

NEW ZEALAND'S NATIONAL LEGAL IDENTITY

BY SEAN BALDWIN LL.B. (Hons)(Cantuar)

Barrister and Solicitor

In 1983 in an extra-judicial address to the 22nd Australian Legal Convention,¹ Sir Robin Cooke suggested:

It would seem that a distinctive Australian identity is being consciously fostered. I have already confessed that the same applies in New Zealand, although so far it has been less overt.

The "distinctive identity" referred to was the identity of the legal systems that had developed in Australia and New Zealand by 1983. It is the purpose of the present paper to acknowledge the debt owed by New Zealand law to the influence of other, in particular Commonwealth, jurisdictions, but at the same time to emphasise its ultimately indigenous character; to discuss the nature of this indigenous New Zealand legal identity as it has evolved in 1987 (rather more overt, it would seem, than in 1983); and to argue from this that the final right of appeal to the Privy Council should be abolished for New Zealand in the near future.

New Zealand's courts are still bound by decisions of the Privy Council and although not bound by decisions of the House of Lords, they "are always slow and reluctant to differ from them."² Decisions of the United Kingdom Court of Appeal, the Supreme Court of Canada, and the High Court of Australia also command considerable respect here. However what this respect means in practice seems to have changed significantly in the last few decades. New Zealand law no longer defers blindly as it seemed to do in the past to powerful overseas authorities. It is still very ready to learn from those authorities, but it seems fair to say that New Zealand law is now shaped primarily not by a desire to conform with what is done overseas but rather by a judgment on the part of New Zealand's authorities as to what is required for New Zealand.³

To this extent New Zealand law may be said to be indigenous⁴: not in the sense that it is completely different in substance from other jurisdictions, but rather in the sense that it is as it is because it is seen by New Zealand's authorities as best for New Zealand. It is not indigenous in the sense that the laws of other jurisdictions have not been *influential* in shaping it, but rather in that they have not been *decisive*. The judgment of New Zealand's judiciary and legislature is what has been decisive.

This indigenous character is a matter then of a state of mind, an attitude developed by New Zealand's lawmakers that New Zealand must decide for

¹ "Divergences — England, Australia and New Zealand" [1983] N.Z.L.J. 297.

² Per Cooke J. in *Hayward v. Giordani* [1983] N.Z.L.R. 140 at 145. And see Sir Robin Cooke's address (referred to in note 1) at p.297.

³ See for a prime example of this trend towards the "cutting of the colonial tie" the address referred to in note 1 at pp. 297-8, where Sir Robin Cooke discusses the difference in the New Zealand courts' approach to the deductibility of notional tax in assessing damages between *Smith v. Wellington Woollen Manufacturing Co. Ltd* [1956] N.Z.L.R. 491 and *North Island Wholesale Groceries v. Hewin* [1982] 2 N.Z.L.R. 176.

⁴ This is how Cooke J. has expressly described both our administrative law (*Budget Rent-A-Car v. A.R.A.* [1985] 2 N.Z.L.R. 414 at 418) and our law of negligence (*Brown v. Heathcote C.C.* [1986] 1 N.Z.L.R. 76 at 79).

itself what is appropriate for it. The law is always in a state of flux. It must constantly adapt to the changing demands of the society it serves. Where changes are being made now in New Zealand, they are being made not on the basis of what the United Kingdom authorities have decided for the United Kingdom, Australia for Australia, or Canada for Canada, but on the basis of what New Zealand has decided New Zealand needs.

The attitude of New Zealand authorities then is now one of assertiveness, of independence. But this attitude, it must be repeated, is not reflected in wholesale substantive divergence from other jurisdictions. It is not the purpose of this paper, therefore, to attempt to establish such wholesale divergence. Much of the law of other jurisdictions is of course still appropriate to New Zealand. The assertiveness evident in New Zealand law consists simply of an increased readiness to diverge where this is seen as desirable. It has not entailed throwing into question every aspect of New Zealand law as inherited from the United Kingdom or elsewhere. But it has naturally entailed some notable realignment.

In significant areas of equity, tort, constitutional and administrative law, crime and contract, for instance, New Zealand has seen fit to differ from one or more of the other main Commonwealth jurisdictions. It has done so because the law in those jurisdictions has not been regarded by New Zealand authorities as commensurate with New Zealand's requirements. Indeed in some cases it may not even have been appropriate for those other jurisdictions. But from New Zealand's point of view that has not been relevant. All that has been relevant is that it hasn't been right for New Zealand.

Thus in *Hayward v. Giordani*⁵ the New Zealand Court of Appeal expressed (obiter) clearly different opinions from those expressed by the House of Lords in *Pettitt v. Pettitt*⁶ and *Gissing v. Gissing*⁷ with respect to the conditions necessary for the imposition of a constructive trust in de facto property disputes. The Court suggested that such a trust may be imposed in the absence of common intention in fact. In *Pasi v. Kamana*⁸ Cooke J. went so far as to suggest that the test for a constructive trust in such a case is simply whether "a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property."⁹ Evidently the Court's view of the de facto marriage partnership as it stands in New Zealand differs from the view that English lawmakers¹⁰ hold as regards the English situation.

In *Heathcote County Council v. Brown*¹¹, the Court of Appeal imposed liability in negligence on a public authority for causing purely economic loss not involving danger to health or safety. The Court decided that New Zealand's statutory framework permitted this where it hadn't in the United Kingdom,

⁵ [1983] N.Z.L.R. 140.

⁶ [1970] A.C. 777.

⁷ [1971] A.C. 886.

⁸ Unreported judgment, 28 October 1986, C.A.

⁹ At p.4 of Cooke J.'s judgment.

¹⁰ Not just English judges, but the English Parliament too, and indeed the Parliament primarily: the English courts' view in this area is largely determined by their reluctance to interfere in a field they see as properly the province of the Legislature. In *Burns v. Burns* [1984] 1 All ER 244, for instance, May L.J. stated at p.256: "In my view, as Parliament has not legislated for the unmarried couple as it has for those who have been married, the courts should be slow to attempt in effect to legislate themselves."

¹¹ [1956] 1 N.Z.L.R. 76.

according to the House of Lords in *Anns v. Merton London Borough Council*¹² and *Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson & Co*^{12a}. At a less technical level the Court appears to have taken a different view from the House of Lords as to the appropriate balance between the need to make public authorities accountable to the public they serve and the risks posed by the proliferation of certain types of negligence action in the shape of what Mustill L.J., in a different context, has called "an instinct on the part of the defendant to such an action to play for safety"¹³.

In *Taylor v. New Zealand Poultry Board*¹⁴, Cooke J. collated a series of his own dicta from previous cases suggesting (obiter) that in New Zealand there may be certain "fundamental common law rights" which "lie so deep that even Parliament could not override them." This is in sharp contrast to the black-letter positivist approach to statute law adopted by the House of Lords in *British Railways Board v. Pickin*¹⁵. Perhaps, however, Cooke J. considered that the greater influence of the Cabinet over the legislature in New Zealand than in the United Kingdom or indeed any other country, both because of its relative size to New Zealand's legislature and because New Zealand doesn't have an Upper House in Parliament, meant that New Zealand required a counterbalance to that power in the form of a judiciary prepared to challenge blatant injustice on the part of the legislature.

In administrative law generally, both judicially and extrajudicially, the New Zealand Court of Appeal¹⁶ has shown a greater willingness than the leading courts in other jurisdictions to challenge the exercise of administrative power by administrative authorities. In its view of the scope of the grounds for review of delegated legislation¹⁷; the nature of the requirement of reasonableness in administrative action¹⁸; the scope of the requirement of fairness in natural

¹² [1978] A.C. 728.

^{12a} [1985] A.C. 210.

¹³ In *Wilsher v. Essex A.H.A.* [1956] 3 All E.R. 801 at 810.

¹⁴ [1984] 1 N.Z.L.R. 394 at 398. See for comment by John Caldwell on the decline of "the influence of the black letter positivist approach to law over the New Zealand judiciary" [1984] N.Z.L.J. 357 and [1957] N.Z.L.J. 221.

¹⁵ [1974] A.C. 765.

¹⁶ Extrajudicially, of course, it has been the individual members of the Court of Appeal, in their private capacity, and not the Court as a whole, who have expressed these views.

¹⁷ In *N.Z. Drivers' Association v. N.Z. Road Carriers' Association* [1952] 1 N.Z.L.R. 374, Woodhouse P. and Richardson J. in their dissenting judgment said at p. 382: "When attempting to assess regulations in the context of economic stability the significance and importance of other national interests at stake cannot of course be ignored." This would suggest that the Courts are in effect taking into account the merits or the reasonableness of some delegated legislation in assessing its legality. Compare Lord Hodson's apparently stricter approach in *McEldowney v. Forde* [1971] A.C. 632 at 643: "The question may be put in this way — is the whole regulation too vague and so arbitrary as to be wholly unreasonable" (not, that is, merely unreasonable on balance).

¹⁸ See Sir Robin Cooke, "The Struggle for Simplicity in Administrative Law" in *Judicial Review of Administrative Action in the 1980's*, Taggart (ed.), Oxford, 1986. See also *Van Gorkom v. Attorney-General* [1978] 2 N.Z.L.R. 387, where the Court of Appeal, while purportedly applying the strict test of unreasonableness laid down in *Secretary of State for Education and Science v. Tameside M.B.C.* [1977] A.C. 1014 (recently restated by Lord Diplock in *C.C.S.U. v. Minister for Civil Service* [1984] 3 All E.R. 935 at 950-1, and reaffirmed last year by the House of Lords in, inter alia, *Puhlhofer v. Hillingdon LBC* [1986] 1 All E.R. 67) in fact seemed to apply a slightly less rigid test. The decision made as to differential rates of pay between men and women doesn't really seem in 1978 to have been so unreasonable that no responsible body could have made it.

justice¹⁹; and the power of the courts to review errors of law²⁰ and fact²¹ made by administrative authorities, the New Zealand courts are arguably rather more activist than their United Kingdom, Australian or Canadian counterparts. This may, as regards high governmental authorities, be attributable in part to the fact already mentioned of the "unbridled power" of the Executive in New Zealand's constitutional system.²² More generally, this activism may be attributable to the view on the part of New Zealand's leading judges that fairness, reasonableness and legality in administrative action are considerations of paramount importance and problems with theoretical notions like the separation of powers, while also important, must in the final result give way to the need for accountability in matters directly affecting the rights of citizens.

In criminal law too New Zealand has seen some notable developments in recent years. In *Civil Aviation Department v. MacKenzie*²³, for instance, it was held, following a Canadian authority²⁴ and despite a lack of directly supportive English or Australian authority, that, while absence of fault was a defence to "public welfare regulatory offences" the burden of proving it lay on the defendant. In *Tomkins*²⁵ it was apparently held that a secondary party may in New Zealand be liable for manslaughter for aiding and abetting or prosecuting a common unlawful purpose with a principal who is guilty of murder, only if the secondary party foresaw that death short of murder may ensue from the actions of the principal. It seems to be established in the United Kingdom²⁶, Canada²⁷ and Australia²⁸, however, that an accomplice in such a case may be liable for manslaughter if he merely knew that the principal was carrying a weapon and therefore must have foreseen some harm, although he may not have foreseen death.

In both *MacKenzie* and *Tomkins* the New Zealand Court of Appeal made decisions counter to or at least not supported by strong overseas authorities. In *MacKenzie* it decided that, public welfare offences not being true crimes, liability in respect of them may justifiably be presumed in the absence of evidence to the contrary. In *Tomkins*, on the other hand, homicide being the truest of crimes, the Court was not prepared to impose liability for it

¹⁹ See Sir Robin Cooke, "The Struggle for Simplicity in Administrative Law" (see note 18). And see *Daganayasi v. Minister of Immigration* [1980] 2 N.Z.L.R. 131, where Cooke J. suggested at p.149: "Fairness need not be confined to procedural matters. . . Standing back and looking at the whole case in perspective, . . . one may ask whether [the appellant] has been treated fairly."

²⁰ *Bulk Gas Users Group v. Attorney-General* [1983] N.Z.L.R. 129.

²¹ *Daganayasi v. Minister of Immigration* [1980] 2 N.Z.L.R. 131 at 145-9 per Cooke J., whose decision was in part based on the ground of mistake of fact. Compare the arguably more tentative dicta of Scarman L.J. and Lord Wilberforce in *Secretary of State for Education and Science v. Tameside M.B.C.* [1977] A.C. 1014.

²² See, for instance, the caution expressed by Cooke J. in *Brader v. Attorney-General* [1981] 1 N.Z.L.R. 73 at 78: "It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function. It is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive". And see to like effect McMullin J.'s dicta at p.85.

²³ [1983] N.Z.L.R. 78.

²⁴ *R v. City of Sault Ste Marie* (1978) 85 D.L.R. (3d) 161.

²⁵ [1985] 2 N.Z.L.R. 253. And see too *Hamilton* [1985] 2 N.Z.L.R. 245. In *Tomkins* see especially p.256, lines 24-8.

²⁶ *Betty* (1963) 48 Cr. App. R. 6; *Reid* (1975) 62 Cr. App. R. 109.

²⁷ *Kent* (1986) 27 C.C.C. (3d) 405; *Cluett* (1985) 21 C.C.C. (3d) 318 (S.C.C.).

²⁸ *Markby* (1975) 140 C.L.R. 108; *Varley* (1976) 51 A.L.J.R. 243.

unless the accused was genuinely morally guilty of it²⁹ — that is, unless he foresaw homicide. Neither decision could be made in the abstract. Each entailed the balancing of a number of factors: prevailing public attitudes to the crimes concerned, the purposes of the respective statutory provisions involved and simple considerations of justice in respect of the accused. They were decisions for New Zealand conditions.

The attitude of assertiveness that has established New Zealand's indigenous legal character has been apparent in the work of the legislature as well as the courts. In following an Australian lead by passing the Fair Trading Act 1986 the New Zealand Parliament took a step which will have major ramifications on and indeed render redundant much of the law of negligent mis-statement. In particular s.9 of the Act has swept aside, in the context of trade, the requirement of actual negligence, which is essential to found liability at common law for mis-statement outside the field of contract. And s.9 has left the number of people to whom a person making such a mis-statement may be liable unlimited by reference to a concept like duty of care. It is hard to envisage such a sweeping change being implemented in the United Kingdom. Nevertheless the Act has been passed, apparently in the belief that the interests of the New Zealand consumer warrant it even at the expense of the large body of professionals who may conceivably be seriously affected by it.

In the field of contract too the legislature has made some radical changes to the common law. With the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, the Credit Contracts Act 1981, and the Contracts (Privity) Act 1982, the New Zealand legislature has largely done away with an often very complex and intricate case law regime on the topics affected. It has been suggested that this very complexity and intricacy, while tedious to work through, nevertheless did ensure that there was a solution for virtually every conceivable case that may arise.³⁰ General little-qualified rules such as that laid down in s.6(1) of the Contractual Remedies Act may place the comprehensive coverage of conceivable contingencies in jeopardy. However the legislature has clearly decided that the advantage of clarity of exposition that comes with codification outweighs this and other potential hazards.

These examples provide powerful evidence of the assertive attitude New Zealand's lawmakers have developed towards their lawmaking. Their prime concern seems now to be to make law that they see as serving New Zealand's needs. They have as a consequence created a distinctive New Zealand legal identity.

The most distinctive characteristic of this identity, it is submitted, is its simplicity. Sir Robin Cooke has suggested, for instance, that New Zealand's administrative law may now be summed up in the requirement that public

²⁹ In line with the general principle stated in *Howe* [1982] 1 N.Z.L.R. 618 at 623: "The New Zealand courts, we think, subscribe strongly to the conservation of mens rea as a cardinal requirement of the criminal law. In other words, there must normally be true moral blameworthiness before people can be convicted of crime." It is also in line with the view expressed by the Criminal Law Reform Committee in its Report on Culpable Homicide at p.27 that the law of involuntary manslaughter as it stands is defective in that "it fails to equate liability with culpability".

³⁰ Burrows, "The Contractual Remedies Act 1979" (1980) 1 *Canta L.R.* 82.

authorities act in accordance with law, fairly and reasonably.³¹ New Zealand's law on a duty of care in negligence seems now to be embodied in the simple two-fold test enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*³². The test proposed by Cooke J. in *Pasi v. Kamana* for the imposition of a constructive trust is likewise notable for its simplicity. And, as already mentioned, provisions like s.6 of the Contractual Remedies Act, s.6 of the Contractual Mistakes Act³³ and s.9 of the Fair Trading Act contrast starkly with the vast complex of rules that constitute the common law on misrepresentation, mistake and mis-statement respectively.

The simplicity of much of New Zealand's law, however, does not necessarily entail that the task of the New Zealand judge in applying that law is simple. It means that the general rules he is required to apply in a particular case are clear and easily stated. But more often than not their application is extremely difficult in practice. Precisely because the rules are so broad, their application in an individual instance often involves a considerable degree of value judgment, which judgment must necessarily vary somewhat according to the values of the judge. How much easier it must be, for instance, for a judge to decide whether or not an administrative action is unreasonable where "unreasonable" is closely defined as "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"³⁴, than where it simply means "unfair"³⁵. How much easier to determine whether a common intention in respect of their joint ownership of property evidenced by financial contribution to the purchase of that property was in fact formed by de facto spouses³⁶ than to ask oneself whether a reasonable person in the shoes of a claimant in a de facto property dispute would have understood that his or her efforts would naturally result in an interest in the property.³⁷ How much easier to decide

³¹ "The Struggle for Simplicity in Administrative Law" — see note 18. This is superficially similar to the view of Lord Diplock in the *C.C.S.U.* case that the three grounds for judicial review are procedural injustice, illegality and irrationality. But in New Zealand review of illegality seems to entail an examination of a broader range of issues than in the U.K., and the requirement of unreasonableness is less stringent than irrationality and blends into the requirement of fairness — see notes 17-21.

³² *Brown v. Heathcote CC* [1986] 1 N.Z.L.R. 76 at 79, per Cooke J. The High Court of Australia, on the other hand, has rejected this principle-based approach in *Sutherland Shire Council v. Heyman* (1985) 59 A.L.J.R. 564, where Brennan J. said at 584: "The law should develop new categories of negligence incrementally and by analogy with established categories rather than by extending a prima facie duty of care restrained only by indefinable considerations of the duty or the class to whom it is owed." The House of Lords itself now seems rather dubious about the *Anns* test too — see *Peabody Donation Fund (Governors) v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 at 240 per Lord Keith; and *The Aliakmon* [1986] 2 W.L.R. 902 at 912-4 per Lord Brandon.

³³ At least as it has been liberally interpreted by the courts, creating in effect, some would say, a simple, unqualified rule that if a contract is induced by mistake it is voidable — see *Conlon v. Ozolins* [1984] 1 N.Z.L.R. 489; *Engineering Plastics v. Mercer* [1985] 2 N.Z.L.R. 72.

³⁴ The test laid down by Lord Diplock in the *C.C.S.U.* case (and applied in a first instance decision in New Zealand last year: *N.Z.I. Financial Corporation v. N.Z. Kiwifruit Authority* [1986] 1 N.Z.L.R. 159).

³⁵ The test that Sir Robin Cooke suggested in "The Struggle for Simplicity in Administrative Law" may be applicable in New Zealand, and which the Court of Appeal in *Van Gorkom v. Attorney-General*, in practice, seemed to apply.

³⁶ The test as it seems to stand in the U.K. at present — *Burns v. Burns* [1984] 1 All E.R. 244.

³⁷ The test proposed by Cooke J. in *Pasi v. Kamana*.

a negligence case when previous negligence cases on or near the point are binding authority than when they are mere instances of the application of a general principle, to which principle the judge must ultimately refer himself.³⁸

And yet, at the same time, how much easier it must be for an aggrieved but not particularly wealthy individual to challenge the might of a government department or any other large administrative body if all he or she must prove is that that body acted unfairly; for a deserving spouse to receive some reward for his or her contribution to a *de facto* relationship if all he or she must establish is that such reward would be only fair in all the circumstances; and for a judge in a negligence case to work round difficult prior decisions of a superior tribunal in order to achieve a just result for a plaintiff if all that judge need conform to is a general principle or analysis which is itself simply designed to be “helpful in determining whether it is just and reasonable that a duty of care of a particular scope was incumbent upon the defendant.”³⁹

General principles may be hard to apply in practice, but based directly as they are on broad notions of justice they may well in the end achieve that justice more readily than a case by case approach to law which gradually divorces itself from the ideals which inspired the first in a series of decisions, in the name of binding authority.

The apparent concern with simplicity in New Zealand law, then, may well be largely motivated by a preoccupation on the part of New Zealand's lawmakers with the achievement of practical justice in individual cases. The discretion afforded to judges by the breadth of many of the rules they must apply serves this end.

The achievement of practical justice moreover is not merely a matter of achieving a fair result between persons who have decided to come to court. It also entails making the law more accessible to complainants who may have traditionally been frightened off by the image of the law. The simplification of the law serves, to some extent, to demystify it in the eyes of laymen and as such promotes this accessibility.

Furthermore, simple principles, being directly based as just noted on broad notions of justice, are more readily related to those notions of justice than more specific rules which have only a tenuous link to justice. As such, broad principles may engender more respect from the layman than apparently technical and arbitrary rules. The law must not appear an ass — its simplification helps in this respect.

The simpler the law the clearer its connection with justice then. And the clearer too its rational integrity. The internal coherence or integrity of the law is more readily perceived when it is reduced to its basic principles than when those basic principles are obscured by the mass of intricate, detailed rules that have evolved in the case by case development of the law over centuries. Simplicity thus also helps to engender respect for the law from the layman by demonstrating more clearly in his eyes the *raison d'être* of the various

³⁸ See for instance the judgment of Woodhouse P. and Ongley J. in *Meates v. Attorney-General* [1983] N.Z.L.R. 308 at 334: . . . the presence or absence of a “business or professional element” should be regarded as but a single instance of a test in those particular situations where it has actual relevance. And . . . the wide and correct question to ask is whether there is *prima facie* a sufficient relationship of proximity or neighbourhood which indicates the presence of a duty of care; and if there is, then whether there are any considerations which ought to negative it or limit its scope.”

³⁹ *Brown v. Heathcote C.C.* at p.79, per Cooke J.

interconnecting branches of the law and thereby of the law as a unified whole.

In addition, insofar as simplicity reveals the fundamentally rational character of the law it behoves the makers of that law to establish a rational basis for changes they make to it. Insofar as the law is demonstrably a coherent system of broad principles rather than an apparent hotchpotch of authorities intermingled with ad hoc statutory rules, change in the law must be made in accordance with those principles. Lawmakers must be more accountable to the layman, and indeed to other lawyers, for the modifications they propose to make to the law when the broad issues involved in those modifications are clear than when they are lost in a vast complex of technicalities.

This trend towards simplicity suggests that New Zealand law is moving much closer than the law in other jurisdictions to embodying the spirit of the great English reforming judge Lord Denning's approach to law. Lord Denning too was primarily concerned with the achievement of practical justice at the expense if need be of legal pedantry; the promotion of the accessibility of the law; the promotion of respect for the law; the rationalisation of the law and the increased accountability that accompanies such rationalisation. But a criticism often levelled at Lord Denning, and one that may perhaps equally be levelled at the New Zealand Court of Appeal at the moment, was the degree of lawmaking by the judiciary relative to the legislature that his views entailed. His activism was seen by some as overstepping the proper boundaries of the judge's role. In *Duports Steel Ltd v. Sirs*, for instance, Lord Scarman said, in support of a policy of judicial restraint:⁴⁰

... the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right, (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.

In reply, one could argue that the ultimate goal of law is to do justice between parties to a dispute. If judges are to retain their independence by refraining from giving a just result in a given case because the law as it stands does not provide such a result, they will undoubtedly not be doing justice between the parties to the case. If on the other hand they do interfere and do justice in such a case, thereby flying in the face of the prevailing law, at least there is the possibility that Parliament will accept what they have done as right; or that the people generally will see the judges as their ultimate constitutional protectors, be happy with a just decision, and not be too worried about questions of Chancellor's foot justice and so on⁴¹ — in which case

⁴⁰ [1980] 1 All E.R. 59 — cited in Hodder [1983] N.Z.L.J. 329 at 333. To like effect, note the difference between the view of Cooke J. in *Pasi v. Kamana* and that of May L.J. in *Burns v. Burns* as to the appropriateness for "judicial legislation" of the area of constructive trusts in respect of de facto property rights. For May L.J.'s opinion, see note 10. In *Pasi*, Cooke J. said, at p.4 of his judgment: "Whether New Zealand needs [a statute in this area] is debatable; it is a field in which perhaps justice may be better achieved in the end by proceeding cautiously on a case by case basis."

⁴¹ See Caldwell [1984] N.Z.L.J. at 359 with regard to Cooke J.'s remarks about "fundamental common law rights": "it is probably true that most lay persons already regard the Judiciary as the ultimate protector of their rights and could therefore be expected to applaud Cooke J.'s remarks."

Parliament won't have a mandate to restrict the judges' powers. In either case justice will be done where it would not have been had the judges shown restraint. Alternatively, Parliament may in fact decide to restrict the judges' powers. But in that case we won't be any worse off than if the judges show restraint in the first place. All that will have happened is that Parliament, rather than the judiciary itself, will have restricted the judges' powers. But what is significant is the fact that those powers are restricted, not which branch of government happens to restrict them.

This is not to suggest that judges should become revolutionaries and apply their Chancellor's foot justice in every case. It is simply to acknowledge that at the heart of our legal system, and indeed any legal system of optimum efficacy (if efficacy is determined in this context by the proportion of just decisions made to cases decided) lies the responsible judge.

Words by their nature are to a certain extent uncertain. They have, as has often been said, a core of certainty and a penumbra of uncertainty. Rules, therefore, cannot be framed so as to exclude altogether the possibility of a judge giving them an interpretation not intended by their framers. "Hard cases" must inevitably arise occasionally. And the judge must be left with a discretion to determine how far to go in "hard cases". He must exercise that discretion responsibly. As a check to impetuosity or ill-considered and undesirable change, he must regard change as *prima facie* undesirable and begin therefore with a presumption in favour of the status quo. Caution, that is, must be exercised. And insofar as judicial restraint merely implies caution, it is an admirable attitude to adopt.

But caution does not mean intransigence. Insofar as judicial restraint implies something more than mere caution — insofar as it entails an irrebuttable presumption in favour of the status quo — it is undesirable and an abdication of the judge's now widely-accepted role as lawmaker. What must never be forgotten in this context is that democracy is not pure. Parliament does not and can not reflect the wishes of any body that can realistically be called "the people". Parliament must be paternalistic in its lawmaking and do what it sees as good for the country often in spite of much of the country's wishes. Ultimately, the argument that Parliament must be the sole lawmaker because we live in a democracy and Members of Parliament are our only elected lawmakers, is specious. The choice is in fact not between democracy and paternalism but rather between the paternalism of Parliament and that of the courts. Clearly in some fields Parliament, with its greater access to specialist knowledge and its more flexible procedures for decision-making, is a more appropriate body to decide difficult questions. But the courts are quite capable of making decisions as to what the law should be in many other areas. They have adequate evidence to make informed decisions. And with pleas by the like of Sir Ivor Richardson for New Zealand counsel to be less "reluctant to explore wider social and economic concerns"⁴² in putting the case for their clients, the evidence the courts will have to work with in the future seems likely to permit them to make difficult decisions over an even broader range of subjects than they have thus far. The courts too are independent, impartial, not influenced by political motives which have nothing to do with the desirability of legal changes being considered but everything to do with a Member of

⁴² In an address "Judges as Lawmakers" (1986) 12 Monash L.R. 35, 47 — cited in Caldwell [1987] N.Z.L.J. 221.

Parliament keeping his or her seat. Moreover Parliament cannot deal with everything, or at least not promptly. And in many cases a legal rule cannot be laid down in precise statutory form. The field in which judicial activism may appropriately make its mark is wide, then. It must not be overly restricted, particularly by the judges themselves.

As de Smith has pointed out⁴³, the concept of separation of powers need not, and in common law jurisdictions does not, entail that powers which are analytically different in *quality* be not combined in the one body. What it requires is that too large a *quantity* of power not be vested in one body. A judicious balance must be maintained between the quantity of power possessed by each of the three organs of government. In New Zealand the activism evident in the judiciary seems to be merely greater in degree and not actually different in kind from the activism of other Commonwealth courts. And it is strongly arguable that such a greater degree of activism is desirable in New Zealand to balance the quantity of power held by the Executive by virtue of its influence over the legislature. It is strongly arguable too that however great the degree of activism ought to be, that must be a problem for indigenous New Zealand authorities to resolve. The balance of power that must be judiciously maintained can hardly be so maintained by an authority without a close appreciation of New Zealand conditions. The Judicial Committee of the Privy Council, however, is just such an authority,⁴⁴ and yet a final right of appeal to it on significant questions of law remains open to a New Zealand litigant. The merit of such a final right of appeal is thus very doubtful. The Privy Council being a body composed predominantly of English judges (albeit distinguished), it can hardly be said to have a sufficient association with New Zealand's political and constitutional character to make the judgment on that character which is necessary to the determination of just how activist New Zealand courts should be: just how much, that is, New Zealand courts ought to be involved in the lawmaking process.⁴⁵

Even if the Judicial Committee could tell how far New Zealand courts should go in this respect, they still wouldn't have sufficient acquaintance with New Zealand social conditions to make a realistic judgment as to the substantive law an activist judiciary ought to make for New Zealand. In the fields already discussed, this is particularly obvious. The Judicial Committee could hardly

⁴³ "Constitutional and Administrative Law" (4 ed.), Harry Street and Rodney Brazier (eds.) 1981, Penguin Books, p.31.

⁴⁴ J.F. Northey in [1983] N.Z.L.J. 229 stressed the similarity between our legal systems (N.Z.'s and the U.K.'s, that is). But while their formal structure is certainly similar insofar as they each have an unwritten constitution, New Zealand's Executive holds considerably more power over our Legislature than is the case in England. We don't have an Upper House and we have a Cabinet larger in proportion to the Legislature than England. Professor Northey also seems to over-emphasise the cultural similarities between the two countries. New Zealand and England are both multiracial societies, but the races concerned in each case are of course different. New Zealand nowadays has stronger ties with the U.S.A. than England in many contexts.

⁴⁵ See, for example, Sir Thaddeus McCarthy's judgment in the *Bulk Gas* case at p.139: "It may well be that Lord Diplock's views should prevail in New Zealand too, but that raises important issues of judicial policy relating to the proper boundaries of judicial and legislative functions within the State. For my part I prefer not to canvass the precise application of *O'Reilly* until a situation arises when it is necessary to decide that for the disposal of the case before the Court." Sir Thaddeus, then, seems more cautious than Cooke J. about the degree of judicial lawmaking involved in this context, but he is clear that whether it is desirable or not is a question for the New Zealand authorities to decide for themselves.

be expected to accurately assess the prevailing attitudes in New Zealand towards the de facto marriage partnership, which are a crucial factor in determining the appropriate test for the imposition of a constructive trust here; the prevailing attitudes towards public welfare offences and homicide, so pertinent to the issue of the appropriate criteria for liability for those offences; or the relative weights of the variety of social and historical factors that have defined the limits of New Zealand's law of negligence.⁴⁶

Against this, and in support of the retention of the Privy Council as a third tier in our appellate system, Professor J.F. Northey has argued:⁴⁷

Through the Judicial Committee we have access to the very best lawyers practising in a community almost twenty times our size. It is no disrespect to our own judges to suggest that a final Court of Appeal consisting of those chosen as Lords of Appeal in Ordinary will almost certainly be more distinguished than one recruited from a smaller number of barristers.

More distinguished perhaps, but whether they are also more capable is a rather different question. The task of a judge demands, as already noted, a strong sense of responsibility, prudence, and above all common sense. Clarity of thought is undoubtedly important too, but the sort of insight required of a top mathematician or philosopher is not required of a judge. This is in no way to diminish the respect that must attach to a judge, and it is not of course to suggest that judges cannot also be academic geniuses. It is simply to suggest that their function does not demand it of them. As such, one could reasonably expect even a country as small as New Zealand to produce sufficient people with the requisite qualities of responsibility, common sense and clarity of thought to provide us with an eminently competent judiciary.

Even if this is not accepted, it remains the case that dropping the final right of appeal to the Privy Council would not mean that New Zealand could not continue to learn from the experience of other jurisdictions, the U.K. included. As has been pointed out already, the main value to New Zealand of overseas decisions nowadays, with New Zealand's assertive attitude to the development of its own law, is not in their provision of authorities for New Zealand to follow blindly, but in the way they set out clearly the various aspects to major legal issues with which New Zealand authorities must grapple, and thereby permit those New Zealand authorities to make a carefully reasoned decision as to what is appropriate for New Zealand.⁴⁸ Certainly, if we no longer had a final right of appeal, our Court of Appeal would have to decide difficult cases that would otherwise have gone to the Privy Council without being able to draw on their Lordships' knowledge in relation to the instant facts. But there will nevertheless generally be plenty of cases decided by the

⁴⁶ In *Brown v. Heathcote C.C.*, Richardson J. and Sir Clifford Richmond in their joint judgment said: "These questions [of liability in negligence] have come before this court on many occasions over the last 10 years and we share [Cooke J.'s] view that while we will always benefit from decisions in other jurisdictions, in this evolving area of the law N.Z. judges have developed a considerable body of law in this field. Ultimately, and building on that jurisprudence, we shall we think have to follow the course which in our judgment best meets the needs of this society."

⁴⁷ [1983] N.Z.L.J. 229.

⁴⁸ See Sir Robin Cooke's address (referred to in note 1) at p. 301: "It is trite but true that an enormous help in any judicial process is to hear both sides well argued . . . It is much the same when the issues have been sharpened for decision by the reasoning and sense of values of Courts and writers who have already broken the ground."

Privy Council from other jurisdictions — by the House of Lords, the High Court of Australia and the Supreme Court of Canada and various other tribunals — which will be on or very near the point. There is no reason why New Zealand should lose the assistance of those decisions. Just because we would no longer be a branch of the common law⁴⁹ tree doesn't mean we would be precluded from picking its fruit.

A further argument sometimes put forward in favour of the retention of the Privy Council as our final appellate tribunal is that it provides an invaluable third appellate tier to our court system. Even if it is accepted, however, that such a third tier is desirable, the Privy Council is hardly the ideal embodiment of it. True, in theory it does give an unsuccessful litigant another chance beyond the Court of Appeal, but in practice this option is simply not open to the great majority of litigants because of the prohibitive cost involved.

The arguments in support of the final right of appeal to the Privy Council are not convincing, then. On balance, this right of appeal seems quite anachronistic. It is inconsistent with the assertion of autochthony evident in the 1986 Constitution Act. Allowing an English court to finally decide New Zealand cases seems quite anomalous now. And it is not only anomalous. It is impracticable. New Zealand law is now significantly indigenous. The Privy Council is simply not in touch with New Zealand's legal identity, characterised as it is by its simplicity, or the conditions which shaped that identity. While New Zealand should and will continue to learn from the best legal minds throughout the rest of the Commonwealth, and indeed the world, this need not and should not entail a tribunal composed predominantly of English judges which sits on the other side of the world deciding New Zealand's legal questions for New Zealand.

⁴⁹ In the sense of the United Kingdom common law. It is anachronistic, as Sir Robin Cooke pointed out at p.297 of his address (see note 1) to talk now of only one common law.