THE ROLE OF AN APPELLATE JUDGE

THE RIGHT HONOURABLE MR JUSTICE RICHARDSON*

The following paper was presented on 24 August 1980 by Mr Justice Richardson to a plenary session of the 35th Conference of the Australasian Universities Law Schools Association held from 24-27 August 1980 at the University of Otago.

We are told that the function of the courts in our society is to determine disputes between the parties according to law. To state their role in that way may obscure the wider impact that a decision in a particular case and the reasoning employed may have in other cases and ultimately in the development of the law. But at least it focuses attention on a central feature of the judicial system which underlies any discussion of the role of an appellate judge.

Much of what I propose to say today stems from this feature of the judicial system. To set the stage for that discussion it may be useful to begin by saying something about the workload of an appellate court and the manner in which cases are heard and decided. I shall speak mainly of the Court of Appeal of New Zealand. This is not because of any parochial feeling but simply because I do not have a detailed knowledge of the day to day functioning of appeal courts elsewhere.

Court of Last Resort

Our court is an intermediate court of appeal. However, there have been only some thirty-five appeals to the Privy Council in the last twenty years. Thus, for practical purposes the Court of Appeal is the court of last resort and exercises oversight of the administration of justice in New Zealand. This is particularly true of the criminal law. Criminal appeals may be brought only with the leave of the Judicial Committee. Such leave has been granted only once in the last twenty years. It does not follow that we simply strike out on our own. We have benefited immensely in the past from developments in other jurisdictions. We are considerably influenced by appellate decisions in other Commonwealth countries and decisions of the House of Lords and the Privy Council have particular force where there are no differentiating factors in the two countries justifying a divergent approach. But in practice that is a light rein and in the daily run we function essentially as a court of last resort.

Structure of the Court of Appeal

The Court now has five permanent judges. In addition, the Chief Justice is entitled by virtue of his office to sit in the Court of Appeal although he seldom does so in practice. As from 1 April 1980, on appeals against conviction or sentence a High Court judge designated for that purpose from time to time sits as a member of the Court. That serves the

* The Right Honourable Mr Justice Richardson is a Judge of the Court of Appeal of New Zealand.

twin purposes of bringing to the deliberations of the judges the realities of trial life at the work face of the criminal law and also of broadening the experience of the High Court judges.

The quorum of the Court is three but we may sit as a bench of five where, for any reason, it is thought appropriate. We did so recently in *Wybrow* v *Chief Electoral Officer*[1] where we were asked to and did take a different approach from a three man bench in *Re Hunua Election Petition*[2] as to the method of marking ballot papers in parliamentary elections. Apart from cases where it is known in advance that the Court will be asked to review earlier decisions, from time to time there will be cases where, because of the public interest and/or the legal issues involved, there are advantages in sitting as a bench of five. Having five permanent judges also means that with the Chief Justice or a High Court judge sitting, we can run two divisions and with the five permanent judges we can also rotate the membership of a single division.

Procedure for Hearing Appeals

I turn to consider the procedure for hearing and determining appeals. We have a session each month. The cases on appeal are available to the judges a few days before the session begins and our individual sitting commitments are also arranged in advance. Each of us sits on about two out of three week days spending other days, and for many of us week-nights and some parts of the weekend, working on reserved decisions and reading ahead.

The case on appeal is a complete record from the court below of the relevant proceedings, the evidence and ordinarily the judgment or summing up. A few cases a year are removed into the Court for argument without prior decision of the High Court but most come by way of appeal. So in judge alone cases we generally have a reasoned opinion of the judge below and in jury cases, where relevant to the issues on appeal, we have the summing up to the jury which, apart from directing the jury on legal questions, puts the Crown case and the defence case and makes some comments on the evidence. So we usually have the advantage of starting with a judicial analysis of the case before us.

Our procedure for hearing cases falls midway between the extremes. In some appeal courts extensive oral argument is addressed to judges who have not read any of the material beforehand and who ordinarily give oral judgments at the conclusion of the argument. Other courts require detailed written briefs which are supplemented by closely limited oral argument with the judgments ordinarily being delivered in writing after further research and consideration by the individual judges.

We adopt a middle course. Counsel for the appellant is required to file a memorandum of points on appeal which identifies the issues to be argued. Before or at the hearing he hands in a synopsis of the argument which is often the verbatim argument for the appellant and may run to thirty or forty pages or more. Increasingly, too, the respondent's counsel puts his submissions in writing anticipating in that respect the argument for the appellant.

The hearing itself is relatively informal. Often the only persons present are the judges, the counsel involved and the registrar of the Court. In a

1 [1980] 1 NZLR 147.
2 [1979] 1 NZLR 251.

case of any difficulty the judges tend to question counsel, often extensively, and freely discuss the facts and the law, testing the argument and not worrying about revealing the trend of thinking. At times a hearing is reminiscent of a successful honours seminar at a law school. There are no fixed time limits for oral argument but informally we try to ensure that time is not wasted. We often recess at the conclusion of the appellant's argument and, if we find that we are not moved by his case, do not call on counsel for the respondent to reply. That is particularly true of criminal appeals. Or we may limit the points on which we feel we need to hear the respondent.

Because the members of the Court usually read the judgment or summing up under appeal and much of the other material ahead of the hearing, and because of the way appeals are presented and argued, we seldom take more than two days to hear a case. More often it is a day or less. If we have reached a firm view at the end of the argument, then, whenever we feel able to do so, we dispose of the case orally on the spot with a single judgment in criminal cases and some civil cases, and individual judgments in other civil cases. We determine a substantial majority of the criminal appeals (last year eighty percent) and about one-half of the civil appeals in this way.

The practice of engaging in extensive discussion during the course of the argument and of giving immediate oral judgments has obvious advantages. The first is that the decision-making process is carried out publicly. The judges are working in full public view. It is obvious that they are all participating in the decision-making process. The case is determined on the arguments advanced and not on points which have not been subject to comment by the parties at the hearing. And counsel, and others who are present, see and hear the judgment delivered.

The second is that it facilitates the expeditious disposal of appeals. It is much easier to put the facts into perspective immediately after the conclusion of the argument than to come back to them weeks later after hearing and working on other cases in the meantime. It is an efficient use of judicial time. Indeed, we would be in hopeless arrears if we were to reserve all our decisions and were to go through the process of preparing and circulating drafts for discussion.

But the practice of giving immediate oral judgments does have its problems. One is that, to be in a position for the Court to deal with cases orally, it is necessary for the judges to have read much of the material beforehand and to have a fair understanding of the law involved. In that situation, too, it becomes important to guard against forming a view about the case too early. And there is a risk that the loser may think that the judges have made up their minds too quickly. Again, while some judges are more articulate than others and have a particular capacity for succinct expression of the relevant facts and issues, opportunity for reflection and revision is likely to improve the quality of draftsmanship.

Where judgment is reserved we usually have a discussion amongst ourselves at the end of the hearing to see what tentative views we have on the different issues and we agree that one or more of us will prepare a draft or draft judgments for circulation and discussion. In most cases very little further discussion is required. In others, particularly where we think there are wider policy issues involved, we may live with the case for weeks. So there are great advantages in the collegiate system where the judges are working together as a group. It is not just that we benefit

from discussion with one another. The point is that, if it is a single judgment, then all members of the Court are committed by it and, if there are individual judgments, we are still vitally interested in what the other members of the Court say. Most reserved judgments are delivered within a month or six weeks after the hearing and we seldom have more than twelve or fifteen judgments on hand at any one time.

The Workload of the Court of Appeal

Last year the Court sat on 192 days. It dealt with 227 criminal and ninety-six civil appeals compared with eighty-two criminal and fifty-one civil twenty years ago. Over the last ten years the proportion of appeals allowed has been twenty-two percent on the criminal side and thirty-six percent in civil cases (in 1979 the percentages were twenty-two percent and thirty percent respectively). Those proportions are unexceptionable if we assume that ordinarily appeals are not brought in civil cases unless counsel considers there are reasonable prospects of success and that in criminal cases there is a greater incentive to appeal notwithstanding advice as to the lesser likelihood of success. On the other hand, where a conviction is in issue there will be cases where, although counsel is of the view that on technical grounds an appeal could be justified, it is considered against the longer term interests of the accused for him to succeed on appeal only to be retried and in all probability convicted again at the new trial.

While eight or ten years ago the Court was usually up-to-date with its work, nowadays there are delays in getting all except the most urgent cases dealt with speedily. We had 114 criminal and sixty-three civil appeals set down for hearing at this month's session. Most criminal appeals are disposed of within six to eight months but for some time the waiting time for the hearing of civil appeals has been about twelve months from the time of setting down, which is often a year or so after the judgment in the High Court. The appointment of the fifth permanent judge and the seconding of a High Court judge for criminal appeals, which have allowed us to sit in two divisions for the last few months, have improved the position. We hope to reduce the arrears and the waiting time still further.

We have no direct control over the flow of appeals. There are, of course, some indirect restraints on appellants which are inherent in the appellate system. In civil matters there is the liability for further costs and the reluctance of an appellate court to interfere with decisions of fact and the exercise of discretions. We recognise that the High Court judge saw and heard the witnesses and was in a much better position than we are to assess credibility and draw inferences of fact. And we recognise that, where the High Court has been given a discretion, for example, in family protection, maintenance and custody matters, we should not interfere with the exercise of the discretion unless we are satisfied that the judge has erred in principle or that the decision is plainly wrong. It is not that the judge at first instance has a right to be wrong. Rather, it is simply that in these areas it is difficult in marginal cases for an appeal court to say with confidence that it is right and he is wrong. In a sense then, the appellant has a heavy onus where the appeal is on fact or against the exercise of the discretion; and that is a restraint on potential appellants. However, the readiness of an appeal court to interfere in such a case depends on the value judgment made on the case by the

members of the court. Some may see answers in black and white terms and be willing to interfere. Others may see grey areas and be reluctant to do so. One advantage in a bench of three is that you do get a range of approaches.

Coming next to criminal cases, because there are so few that involve only matters of law, leave to appeal is ordinarily required. In most cases, too, legal aid is sought and there is a preliminary screening by three of the judges to determine that. If any of the three has any reservations about any of the matters raised, for example, as to the directions given in the summing up, or as to the admission or rejection of evidence, or as to the sentence, then legal aid is granted and the appeal is set down for hearing. If not, legal aid is refused and the application for leave to appeal is called and dismissed without a hearing, unless in the meantime, for example, because of matters raised in further written submissions, the Court decides to hear full argument.

That shifting of part of the criminal list without full argument is balanced to some extent by the time increasingly taken in the consideration of directions given by trial judges to juries. The increasing complexity and the refining of concepts in the criminal law, particularly those designed to protect the accused, have made the task of the trial judge in instructing the jury very difficult. It is well settled that a summing up must be considered as a whole and against the background of what were the live issues at the trial. It may well be that juries often draw on overall impressions from the summing up and do not concentrate on the fine detail. However, it is still necessary to ensure that they receive adequate directions on the essential points for their consideration.

To a large extent our lists reflect the ever increasing workload on the other courts. The Royal Commission on the Courts, which reported in 1978, made recommendations for restructuring the work of the courts to ease the problems and its major recommendations in that respect, including those affecting the Court of Appeal to which I have referred, have been implemented or are in the process of being implemented by the Government.

But, unless the legislature gives consideration to some fundamental questions—such as, what are the reasons for the huge increases in the numbers of criminal and civil cases; are the court processes the best machinery for dealing with all the classes of case that now go there; and what should be the role of the courts in our society—pressures on the courts, overall, are likely to continue even if the pressure points themselves are shifted. Thus, in our case, the shifting of some classes of jury trials to the District Court, which is expected to take effect shortly, may well lead to more jury trials. So it is unlikely to reduce and at least initially it may increase the flow of appeals against conviction and sentence to the Court of Appeal.

From 1957 to 1977 the Court of Appeal had only three permanent judges. Now there are five. What of the future? I think there are considerable advantages in staying at five. If our workload continues to expand, serious consideration will have to be given to the development of a screening mechanism leading to the granting or refusing of leave to appeal in more classes of case rather than erode the collegiate character and possibly the public standing of the Court by an indefinite expansion of our numbers.

Judges as Law-Makers

Up to this point I have been discussing the structure of the Court of Appeal, its workload and the appellate procedures we adopt in New Zealand. This leads on to what may be more interesting questions as to the role of appellate judges as law-makers.

In the vast majority of cases in our Court it is the facts which are critical. Once they are determined it is usually a matter of applying settled law. However, in a minority of appeals the legal answer to the disposition of the particular case is not automatic. Different answers may be open whether it is a matter of applying the common law or construing legislation. While the common law is ordinarily developed by the application of old principles established in old cases to new situations, it all depends on what analogies are used. Legislation may be ambiguously expressed. In a real sense there may be alternatives open to a judge. Regrettably perhaps, when a judge dons a wig he does not find that the true answer is miraculously revealed to him. It is at times a question of making choices; of making law.

The critical question then is how much freedom does a judge have and how much should he have in making new law. Views differ as to that. I cannot today canvass in any worthwhile manner the various jurisprudential theories as to judging. What I shall do is to discuss quite briefly what seem to me to be the substantial limitations on creative law-making by appellate judges in our type of society.

Limitations on Creative Law-Making: The Adversary System of Deciding Particular Cases

The first limitation is inherent in the judicial function. We decide particular disputes. We are not engaged in solving general problems. They are actual disputes not hypothetical questions. This has several important implications. One is that the decision of the Court has an immediate and often powerful impact on the litigants. What is decided directly and immediately affects the parties to the case—their pockets, their livelihoods, their reputations, their liberty. A judge must concentrate on the circumstances of the particular case. His responsibility is to do justice in that particular case according to law. This explains to some extent why some judgments seem preoccupied with the facts and short on the law. The laying down of general principles becomes much less important than trying to arrive at the right answer in the particular case. And there are further implications of this duty to the particular litigants to which I shall return shortly.

Secondly, the courts cannot go out looking for work. They do not initiate cases. They take what comes. Politicians and officials may have bright ideas and do something about them right away. We decide only those cases that come before us. At times we may express views on matters that we are not directly called on to decide for the purpose of the particular case; and there will be differing views as to how much latitude judges should have in that respect. But we cannot write a textbook in the guise of answering a single legal problem.

The third way in which the constraint that courts only consider the cases put to them applies, is that someone must decide to institute proceedings which we have jurisdiction to determine. There are two aspects of this. One is that we may not have jurisdiction to determine the dis-

pute. For example, in the public law field the decision may have been entrusted by the legislation to administrative bodies in such terms as to exclude judicial review and the application of the principles of natural justice and fairness as developed by the courts. The other is that, even if the courts have jurisdiction, we waste our sweetness on the desert air if our services are not invoked. People must have confidence in the processes of the courts. Otherwise they will not use them to resolve civil disputes, nor will they co-operate in the criminal processes. That need for confidence is the reason why impartiality and the appearance of detachment in decision-making are traditionally regarded as supreme judicial virtues.

The fourth constraining factor under this head is that the courts are dependent on the factual material which the parties choose to put before them. The parties may not be interested in wider social issues. Certainly it is unlikely that all views relevant to an issue will be canvassed with supporting material. There is a limit to what the parties may be expected to do at their own expense. The adversary system does not readily lend itself to the determination of social issues but we cannot convert ourselves into committees of inquiry. Yet, are not those who may be interested in and, indeed, adversely affected by new law, entitled to have their views considered? The techniques of class actions and *amicus* briefs have not been developed in New Zealand and any New Zealand judge must be conscious of the difficulty of reaching conclusions as to social policy and the public interest on inadequate information.

Judges as Law-Makers: Functional Limitations

So far I have been discussing the restraining effects on judicial law-making of the adversary process for determining particular disputes. There are, of course, other limitations on the role of the courts as agencies of change. In twentieth century jurisprudential theories, as G Edward White has observed:[3]

> Some limitations have been intellectual (an obligation to give adequate reasons for results), some institutional (an obligation to defer to the power of another branch of government), some political (a need to avoid involvement in hotly partisan issues), some psychological (a need to recognise the role of individual bias in judicial decision-making).

Some points seem to me to be tolerably clear. The first is that the duty of the judge to give adequate reasons for his decision is a protection to all concerned. Litigation is our society's method of settling disputes in a civilised way according to law. The delivering of reasons is part and parcel of the open administration of justice. Judgments are addressed not only to the parties, who are primarily concerned in the result and the immediate reasoning leading to it, but also to the wider public who may be as concerned with the implications of the reasoning for the future as they are in the result of the particular case. Clearly judgments should not be arabesques. They should disclose exactly how the judge decided the case the way he did. So that his reasoning as well as the end decision are open to comment and criticism. The focus is then, as it should be, on the reasons for the decision, rather than on the exercise of judicial authority.

3 *The American Judicial Tradition* (1976) 371-372.

It follows from this concept of the judicial function that the judge cannot be limited to consideration of arguments that counsel happen to advance. He is entitled to conduct his own research and reflect that in his own judgment. That is subject to the obvious rider that, if after the hearing he comes across a line of thinking likely to bear significantly on his final decision, ordinarily he should bring that material to the attention of counsel for their comment.

The second is the importance of order, certainty and stability in society. People need to know where they stand, and what the law expects of them if they are to be able to plan their affairs with some assurance that they are not running into legal snares. So the body of legal decisions of the past should be a reasonably reliable guide for them in that respect. And when a layman embarks on litigation he should have some idea where he is heading.

The third is that in the discretionary area where judicial and judicious development of the law is called for, the judge must reflect what he perceives to be the needs of society. An example of this is the great development of the law of negligence—a development undertaken by the courts on a case by case basis over the last fifty years. I think most would agree that it has been very creative work. By and large it has been well accepted throughout the English-speaking world.

It is sometimes argued that judges should be far more innovative in other areas too. Clearly there are arguments both ways, highlighted in the continuing discussion as to the proper role of the courts in considering complaints as to the exercise of executive power. On the one hand it may be argued that the control of the abuse of power is essentially a political question which the judges, respecting the supremacy of Parliament and the separation of powers, should not attempt to decide. In support two points may be added. The first is that judges are not accountable to the public will as are the politicians. They never have to justify their decisions in public debate. They never have to put their acceptability to the test of re-election. The second is that it is said that judges are not representative of society in their attitudes to life: that their training, with its emphasis on the precedents of the past, and their age make them conservative and old-fashioned in their thinking; and that the lawyers who tend to become judges have usually led middle-class lives and have acted for and embodied the values of their moneyed clients.

On the other hand it may be contended that it is for the court, in the interests of justice, including justice for the particular litigant before it, to determine the matter. Otherwise it is said that the judge is opting out and by inaction is leaving responsibility for correcting the abuse of power complained of, with other branches of government. A responsibility which, so the argument goes, a parliament, which is completely controlled by the governing party, cannot be relied on to discharge in individual cases. Moreover, the courts are necessarily the final determinant of the public interest considerations involved. But this is only in the particular case for decision because, so the argument continues, parliament is free at any time to deal with the matter for the future by appropriate legislation. And a policy of non-intervention or judicial self-restraint in social issues may be viewed by some sections of the community as a disguised preference for one set of economic and social values.

In practice, the issue does not present itself in such stark terms. Usually the arguments for or against judicial intervention in the particular case

are clear. Judicial innovation is perhaps more accepted in areas of the common law where, to use Lord Devlin's words[4] there is a general warrant for judicial law-making than in statute law where there must at least be a presumption that parliament has said all that it wanted to say on the particular topic. Nevertheless, in section 5(j) of the Acts Interpretation Act 1924 (and its statutory counterparts in Australia and Canada), parliament itself has enjoined the courts to accord to its legislation such fair, large and liberal construction as will best ensure the attainment of the object of the legislation according to its true intent, meaning and spirit. So that cardinal rule of statutory interpretation requires the courts to consider the public policies which the legislation serves.

What is important, of course, is that the judge should have a philosophy of life, a framework of reference against which to probe and test the economic, social and political questions involved. The identification of community values and their reflection in judicial decisions is relatively straightforward where society is homogeneous and there is a single set of values which are held by the great majority of people. That is, where there is a clear consensus. And there may be such a consensus in relation to particular issues but not as to others. For example, despite the occasional political and bureaucratic criticisms of judicial initiatives in developing procedural safeguards in public law fields, I doubt if there is any wide disagreement as to the manner in which the courts have developed the principles of natural justice and fairness. Perhaps the same cannot be said of judicial review of administrative decisions and I have in mind the mixed reaction in the United Kingdom to such cases as *Padfield* v *Minister of Agriculture, Fisheries and Food,*[5] *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council*[6] and, by way of contrast, the retreat from involvement in policy issues in cases such as *Gouriet* v *Union of Post Office Workers*[7] and *Duport Steels Ltd* v *Sirs.*[8]

The problem becomes much more difficult where society is clearly divided on the particular issue; where there are different sets of values—whether economic, moral, political or social—which are strongly, even tenaciously held. The point is that a judicial decision is not an empty exercise. The authority and power of the state are invoked. A judge's choice of values in reaching a decision may involve the affirmation of one set of values and rejection of another. So in that way, admittedly in a very small proportion of the cases coming before the courts, a judge may be involved in social change and in resolving conflicts between competing social values in a pluralistic society.

In so acting judges are shaping the laws to meet the aspirations and necessities of the times. Thus we must recognise that affirmative government is a feature of New Zealand life; that change and continuity sit uneasily together; that we are a multi-cultural society and in many areas we cannot draw on universally accepted values; but that justice in the abstract cannot always be achieved. Particularly in this class of case, social awareness is just as important as professional competence.

Judgment writing, too, reflects the ethos of the particular society.

4 "Judges and Law Makers" (1976) 39 MLR 1, 9.
5 [1968] AC 997.
6 [1977] AC 1014.
7 [1978] AC 435.
8 [1980] 1 All ER 529.

Flamboyant rhetoric and evangelical fervour have no place in our judgments. In articulating public policy we must, I think, persuade by low-key, coldly rational argument, drawing where we can on commonly held values and, in those areas where choices are required, on overriding social goals with which readers can identify.

In the end a reflection of the needs of society and the striking of the right balance between the judicial branch of government and the legislature and the executive, is a matter of judgment: initially the judgment of the courts but ultimately the judgment of society to whom, however indirectly, the judges are responsible. Inevitably there will be frictions. Judges cannot expect to play their part in developing the law to meet changing social needs without being subject to principled criticism. That is the price of involvement in contemporary issues of public importance. For myself I would be sceptical of the true relevance of the work of the courts if our judgments were not subject to rigorous scrutiny and debate. If no-one is criticising our work it is because we are making no impact. If we are playing our part in society inevitably there will be criticisms of decisions in particular cases and of trends in the development of our laws; and inevitably there will be some tensions in the relations between the judiciary and other law-making institutions.