 See eg the comment by Richardson J that Wild CJ was "a truly great New Zealand Chief Justice" ([1993] NZLJ 199).

85 Supra note 6. The New Zealand Law Reports show that Wild CJ sat in Court of Appeal cases heard in April and May 1967, May, July and October 1968, March 1970, February and May 1971, September 1972, May, July and December 1973, April, June, September and November 1974, March, April, May and October 1975, and April 1976.

occasions".[86] The Court of Appeal judges also held to the view that they formed an autonomous group of judges, who retained the right to refuse to do Supreme Court work. The conflict between the Chief Justice and the Court of Appeal was evident in the retirement speech of Turner P in 1973. He observed that there were "two opinions" as to whether the Court of Appeal was "just a department of the Supreme Court", though "never among the working members of the Court of Appeal, either past or present". He declared firmly that the Court of Appeal believed that "it should determine its own programme, make its own fixtures, and devote itself to its own work, uninterrupted, except possibly in cases of the greatest emergency, by any requirements arising from the work or organisation of the Supreme Court".[87] Tensions between the Chief Justice and the Court of Appeal continued during the Presidency of McCarthy P and were a factor in his decision to take early retirement.[88]

A third link between the Court of Appeal and the Supreme Court was the provision for the temporary appointment of Supreme Court judges as "additional judges" of the Court of Appeal. Such appointment could be made "at any time during the illness or absence of any Judge of the Court of Appeal", or "whenever the Chief Justice and the President of the Court of Appeal certify that in any appeal or proceeding before that Court it is expedient that any Judge of the Supreme Court nominated by the Chief Justice should act as an additional Judge".[89] In 1973, further provision was made for temporary appointments from the Supreme Court when a vacancy occurred in the Court of Appeal or when a Court of Appeal judge was on leave "preliminary to retirement".[90]

During the period under review, when the Court of Appeal comprised only three permanent members, the temporary appointment of Supreme Court judges was at times essential to the continued existence of the Court. This was because there were repeated occasions when one or other of the permanent members of the Court was absent on sabbatical leave, in attendance at the Privy Council, on other official duties or on leave pending retirement.[91] Furthermore, the seconding of Supreme Court judges to sit in

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86 "Sir Alexander Turner Retires" [1973] NZLR 322, 324.

87 Ibid, 326.

88 Supra note 56.

89 Judicature Act 1908, s 58(1 & 2)).

90 Judicature Amendment Act 1973, s 2.

91 In particular, McCarthy J, who described himself as a "restless mover", was absent chairing Royal Commissions during most of 1964, 1968, and 1970-72; and Woodhouse J, though chosen as successor to Turner P in early 1974, only sat continuously from February 1975 (supra note 58, at 378, and supra note 56). Other lengthy absences indicated in the New Zealand Law Reports were those of North J

particular appeals was useful when the President and Chief Justice wished the Court to convene as a bench of five members, to deal with difficult or controversial issues. In *J T Coltman Ltd v Police*, which concerned an appeal from the Chief Justice on the Sale of Liquor Act 1962, North P noted that the appeal was originally heard by a Court of three but that "when it became plain that the members of the Court were not in full agreement, it was decided that in view of the importance of the case it should be re-argued before a Court of five".[92]

The Court of Appeal certainly benefited from the input of highly capable Supreme Court judges, who kept the Court in touch with Supreme Court processes and brought new insights to bear on the work of the Court of Appeal. These judges included men who were later permanently appointed to the Court of Appeal, and other senior judges such as Hutchison, McGregor, Macarthur and Haslam JJ who were not. A relatively young and recently-appointed Supreme Court judge who soon made his mark on the Court of Appeal was Robin Cooke. He first sat in the Court in September 1974, sat frequently in a temporary capacity during 1975, and was permanently appointed on the retirement of McCarthy P. He gave early notice of his penetrating intellect, his scepticism of traditional legal labels and categories and his search for underlying legal principles, all of which were to be evident in his subsequent long career in the Court.[93]

However, especially by the 1970's, the provision for the temporary appointment of Supreme Court judges to the Court proved to be a mixed blessing. This was because the provision was used to forestall the much-needed expansion of the permanent Court, required by a greatly-increased workload and the almost continual absence of one or other of the permanent Court of Appeal judges. The ready resort to the appointment of a succession of temporary judges undermined the effective functioning of the Court in that the independence and teamwork of the Court were weakened and an increasingly heavy burden was placed on only two permanent members of the Court. A commentator noted that "an appellate Court, any more than a rugby team, cannot operate with anything approaching efficiency if its personnel is changing", and that inevitably, "a disproportionate share of the work load must fall on the permanent members".[94] On the retirement of

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(March-September 1960, May-July 1961, and April-September 1967), Turner J (February-May 1965), and Woodhouse J (September 1975-March 1976).

92 [1971] NZLR 203, 204 (the Court comprised the three permanent members and Haslam and Richmond JJ). See also *R v Halliday* [1958] NZLR 1036 where the issue of imprisonment of a youth aged 17 was considered.

93 *R v Grice* [1975] 1 NZLR 760, 765, *NZIAS v Ellesmere County* [1976] 1 NZLR 630, 636, and *Police v Creedon* [1976] 1 NZLR 571, 585.

94 Supra note 41, at 331.

Turner P in 1973, it was learned that his position was not "at once" to be filled by a permanent member of the Court and would instead be occupied by a series of temporary appointments each for a few months.[95] This produced an outraged response from Turner P, who objected to Supreme Court judges being "able to be nominated into this Court for temporary periods of duty, as a matter simply of administrative convenience", and who bemoaned "the unsatisfactory situation of my Court as I leave it".[96] The pattern of repeated absences of permanent Appeal judges and heavy reliance on temporary appointees continued under McCarthy P. He remarked on his retirement that, in the three years of his Presidency, the permanent members of the Court had been able to sit together for only several months, which he claimed was "a state of affairs never contemplated when this Court was established". He suspected that "the quality of our work has not always reached the levels I had hoped for", as a result of the Court being over-committed and "the constant change in personnel".[97] Wild CJ was not prepared to support the Presidents' requests for additional permanent members, the strains on the permanent members of the Court intensified, and McCarthy P recalled that "altogether it was quite an unhappy time".[98] By the end of Wild's Chief Justiceship, the case for an additional permanent Court of Appeal judge had become unanswerable, and in the year after McCarthy P's retirement legislation was passed allowing for such an appointment.[99]

V. THE WORK OF THE COURT OF APPEAL

1. Nature of the Court's work

The permanent Court of Appeal continued the civil jurisdiction which the former Court had exercised. The most commonly exercised civil jurisdiction was the hearing of appeals from judgments and orders of the Supreme Court.[100] Further, the Court of Appeal regularly adjudicated on motions, cases stated and questions of law removed into the Court by

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95 Supra note 86, at 324-5.

96 Ibid, 325-6.

97 Supra note 58, at 379. McCarthy P may have had in mind the case of *R v Nakhla (No 1)*, where, as a result of an administrative error, the judgment read out by McCarthy P omitted a key passage; the error was later discovered but Nakhla then commenced an unsuccessful action against McCarthy claiming damages for "abuse of legal process" and consequent false imprisonment (*Nakhla v McCarthy* [1978] 1 NZLR 291).

98 Supra note 56. The unhappy state of the Court of Appeal was epitomised by the unsatisfactory state of the Court of Appeal building: this was poorly ventilated and heated and was an earthquake risk (per Sir Thaddeus McCarthy).

99 Judicature Amendment Act 1977, s 5(1).

100 Judicature Act 1908, s 66. See *In Re Lolita* [1961] NZLR 542.

Supreme Court judges and other Courts.[101] Civil cases heard in the Court ranged across a wide field. They included private law matters of procedure, contract, negligence (including personal injury cases), property and wills, and administrative law issues centred on the prerogative writs and (from the early 1970's) the Judicature Amendment Act 1972.[102] The Court was repeatedly called upon to interpret New Zealand legislation such as the Matrimonial Property and Proceedings Acts of 1963 and the Land and Income Tax Act 1954.[103] In *Marx v CIR*, North P commented (in his judgment on the latter Act) on the "struggle by the Commissioner of Inland Revenue to combat the ingenuity of legal advisers and accountants who, in these days of high taxation, have been engaged in devising schemes for what has been somewhat picturesquely described as 'the art of dodging tax without actually breaking the law'".[104] Section 108 of the Act, which struck down transactions which had as their main purpose tax avoidance, proved to be particularly troublesome, and the vagaries of judicial interpretation produced a string of split decisions in the Court and the Privy Council.[105]

At the time of the passing of the Judicature Amendment Act 1957 there was a strong body of opinion that the existing Court of Appeal should be retained for criminal appeals and that the new permanent Court of Appeal should have civil jurisdiction only. It was believed by many that criminal appeals were best dealt with by judges who had the day to day experience of presiding over criminal trials, and who were in contact with prisoners, witnesses and juries.[106] However, it was finally resolved that the Court of Appeal should take over the criminal jurisdiction of the Court of Appeal to ensure enough work for the permanent Court of Appeal and greater

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101 Judicature Act, s 64. See *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961. See also Judicature Act 1908, ss 67-68.

102 See *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152, *Boots (NZ) Ltd v Tews Pharmacy Ltd* [1969] NZLR 890, 896. and *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728.

103 See *Hofman v Hofman* [1967] NZLR 9, *E v E* [1971] NZLR 859, and *Haldane v Haldane* [1976] 2 NZLR 715.

104 [1970] NZLR 182, 188-9.

105 See eg *Mangin v CIR* [1970] NZLR 232 and [1971] NZLR 591, *Ashton v CIR* [1975] 2 NZLR 717, and *Europa Oil (NZ) Ltd v CIR* [1976] 1 NZLR 546. In the *Mangin* case, the majority of the Court of Appeal reversed a Supreme Court decision, and the majority of the Privy Council upheld the Court of Appeal's decision; while in the *Europa* case the Court of Appeal allowed an appeal in part from the Supreme Court, but the majority of the Privy Council allowed the appeal from the Court of Appeal. Cooke J described section 108 as "unique in New Zealand legal history" (*Tayles v CIR* [1982] 2 NZLR 726, 727). He also said of the *Europa* cases ([1971] NZLR 641 and [1976] 1 NZLR 546) that "the best that can be said about this unsatisfactory history of litigation is that in the ultimate the taxpayer and the Commissioner each had one win, so it could be called a draw" (letter, 1 November 1993).

106 See eg Editorial (1957) 33 NZLJ 262.

uniformity of approach to criminal appeals and penalties.[107] The major area of criminal jurisdiction was the hearing of appeals against conviction and/or sentence, which required leave to be given unless the ground of appeal involved a question of law alone.[108] Criminal cases also reached the Court of Appeal by cases stated by the Supreme Court for the opinion of the Court of Appeal on a question of law.[109] The Court of Appeal heard appeals from decisions of Supreme Court judges on questions of law or on cases stated on questions of law by the Magistrates' Court, provided leave was given, and cases stated on questions of law from the Magistrates' Court for the opinion of the Supreme Court might be removed into the Court of Appeal by the Supreme Court.[110] On rare occasions, the Court of Appeal considered matters referred by the Governor-General in exercising his prerogative of mercy.[111]

In hearing appeals the Court was commonly concerned with alleged misdirections to the jury, the admissibility of evidence and questions of criminal practice and procedure, and after the introduction of the Crimes Act 1961 the Court was called upon to interpret the provisions of this Act. Criminal appeals heard by the Court included the sensational murder case of Arthur Allan Thomas, of which a full Court of Appeal later said that "no criminal case in recent times has caused such controversy and stirred the public conscience as much".[112] During the period 1971-1975, the Court of Appeal dismissed an appeal against Thomas's conviction, ordered a new trial on a petition to the Governor-General, dismissed a conviction from the second trial and answered a further petition to the Governor-General in the negative.[113] At the more mundane level, but of far greater practical significance, the Court heard appeals and questions of law concerning

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107 Supra note 1, at 2376 and 2388.

108 Criminal Appeal Act 1945, s 3, superseded by the Crimes Act 1961, s. See eg *R v Nakhla (No 1)* [1974] 1 NZLR 441. Note, of the 164 criminal cases heard in 1976, 148 were against conviction and/or sentence (figures supplied by Court of Appeal Registrar).

109 Crimes Act 1908, s 442-443, superseded by the Crimes Act 1961, s 380-381. See *R v Maxwell* [1960] NZLR 624 and *R v Strawbridge* [1970] NZLR 909. Further, where it appeared to the Supreme Court that a criminal case was one of "extraordinary importance", it might be removed into the Court of Appeal for a "trial at bar" (Judicature Act, s 69). George Barton believes that this procedure has never been and never will be invoked (supra note 2).

110 Summary Proceedings Act 1957, ss 144, 113 and 78. See *Police v Anderson* [1972] NZLR 233 and *Police v Lloyd* [1973] 2 NZLR 486.

111 Crimes Act 1961, s 406. See *R v Dick* [1973] 2 NZLR 669.

112 *Re Royal Commission on Thomas Case* [1982] 1 NZLR 253, 255.

113 See *Thomas v The Queen* [1972] NZLR 34 and *R v Thomas (2)* [1974] 1 NZLR 658.

convictions under the Transport Act 1962, especially after the introduction of the blood and breath alcohol provisions of 1968.[114]

The hope of Attorney-General Marshall that, with the combined civil and criminal jurisdiction, the Court of Appeal would have sufficient work was more than amply fulfilled. In May 1959, it was reported that "in the first fifteen months of its work the reconstituted Court of Appeal of New Zealand disposed of some ninety-three cases".[115] Indeed, on his retirement, Gresson P predicted that "this Court will not be able to function properly unless there is some cessation of appeals without any merit at all and some restraint exercised in regard to the amount of time occupied in argument and in citation of cases".[116] In ensuing years, the total number of cases heard grew markedly, rising from 116 in 1964 to 216 in 1976. Criminal appeals consistently outnumbered civil appeals, usually by more than two to one, although a higher proportion of civil cases extended over more than one day's hearing.[117]

In the face of the ever-increasing workload, the Court adopted several measures to improve efficiency and the despatch of business.[118] In 1969, the Court issued a Practice Note to try to overcome the problem of cases on appeal being "frequently filed in an unsatisfactory state", so that the Court's time was "wasted in searching for details which should be readily ascertainable". The Note directed the Registrar not to accept cases on appeal unless they were legible, numbered, correctly ordered and indexed.[119] In 1973, McCarthy P issued a Practice Note to save the time of the Court and counsel "in preparation for issues not really in dispute and in the taking of notes during the hearings" and directed counsel to file detailed, fully informative grounds of appeal and synopses of argument.[120] Cooke P

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114 See eg *Thomas v Auckland City Council* [1975] 1 NZLR 751.

115 (1959) 35 NZLJ 117.

116 [1963] NZLJ 123. Note, there were instances of considerable delay in delivering judgments during Gresson P's Presidency (see *In re the Bed of the Wanganui River* [1962] NZLR 600 (nearly 19 months) and *Corbett v Social Security Commission* [1962] NZLR 878 (14 months)).

117 Civil appeals heard went from 38 in 1964 to 79 in 1975 and 52 in 1976, and criminal appeals from 78 to 132 to 164 ([1976] NZLJ 127 and figures supplied by the Court of Appeal Registrar).

118 See [1972] NZLJ 107. Further, in 1968 the Court held sittings in Auckland to dispose of several appeals in that area, and in 1971 it sat in Christchurch for the first time in over 100 years ([1968] NZLJ 385 and [1971] NZLJ 511).

119 [1969] NZLR 864.

120 Practice Note [1973] 2 NZLR 357. The Note also provided that except in special circumstances the judges would no longer read their written reasons for their judgments, but would merely indicate their conclusions and then hand their judgments to the Registrar for distribution. Ten years later the English Court of Appeal issued a similar Practice Note ([1983] 2 All ER 34). See also [1976] NZLJ 376.

remembered that when he appeared as counsel in cases before the early Court of Appeal, "the form was a good deal tougher than we are today" and that "it was a strong Court in more ways than one".[121] North P himself remarked that counsel "must be willing to accept the searching questions that come from the bench" and conceded that they might on occasions leave Court with "bloody heads".[122] The Court would sometimes intervene and direct counsel to make submissions not referred to in argument but which the Court considered were relevant. Thus, in *Provident Life Association v Official Assignee*, the Court took this decision on a question touching statutory regulations having wide application.[123]

2. Judgments of the Court

Turner J believed that the strength of the Court of Appeal lay in "the permanent and continuous association of three of the best lawyers in the country, held together as a team, if not with one voice, at least after ample opportunities for conference and discussion, and the reconciliation of conflicting views".[124] He recalled that North P would, after a case was argued, invite him and the other judge into the President's room and have a conference about the way the case should go, and that often they would wrangle for a whole day about the case.[125] The collegial nature of the Court of Appeal process made for effective and efficient decision-making and kept dissenting judgments to a minimum. In *Liverpool Insurance Co v Waianiwa Transport*, North P noted in his oral judgment on the day of the hearing that the members of the Court had had the opportunity over the luncheon adjournment to consider the argument heard that morning, had a clear view of the case, and so did not think it necessary to call on the opposing counsel.[126] In *R v Nakhla (No 1)*, Beattie J explained that, following the hearing, all the various issues involved were discussed, a decision was taken that the appeal should be dismissed, and then a judgment was prepared which reflected the combined views of the members of the Court.[127] Even

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121 Supra note 21, at 172.

122 Supra note 29, at 110.

123 [1963] NZLR 961.

124 [1973] NZLJ 325-6.

125 Turner J recalled that he, North P and McCarthy J had very different backgrounds and lines of thought, being "not a devout Methodist, the son of a Baptist minister and a Roman Catholic respectively". Yet, through "bickering in a friendly, liberal way", they reached a good understanding of issues (supra note 6 and [1991] NZLJ 437). Likewise, North P remarked that the success of the Court of Appeal "depends in a great measure on the willingness of the individual members to listen to the views of each other" (supra note 28, at 109); and McCarthy P stressed the collegial nature of the Court "built on mutual confidence and trust" (supra note 56).

126 [1965] NZLR 731.

127 *Nakhla v McCarthy* [1978] 1 NZLR 291, 299.

where members of the Court delivered separate judgments, there were exchanges of views beforehand, as reflected, for example, in comments such as "I have derived considerable advantage from reading the judgment prepared by North J".[128] In *Police v Wyatt*, Turner J acknowledged that, while at first he had been attracted to the counter-argument presented by counsel, he had had the advantage of reading the judgments of North P and McCarthy J and had come to concur with them.[129] The "team" approach of the Court was also evident in the practice sometimes adopted for the President to invite another member of the Court to present his judgment first, particularly where the other member had produced the major judgment.[130] The combined efforts of the Court's judges gave the Court the confidence to overrule decisions of the Supreme Court, including those of the Chief Justice, where it considered appropriate.[131] The collegial nature of the process also reduced the overall length of judgments and made judgments more mutually complementary. All of this helped to give the Court a more coherent and authoritative voice.[132]

In criminal cases, statute dictated that the judgment of the Court of Appeal be pronounced by one member of the Court unless "in the opinion of the Court the question is one of law on which it would be convenient that separate judgments should be pronounced".[133] Turner J recalled the lengths to which North P went to produce a combined, compromise judgment in *R v Lorimer*, in the face of different views of the Court.[134] However, separate judgments would be given where important issues of law were fully argued and the Court considered it important that guidance should be given.[135] In *R*

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128 [1963] NZLR 661.

129 [1966] NZLR 1118, 1131. See also *De La Rue v The Queen*, where Richmond J acknowledged that, "after the benefit of argument and discussion in this Court", he had come to agree that an earlier judgment he had delivered in the Supreme Court should be overruled ([1971] NZLR 532, 535).

130 *Nicholls v CIR* [1965] NZLR 836 and *Dimond Manufacturing Co v Hamilton* [1969] NZLR 609.

131 *R v Currie* [1969] NZLR 193. Such was the sense of judicial independence that, on occasions, both the Chief Justice and the President of the Court of Appeal would find their judgments overruled (see eg *Hocking v Attorney-General* [1963] NZLR 513 (decision of Barrowclough CJ reversed by North and Turner JJ, Gresson P dissenting).

132 Supra note 6.

133 Criminal Appeal Act 1945, s 18 and Crimes Act 1961, s 398.

134 In this case, North P and McCarthy J were of the view that the consequences of a verdict (ie for sentencing) were not the concern of the jury and the judge had the right to refuse to tell the jury of the consequences; but Turner J believed that there might be circumstances where the jury should be told of the consequences. After considerable persuasion, separate judgments were averted and the combined judgment reflected the views of all concerned (see [1966] NZLR 985).

135 *R v Cottle* [1958] NZLR 999, 1007, 1023, 1030; and *R v Johnston* [1974] 2 NZLR 660, 661.

v Convery, North P noted that "the appeal raises questions of some interest in relation to the application of the English Judges' Rules in criminal trials in New Zealand", and "accordingly we have found it convenient that separate judgments be pronounced".[136]

Separate judgments were more common in civil cases. Obviously, separate judgments would occur where the members of the Court were divided in their views as to the outcome or as to the reasons for the decision.[137] Members of the Court would also wish to give separate judgments so as to give weight to the Court's judgment "on issues which have not yet been the subject of any authoritative decision in this country".[138] Further, Turner P in *Walker v Walker* commented on the "desirability of issuing several judgments, not one only, where statutes were construed or applied in appellate courts", as this reduced the "danger of attributing the ratio of a decision to a single sentence".[139] Judges also decided to give separate judgments out of deference to the "full argument" of counsel, and where the Court differed from judgments of the Supreme Court.[140] In *Public Trustee v CIR*, North P noted that he had had "the advantage of collaborating, in a measure, with my brother Turner in determining the form that his judgment should take", but that as he was differing from the Chief Justice it was "desirable that I should say a few words of my own".[141] During the Presidency of North P, there was a greater tendency for members of the Court to deliver separate judgments, for reasons such as wanting to put in their own words the way they looked at the case or because "the dispute had engendered a good deal of heat and ill-feeling".[142]

Overall, the Court adopted a cautious and restrained approach to its judicial function. The oft-repeated policy of the Court was to avoid presenting final conclusions on issues unless there had been argument from counsel and the matter fell "directly for determination".[143] In *Hunyady v Attorney-General*,

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136 [1968] NZLR 430.

137 *Morrison v USS Co* [1964] NZLR 468.

138 *USS Co of NZ Ltd v Wenlock* [1959] NZLR 173.

139 [1973] 2 NZLR 7, 8.

140 *Preston v Preston* [1960] NZLR 385, 403, and *Smith v Attorney-General* [1974] 2 NZLR 225, 230.

141 [1971] NZLR 77, 89.

142 *McDowell v Attorney-General* [1963] NZLR 878, 895; and *Upper Hutt City v Burns* [1970] NZLR 578, 590.

143 *R v Pellikan* [1959] NZLR 1319, 1320-1; and *R v Grice* [1975] 1 NZLR 760, 766-7. In *Re Havill (Deceased)* [1968] NZLR 1116, 1133, Turner J noted that his view on a point not necessary for his decision "cannot be regarded as an essential part of my judgment". But note, Cooke J appeared readier to express his views on issues of principle that arose (*Roome v Roome* [1976] 1 NZLR 391, 392-3 and *Stewart Investments Ltd v Invercargill CC* [1976] 2 NZLR 362, 366, 373-4).

where the issue was the "highly technical" area of discovery of documents, and the Court had derived no assistance from a lay litigant, Turner J stated that "it will not be desirable for us to attempt a statement of general principle, which in another case we might find it necessary to examine more meticulously".[144] In *Re 110 Martin Street, Upper Hutt*, Turner P doubted whether there was an existing *lis*, and noted that "this Court is usually reluctant to write purely advisory judgments when no active dispute exists between specific contesting parties".[145]

The Court adhered strictly to the established constitutional principle that it was bound by statute law, even where the result was "most unfortunate" and "justice between the parties was not well served".[146] Furthermore, the Court accorded great weight to judicial precedent and the notion of certainty in the law. In *Re Manson (Deceased)*, the Court of Appeal refused to overrule a decision of the Court which had stood for thirty-five years. McCarthy J, in delivering the judgment of the Court, stated that the Court would not substitute for an earlier decision an opposite conclusion which it merely thought preferable, particularly where the earlier decision had been followed and applied over many years and the decision caused no injustice to individuals.[147] The Court followed this approach to the extent that it would not abrogate doctrines of law which were well established in New Zealand law, even where these were clearly outmoded. In *Spence v Relph*, McCarthy J admitted that the actions for enticement or for harbouring a wife were "hardly popular in Judicial circles in this age", but (in line with North P and Turner J) stated that they were too well established to be abolished except by legislative action.[148]

Besides New Zealand precedents, English judgments were accorded a prominent place. The Judicial Committee of the Privy Council played a role far beyond the limited number of cases which went on appeal and the even fewer cases in which appeals were successful.[149] The Court of Appeal

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144 [1968] NZLR 1172, 1173.

145 [1973] 2 NZLR 15, 17.

146 *Cotton v Central District Finance Corporation* [1965] NZLR 992, 997-8.

147 [1964] NZLR 257, 271-2 (note, this case had been removed into the Court for the specific purpose of enabling the Court, if it saw fit, to overrule its earlier decision). See *McFarlane v Sharp* [1972] NZLR 838, 841 and *E v E* [1972] NZLR 932, 935. Turner J recalled that he and his fellow judge would "listen to the arguments, establish the facts, apply the law to the facts and then reflect upon whether they had the sense of having got things right or of having made fools of themselves" (supra note 6).

148 [1969] NZLR 713, 731. See also *Attorney-General v Wilson* [1973] 2 NZLR 238, 249.

149 In the years 1958-1976, 26 appeals from the Court of Appeal were heard by the Privy Council and of these 11 were successful ("Appeals to the Privy Council" [1973] NZLJ 506-8 and [1977] NZLJ 42).

judges were very conscious of the Privy Council being the "supreme and ultimate appellate authority for New Zealand" and would scrupulously follow the Privy Council's speeches and observations.[150] McCarthy J recalls the brooding influence of the Privy Council in North P's repeated refrain in considering legal issues: "what would the Privy Council say?"[151] On his retirement, McCarthy P spoke of the "inhibitions" which the right of appeal to the Privy Council "places on the capacity of this Court to develop our case law in a way which best suits New Zealand and the New Zealand way of life".[152] The House of Lords was described by Gresson P as "in practice the alter ego of the Privy Council".[153] North P affirmed that the House of Lords was "entitled, particularly on substantive law, to the very greatest respect and only departed from on rare occasions".[154] Decisions of other English Courts, notably the Court of Appeal, were found to be helpful and of great persuasive value, and judges such as Gresson P would routinely follow strict rules "settled in England by the strong trend of authority and all the English textbook writers".[155] Of other Commonwealth precedents, those of Australia played the most important role. New Zealand statutes such as the Land and Income Tax Act corresponded closely with Australian counterparts, thus prompting extensive reference to case-law thereon; and pronouncements of the Australian High Court were accorded great value and at times even preferred to English judgments.[156]

The Court's cautious stance was most clearly revealed in its response to legal issues of broader cultural and social significance. On the rare occasions when issues relating to Maori rights were heard, the attitude of the Court was informed by the view that "the Treaty of Waitangi was only a solemn statement of intention by the monarch to do all that was reasonably possible, and it did not give individual Maori the right to sue under the Treaty".[157] In its interpretation of the Matrimonial Property Act 1963, the Court's approach was expressed by North P when he said that "the mere fact that a wife has been a good wife and looked after her husband domestically,

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150 *Corbett v Social Security Commission* [1962] NZLR 878, 900 (per North P).

151 Supra note 6.

152 Supra note 58, at 380.

153 *Corbett v Social Security Commission* [1962] NZLR 878, 898.

154 *Ross v McCarthy* [1970] NZLR 449, 453. See eg *Satterthwaite v New Zealand Shipping Co* [1973] 1 NZLR 174, 177.

155 See *NZ Industrial Gases Ltd v Anderson Ltd* [1970] NZLR 58, 60 and *R v Naidanovici* [1962] NZLR 334, 337.

156 See eg *Elmiger v CIR* [1967] NZLR 161, 177 and *Attorney-General v Wilson & Horton Ltd* [1973] 2 NZLR 238, 241-2. Note Cooke J's comment in *MOT v Burnetts* [1980] 1 NZLR 57.

157 Supra note 6. See *In Re the Bed of the Wanganui River* [1962] NZLR 600; *In Re The Ninety-Mile Beach* [1963] NZLR 461; *Hereaka v Prichard* [1967] NZLR 18; and *Hauhungaroa 2C Block v Attorney-General* [1973] 1 NZLR 389.

cannot possibly, in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share".[158] This approach was not in tune with the rising notion of marriage as a partnership of equals who normally performed different functions.[159] It was criticised by later judges as effectively giving a disproportionate weight to monetary contributions normally provided by the husband and underestimating intangible services normally provided by the wife.[160] No doubt the cautious response of the Court to such issues facilitated the disappearance of "universal and uncritical approval of our judicial system" and the emergence (certainly by the 1970's) of a climate of "questioning and criticism".[161]

However, over time, the collegial expertise of the Court of Appeal ensured that it made a major contribution to the development of New Zealand law. This the Court did in an indirect way through its clear, well-reasoned and authoritative calls for reform of areas of the law, which motivated the legislature into action. The Court's impact was seen, for example, in the passing of the Illegal Contracts Act 1971, and the reform of the Town and Country Planning Act 1953.[162] Further, certain Court of Appeal judgments brought controversial areas of the law into sharper focus and this too prompted legislative action. The legal tests relating to censorship and indecency adopted by North and Cleary JJ in *Re Lolita* had a considerable influence in bringing forward the Indecent Publications Act 1963 which was designed to "loosen the restrictions on publishing and sound recording imposed by the previously existing legal tests".[163]

Increasingly, the Court also acted in a direct way to fashion the law in a manner appropriate to the needs of New Zealand in the second half of the twentieth century. This the Court was prepared to do especially in areas which it regarded as judge-made law, such as practice, procedure and evidence.[164] In *McKnight v Davis*, Turner J said that "the Court must

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158 *E v E* [1971] NZLR 859, 885. This was broadly followed in *Haldane v Haldane* [1975] 1 NZLR 672, 673-675.

159 *Haldane v Haldane* [1976] 2 NZLR 715, 721.

160 *Reid v Reid* [1979] 1 NZLR 581 & 599 (per Woodhouse and Cooke JJ).

161 Supra note 58, at 379. See also the criticism of Sir Alfred North's role as Commissioner in the Moyle inquiry (Mummery, "The Privilege of Freedom of Speech in Parliament" (1978) 94 *Law Quarterly Review* 276).

162 See *Stewart Investments Ltd v Invercargill CC* [1976] 2 NZLR 362, 363.

163 See *Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 407 (per Woodhouse P). George Barton states that the "disastrous decision" of the Court of Appeal in *In re Sheridan* [1959] NZLR 1069 prompted the Public Trustee to seek an amendment to the Trustee Act 1956, and this was effected in s 12 of the Trustee Amendment Act 1960 (supra note 2).

164 [1963] NZLR 858.

always be the master of its own procedure, and must when necessary use its inherent jurisdiction to ensure that justice is done", and that "due enquiry for the truth is not to be stifled by outmoded procedural restrictions".[165] The Court accepted that New Zealand rules of procedure and evidence sometimes differed from those of England, and by the late 1960's the distinctive nature of New Zealand legal processes was increasingly emphasised.[166] In *Jorgensen* v *News Media (Auckland) Ltd*, the Court held, contrary to a long-standing decision of the English Court of Appeal (which had been followed in New Zealand), that a certificate of conviction was admissible evidence of guilt in a subsequent defamation action. North P referred to "the climate of New Zealand law" and stated his belief that "on matters of evidence it is within the province of the Judges to adapt the existing law of evidence to meet modern conditions". Turner J concurred, noting that "the law of evidence is Judge-made law, directed to the control of the processes by which Judges daily endeavour to do justice; and that if it requires modification, that modification is particularly a matter with which the Judges should be entrusted".[167]

Traditionally the Court of Appeal drew a clear distinction between adjectival law where it accepted the right to modify the law to meet local needs, and substantive law where "only in exceptional circumstances will the Courts be willing to entertain an application to strike out a new line differing completely from established long-settled principles".[168] However, in 1971, the Court took the momentous step of "striking out a new line" in an area of substantive law which had been governed for ninety years by a decision of the House of Lords. In *Bognuda v Upton & Shearer Ltd*, the Court (comprising North P, Turner J and Woodhouse J) rejected the House of Lords ruling that, where a landowner had no easement of lateral right of support, no action would lie for damage caused by the adjacent landowner. The Court held that the House of Lords decision was not binding and was based on a system of acquisition by prescription of lateral support which was not available in New Zealand. North P, in his judgment delivered the day before his retirement, declared that there was "no binding authority in New Zealand standing in our way" of finding that the adjacent landowner owed a duty of care. Woodhouse J, whose presence was probably decisive to the outcome, declared that "the responsibility of this Court is to decide

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165 [1968] NZLR 1164, 1170.

166 See eg *R v Naidanovici* [1962] NZLR 334, 339; *R v Parker* [1968] NZLR 325, 327; and *Rowley v Wilkinson* [1968] NZLR 334, 339.

167 [1969] NZLR 961, 979 & 990-1. See also *R v Fox*, where Turner P upheld the criminal practice adopted in New Zealand which differed from that of England, and noted that "the ordinary rule, which is that the Courts will in general follow English practice, is not slavishly to be followed" ([1973] 1 NZLR 458, 469).

168 *Ross v McCarthy* [1970] NZLR 449, 456.

cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions". He stated firmly that it would be "quite inappropriate" for the Court to follow a rule of the House of Lords which was based upon a set of principles that "unquestionably are inapplicable in New Zealand".[169]

VI. CONCLUSION

This review of judges at work in the permanent Court of Appeal during the first eighteen years of its existence indicates that the Court more than fulfilled the expectations of its proponents. The administration of justice in New Zealand's highest local Court was despatched with heightened expertise and efficiency.[170] From the "permanent and continuous association" of three of the best appellate lawyers in New Zealand there evolved a Court which was greater than the sum of its parts. The blend of common sense, logic, pragmatism, and scholarship displayed by the Court's members produced, over time, an increasingly distinctive and self-confident legal identity. The development of the Court of Appeal was hampered by anomalies such as the ambivalent roles of the President and the Chief Justice; by the lack of support given to the Court by the authorities, particularly in the 1970's; and by the forces of tradition expressed in the Privy Council and in deeply-ingrained legal attitudes held by judges who came from a narrow band of the population. Yet these factors did not seriously affect the growing prestige that the Court acquired in New Zealand and overseas.[171] In 1959, the conferment of knighthoods on the members of the Court was welcomed as "public recognition of the fact that our Court of Appeal is the most important unit in the community".[172] In particular, the period of 1963-1971, when the Court was staffed by North P and Turner and McCarthy JJ, was seen as a "golden age" in the history of the Court.[173]

By 1976, the foundations of the modern Court of Appeal had been laid. McCarthy P's retirement marked the end of an era, as he was the last of the Presidents to have sat in the Court (albeit in a temporary capacity) from the year of its inception. In subsequent years the Court was to assume an expanded and increasingly self-confident form in the hands of a new

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169 [1972] NZLR 741.

170 Wild CJ commented that "I doubt if it is sufficiently appreciated even in the legal profession itself how well the appeal system has worked" and emphasised the "expedition with which appeals have been dealt with" ([1971] NZLJ 372).

171 Supra notes 24, 32, 38, and 50.

172 (1959) 35 NZLJ 183.

173 Dugdale, "Obituary Sir Alexander Turner" [1993] NZLJ 299, 300. See also [1973] NZLJ 328.

generation of judges whose legal careers were established in the post-World War Two years. In concluding his retirement speech in May 1976, McCarthy P remarked in his characteristically apt and concise way:

> We of the Court that sat here so long, Sir Alfred North, Sir Alexander Turner and I, have run our race. I am vain enough to think that that was a good Court. An entirely new generation now takes over.[174]

174 Supra note 58, at 380.