# Principles of Professionalism in Law Teaching and Judicial Practice

By Judge Peter Spiller*

I am pleased and honoured to have been asked to write an article for the Waikato Law Review edition commemorating the 20th Anniversary of the University of Waikato Law School. In my article I shall reflect on the concept of professionalism, which is one of the key goals of the School. I shall do so in the context of my memories of the Law School and the principles of professionalism which I developed while teaching in the School. I shall conclude by considering the implications of these principles for judicial practice.

Professionalism is derived from the Latin word profiteri, which refers to a public declaration. The term profession came to refer to the exercise of a calling or vocation requiring specialised knowledge and expertise. A central objective of the Waikato Law School has been to provide its students with a professional legal education. In the strict sense this objective means that Waikato's law graduates are eligible to practise law in terms of the legal profession's requirements. Yet from the outset the School set itself the broader goal of educating a "new legal professional", with generic legal skills which could "be used in a variety of contexts and environments".[1] Informing this goal were the other two objectives of the School, namely, biculturalism (reflecting the growing Māori dimension in the law) and law in context (reflecting an understanding of the environment in which laws are made and administered). A further dimension to the Waikato Law School's concept of professionalism was the idea that "the essence of being professional is to consider matters beyond the individual alone", with a view to providing competent and ethical service to members of the community.[2] It was in the context of these notions of professionalism that I arrived in the Waikato Law School.

## I. Memories of the New Professional School at Waikato University

I was one of the initial appointees of the School. I came to the School after 12 years as a law academic at Natal University in South Africa and four years at Canterbury University. During my academic life preceding my appointment at The University of Waikato I had studied at the Universities of Natal, Cambridge and Canterbury.

I well remember the day in September 1990 when I came from Christchurch for my interview. I met the new Dean, Professor Margaret Wilson. The staff of the School comprised her, Ruth Busch (who had been teaching Legal Systems before the start of the School) and some administrative members, and the facilities were still rudimentary. But there was a palpable sense of hope and enthusiasm for the new School.

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1 Margaret Wilson, "The Making of a New Legal Education in New Zealand" (1993) Wai L Rev 1 at 18.

2 Ibid at 3.

A key figure in support of the School was the Vice-Chancellor, Professor Wilf Malcolm. From the time that I met him I was struck by his fine qualities of leadership. He had that rare gift in a leader: the ability to inspire self-belief in those whom he led. Another important figure was Gerald Bailey, a local lawyer who went on to become the Chancellor of the University. Both Wilf and Gerald (as well as Margaret Wilson and other staff) were on my appointment committee. I was thrilled to be offered the position of Associate Professor. I delayed taking up the appointment until December 1991, as my son was completing his primary schooling on a scholarship in Christchurch.

Two months after my appointment in 1990 there came the news that the Government had decided to remove the external funding provided for the establishment of the new Law School. I remember the real distress that was caused, especially to those new members of staff who were newly arrived from overseas. Through the courage and determination of Margaret Wilson, Wilf Malcolm and influential supporters, the School was allowed to survive. In the first half of 1991, I was grateful to be included in the Māori orientation course and the official opening of the School. By the time I arrived to take up my position at the end of the year, I felt part of the new team.

In my first teaching year I was assigned the teaching of Torts and Criminal Procedure. In subsequent years I dropped the latter and replaced this with Contracts and Dispute Resolution, and later replaced these subjects with Legal Systems and Fair Trading and Consumer Law. From the beginning of 1992, the School was kind enough to accommodate my part-time commitment as a Referee of the Disputes Tribunal (formerly Small Claims Tribunal). My roles as law teacher and Referee proved to be complementary and mutually enriching: my teaching and research benefitted from my practical judicial role, and the latter benefitted from my growing knowledge of relevant areas of the law. Meanwhile the School continued to expand beyond the teaching of the early years of the LLB and established Honours and later Masters programmes.

In late 1993 I was privileged to be the founding editor of the Waikato Law Review (a position from which I retired at the end of 2004). Coincidentally, I became Acting Dean of the School. This role was succeeded in early 1994 by my three-year tenure as Chairperson of the School, and I was also appointed Professor. I remember my leadership years of the School as exhausting, demanding and also fulfilling in many ways. In my 34 years of academic life, The University of Waikato stands out as the university which most challenged accepted boundaries in a wide range of areas, including those relating to Māori and women's rights. Trying to reconcile at times fiercely competing interests was challenging and interesting. Within the School and the wider University there was, amongst the staff and students, a wide diversity of backgrounds and approaches. As with any human institution, there were at times some difficult personnel issues to address. Meanwhile the young School continued to grow, and the staff and I developed quality assurance manuals and other measures to systematise and professionalise the work of the School.

The years following the end of my Chairpersonship in early 1997 were for me devoted more fully to the development of my teaching and scholarship. I am grateful to the School for the opportunity and support it gave for me to complete a number of publications which I hope and believe have been of wider benefit. In between the departure and arrival of succeeding Deans, I took on the role of Acting Dean three more times, and was thus also involved in the broader life of the University.

At the start of 2005 I took leave from The University of Waikato to become Principal Disputes Referee, which role followed on from my part-time position as a Referee. During the succeeding years I was pleased to be asked to take on some part-time teaching, notably in Commercial

Transactions and Torts. In August 2009 I was appointed to the District Court bench and from the beginning of this year I have been an Honorary Professor of the School.

Looking back over my 20 year association with the Law School, I retain a sense of excitement about having been part of the creation of a new professional body. I was honoured to be one of the guardians of the infant School and to contribute to its emergent growth and development. For both individuals and social bodies, their formative years leave a lasting imprint, and it was a privilege and a responsibility to be part of the School's formation. Through the challenges, frustrations and achievements of the School, the vibrancy and commitment of the School's staff and student body provided sustenance for its leaders. The School also provided the setting for the development and refinement of my own views of what it meant to be a teacher of law, as I shall now outline.

## II. Principles of Professionalism in Teaching Law at Waikato University

As far back as 1976 I had discovered that I had a vocation to be a teacher of law. However I was given no training as a teacher and was left to devise my own teaching methods. Over the 16 years before my arrival at Waikato I made efforts to improve my teaching methods. But it was during my teaching years at Waikato Law School that I most consciously reflected on my practice of teaching law and tried to develop a model of professionalism in my teaching. There were various reasons for this.

One reason was the stimulus of working in a new law school in which the value of effective teaching was recognised. An important part of this recognition was the support given to providing small-group teaching in key courses. I shall always treasure my years with the first-year Legal Systems students in particular. Each week I would meet with my seminar groups of around 25 students each for a double-period session in which we would explore the readings and themes for the week and develop legal skills. Accompanying the seminar was a weekly lecture, which provided a useful framework for the week, but it was readily apparent that it was in the weekly seminar that the most valuable learning took place. I was able to develop a close personal tie with each student, who felt recognised in a human way and accountable for his or her progress. The advance in understanding and skills by many students during the year was considerable and gratifying for them and for me.

Another reason for my increasing reflective practice was the presence of the University's Teaching and Learning Development Unit, which provided active support for staff teaching. My close ties with this Unit culminated in my completion of a Certificate in Tertiary Teaching. The Unit's support and guidance were invaluable in my continuing efforts to reflect and improve my teaching.

Yet another reason for the energy I put into my teaching at the Waikato Law School was the student body itself. The first class that I taught comprised the pioneering students of the School, some of whom had waited in the Waikato and nearby areas for years before having the opportunity to study their chosen field at their local university. These students showed courage in the face of the early setbacks for the School. They and subsequent classes included more so-called "mature age" students than I had encountered at my previous law schools, and the confidence and broader life skills that they brought to bear on their studies benefitted their fellow-students and me. The Waikato Law School also attracted a significant number of Māori students, and I greatly valued the warm and vibrant dimension that they brought to the student body. I have been proud to see

the career advances that many Waikato law graduates have made since leaving law school, and have been pleased to maintain contact with former students.

What shaped the principles of professionalism in teaching law that I developed while at the Waikato Law School? Here I need to refer to my own personal background, which inevitably influenced my views. The educationalist Parker J Palmer stressed the importance of teachers infusing their work with a strong sense of personal identity.[3] I pay tribute to three key elements in my background. My early Catholic upbringing had impressed upon me the importance of striving for right conduct; my maternal Anglican family ties had instilled in me the value of loving human interchange; and my teenage spiritual experiences had engendered an underlying faith life. These three elements may be expressed in the words of a Hebrew text which dates back some 2700 years ago. The prophet Micah wrote:[4]

> And what does the Lord require of you? To do justice and to love kindness and to walk humbly with your God.

I shall now present my views of teaching in the context of Micah's three-fold injunction, which I recast as justice, humanity and humility. I am encouraged to do so by the Law School's contextual and bicultural goals. The Judaeo-Christian faith has played a fundamental role in the development of New Zealand's law and society, and Māoridom retains to the present a strong and vivid sense of the spiritual world.[5]

## *A. Justice*

The Hebrew word משפט (mishpat) means justice or right, doing what is proper or fitting. Micah's call to do what is right meant for me the need to teach with a sense of wholeness and rectitude. This imperative had two aspects. The first related to the organisation and presentation of my subject-matter, and the second related to the alignment between my teaching and the assessment requirements of my courses.

### *1. Organisation and presentation*

From the outset of my teaching career, a primary focus was to communicate in as clear and systematic way as possible the essentials of the subject-matter that I taught. I endeavoured to ensure that my students concluded their courses with knowledge and understanding of the main principles of relevant law and its key sources. I recall that, in preparing my first lecture notes in 1976, I thought of the approach that had served me well in my studies. This involved a careful structuring of topics so that the subject-matter was readily accessible. Throughout that year, as I struggled through my inexperience as a lecturer both in terms of content and presentation, the structure that I devised acted as a life-raft for my students and me.

In my Waikato years, I strove to develop the clarity and structure of my teaching. This I tried to do through providing materials which presented the skeleton of each lecture, focussed questions for each seminar, and the logical progression of the course. I used a variety of teaching methods, including the familiar talk-and-chalk approach and overhead transparencies. In more recent years technologies such as powerpoint provided added means of presenting the essence of

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3 Parker J Palmer, *The Courage to Teach* (Jossey-Bass Inc, San Francisco, 1998) at 10.

4 Micah 6:8: דיהלא סע תכל ענצהו דסח תבהאו טפשמ תושע

5 "Society can only function if all things physical and spiritual are in symmetry" Khylee Quince, "Māori Disputes and Their Resolution", in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2 ed, OUP, 2007) at 284.

teaching content in an accessible manner. The feedback from students was that they appreciated teaching which was based upon a clear structure: it has rightly been observed that the human mind works best in patterns of meaningful connection,[6] and that effective teaching is conveyed in a way that makes learning accessible.[7]

Related to my efforts at clear, structured communication was my focus on depth rather than breadth in teaching and learning. I would far rather my students properly learnt and integrated ten new skills or insights from my course than they acquired a tenuous awareness of 100 features. Thus, I divided each of my courses into a selected number of themes, and all the activities of each week (lectures, seminars, readings, and other learning exercises) were devoted to reinforcing the necessary skills and insights related to a particular theme. Palmer, in encouraging educators to "teach more with less", remarked that "each discipline has an inner logic so profound that every piece of it contains the information necessary to reconstruct the whole".[8] The resultant emphasis on depth rather than breadth did, I believe, facilitate deep rather than surface learning.[9]

*2. Alignment of teaching and assessment*

Whereas the provision of clear and structured teaching was an instinctive part of my teaching endeavour from the outset, linking assessment with teaching was not. In my early years of teaching, I paid inadequate attention when compiling my teaching materials to what would be examined. In fact, when the departmental secretary asked for examination papers before the end of the academic year, I would react with the bewildered question: how could I set the examination before I had completed what I was to teach? While I tried to gear my assessment to what had been taught, there were indications from my marking that there was a gap between the teaching and the assessed learning in the course.

In response to this problem, I decided to remodel my teaching to make it expressly assessment-based. Before the start of the academic year, I formulated the questions that I would set in the internal assessment and examination, and I incorporated similar questions in the materials provided for each module of the relevant course. Each week students were required to read a section of the materials in the light of the questions set, and in class I would model the process and the students would practise the skills required to answer these questions. The merits of this new approach were immediately apparent. First, the alignment of assessment with the teaching activities of the course appeared to be a much fairer and more constructive way of operating than the former approach where assessment was tagged on at the end of the teaching. I was now actively helping the students to succeed in terms of the measurable outcomes of the course.[10] Secondly, the new approach dramatically improved the level of engagement of the students in my courses. This shift reflected the fact that student perceptions of what is recognised for assessment purposes have a substantial impact on their learning behaviour.[11] It has been rightly observed that assessment is the "senior partner in learning and teaching".[12]

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6 Palmer, above n 3, at 127.

7 John Biggs, *Teaching for quality learning at university* (SRHE and Open University Press, Buckingham, 1999) at 93.

8 Palmer, above n 3, at 122-123.

9 Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, London, 1992) at 13.

10 Biggs, above n 7, at 11.

11 H Fry, S Ketteridge and S Marshall *A Handbook for Teaching and Learning in Higher Education (*Kogan Page,Wakeford, London, 1999) at 58.

12 Biggs, above n 7, at 160.

However, by the late 1990s, I increasingly became aware of further difficulties in my teaching. One problem was the uneven engagement of students in preparation for and participation in seminars. This problem was linked with the increasingly heterogeneous nature of the student body and the financial (and consequent time) constraints increasingly being placed on students. The other problem that I experienced was the lack of formative assessment which would provide mutual feedback between the students and me. Issues that needed to be clarified sometimes surfaced during class discussion, but otherwise I was left to make judgements on student work only in summative (final) assessment. Students were not alerted to areas in their work that needed to be improved, and I was not attuned to recurrent difficulties which needed to be rectified in my teaching.

In response to these problems, I introduced incentive-based preparation exercises in courses where I was the convenor. In the week before each seminar class, students were required to prepare answers to assessment-related questions on course materials, and at the start of each seminar class students handed in a one-page written summary of their responses. The preparation exercises were read by me and returned at the following class. A percentage of the final mark was assigned to students who completed the preparation exercises and attended the seminars. The exercises were ungraded so that students were not penalised for initial failures in understanding, but contained qualitative feedback to assist students to improve.

The introduction of the preparation exercise technique resulted in a significant improvement in student engagement, reflected in improved class discussion and higher student achievement. The technique also provided effective formative assessment for the students and me. Through completion of the weekly exercises, students furthered the understanding and practised the skills required for the graded internal assessment and examination. It has rightly been observed that formative assessment should play a key role and should help to enhance the confidence and lessen the anxiety of assessment for students.[13] There should also be incentives for formative assessment that reward the intrinsically motivated students and encourage students who are motivated by external rewards.[14]

The further problem with which I then grappled in my assessment-related teaching journey was related to the criteria used by me in marking assessment tasks. While, by the end of a module of a course, most of the student body appeared to grasp what standards and guidelines would be used by me in assessing student work, there still appeared to be a level of uncertainty in this regard.

To try to overcome this uncertainty, I began each module of my course by telling students what key competencies I would be seeking in their work. I then also provided the students with the criteria that I would use to assign grades in the A, B and C ranges. During ensuing small-group teaching in the module, I involved the students in exercises to make these criteria more meaningful. For example, I presented three made-up student scripts, representing work in the A, B and C grade ranges, and asked the students to assign an appropriate grade and give reasons in the light of the criteria that I provided. It has been pointed out, in relation to assessment requirements, that "exemplars convey messages that nothing else can".[15]

The placing of explicit guidelines and criteria at the heart of student learning, together with clear, structured, assessment-based teaching techniques, represented my attempt to act justly to-

13 Ramsden, above n 9, at 212.

14 H Fry, S Ketteridge and S Marshall, above n 11, at 80.

15 P Schwartz and G Webb *Assessment: Case Studies, Experience and Practice from Higher Education* (Kogan Page, London, 2002) at 136.

wards my students. This was in line with the philosophy that teaching should be based upon a relationship of trust which is developed through open, consistent and honest action.[16]

### *B. Humanity*

The Hebrew word חסד (chesed) means loving-kindness, virtuous giving with a focus on the recipient. This quality had two dimensions in my teaching journey, namely, the forging of personal connections with my students and the fostering of ongoing dialogue with them.

*1. Personal connections*

From the outset of my teaching career, I was keen to establish a close personal rapport with my students. To this end, I learnt the names of all the students in my classes so that I could interact with them individually when they asked or were asked questions. This practice appeared to motivate the students to engage better in my courses. Learning the names of my students continued to be a feature of all my small-group teaching. I compensated failing memory powers with devices such as seating plans in which I inserted student names while I called out names on a roster or returned work handed in the previous week. In this way each and every member of the class was recognised and affirmed as an individual in his or her own right, and was made to feel more accountable in the learning enterprise. This practice was in line with my view that the student in the educational process should be seen, not simply as a mind waiting to be trained, but as a whole person, including his or her affective (emotional) dimensions. It has rightly been said that students should have a sense of being seen and heard.[17]

The large-group lecture format has played a major role in law schools, and the Waikato Law School was no exception. I recognise the value of this format in conveying frameworks and themes to large groups of people. But this format inevitably restricted the personal links that I could develop with the students. In the Waikato Law School my belief in student-centred learning meant that my teaching was primarily seminar-based. In Legal Systems, I reduced lectures to one at the beginning of each week and (as indicated above) divided the remaining classes into seminars of which the students had to attend one per week. The effect of this change was remarkable. I was able to monitor the progress of each student in a way that was not possible in a lecture format. This personalised involvement, and the opportunity to acknowledge continually the achievements of each student, became important means of encouraging growth in self-confidence amongst students.[18]

My personalised contact also meant that I was directly appraised of the diverse nature of the student body, and the resultant need to extend the range of my teaching activities. Teaching practice should enable the teacher to understand the variations that exist in student understanding, and to respond to differing student misunderstandings and needs.[19]

*2. Ongoing dialogue*

During the course of my teaching career, I came increasingly to the view that teaching should essentially involve a conversation between teacher and student. To this end, the teaching activities preceding each assessment exercise encouraged the students to convey to me their growing un-

16 S Brookfield *The Skillful Teacher* (Jossey-Bass, San Francisco, 1990) at 131.

17 Palmer, above n 3, at 151.

18 Brookfield, above n 16, at 157.

19 M Prosser and K Trigwell *Understanding Learning and Teaching* (Society for Research into Higher Education and Open University Press, Buckingham, 1999) at 135, 169.

derstanding of the work required. The weekly one-page summaries allowed students regularly to set out in succinct form their responses to questions set, and I responded to these with qualitative feedback. In courses where weekly summaries were not required, each week students handed in a short written commentary which I read and returned with comments at the following class. The student commentary might be a two-sentence summary at the end of class as to the gist of what was covered, a statement of the most obscure point and/or the clearest point of the class, or a suggestion as to what difficult areas should be covered at the next lesson and how these could best be presented. In the seminars, I divided the students into small groups or pairs to discuss a set topic and to report back to the group as a whole. Such reporting might relate to matching exercises in which the students had to link together complementary sentences on two lists, or might cover the pros and cons of a debateable area of the law.

These activities addressed the reality that the student occupies a central role in the educational process.[20] It is ultimately what students do that determines whether changes in their understanding actually take place.[21] A course of learning should be designed to engage rather than engorge students: good teaching should mean that the student integrates knowledge and skills and makes them his or her own.[22]

The regular interchange that I had with my students in small-group classes, built upon the personal connections that I fostered, was in line with the philosophy that teaching should be a co-operative activity in which talk passes between teacher and students. In the words of Katz, one should teach as though students mattered.[23] The student voice should be listened and responded to with respect, and it has been recognised that affirming students' self-esteem is crucial to sustained learning.[24]

### *C. Humility*

The Hebrew word ענוה (hatznea) means humility or modesty, being cognisant of a spiritual force or good greater than one's own. Micah's focus on humility had two implications for my teaching: the need to recognise my own frailty and the need to respond to something greater than myself.

#### *1. Recognising personal limitations*

Teaching is a career that requires a great deal of the teacher in terms of emotional and intellectual energy. There are ongoing demands to acquire the best possible understanding of the subject-matter and to ensure that students can experience the best possible learning of this subject. Being the educational leader of a group of people, whether they be assembled in numbers in the hundreds or in small groups, is a test of courage, resilience, agility of mind and stamina. In the quest for doing the right thing in a kind manner, there was a danger of me forgetting my own needs and depleting my energies.

In attempting to address this issue, before each class I tried to set aside quiet time, to focus my thoughts and energies on the teaching ahead of me. In this way I tried to gather strength to be the kind of teacher that I was called to be, and to renew the enthusiasm that a teacher needs to bring to

20 Palmer, above n 3, at 31.

21 Ramsden, above n 9, at 131.

22 Palmer, above n 3, at 133.

23 J Katz *Teaching as Though Students Mattered* (Jossey-Bass, San Francisco, 1985).

24 Brookfield, above n 16, at 95.

teaching.[25] During discouraging times when, despite my best efforts, students were unresponsive or performed poorly, I tried to bear in mind that there were limits to what I could achieve with all the people in my class. I was called to accept that each person is on a unique path of life, and that I have to grant some students the right not to learn.[26]

*2. Responding to the greater being*

Humility assisted my teaching career by continually pointing away from my narrower preoccupations with self-interest and my human tendencies to take the easier path. Humility pointed towards my need to strive at all times for the life-enhancing qualities of integrity, trust and good faith. The effective teacher is, after all, required to be a mentor figure, modelling what is taught through his or her actions.[27]

Humility continually reminded me of how much I could learn from my colleagues and my students, each of whom had a unique contribution to make. Humility also reinforced for me that teaching is an unending journey of learning, about one's craft as a teacher and about one's subject-matter.[28] Palmer eloquently expressed the latter dimension when he remarked that "at the center of our attention is a subject that continually calls us deeper into its secret, a subject that refuses to be reduced to our conclusions about it".[29]

Responding to the greater being certainly did not require me to proselytise for one faith form or another. Indeed, when teaching some areas of the law I would have been hard-pressed to evangelise even if this was appropriate. I saw my role as a law teacher in a secular university as being to present matters in a balanced form with a view to encouraging informed debate and understanding. This approach was in line with my view that teaching should be geared towards developing critical thinking.[30] This quality is especially important in the teaching of law, where true understanding requires an appreciation of contesting viewpoints and an openness to alternatives.

Modern academics in New Zealand and elsewhere are now subject to powerful influences to devote more of their working time to research, so as to produce the publication "outputs" now seen to be necessary for career advancement. Humility reinforced my calling to serve my student community, and helped me make ongoing efforts to teach with credibility and authenticity in my fields.[31]

## III. Implications of Professional Teaching Principles for Judicial Practice

I was a Referee of the Disputes Tribunal for 19 years, including the last five and a half years as Principal Disputes Referee. The Tribunal hears civil cases up to a monetary limit which has increased over the years to the present level of $15,000 ($20,000 by consent). Since August last year I have exercised the duties of a District Court Judge, with civil and criminal jurisdiction.

25 Palmer, above n 3, at 90-91.

26 Brookfield, above n 16, at 162.

27 I Shor and P Freire *Pedagogy for Liberation* (Macmillan, South Hadley, Massachussetts, 1987) at 160.

28 KE Eble *Craft of Teaching* (Jossey-Bass, San Francisco, 1988) at 9.

29 Palmer, above n 3, at 105.

30 Brookfield, above n 16, at 20.

31 Ibid, at 134.

As occurred at the start of my teaching career, I approached my duties as Referee with enthusiasm but with no training in processes and procedures. I well remember the sense of trepidation and near-bewilderment which I felt during my early hearings of cases. I was required to dig deep into the skills and knowledge that I had gained as a law teacher, and into my own value-system. More recently, on my appointment as a District Court Judge, I received limited training and guidance, and I was keenly aware in my early court appearance of how much I had to learn.[32] During my years as a Referee, and now as a District Court Judge, I have had the opportunity to consider the links between the principles of professionalism in law teaching and those in judicial practice. I shall now reflect on how the three elements of my teaching practice resonate with judicial practice.

### *A. Justice*

New Zealand judicial officers are sworn to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[33] The judicial officer, whether Referee or Judge, has great power over the proceedings, and can have considerable impact on the lives of those who appear. It was therefore essential that I conducted my hearings in as open-minded and even-handed manner as possible.[34] As I soon discovered, this laudable objective faced challenges in the presence of inarticulate, long-winded, obsessive, close-minded and/or repeat disputants.

From the outset of my time as a judicial officer, I became aware that the key requirement of doing right was to follow fair and transparent procedures.[35] In the Disputes Tribunal, lawyers are not allowed to represent parties, and so disputants have to present their own case. An increasing phenomenon in the court system is the presence of self-represented lay litigants. It was therefore important for me to give lay parties in my hearings clear guidance as to the processes that were to be followed, so that people could have a greater sense of safety and confidence to do justice to their own position.[36]

For both the judicial officer and the disputant, the hearing process is a journey of discovery. Lay disputants are immersed in the realities of their dispute but have little notion of the relevant law or sometimes even the issues at stake. The judicial officer has little prior knowledge of the facts, apart from those which emerge from the file, but is required quickly to grasp these facts and then discern a path to their resolution.[37] It was therefore important for me to have at hand materials in the form of procedural guidelines and legal resources which I could use in the hearing. Where

32 "To the outsider, the newly appointed judge comes to the Bench fully armed, so to speak, equipped with a judicial philosophy and matching professional skills to discharge his judicial responsibilities. This vision of the new judge is, measured by my experience, a mirage." Hon Sir Anthony Mason, "Judicial Method", (paper presented to Judges' Conference, Nelson, March 2004).

33 Oaths and Declarations Act 1957, s 18.

34 "The right to a fair hearing in the courts is an elementary but fundamental principle of British justice" (*R v Burney* [1989] 1 NZLR 732, at 734, per Richardson J).

35 "The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice" (*Black v Taylor* [1993] 3 NZLR 403, at 412, per Richardson J).

36 "[T]he primary responsibility of the courts [is] to provide informed and just answers" (*Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, at 295, per Woodhouse P).

37 "[T]he evidence will provide ready answers to issues which at present appear, at least to a mortal mind, unusually difficult to define and determine" (*Sew Hoy & Sons Ltd v Coopers and Lybrand* [1996] 1 NZLR 392, at 408, per Thomas J).

for example a dispute related to the Fencing Act 1978, I would photocopy the relevant provisions and discuss these with the parties. Most people respond well to visual cues, and my use of the whiteboard was at times of great assistance in clarifying matters for the parties and me.

The end point of most Tribunal and Court proceedings is the decision of the judicial officer hearing the matter.[38] In a judicial decision, the judicial officer makes an assessment of the material relevant facts, the law that applies, the issues that emerge from the facts and the applicable law, and then proceeds to make findings on the key issues. As with my teaching, I wanted my hearing process to align with the culminating assessment.[39] It was therefore essential that I carefully gathered the material facts and applicable law with the parties in the hearing, clarified the issues with them, and then shared with them the embryonic findings that I was developing. In this way I could test the accuracy and validity of the decision that was emerging in my mind, allow the parties the opportunity of responding to my thoughts, and help ensure that the final decision and its elements would not be a surprise to the parties.[40]

### *B. Humanity*

For most lay disputants and litigants, the tribunal/court environment is an alien world, and parties appear for hearings with considerable apprehension. For lawyers, the hearing can represent the culmination of many hours of anxious effort, and for those appearing at or near the start of their legal career the hearing can be an ordeal. It was therefore incumbent upon me, as the leader of my tribunal or court, to foster and preserve a humane legal environment.

The achievement of this objective was always assisted by my regular use of people's names, respectful listening and courteous interchange. The judicial officer sets the tone of his or her court, and people will generally follow the role model set by the presiding officer. I have observed behaviour by judicial officers that is bullying, belittling and sarcastic, and seen that this behaviour did not reflect well on the officers concerned or assist the administration of justice. I have always been determined to facilitate an atmosphere in court that preserves human dignity and allows the participants to contribute in as open and constructive manner as is possible.

Preserving the humanity of litigation tends to be more challenging in the court environment, where (unlike in the Disputes Tribunal) proceedings are usually conducted by lawyers on behalf of their clients. In the summary criminal jurisdiction hearing-days, scores of people are faced with criminal charges or sentences and there is pressure on the judge to "process" all the cases on the list. I have observed that in this process the person facing the charge or sentence appears as a bewildered onlooker, often in a state of distress or even trauma as to what dire news is in store. I made it an inflexible rule on my part, that, at the end of each discussion with counsel, the prosecution or other key participants, I turned directly to the individual most concerned and explained at

38 In the Disputes Tribunal there is provision for the proceedings to end in an agreed settlement, and in the District Court there is increasing provision for the resolution of matters through judicial settlement conference.

39 "[T]he judge must explain why he has reached his decision. … Transparency should be the watchword" (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, at 377–8, per Henry LJ).

40 "Those with any knowledge of human nature who pause to think for a moment [are not] likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events" (*John v Rees* [1970] Ch 345, at 402, per Megarry J).

least briefly what is to happen to him or her.[41] By contrast, in civil cases it is not uncommon for the hearing to be conducted only in the presence of the judge and the lawyers, without the parties themselves. In the rarified atmosphere of legal argument, the challenge for me as judge was to remember the human realities of the parties in any decision that I reached.[42]

During the years of my judicial life, I also learnt the advantages of judicial deafness and blindness at times. Litigation is often fraught with intense human emotion, be the matter a small civil dispute or serious criminal activity requiring sentencing. I learnt that some human battles did not need to be fought by me, as where people displayed anger or hurt in a way that was not harmful to others.

The human dimension of judging required me to approach each party and disputed matter without prior assumption on my part. This lesson was especially important in responding to the diversity of New Zealand culture. It could not be assumed that all people from the same racial or ethnic background had the same cultural values or would have the same pattern of responding to conflict. I learnt of the importance for many people of saving face, especially for those from certain immigrant cultures.

Humanity also needed to be conveyed in the expression of my decisions. In the face of conflicts of evidence, I needed to recognise that people might not necessarily or consciously be telling untruths but were trying to make sense of their own world. My decisions needed to balance dignity, clarity and the human touch. Above all, my decision needed to be addressed to the person who stood to lose from the outcome.[43] That person, more than the successful party, needed to know the reasons for the decision. I had to convey to the loser that I had heard and considered his or her argument and then explain why I did not accept that position.[44]

Finally, humanity dictated that my judicial decision-making needed to be prompt. To help meet this goal, my decision making process took place largely during the hearing, as the key facts, issues, applicable law and tentative findings started to assemble.[45] My aim as a judicial officer was to deliver judgment at or shortly after the conclusion of the hearing. Promptness could promote better decisions in that I needed to retain a sense of the hearing in completing my decision, and this sense could fade as memories clouded and other commitments intruded. Promptness could also promote better reception of decisions and reduce costs and anxiety for the parties.[46]

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41 In *Police v Smith and Herewini* [1994] 2 NZLR 306, 328, Hardie Boys J did not think it right to disregard the considered evidence of the doctors tendered by the Crown, as "[t]hey, not we, must live with the consequences of our decision".

42 In *Rodgers v Rodgers* (1985) 1 FRNZ 539, at 541, Woodhouse P noted that the significance of a family transaction embarked upon during a marriage "ought not to become the subject of some arid examination by use of legal microscopes".

43 "It was important in the way the case was conducted in court and the way that the judgment was given, that the loser was assured that he had got a fair, honest and careful hearing" (per Sir Clifford Richmond, interview 23 February 1994).

44 This is expressed as providing the LOPP (losing party's position) and the FLOPP (flaw in the losing party's position) (JC Raymond, "The Architecture of Argument" (2004) 7 *The Judicial Review* at 44).

45 "It is important for a trial judge to use the hearing for the purpose of working towards a reasoned decision rather than pick up the pieces and try to stitch them together after the hearing has concluded" (Mason, above n 32).

46 "One way of avoiding the dangers associated with delay is to adopt a routine practice of delivering unreserved judgments. It is a technique with which famous names can be associated" (*Hadid v Redpath* [2001] NSWCA 416, per Heydon J).

### *C. Humility*

The start of my judicial career in the Disputes Tribunal was a life-changing experience. I quickly realised that I was faced with many realities beyond my knowledge and experience. I had to come to terms with these realities quickly and decisively without the luxury of extended time for analysis.[47] My recent experience sitting in busy criminal courts, hearing scores of cases each day, underscored the demand for quick, effective judicial responses. In some cases the answers to the questions posed were clear to my mind but in other cases the merits were finely balanced. I knew that the decisions that I gave would have real consequences for the lives of those involved and that some people would be unhappy with the results.[48]

In the face of these daunting realities, the safest path for me was the path of humility. As with teaching, I needed to begin each hearing day with a quiet time for focus and reflection, so as to gather calmness and strength. As the hearings commenced, it was important for me to approach each case with genuine openness to what I could learn from the parties or counsel themselves and the evidence that they presented. This openness required me to be responsive to the parties or counsel through to the end of the hearing, even where the merits of the case were plainly heading in a particular direction. I needed to recognise that I brought to my judicial role my own limitations, subjective views and preferences, and that there would be a constant struggle to prevent these personal qualities from impeding a just resolution of the cases before me.[49] Humility directed me to be open to what guidance I could obtain from material directly relevant to each case, and more generally to training materials and courses that became available. I also needed to have the humility to ask questions, whether of the parties or counsel in court proceedings, or of my colleagues outside of court.

Humility also assisted me in satisfactorily concluding matters requiring my decision. I realised that I was required to direct my fullest efforts to the case at hand, but that my answer was not necessarily the perfect or the only answer that could be produced.[50] Particularly in high-volume tribunals and courts, the capacity for error is an ever-present hazard. It was important for me to recognise this reality, do my best and then let go of the case at hand. The appeal process was for me a cause of some concern, especially in my early years as a judicial officer. But humility helped me to accept that appeal rights are a necessary, valuable and potentially educative part of the justice system, and that I should not invest emotional energy in worrying about the progress of appeals from my decisions.

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47 "Judges are not intended to be automata and can only do their best to adjudge" (*Fleming v Securities Commission* [1995] 2 NZLR 514, at 525, per Cooke P). In *M v Y* [1994] 1 NZLR 527, at 537, Hardie Boys J observed that "Judges are, fortunately, human".

48 "Different judges will have different views, and at least one party is likely to be dissatisfied" (*Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24, at 45, per McKay J).

49 "[W]hat a judge will do is inevitably influenced by his background, his training, and above all his nature" (*Re R* [1974] 1 NZLR 3 99, at 405, per McCarthy P).

50 In *Attorney-General for UK v Wellington Newspapers* [1988] 1 NZLR 12 9, 168, at 170, Cooke P noted that, in the case at hand, "a range of opinions is genuinely open", and replied to those who say "that the answers depend on the philosophy of the individual judge, I can only reply that one must do the best one can to be objective".

## IV. Conclusion

The laudable goal of professionalism, which has been at the heart of the Waikato Law School during its first 20 years, is an essential element of constructive legal endeavour, whether in the academic or the judicial sphere. The precise way in which professionalism is applied in the law classroom or the court will be shaped by the personality of the law teacher or the judicial officer. In my own experience, I have found the three principles of justice, humanity and humility to be my surest supports and guides. All three elements point towards the key feature of professionalism, namely, service to other human beings. The imperative to do right to those who appear, whether as students or litigants, requires the teacher or judge to provide a safe environment through clarity, structure and a coherent path to the final outcome. The duty to act with humanity requires the teacher or judge to recognise, as fully as possible, that those who are entrusted to one's care, for however short a time, are fellow-human beings deserving of respect and dignity. The call to remain humble allows the teacher or the judge to be continually open-minded, to reach for truths beyond his or her own limitations, and in this way to draw strength for the tasks at hand.

I conclude with the waiata that I sang at my swearing-in ceremony as a judge, and which expresses the model of professionalism which I have tried to pursue in my teaching and judicial life. The waiata asks the question: "Who will care for our marae and traditions?" And there comes the answer: "Let it be what is right, let it be truth, let it be love".[51]

51 Mā wai rā e taurima te marae i waho nei? Mā te tika, mā to pono, me to aroha e.