THIRTEENTH WILFRED FULLAGAR MEMORIAL LECTURE

JUDGES AS LAWMAKERS IN THE 1990s

THE RIGHT HONOURABLE MR JUSTICE RICHARDSON*

New Zealand lawyers are well aware of the distinctive judicial contributions of Sir Wilfred Fullagar on the Supreme Court of Victoria and then for over a decade on the High Court of Australia. As one who for 30 years has read his judgments with admiration and respect I feel honoured to speak in his name this evening.

It is also a particular pleasure to return to Melbourne, and especially to this lively and congenial Law School. While at Monash in early 1984 I took part in a number of sessions on the role of appellate judges. The speech notes of several addresses I gave at that time were published in the Law Institute Journal[1]. What I propose to do this evening is to develop some themes adverted to there and look ahead to the process of judicial law making in the 1990s.

With such a wide subject matter there is a need to make arbitrary choices. Let me stake out the position by developing two fairly obvious points. The first is that judges do make law. In the great majority of cases at the trial and first appellate level once the facts are determined and assessed the legal answer is clear cut. However, in a relatively small number of cases that response is not automatic. The direction of development of the common law depends on what analogies are used and on an assessment of the values involved. For many of us Lord Reid finally exploded the myth that all a judge does in developing the common law is to declare it. In addressing the Society of Public Teachers of Law in 1972 he said:

> "Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more."[2]

Judicial intervention is perhaps more recognized in areas of the common law where, to use Lord Devlin's words,[3] there is a general warrant for judi-

* Judge of the Court of Appeal of New Zealand
Delivered at Monash University on 23rd September 1985

[1] (1984) 58 L.I.J. 545.
[2] (1972) 12 J.S.P.T.L. 22.
[3] Lord Devlin, "Judges as Lawmakers" (1976) 39 M.L.R. 1, 9.

cial 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. But as we all know legislation may be incomplete or ambiguously expressed. In explaining what the statute means the Court makes law just as if the explanation given were contained in a new Act of Parliament. The interpretative approach taken inevitably depends on the perceptions judges have of community values and attitudes in their own society and on any statutory directives. Different jurisdictions have at different times reflected a variety of approaches. The strict construction rule, the mischief rule, the golden rule, and in more modern terms, the literal approach and the purposive approach are familiar to all law students. In New Zealand one test and one test only is mandated by statute. Under our *Acts Interpretation Act* we are required — and have been since 1888 — to accord to every Act and every statutory provision such fair, large and liberal interpretation as will best ensure the attainment of the object of the legislation according to its true intent, meaning and spirit. That purposive approach is of course now reflected in s 15AA of the Commonwealth *Acts Interpretation Act* and in section 35(a) of the Victorian Statute. Perhaps I can add that sitting as the Court of Appeal of the Cook Islands construing constitutional legislation of that country we concluded that that kind of provision mandates a similar interpretative approach to that adopted by Lord Wilberforce in *Minister of Foreign Affairs* v. *Fisher*[4], that is "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' "[5].

That cardinal rule of statutory interpretation requires the courts in our two jurisdictions to consider the public policies which the legislation serves. It also requires consideration of the scheme of the legislation. That involves examining the relationship between the various provisions and recognising any discernible themes and patterns and underlying policy considerations. That kind of analysis may in some cases cast light on the meaning of the provision in question: not in all cases, for it is obviously fallacious to assume that legislation has a totally coherent scheme, that it follows a completely consistent pattern and that all its objectives are readily discernible. Still, the legal result may well turn on the interpretative approach adopted and the value judgments made by the judge along the way.

Let me give one example from income tax law, which for many years was a large part of my life. It is, I think, a reflection of the scheme and purpose analysis of which I have been speaking that we regard our counterpart of your old section 260 as a central feature of the tax system designed to protect the tax base and the general body of taxpayers from what are considered to be unacceptable tax avoidance devices. It is a reflection of that philosophy which led the New Zealand courts to adopt a much more generous approach to our section than was taken at about the same time by the High Court of

[4] [1980] AC 319.
[5] Id. 328.

Australia under Sir Garfield Barwick. I am not suggesting that one approach was right and the other wrong. We are judges in and for our own societies and our interpretative approaches must reflect our own perceptions of what is appropriate in our particular jurisdictions.

In either area then, common law or statute, the judge may be obliged to make a series of value judgments. In that class of case he is engaged in a balancing exercise which is dependent on the perceptions of the judge concerned and the constraints under which he operates. Professor Griffith[6] goes so far as to say that it is the creative function of judges that makes their job important and that if the judicial function were wholly automatic it would not be necessary to recruit highly trained and intellectually able men and women to serve as judges and to pay them handsome salaries. There may be elements of overstatement in that comment but no lawyer in 1985 can doubt that judges, particularly at the higher appellate levels, have a substantial law making role.

The second and equally obvious preliminary point is that not only are societies such as ours more litigious than previously, but also the nature of the cases reaching the appellate courts in their civil jurisdiction has changed markedly. At least that is the New Zealand experience and my understanding of developments in other close jurisdictions. In our Court the volume of business has increased four-fold in 25 years. On the civil side, public law questions and problems involving the interpretation of statutes considerably outnumber private law disputes. The rise of the modern welfare state, changing social attitudes in an increasingly diverse and restless society, and the greater willingness to challenge previously accepted norms and conventional institutional structures have all contributed. Finally the costs of delivery of legal services have some effect on the work flow of the courts in the 1980s, which depends in part on the availability of legal aid. For in the public law field as distinct from private law, by definition one of the parties is either a government agency or is almost always state supported and there are more interest groups prepared to litigate or to support an otherwise unaided litigant.

It is also important to notice that as Professor Jaffe has said:

> "The judicial function is not a single, unchanging, universal concept. In any one habitat it differs from era to era ... We know, though we are not always aware of its relevance, that not only the sum of Governmental power but its distribution is constantly changing. The powers of the executive and the legislature wax and wane at the expense of each other ... These are platitudes, but it does not occur to us as often as it might that the judiciary also is, or at least can be, one of the great branches of the tree of Government. I mean by this to make a number of points; first, that it is part of the Government, and second, that its power, too, waxes and wanes. The conditions which act upon the executive and the legislature to determine the character of their powers act upon the judiciary; and

[6] Professor J. A. G. Griffith, *The Politics of the Judiciary* (2nd ed., London, Fontana, 1981) pp. 18–9.

the shape of the other branches of the great tree of State are functions of the shape of the judiciary."[7]

The changing pattern of appellate work reflects this. There is also, I think, some change – not I suspect confined to New Zealand – in the expectations which sections of the community have of their legal system and of the judges who preside in their courts. Society insists on providing controls over the exercise of power. That is reflected in the emphasis we place on the rule of law; and the movements which have taken place, not only in my country, and which have shifted greater power to the executive government, have led to increasing resort to the courts and in some jurisidictions to calls for a bill of rights to move the pendulum back a step by protecting basic constitutional freedoms against erosion by statute. Delivering the 9th Wilfred Fullagar Lecture five years ago, Lord Scarman expounded the case for incorporating a bill of rights into municipal English law. He concluded that English law lacks a coherent basis of principle on which it can tackle the problem of human rights in their modern setting; that to that extent the common law has failed; and that a new bill of rights could set standards for politicians, administrators and judges.[8] In 1982 Canada adopted as fundamental law the *Charter of Rights and Freedoms.* That supreme legislation has already produced a considerable flow of constitutional cases and commentary. The present New Zealand Government proposes introducing a Bill of Rights for New Zealand and earlier this year published a white paper containing a draft bill and commentary. Many of the provisions of the draft bill draw heavily on the Canadian Charter, including the critically important clause 3 providing that the rights and the freedoms contained in the bill are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Clearly such issues involve the courts in making value judgments with considerable consequences.

And just as beauty is said to lie in the eye of the beholder, the advantages of a bill of rights depend on the viewpoint of the particular protagonist. As one writer has observed:

"The radicals hope that such increased power would be seized by the judges to accomplish radical change ... The conservatives hope (more realistically) that a judiciary enhanced in power would act as a brake on a legislative programme designed to bring about social change."[9]

Coming closer to home, it is of some interest to note the immediate public reaction by some New Zealand politicians to the interlocutory injunction issued by the New Zealand High Court halting the All Black tour of South Africa pending determination of the issue whether the New Zealand Rugby Football Union had acted contrary to the objects of the Union in accepting the tour invitation. That political response was to warn of the dangers of

[7] Professor L. K. Jaffe, *English and American Judges as Lawmakers* (Oxford, Clarendon Press, 1969) pp. 10–1.
[8] Lord Scarman, "The Common Law Judge and the Twentieth Century" (1980) 7 *Mon. L.R.* 1, 10.
[9] I. W. Duncanson, "Balloonists, Bills of Rights and Dinosaurs" [1978] *Public Law* 391, 397.

allowing judges, not elected representatives of the people, to have the last word on a range of human rights.

I mention these matters not with a view to drawing any conclusions as to the wisdom of entrenching constitutional guarantees. The more modest point I wish to make is that courts which have that kind of constitutional function cannot escape that further dimension of judicial creativity.

It is inevitable in a pluralistic and changing society – with or without a bill of rights – that in a proportion of the cases before the courts judges will be involved in social change and in resolving conflicts between social values. Where judges invoke the need for judicial restraint that is itself a function of judicial involvement in the choices to be made. We should face that reality and recognise that society demands of us the rational analysis of the considerations of principle, policy, precedent and pragmatism which have led us to a particular conclusion. A failure on our part to articulate the alternatives and give reasons for our conclusions may well justify the criticism that that failure simply reflects a disguised preference for one set of values, usually the status quo. In other words the duty to give adequate reasons for decision is protection to all concerned and it rightly shifts the emphasis to the reasoned justification for the legal answer rather than focusing on the exercise of judicial authority and the power of the state.

It does not follow from this discussion of these two features of judicial life in the 1980s that a judge has a completely free hand in answering society's problems. The courts must be alert to the proper limits to their role. There are obvious and powerful constraints. Judges decide specific disputes in proceedings initiated by litigants. They are not engaged in solving general problems. There are also other recognized limitations. Litigation under the adversary system does not readily allow for an extensive social inquiry and so there is need for great care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties. Judges, of all people, must respect precedent, even if not in a blinkered way. They must recognise that any legal change through the adjudication process, however just, is at the expense of some certainty and predictability and may defeat some legitimate expectations. Judges are not accountable to the public will as are politicians and they are not necessarily reflective of society in their attitudes.

Against that background I propose now to consider in turn two matters which will be basic to any assessment of the role of judges as lawmakers in the 1990s: the capacity of judges to assess and reflect society's wider values, and the material they take into account in reaching their decisions.

THE ABILITY OF JUDGES TO REFLECT SOCIETY'S CONCERNS

The comfortable axiom "the quality of our judges determines the quality of our justice" conceals more than it reveals. For it presupposes ready agreement on the range and blend of qualities that are desired in judges and

confidence in the ability of the selection process to lead to the appointment of those best qualified to discharge that role.

It is of course essential that judges should be perceived to be persons of the highest integrity and ability who in their professional careers have demonstrated particular competence and gained the respect of those with whom they have worked. But professional competence and high character are not the only ingredients in the judicial make up. To speak only in terms of competence and character leaves unanswered questions as to society's expectations of the role of the judge. In weighing or reflecting those expectations it is necessary to keep in mind the criticisms which have at times been made of the inability of those entrusted with judicial law making power to fully understand society's concerns when making value judgments. In that regard it is often said by our critics that our training, with its emphasis on the precedents of the past, tends to make judges conservative and old-fashioned in their thinking. It is said that the lawyers who become judges have usually led sheltered middle-class lives, at least during their adult years, and are likely to have absorbed the values of their monied clients and their professional colleagues. Then there is the consideration that judges are not publicly answerable for their decisions as are politicians. In our jurisdictions they never have to put their acceptability to the test of re-election. So, the argument goes, it is an insufficient answer for those supporting a broader law-making role for the courts to say that the judges will have those accountability considerations in mind in drawing a line between interpreting statutes and developing the common law on the one hand, and legislating on the other.

It is obvious enough that judges are not necessarily reflective of society in their attitudes. There are no women on the High Court of Australia or the Court of Appeal of New Zealand (and never have been), no aborigines nor Maoris respectively, and no one under 50. Our courts are not representative in that sense. Not that we could ever have a court of limited numbers which in its membership balances all the interest groups in society, let alone one that matches a job specification drawn up by the parties to appeals. What is necessary is that our judges appreciate so far as they can the nature and complexity and directions of the society of the 1980s. In short, that they have sufficient nous, sufficient social awareness, and that they are sufficiently sensitive to their own limitations.

Are we deluding ourselves if we think that is likely to be the case? A number of comments may be made. First, in their earlier careers and whatever their field of specialization many judges will have had both professionally and privately an involvement in local community and some wider public isues. Many, too, will have gained some experience of the functioning of bureaucracies. In their personal lives, too, the breakdown of patriarchal authority and the democratization of family life have meant that today's judges are somewhat more immediately exposed in the family environment to the interplay of attitudes in society in a less sheltered way than used to be the case. Second, those who have been trial judges will have seen a cross-section of society

as witnesses, jurors and litigants, even though they will not have been involved at first hand in social and political issues let alone have been directly subject to economic and social deprivation on the one hand, or to the pressure of entrepreneurial success on the other. Nevertheless they work in the world and in the public eye. They do gain some appreciation during their work of community attitudes and standards. Third, those of us who sit as appellate judges are well aware of the importance of trying to keep abreast of changing pressures within our society so as to be able to reflect current community aspirations in the value judgments we are called on to make. Judicial detachment does not require that judges spend their lives in cocoons. None of the judges whom I know lead separate lives insulated from regular association with people in the community. Fourth, and in many ways the most important consideration of all, work at the appellate level is a constant and remarkable learning experience. We are concerned with the flesh and blood of actual cases, large and small. Over a period of years we consider a range of the most acute problems of society as well as the most mundane. We learn from the material in the cases — as an aside, the 2,000 or so probation reports I have read in the last eight years have certainly made me aware of some of the underlying social problems in New Zealand. We learn from arguments of counsel. We learn from our own work-related research and we learn from working in a collegial environment with our fellow appellate judges. For many of us appellate work is the largest and most extending educational experience of our lives.

Even so we are all influenced and limited by our backgrounds. Like other people, judges may be anywhere from reactionary to radical in the spectrum of social thinking. Where they come and the extent to which within the spectrum they reflect society in their attitudes and accommodate their thinking to social change depend on many circumstances. Two of the factors not already touched on are of particular importance: one is the system of legal education, the other is the manner of judicial selection and education.

In part as a result of the developments in legal education over the last 20 to 30 years, I view the creative role of New Zealand judges in the 1990s with cautious optimism. Changing forces in modern society have their impact on educators as well as on the young. There is a healthy insistence on the examination of the social purposes which particular rules, whether legislative in origin or developed by the courts, now serve. That is also of course reflected in the institutions of law reform. Of greater impact on society in the long run, and benefitting from the North American law school experiences, the rigorous training in analysis and evaluation of legal principles and underlying policies which is now so much part of legal education in our part of the world has I believe expanded the ability of law graduates to address the wider considerations increasingly relevant to judicial decision making. Allied with that is the increasing influence of law reviews with their emphasis on what the law should be, buttressed in many cases by consideration of the responses of the courts, law reform bodies and legislatures to similar problems in other

societies. Certainly that increased awareness and interest has been apparent to me in legal education in New Zealand over the last 20 years in which I have been involved directly as an academic lawyer, and then indirectly in a number of capacities. And while my knowledge of legal education in Australia is distinctly limited, my experience at Monash last year led me to think that those lawyers who will be arguing cases in the courts in the 1990s and early in the next century will be equipped through their education to contribute to the resolution of those legal controversies that call for an evaluation of economic and social goals. They will also play a part in educating the judges.

The second matter I referred to a few moments ago is the selection and education of judges. Much can be said about that. In the time available I shall confine myself to three observations. The first is that the system of selection and the acceptance of limitations on the field from which appointments are made will influence the kind and shape of judicial decision making. There are many systems of judicial appointment in various jurisdictions, ranging from popular election to simple executive appointment. In an illuminating address at the University of British Columbia in 1984[10], Sir Robert Megarry has provided a wealth of material concerning the selection of judges in England. He observes that although some countries have successfully taken the risk of appointment as judges of lawyers who have not proved themselves in the courts, England has remained firmly wedded to the proving and revealing process of practice as an advocate as a necessary prelude to appointment to the bench there; that in recent years England has settled down to a system of confining the appointments to appellate courts to those who are or have been High Court judges, thus excluding such leaps as took Lord Macnaghten from the Bar to the House of Lords in 1887, and Lord Radcliffe from the Bar to the House of Lords in 1949, and Lord Wilberforce from the High Court direct to the House of Lords in 1964; and that a career in politics has virtually ceased to be an avenue leading towards the bench. By way of contrast, and as Professor Griffith has reminded us, of 139 judges appointed between 1832 and 1906, 80 were members of the House of Commons at the time of their nomination, and 11 others had been candidates for Parliament. Again by way of contrast, four of President Roosevelt's appointees to the Supreme Court of the United States had had substantial careers as academic lawyers (Chief Justice Stone as Dean of Columbia, Frankfurter J at Harvard, Douglas J at Yale, and Rutledge J as Dean of Iowa), as did Chief Justice Laskin of the Supreme Court of Canada at the University of Toronto and Osgoode Hall.

Sir Robert Megarry[11] goes on to say that the structured nature of the legal

[10] Sir Robert Megarry, "The Anatomy of Judicial Appointment: Change but not Decay" (1985) 19 U.B.C.L.R. 113.

[11] Ibid.

profession in England normally ensures that the true field of choice is indeed narrow with appointments to the High Court being made largely from the ranks of less than 250 established silks aged between 48 and 60. With about seven appointments a year to the High Court a significant proportion of that pool, perhaps 30 per cent, attain judicial office as they pass through that age bracket. No doubt it is thought that the leavening experience of drawing from a wider recruitment base at that level or for the Court of Appeal and House of Lords now poses too many risks and disadvantages. That is the choice the particular society must make for itself and of course the fact that foreigners, as parties to litigation, choose in such numbers to resort through choice of law clauses to the English commercial courts demonstrates that as businessmen looking for the efficient disposal of controversies with emphasis on the certainty and predictability of the legal result, that system gives the service which they want.

That then is the current English approach. Speaking as a New Zealander I feel it is important in our diverse and changing society to seek through the selection process to obtain a range and diversity of experience of life in those who serve as appellate judges. Clearly, too, we should strive to appoint women and Maoris to the highest courts. There are also advantages in my view, both in terms of reducing the generation gap in times of rapid social and technological change and of providing continuity on the court itself, in having a considerable age range on the appellate bench. That is not difficult to achieve if, as in the case of the present membership of both the High Court of Australia and the Court of Appeal of New Zealand, the average age on appointment is 52, rather than in the mid 60s. Whether an average starting age of about 50 is still thought too high depends on a balancing of considerations. Certainly judges of that age are far removed from the young whose perceptions of society they cannot fully appreciate. But there are two other considerations. One is that if judging is regarded as a second career reasonable time is needed to achieve mature recognition in the first career and then, in the case of most appellate judges, to prove themselves as trial judges. The other is that the earlier the appointment the longer the appointee may stay in office, which may be a mixed blessing.

This leads on to my second comment in relation to the selection system. It is that it is difficult to foretell how a judge will develop and change over a long judicial career. Horizons change. Tenured appointment itself may have a liberating effect. We all know of persons of whom high hopes were held who never quite fulfilled their promise. That is as true of judges as of those in other walks of life. The reverse is equally true and some perform even better than was expected. Perhaps equally important, if a judge comes to his responsibility with a questioning enthusiasm then he is bound through the learning process I adverted to earlier to develop and change in his thinking. We can all point to examples of that in different jurisdictions. It is particularly for this reason that I am not as troubled as some in our profession

at the thought that those concerned with appointments at the appellate level may take an interest in the wider social attitudes of those under consideration and contemplate the appointment of judges who they believe will be sympathetic to their views. In that regard the probity of governments, informal consultation systems designed to ensure that no one is appointed who is not acceptable to the professional peer group, and the vigilance of the legal profession and the wider community are protections against the appointment as judges of persons of questionable integrity or competence. If some such person does slip through the net the results can be serious and the public standing of the judicial process may suffer for a time. But it would be unfortunate for society if because of an overriding fear of that kind we limited the judicial pool too sharply and ended with a judiciary reflective of only a narrow segment of society.

The third point concerns the education of judges. If we rank character, competence and social awareness as the most important qualities in our judges it is the last, social awareness, which is both the most difficult to maintain and the most difficult to monitor. Society and colleagues are sensitive to lapses in integrity and can be counted on to react strongly to perceived departures from the high standard we rightly expect of those who have in their judicial oaths sworn to act without fear or favour, affection or ill will. If the consultation processes are working effectively we can expect those appointed to have the intellectual competence and lawyerly skills that are required.

But a judicial appointment is not a progression. It is an abrupt career change. Whatever our previous experiences, few judges on appointment are familiar with all the facets of the machinery of justice. Thus some may have little recent experience of criminal trials and sentencing. For many judges the first few months are a period of intensive learning. Thereafter they consciously seek to keep up with change in laws and practices. We have tended to rely almost completely on self-education by the individual judge and on the judge's informal discussions with judicial colleagues and judges' meetings. But there is much to be said for the development of an organised programme of judicial education – both for new judges on appointment and for the continuing education of serving judges. The world is changing and as time goes by our reservoir of knowledge and our social experience need to be supplemented by a carefully developed educational programme. It is not an adequate response to yearn for the comfortable stability of the past and to abdicate responsibility for the evolution of our laws to meet changing social needs. It is not sufficient to think that our children or grandchildren are an adequate window on society, or that our own reading will necessarily bridge the gap. Formal judicial education programmes such as those developed in North America, which some Australian and New Zealand judges have attended, are, I believe, a much more effective means of gaining information and insights and are particularly important in stimulating awareness of differing social views and of changes in social outlook. After all, this is the way keeping abreast is provided for in other professions these days.

THE INFORMATION GATHERING PROCESS

In some appellate courts extensive oral argument is addressed to judges who may not have read any of the material beforehand and who determine the case on the arguments furnished by counsel. At the other extreme some courts require detailed written briefs which are supplemented by closely limited oral arguments and the judges themselves carry out extensive independent research. Usually an intermediate course is adopted. It is a matter of determining the most effective means of presenting and assessing the issues involved and what is considered appropriate will vary from society to society.

I mention the New Zealand Court of Appeal as an illustration. We adopt a middle course. Counsel for the appellant files a memorandum of points on appeal which identifies the issues to be argued. Before or at the hearing counsel generally hands in a synopsis of the argument (which may in some cases contain the full argument for the appellant) and in the major cases the respondent's counsel also puts submissions in writing. The hearing itself is relatively informal and in a case of any difficulty we 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 our thinking. It is not a matter of flooring counsel but of exploring issues. The hearing is our one opportunity of checking our initial reactions to the case against the arguments and counter-arguments of counsel who may have been thinking about the issues in the case for months. 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. In most cases we find there is ready agreement on the issues and 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 or months. It is not just that we benefit from discussion with one another: if it is a single judgment then all the 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. In that sense, and this is the collegiate safeguard against judicial extremism, the legal answer is derived from an amalgam of judicial attitudes and life experiences.

What materials should a judge take into account in arriving at the decision? It is an unrealistic over-simplification to say that all he needs do is follow the practice that Justice Brandeis adopted in his briefs as counsel and in his early opinions as a judge, namely to set out the factual basis of his inquiry, undertake an extensive empirical investigation (complete with technical references), make a cost benefit analysis of the effects of various policy choices, and choose the most efficient solution.[12]

There are obvious constraints inherent in any such regimen. Litigation

[12] G. E. White, *The American Judicial Tradition* (New York, Oxford University Press, 1976) p. 164.

under the adversary process is not an ideal vehicle for conducting an extensive social inquiry. The parties or their lawyers may lack resources or indeed any interest in exploring wider issues. There may be serious gaps in the material furnished to the Court. The techniques of requiring supplemental briefs from the parties and *amicus curiae* briefs from government and affected industry and citizen groups have not been comprehensively developed outside the United States. And there are obvious dangers in assuming from our own reading and research, however wide, that we fully appreciate the economic and social implications of alternative approaches.

It is true that we are increasingly researching extrastatutory material in interpreting legislation. A careful consideration of legislative history is often illuminating: not only of Hansard, and there it has to be recognised that debates on the floor of the House may have little if any influence on the course of a bill and the Minister's second reading speech may not reveal all the public policy issues addressed, but also of the whole course of events leading up to the bill and the various steps in the preparation of the statute, notably law reform committee reports and even in some cases the explanatory notes to the bill and amendments made in the bill stages. A further development in this shrinking world is the increased use of international standards. Applying the presumption that Parliament should not be deemed to legislate inconsistently with its international obligations, courts in recent years have made significant use of international materials. They have done so in adopting a construction designed to ensure uniform interpretation of uniform statutes such as those implementing double tax treaties and, more widely, by reference to provisions of international covenants on civil and political rights, other international treaties and resolutions of the United Nations, they have sought to set the legal statute in its international context.

It is true, too, that judges may properly take judicial notice of a range of factual material. Section 42 of the New Zealand *Evidence Act* 1908 expressly allows generous reference to such published works as we consider to be of authority on the subjects to which they relate so that a wide range of statistical and economic and social data may be considered under that rubric. At the same time we must be cautious in the weight we give to material of that kind, particularly where it has not been subject to scrutiny at trial or on the argument of the appeal.

What I have been saying proceeds on the premise that if lawyers are trained to think through every ramification of a problem they ought to be able to inform themselves of the social policy implications of the alternatives. The problem then lies not so much in an inability on the part of the courts to assess social data as in the difficulty of ensuring that the relevant material is before the court. Access to comprehensive library facilities is vital. Looking ahead I like to think that in the 1990s we will be taking full advantage of the immense developments in computer technology. Thus we may well find that through information retrieval systems counsel and judges will be able in the course of argument to elicit and bring up any relevant published

data on their individual screens and obtain immediate printouts for continued study. Even so there will still be problems of selection and assessment. We must be aware of those limitations while recognising at the same time that our politically insulated position will at times allow a more detached engagement in the objective balancing of costs and benefits than is possible for the legislature and the executive.

We must be aware too of the risks of a too ready and unmeasured identification of community values and their reflection in judicial decisions. Consider for example two major areas of judicial involvement which have been the subject of much self-approbation – administrative law and negligence. I doubt if there is wide disagreement in New Zealand as to the manner in which the courts have developed the principles of natural justice and fairness in the administrative law context. But that may be partly because those principles have an immediate public appeal. And as in so many areas we could benefit from expert advice as to the social and administrative costs of the orders we are being asked to make, and the end results likely to be achieved. Again, judged simply in terms of the wider public response it seems that the development of the modern law of negligence by the courts has by and large been well accepted. There too it would be useful to have an analysis of the costs to society of those developments – for example in shifting the economic burden of careless advice and omissions on the part of employees of local bodies on to the ratepayers. Perhaps the partial rejection of *Anns* v. *Merton London Borough Council*[13] by the High Court of Australia in *Shire of Sutherland* v. *Heyman*[14] and the retreat from *Anns*[15] in England indicated in *Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co Ltd*[16] may suggest a perception in both jurisdictions that the law was moving too fast, even if *Anns*[17] still seems alive and well in Canada[18]. In any event it points up the need for particular care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties to the litigation.

Finally, I referred a few moments ago to the proposition that lawyers are trained to think through every ramification of a problem. Outside observers of the judicial process are not always prepared to make that assumption. It must be conceded too that many of our counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform materials overseas as well as in New Zealand; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified, and so on. That

[13] [1978] AC 728.
[14] (1985) 59 A.L.J.R. 564.
[15] [1978] AC 728.
[16] [1985] AC 210.
[17] [1978] AC 728.
[18] *City of Kamloops* v. *Neilsen* (1984) 10 DLR (4th) 641.

hesitation on the part of counsel may be due in part to the reluctance of some judges to receive such material or, having received it, to give it any obvious weight. But here again I am cautiously optimistic about the judiciary's institutional competence to meet the demands and challenges of the 1990s. For the last word on that I return to Jaffe's landmark study[19]. Referring to the circumstances that provide both opportunity and need for judicial involvement in the evolution of the law, he concluded:

> "But the occasion alone will not compel the judicial response. That will depend on the outlook of the legal profession, judges, practitioners, teachers and learned writers, critics and publicists. That outlook will be formed by tradition. But tradition can be modified by professional education and by the commanding presence of strong, persuasive voices on the bench and in the schools."[20]

[19] Professor L. L. Jaffe, *English and American Judges as Lawmakers* (Oxford, Clarendon Press, 1969).
[20] Id. 16.