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Lecture

SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2024 – "OCEANS APART? NEW ZEALAND'S PLACE IN THE COMMON LAW FAMILY"

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> The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.[2]

1 New Zealand and Singapore have much in common. We are both island nations with populations of roughly equal size.[3] Each, in times gone by, British colonies, and each achieving full independence in the second half of the last century. Most significantly for my subject matter, Singapore and New Zealand inherited and have retained the English common law tradition, despite our nations being oceans apart from Britain. Since independence our nations have each forged a unique jurisprudence suited to the circumstances of its society. And yet we demonstrably remain part of the common law family.

2 This lecture is an attempt to tell some of Aotearoa New Zealand's common law story. Of course, this is a complex story, and there are many versions that could be told. I could tell a version in which New Zealand has drifted away from the UK and towards its commonwealth friends – a story perhaps focused on the law of negligence or contractual interpretation. I have used my editorial freedom to instead tell a story of New Zealand's distinctiveness. Although it is a story shaped by a history, events and people particular to New Zealand, I believe it is worth

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2 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 519–520, *per* Lloyd LJ.

3 The populations of New Zealand and Singapore are approximately 5.1 million and 5.6 million, respectively. However, the land masses are vastly different: 268,021km^2 compared to just 743.3km^2.

reflecting upon, revealing as it does some fundamental things about the common law.

3 The first – that developments in the common law in New Zealand are simply the common law operating in accordance with its standard method.

4 The second insight this narrative gives us is the abiding value of the common law's legal frameworks, and the power of the underlying common law method. Given the overlay of nearly 200 years of New Zealand's distinctive history, circumstances and of domestic statutory law, I suggest it is a remarkable thing that common lawyers and judges can gather in forums such as this and so readily identify similarities and differences between our laws. A common conceptual framework and a common legal language are powerful gifts that the common law has given us. They are gifts that enable economies to thrive and that support a rules-based world order.

5 To tell this story I am going to focus on the common law as it is today but using historical narratives to explain, or at least place in context, the present content of the law and its practice. I focus on four narrative strands for the purposes of this lecture.

I. The four narrative strands

6 I centre the first strand on the voyage of the Polynesian explorer Kupe. Kupe led the arrival of ocean-going canoes, called *waka*, which settled the islands of Aotearoa, now known as New Zealand, about seven centuries ago.[4] The language and customs of these settlers quickly evolved so that they became the people we know now as the Māori. Māori are a strongly tribal society – the tribes, known as *iwi*, trace back to the *waka* they arrived on.

7 When British settlers began arriving in New Zealand in their numbers in the 1820s, they discovered that Māori had a complex set of values and rules that together governed social relations, and their relationship with the land and the natural world. Those customs and

4 Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2; see James Belich, *Making Peoples: A History of the New Zealanders* (Penguin Books, 1996) at pp 24–26.

values are collectively referred to as *tikanga* – which literally means "what is right".[5]

8 The second narrative strand is connected to the signing in 1840 of *te Tiriti o Waitangi* (the Treaty of Waitangi). This was a treaty between the English Crown and Māori *rangatira* (chiefs) and is the founding document of the nation of Aotearoa New Zealand. Just what was agreed in the Treaty is, in some respects, still the subject of contention. It was a version written in Māori that most chiefs signed, and it seems much was lost in translation. But it is undisputed that the Treaty guaranteed Māori undisturbed possession of their lands, estates, forest, fisheries and other treasures. And critically, that it guaranteed Māori the same protections as British subjects, including the protection of the law.

9 It is, as they say, a fact on the ground that the British did establish sovereignty over the country. British laws, and British-style courts were quickly introduced. Despite a short period of innovation and attempted bijuralism in the 19th century, English law came to dominate the legal landscape for many decades.[6] There were some exceptions to this. Cases in which largely *Pākehā* litigants invoked *tikanga* concepts had some success.[7] Moreover, since the creation of *Te Kooti Whenua Māori* (the Māori Land Court) in 1864, *tikanga*-based interests have been recognised by that court – even if in the early decades of that court's history it was usually for the purpose of their extinguishment.[8]

10 The third strand concerns the arrival of English law in New Zealand following the signing of the Treaty. It begins with the journey of our first Chief Justice, Sir William Martin, aboard the tall ship *Tyne*, which arrived in New Zealand in August 1841.[9] On that journey, Martin worked with the incoming Attorney-General, William Swainson, and Thomas Outhwaite, the first Registrar of the Supreme Court, who were

5 See New Zealand Law Commission, *He Poutama* (NZLC SP24, 2023) at pp 63–66 <https://www.lawcom.govt.nz/our-work/tikanga-maori/tab/study-paper> (accessed 30 October 2024).

6 Shaunnagh Dorsett, *Juridical Encounters: Māori and the Colonial Courts, 1840–1852* (Auckland University Press, 2017).

7 See discussion of early New Zealand cases applying *tikanga* concepts in *Ellis v R* [2022] 1 NZLR 239 at [93], *per* Glazebrook J; and at [246], *per* Williams J; and in *Smith v Fonterra* [2024] NZSC 5 at [183]–[186]. "*Pākehā*" is a term in *te reo Māori* (the Māori language) broadly used to describe New Zealanders of European descent.

8 See David V Williams, *"Te Kooti Tango Whenua": The Native Land Court 1864–1909* (Huia Publishers, 1999).

9 "Editorial", *New Zealand Gazette and Wellington Spectator* (14 August 1841) at p 2.

travelling with him.[10] They worked to lay the foundations of what would be New Zealand's innovative procedural code.

11 Over the next few years the Chief Justice further refined this work in collaboration with his first judicial colleague, Justice Henry Chapman.[11] The two judges traversed long distances across New Zealand's North Island mostly on foot – the Chief Justice coming from Auckland in the North, and Justice Chapman from Wellington in the South – meeting in the middle at New Plymouth on the western coast to complete work on the rules.[12] The new rules, enacted in 1844, were revolutionary in providing that all civil actions, legal or equitable, were to be commenced by a single writ of summons. They abolished the complex forms of action and administratively merged common law and equity – anticipating reforms in England by many decades. They were also revolutionary for providing for uniform rules of procedure and a simple form of case management.[13] In 1856, those rules were developed into a comprehensive procedural code[14] – the first of their kind in the British Empire, predating the better-known Indian Code of Civil Procedure by three years.[15]

12 There were other early efforts to reform aspects of process to suit the needs of the colony. In the late 1840s, standing counsel was appointed and paid by the State to provide legal representation to Māori claimants who were otherwise unable to access justice through the courts.[16] This initiative was supplemented by the creation of a digest of New Zealand law and procedure written in the Māori language, which was commissioned by the Governor in 1845. The digest was eventually expanded into a complete book, published in 1858.[17] It is clear from these examples that access to justice was considered an issue deserving of attention in those early days.

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10 At that time, our senior first instance court was called the Supreme Court. It is now the High Court.

11 Guy Lennard, *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Whitcombe and Tombs Ltd, 1961) at pp 38–39. The result was the Supreme Court Rules Act 1844 (New Zealand).

12 Guy Lennard, *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Whitcombe and Tombs Ltd, 1961) at p 39.

13 Supreme Court Rules Ordinance 1844 (8 Vict No 1) r 12; see Shaunnagh Dorsett, "The First Procedural Code in the British Empire: New Zealand 1856" (2017) 27 NZULR 690 at 694 and 697–698.

14 Supreme Court Procedure Act 1856 (New Zealand).

15 Shaunnagh Dorsett, "The First Procedural Code in the British Empire: New Zealand 1856" (2017) 27 NZULR 690 at 690.

16 Guy Lennard, *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Whitcombe and Tombs Ltd, 1961) at p 37.

17 Guy Lennard, *Sir William Martin: The Life of the First Chief Justice of New Zealand* (Whitcombe and Tombs Ltd, 1961) at p 30.

13 The final strand is New Zealand's reluctant acceptance of legislative independence through the Statute of Westminster Adoption Act 1947, removing the right of the Westminster Parliament to legislate for New Zealand. This marked the beginning of the end of a long history of deference by New Zealand judges to the decisions of English courts.

14 The extent of the deference was in part due to the structure of the courts. The Privy Council remained New Zealand's final court of appeal until 2004. But it was also a story of demographics and economic dependency.[18] Most who migrated to New Zealand following the signing of the Treaty came from Britain.[19] In a little over 40 years from 1840, the British population increased from 2,000 to 500,000; so that by the year 1900 Māori made up just five per cent of the population.[20]

15 New Zealand had been marketed to these migrants as a "better Britain" in the Pacific.[21] This provides some social context to the tendency of the New Zealand legal system to follow in Britain's footsteps. Also relevant is the economic shock and Long Depression of the 1880s.[22] The solution to the economic challenges of the time came in the form of refrigerated meat and dairy exports to Britain, which began in 1882 and increased rapidly thereafter.[23] Historian James Belich notes that as it entered the 20th century, New Zealand not only had a large population of British origin – it was also totally economically dependent on the mother country across the ocean.

16 The development of the common law during this period thus became primarily an exercise in conformity with English authority.[24] In an article "Legal Change over Fifty Years", B J Cameron discusses lines of authority which demonstrate the almost complete deference in the courts to English authority.[25] For example, in *Barker v Barker*,[26] a 1924 divorce case, a full court of the New Zealand Court of Appeal rejected a line of

18 See generally B J Cameron, "Law Reform in New Zealand" [1956] NZLJ 72 at 72.
19 James Belich, *Making Peoples: A History of the New Zealanders* (Penguin Books, 1996) at pp 299–312.
20 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at pp 16–17.
21 James Belich, *Making Peoples: A History of the New Zealanders* (Penguin Books, 1996) at pp 321–328.
22 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at pp 34–35.
23 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at p 53.
24 See B J Cameron, "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 209–211 and their identification of the cases discussed in this part of this lecture.
25 B J Cameron, "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 209–210.
26 *Barker v Barker* [1924] NZLR 1078.

earlier New Zealand cases because they conflicted with a recent decision of a divisional court in England. This was despite significant variation, sourced in New Zealand statute law, between English and New Zealand divorce law, and at least two of the five judges expressing disagreement with the English decision in principle.[27]

17 In another case, the New Zealand Court of Appeal indicated it would overrule its own prior decisions in order to follow the English precedent of *Young v Bristol Aeroplane Co, Ltd*[28] – a case in which the English Court of Appeal held it could not overrule its own prior decisions.[29] A final example is *Union Steamship Co v Ramstad*[30] ("*Union Steamship Co*"), which concerned the relevance of tax to the assessment of damages for personal injury.[31] The New Zealand Court of Appeal considered the authorities and followed the approach which best aligned with English law, though other Commonwealth jurisdictions had taken different views. Just six years later, the House of Lords reversed the English cases which had informed the New Zealand Court of Appeal's decision, noting they had not been widely followed in other jurisdictions.[32] Within a year, the New Zealand Court of Appeal had reversed its own decision in *Union Steamship Co* to follow the new House of Lords authority.[33] By the 1950s, this track record had earned the New Zealand courts a reputation as "timid and conservative".[34]

18 There were, of course, exceptions. For instance, the New Zealand courts independently developed family protection principles concerning succession on death, after the passage of the Testator's Family Maintenance Act 1900 gave them the power to override the terms of a will in order to make fair provision for the spouse and/or children of a testator who had left them without adequate provision.[35] This was the first such legislation in the Commonwealth, and therefore a truly novel field of law. But absent such a prompt from the Legislature, the courts

27 *Barker v Barker* [1924] NZLR 1078.
28 [1944] 1 KB 178.
29 *Re Rayner* [1948] NZLR 455 at 506–507, per Blair J; as cited in B J Cameron, "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 210.
30 [1950] NZLR 716.
31 *Union Steamship Co v Ramstad* [1950] NZLR 716, as cited in B J Cameron, "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 210.
32 *British Transport Commission v Gourley* [1956] AC 185.
33 *Smith v Wellington Woollen Manufacturing Co Ltd* [1956] NZLR 491.
34 B J Cameron, "Law Reform in New Zealand" [1956] NZLJ 72 at 73.
35 Robin Cooke, "The New Zealand National Legal Identity" (1987) 3 Canta LR 171 at 174; Rosalind Atherton, "New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise" (1990) 2 Otago LR 202.

tended to remain "faithful followers" of Britain rather than trailblazers for much of the 20th century.[36]

19 Also of relevance is a famous, or perhaps infamous, event in New Zealand's legal history – the Protest of Bench and Bar of 1903 (the "Protest"). This arose out of a Court of Appeal decision that a plot of land gifted by the Māori tribe of Ngāti Toa to the Crown for the establishment of a school by the Church of England had reverted to the Crown.[37] The Privy Council overturned this decision and excoriated the Court of Appeal for misapplying the law and allegedly showing undue deference to the Crown.[38]

20 In response, then-Chief Justice Sir Robert Stout, convened a meeting of judges and members of the Bar in the capital city of Wellington. We know what occurred at that meeting because, curiously, it was reported in the law reports.[39] The Chief Justice said it was unbecoming of the highest tribunal in the Empire to "make such unfounded aspersions" about another court and suggested their Lordships had made a number of legal and factual errors in their judgment due to ignorance of New Zealand law and procedure. A speech from one judge present dismissed the Privy Council's suggestions as the unfounded opinion of "four strangers sitting 14,000 miles away".[40]

21 Although the Protest may appear to express a wish for the law in New Zealand to be allowed to develop to meet local circumstances, viewed with a wider lens there was no striking out, or attempt to strike out, on such an independent path. The decision is better explained by the historical moment and the ongoing legal and political tensions in relation to Māori land. Perhaps also attributable to the personalities of the protagonists, and, in particular the Chief Justice – a powerful figure who had previously served as Prime Minister of New Zealand from 1884 to 1887.

22 To return to the nautical theme of this lecture, the adoption by New Zealand in 1947 of the Statute of Westminster set the course for the second half of the 20th century. The reluctant acceptance of full independence was an acknowledgment, in constitutional terms, of the vast ocean separating our small Pacific islands from the British Isles,

36 B J Cameron, "Law Reform in New Zealand" [1956] NZLJ 72 at 73–74. And those prompts themselves were very rare: see B J Cameron, "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 207.

37 *Solicitor-General v Bishop of Wellington* (1901) 19 NZLR 665.

38 *Wallis v Solicitor-General* [1903] AC 173.

39 *Wallis v Solicitor-General*, *Protest of Bench and Bar* (1903) NZPCC 730.

40 *Wallis v Solicitor-General*, *Protest of Bench and Bar* (1903) NZPCC 730 at 746–759.

separating them in terms of both geography and identity. It provided a new departure point for our law.

23 By the 1960s, there was a groundswell of support for the development of a distinctively New Zealand legal system. This call came at a time of tremendous societal change in New Zealand. Our identity as a nation apart from Britain was growing stronger, following the Second World War and the establishment of the United Nations, of which New Zealand was a founding member.[41] In the 1960s, Britain also began the process of joining the European Economic Community, a process finalised in 1973 – leaving New Zealand to rethink its place in the world, and forcing it to diversify markets for its goods.[42] The 1970s was the time of another reckoning, within New Zealand society itself, as a major protest movement erupted over the rights and treatment of Māori.[43]

24 I mentioned earlier, the importance of the structure of the courts to the pace at which a distinctive common law developed. Significant milestones in this regard included the establishment in 1958 of the New Zealand Court of Appeal as a permanent court. Up until that point the Court of Appeal had been no more than a sometime assembly of High Court judges. With its new stature, and collegiality, the court began also to grow in confidence, and to move away from slavish application of English authority.

25 From the 1960s, the development of a distinctive common law was palpable and accelerating, and for the first time, reference began to be made to a New Zealand common law.[44] In the 1974 case of *Bognuda v Upton & Shearer Ltd*,[45] the Court of Appeal proclaimed that while the decisions of the House of Lords were entitled to the greatest respect, they were not binding on the New Zealand courts.[46] Then in 2004 came the

41 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at pp 297–299 and 318–319.

42 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at pp 425–443.

43 James Belich, *Paradise Reforged: A History of the New Zealanders – From the 1880s to the Year 2000* (Penguin Books, 1996) at pp 474–487.

44 See, *eg*, *Davis v Lethbridge* [1976] 1 NZLR 689; and *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 at 979.

45 [1972] NZLR 741.

46 A decade earlier, the Court of Appeal had ruled that New Zealand courts should generally not follow House of Lords decisions where they conflicted with decisions of the Privy Council: *Corbett v Social Security Commission* [1962] NZLR 878. In 1969, the court declined to apply an English Court of Appeal decision which it considered to have been wrongly decided: *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 at 978–979, *per* North J; and at 990, *per* Turner J.

creation of the New Zealand Supreme Court, replacing the Privy Council as New Zealand's final Court of Appeal.

26 Which brings me to the present-day focus of this lecture. In the next part I illustrate some of the differences that characterise New Zealand law today, linking back to those four narrative strands. I focus on the areas of *tikanga*, administrative law, equity and procedural law. I suggest that the four strands I earlier identified can be seen threaded through New Zealand's common law today.

II. *Tikanga* and common law

27 The narrative strand from Kupe's journey to New Zealand runs through to the present day. Today approximately 20% of New Zealand's population *whakapapa* Māori – they link to Māori ancestry. Although, like the rest of New Zealand, a strongly-urbanised people, Māori still largely identify with their *iwi* – their tribe. Many of the customs that regulated Māori society on first arrival, *tikanga*, continue to regulate the lives of Māori. Today, *tikanga* is recognised as having been New Zealand's first law and as a continuing source of values and customs in our society that can inform our common law.

28 Critical context for recent common law developments I am about to discuss is provided by Parliament's acknowledgment of the role that *tikanga* plays in society. Parliament has included *tikanga* concepts into various statutes as a mandatory or permissible consideration for decision makers. For the last 30 years, these statutes have required courts to apply *tikanga* concepts and values.[47] At least since 2018, the *Legislation Guidelines* published by the Legislation Design and Advisory Committee have stated that new legislation should, as far as practicable, be consistent with *tikanga* and that legislation should be drafted with consideration of whether it may affect practices governed by *tikanga*.

29 Many impose *tikanga* obligations or considerations on non-Māori as well as Māori, *eg*, *tikanga*-based principles will affect those applying under the Resource Management Act 1991 for permission to use land or resources.

47 See, *eg*, the following New Zealand statutes: Resource Management Act 1991 ss 2, 6(e) and 7(a); Oranga Tamariki Act 1989 (Children's and Young People's Well-being Act 1989) ss 2 and 4–5; Trademarks Act 2002 ss 3–4, 17 and 178–179; Patents Act 2013 ss 3, 5 and 225–228; Property (Relationships) Act 1976; Te Ture Whenua Māori Act 1993 (Maori Land Act 1993); Climate Change Response Act 2002; Coroners Act 2006; Marine and Coastal Area (Takutai Moana) Act 2011; and Education and Training Act 2020.

30 A further interesting development was the use made by Parliament of *tikanga*-based concepts when settling claims brought by *iwi* for breaches of the Treaty of Waitangi. This legislation has on occasion entailed the recognition of the legal personality of natural resources, consistent with *tikanga* principles, *eg*, Te Urewera Forest and the Whanganui River.[48]

31 It is against this background that I describe a trio of cases which show the common law responding to local circumstances.

32 The first case is *Takamore v Clarke*[49] ("*Takamore*"). James Takamore was a man of Māori descent with ancestral ties to the Tūhoe and Whakatōhea tribes from the north-east of New Zealand's North Island. He was born and had lived in Kutarere, his tribal homeland. But at the time of his death he had been living for 20 years in the South Island city of Ōtautahi (Christchurch) with his *Pākehā* partner, Denise Clarke, and their two children. When Mr Takamore died, he left no testamentary instructions as to burial. His extended Māori family wanted him returned to Kutarere to be buried in accordance with *tikanga*. But his wife and children wanted him buried in Christchurch near them. Even so, his extended family took his body, without the permission of the wife and children, and buried it in the tribal lands.

33 The dispute progressed all the way to the Supreme Court. A majority of the court held that "the common law of New Zealand requires reference to the *tikanga*, along with other important cultural, spiritual and religious values" in decisions regarding burial.[50] On balance, however, the court was satisfied that the ultimate decision regarding Mr Takamore's burial lay with his wife, Ms Clarke, at common law, provided that regard was had to the relevant *tikanga* and to the wishes of other members of the family. So, a gentle engagement of the common law with *tikanga*.

34 The next significant case is *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[51] Trans-Tasman Resources sought permits to undertake seabed mining within New Zealand's exclusive economic zone. This was to be off the Taranaki coast and was the subject of significant public protest.

48 Te Urewera Act 2014 (New Zealand) s 11; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (New Zealand) s 14.
49 [2013] 2 NZLR 733.
50 *Takamore v Clarke* [2013] 2 NZLR 733 at [164].
51 [2021] 1 NZLR 801.

35 The issue of the grant of permits ended up before the Supreme Court. Among the statutory matters which had to be taken into account by the decision maker were the effects of the seabed mining on "existing interests" in the area,[52] and "any other applicable law".[53] All members of the court agreed that *tikanga*-based customary rights and interests were "existing interests" that had to be taken into account.[54] They also agreed that *tikanga* had to be taken into account more broadly as "other applicable law" for the purposes of the legislation.[55] The failure of the decision maker to consider these matters, among others, was an error of law, and the permits were quashed. It is fair to say this shows a more significant engagement with *tikanga* than in *Takamore*.

36 The third significant, and most recent, case is *Ellis v R*.[56] In 1993, Peter Ellis was convicted of sexual offending against seven very young children who had attended a childcare centre where he had worked as a teacher. Mr Ellis served nearly seven years in prison. He maintained his innocence throughout, and over the years the safety of his convictions was the subject of ongoing public debate and controversy. It was, and continues to be, one of the most controversial cases in New Zealand's history. In 2019, Mr Ellis was granted leave to appeal to the Supreme Court. But before the hearing could take place, he died. In accordance with Mr Ellis's wishes, the executor of his estate applied for the appeal to continue.[57]

37 There was no issue that jurisdiction to continue the appeal existed, nor that it required leave to do so, but the issue arose as to what principles should govern the grant of leave. There was no directly applicable rule of court, statute or New Zealand common law authority that provided the answer.

38 During the hearing of the application for continuance, argument focused upon what interest the appellant could have in the appeal following his death. How could a dead man have any interest in correcting a miscarriage of justice? Mr Ellis was not Māori, but all parties agreed *tikanga* principles could be relevant to this issue. After seeking time to

52 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (New Zealand) s 59(2)(b).
53 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (New Zealand) s 59(2)(l).
54 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 at [8].
55 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 at [9].
56 [2022] 1 NZLR 239.
57 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [32].

prepare further argument on the issue, counsel provided the court with an agreed statement recording the consensus view of New Zealand's foremost *pūkenga* (*tikanga* experts) as to *tikanga* principles that bore on the issue.[58] The experts described *tikanga* as follows (and I abbreviate):[59]

> Tikanga is the Māori 'common law'. It is a system of law that is used to provide predictability and … [provides] templates and frameworks to guide actions and outcomes. … [I]t includes both the rules (what you should and should not do) as well as the principles that inform the practical operation and manifestation of the rule. … Tikanga has a flexible dimension to it. … Importantly, however, when a new matter or issue arises for resolution, recourse is always had to the fundamental principles that underlie tikanga as well as drawing on historical precedent and how tikanga has been recognised in similar situations.

The *tikanga* statement described the concept of *mana* – conveying power, presence, authority, prestige and reputation. The statement noted that it is a concept that today is widely recognised in broader New Zealand society including by, but also beyond, Māori.[60] It explained that a person's *mana* continues after death and has wider implications for the person's *whānau*.

39 All members of the court drew in their analysis upon a Canadian authority which set out a framework to guide the exercise of the discretion to grant a continuance.[61] Glazebrook, O'Regan and Arnold JJ noted that other factors may also be relevant to that analysis, including *tikanga* concepts,[62] while Williams J and I would have explicitly amended that framework to include *tikanga* considerations.[63] A different majority, comprising myself, Glazebrook and Williams JJ, accepted the common position taken by the Crown and the appellant that the *mana* of both Mr Ellis and the complainants was implicated, as well as the *mana* of their wider families. While finality in litigation was acknowledged as an important consideration, the grant of leave before Mr Ellis's death was an acknowledgment that there was an issue as to the safety of the convictions – and if the convictions were unsafe a serious miscarriage

58 The issue having arisen during hearing, the parties sought leave to file further submissions. The hearing reconvened after the filing of submissions which included an agreed statement on relevant *tikanga*. This is appended to the end of the judgment.

59 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at Appendix: Statement of *Tikanga*, paras 24, 27 and 32–33.

60 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [185].

61 *R v Smith* [2004] 1 SCR 385.

62 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [58], *per* Glazebrook J; and at [292], *per* O'Regan and Arnold JJ.

63 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [210]–[211], *per* Winkelmann CJ; and at [236], *per* Williams J. See further at *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [212], *per* Winkelmann CJ; and at [238]–[244], *per* Williams J.

of justice had occurred. The uncertainty regarding Mr Ellis's convictions could not be left unaddressed.[64]

40 The case provided an unexpected opportunity to clarify the way in which *tikanga* is to be applied more generally. The court was unanimous that *tikanga* has and will continue to be recognised in the development of the common law of Aotearoa New Zealand. The majority held that the relationship between *tikanga* and the common law should evolve contextually and as required on a case-by-case basis.[65] A need for caution was expressed. Caution that the process is not allowed "to impair the operation of tikanga as a system of law and custom in its own right".[66] But caution also that this was not a revolutionary moment in the common law, but rather one of continuity, emphasising the continuity in society and law of the place of *tikanga*, and the stabilising effect that the incremental common law method must be allowed to have.

III. Administrative law

41 I hesitate to embark upon any discussion of the distinctiveness of a New Zealand approach to administrative law. It is a topic that could be the topic of a series of lectures. I am therefore going to focus upon some aspects of it that draw through all of the four narrative strands.

42 The Court of Appeal referred to a "New Zealand point of view" in administrative law as early as 1985,[67] and there are indeed marked differences between our approach and those of comparable jurisdictions. Part of this distinctiveness is due to the absence of a written constitutional document – in contrast to Singapore, Australia and Canada. Part of it is due to that focus upon substance over form, detectable in those early reforms introduced by our first Chief Justice. And part of it is due to the impact of the ongoing discussions and debate about the place of the Treaty of Waitangi in our law and society.

43 Our administrative law is characterised by a flexibility of approach. This is undoubtedly helped by statutory provisions that have simplified procedure but leave untouched the source of the jurisdiction – which is the High Court's inherent jurisdiction. There is also a discernible resistance in our common law of judicial review to excessive formalism.

64 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [187].
65 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [21], [116], [119] and [127], *per* Glazebrook J; at [183], *per* Winkelmann CJ; and at [261], *per* Williams J.
66 *Ellis v R (Continuance)* [2022] 1 NZLR 239 at [22], [120] and [122], *per* Glazebrook J; at [181], *per* Winkelmann CJ; and at [270]–[272], *per* Williams J.
67 *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190.

In the 1980s, President Cooke famously spoke of the struggle for simplicity – warning against the complication of obscure concepts and superfluous principle.[68]

44 I diverge at this point to acknowledge the then-President of the Court of Appeal, Robin Cooke, who later became Baron Cooke of Thorndon. He was one of the key judicial figures in the development of a distinctive New Zealand common law. He had a distinguished legal career and was the only Commonwealth judge in the past century to sit in the Appellate Committee of the House of Lords on UK appeals.

45 Throughout his career as a lawyer, he challenged New Zealand's "unquestioning compliance" with English authorities.[69] As a judge, he was an innovator in the sense that he was astute to clear away formalism in the common law which did not serve the interests of justice.

46 Returning to the distinctiveness of New Zealand's administrative law, the flexibility goes beyond the procedural and shapes our substantive law. For example, New Zealand courts have not drawn a distinction between jurisdictional and non-jurisdictional facts or errors. As our Court of Appeal has put it:[70]

> Error of law is a ground of review in and of itself; it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction.

By contrast, the Australian position is that "not all errors of law invalidate a decision, be it of the Executive, a tribunal, or an inferior court – only jurisdictional errors of sufficient materiality invalidate a decision".[71] The English courts draw less of a bright line since the *Anisminic v Foreign Compensation Commission*[72] ("*Anisminic*") decision, but still place emphasis on whether a particular determination is within or outside of the relevant body's jurisdiction, or "area", in determining the degree of deference to afford it.[73] I understand the Singapore Court of Appeal has also emphasised the significance of "precedent facts" in setting the stage

68 Robin Cooke, "The Struggle for Simplicity in Administrative Law" in *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Michael Taggart ed) (Oxford University Press, 1986) at pp 14–15.

69 Robin Cooke, "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233 at 235.

70 *Peters v Davison* [1999] 2 NZLR 164 at 181, *per* Richardson P, Henry and Keith JJ.

71 Justice Jayne Jagot, High Court of Australia, "In Defence of Jurisdictional Error", speech at the Appellate Judges Conference, Banco Court, Supreme Court of New South Wales (22 April 2022) at para 2.

72 [1969] 2 AC 147.

73 See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at 209, *per* Wilberforce LJ.

for judicial review, in the case of *Nagaenthran a/l K Dharmalingam v Public Prosecutor*.[74] In that case, it was held that in the absence of some objective fact on which the decision maker's jurisdiction was conditional, the scope of the court's function in judicial review would be limited.

47 However, the most unique feature of New Zealand's administrative law landscape is the founding document of our nation, *te Tiriti o Waitangi*. That Treaty was not always recognised as a significant feature of the legal landscape. In 1877, our then-Chief Justice James Prendergast declared the Treaty a "simple nullity".[75] In 1940, the Privy Council held that courts could not directly enforce the Treaty unless it is incorporated into statute.[76]

48 In the 1960s and 1970s, Māori protests that the Crown had breached its obligations under the Treaty began to build. This was the background to decisions in the 1970s and 1980s to give statutory recognition to the "principles" of the Treaty in particular pieces of legislation.[77] It was statutory recognition that in turn led the High Court to conclude in 1987 that the Treaty was "part of the fabric of New Zealand law" and therefore relevant in interpreting statutory powers.[78]

49 In the same year, in *New Zealand Māori Council v Attorney-General*[79] (also referred to as the *Lands* case), the Court of Appeal upheld an application for judicial review of a government policy to transfer certain land out of Crown ownership to new state-owned enterprises.[80] Māori were concerned that the transfer might defeat their Treaty claims to the land.[81] The State-Owned Enterprises Act 1986 provided for such

74 [2019] 2 SLR 216.

75 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

76 *Tukino v Aotea District Māori Land Board* [1941] NZLR 590. But note subsequent decisions have nevertheless "[dealt] a heavy blow to [Tukino]'s crumbling façade": see Natalie Coates, "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in *Challenge and Change: Judging in Aotearoa New Zealand* (John Burrows & Jeremey Finn eds) (LexisNexis, 2022) at p 81.

77 These "principles" were first referred to in statute (Treaty of Waitangi Act 1975) and were interpreted and given content first by the Waitangi Tribunal, and later by the courts. No such principles are contained in the text of the Treaty itself. Although there is no settled list of principles, and the subject is one of ongoing controversy, some recognised principles include: exchange, partnership and active protection, and potentially *rangatiratanga* (sovereignty) and fiduciary duty, and, to a lesser extent, consultation and development.

78 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 196, *per* Chilwell J.

79 [1987] 1 NZLR 641.

80 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

81 Beginning with the Treaty of Waitangi Act 1975, the Crown created a process for negotiating settlements for contemporary and, since 1985, historical Māori

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transfers, but it also contained a section providing that: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."[82]

50 The court held the policy of land transfer was inconsistent with the Crown's obligations in accordance with the principles of the Treaty, which included a duty to act reasonably and in the utmost good faith in respect of the Māori people.

51 The *Lands* case was one of the most consequential in New Zealand's legal history. It established that the Crown's obligations under the Treaty could be justiciable if a statutory framework was there to provide a footing for a claim.

52 Today, more than 35 statutes contain explicit reference to the Treaty. Treaty of Waitangi jurisprudence now comprises a significant field of administrative law. In many contexts, public officials are required to act consistently with the principles of the Treaty – a requirement which has given rise to a steady diet of judicial review proceedings in which the Treaty is invoked directly to challenge Executive decision-making.[83] The Treaty generally only imposes a substantive constraint on Executive decision-making where there is some incorporation of it in the empowering legislation. But the Supreme Court has confirmed that such incorporating provisions, which are now common in the New Zealand statute book, are to be given a broad and generous construction.[84] This flows out of the longstanding principle of New Zealand law that the Treaty of Waitangi is relevant as an extrinsic aid in statutory interpretation.[85]

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grievances. However, the Crown had a clear rule that it would not use privately owned land to settle Treaty claims.

82 State-Owned Enterprises Act 1986 (New Zealand) s 9. This was an important provision because the Treaty is only part of domestic law to the extent it is adopted through an Act of Parliament. Even with this statutory provision, there remained an issue as to whether the "principles of the Treaty" were justiciable.

83 The Treaty has featured extensively in the law of judicial review in New Zealand. I will not attempt to add to the scholarship of Matthew Palmer in which he provides an analysis of 53 cases in which the Treaty was directly invoked in judicial review proceedings: Matthew S R Palmer, "Indigenous Rights, Judges and Judicial Review in New Zealand" in *The Frontiers of Public Law* (Jason N E Varuhas & Shona Wilson Stark eds) (Hart Publishing, 2020) at p 135.

84 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 196, *per* Chilwell J; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151], *per* France J.

85 See, *eg*, *Ngaronoa v Attorney-General* [2017] 3 NZLR 643 at [46].

IV. Equity

53 The next area I turn to is equity. This allows me to pick up the third narrative strand – the innovation driven by, and born of, local circumstances.

54 With the procedural reforms I mentioned earlier, New Zealand became the first common law jurisdiction to apply law and equity in a truly concurrent fashion. That was the result of Chief Justice Martin's productive sea voyage from Britain. I suggest this procedural background set the scene for substantive developments in the years to come.

55 These developments occurred in the context of a profession and Judiciary that did not specialise in either the work of common law or equity divisional courts. They were lawyers used to dealing with claims raising both equitable and common law principles, arising from the same pleadings and in the same court.

56 For instance, the 1987 Court of Appeal decision in the case of *Day v Mead*.[86] In that case, Mr Day's solicitor was found to have breached a fiduciary duty when he advised Mr Day to invest in a company, without disclosing a conflict of interest he had in advising on the transaction. But Mr Day then made a second investment at a time when he knew more about the company, and it was found that he should have undertaken more due diligence before investing further.[87] Damages were accordingly discounted by 50% for Mr Day's contribution to his own loss.

57 The notion that an award of damages could be reduced due to contribution by the plaintiff was, at that point, foreign to the field of equity. That remains the case in most jurisdictions.[88] The development has gained some support in Canada,[89] however the Australian courts remain strongly opposed, saying it presents "severe conceptual difficulties".[90] None of England, Hong Kong or Singapore have followed suit.[91] President Cooke however, saw the situation as "an opportunity for

86 [1987] 2 NZLR 443.

87 *Day v Mead* [1986] NZHC 37.

88 See Andrew S Butler "Simplicity and Innovation in the Law of Equity and Trusts: The Cooke Era" (2008) 39 VUWLR 167 at 172–173; and *Pilmer v Duke Group Ltd* (2001) 207 CLR 165 at 210.

89 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 586–587, *per* La Forest, Sopinka, Gonthier and Cory JJ.

90 *Pilmer v The Duke Group Ltd* (2001) 207 CLR 165 at [86], *per* McHugh, Gummow, Hayne and Callinan JJ.

91 Robert Ribeiro, "Equitable Compensation for Breach of Fiduciary Duty", speech at Asia-Pacific Judicial Colloquium, Singapore (28 May 2019) at paras 87 and 89 <https://www.hkcfa.hk/filemanager/speech/en/upload/2239/20190529%20

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equity to show that it "has not petrified and to live up to its maxims".[92] The answer should be what is required to do justice.

58 Shortly after *Day v Mead*, the availability of exemplary damages for breach of an equitable duty was confirmed in New Zealand in *Aquaculture Corp v New Zealand Green Mussel Co Ltd*.[93] This innovation has again been considered and approved in Canada, but not in New South Wales, Australia.[94]

59 President Cooke saw the matter as straightforward, commenting in that case that: "For all purposes now material, equity and common law are mingled or merged."[95] This first-principles approach to the development of equity is exemplified in a number of New Zealand authorities. For present purposes I record just a few more prominent examples.

60 In terms of substantive equitable doctrines, the traditional estoppels have been broadly simplified in New Zealand into a single, directly actionable doctrine of equitable estoppel based on unconscionability as a unifying principle.[96] This unifying principle has also been applied in the area of constructive trusts, where in addition to the "common intention constructive trust" approach – which I note was recently affirmed by the Singapore Court of Appeal in its judgment in *Ong Chai Soon v Ong Chai Koon*[97] – the New Zealand courts have recognised a broader constructive trust doctrine based on the reasonable expectations of the party claiming an equitable interest, irrespective of the other party's subjective intention.[98]

Paper%20on%20Equitable%20Compensation%20for%20Singapore%202019%20(final).pdf> (accessed 30 October 2024).

92 *Day v Mead* [1987] 2 NZLR 443 at 451.

93 [1990] 3 NZLR 299. The court confirmed, but did not award, the availability of exemplary damages for breach of confidence. In a paper delivered to the Australian Institute of Judicial Administration, Appellate Judges Conference, Stephen Kós (current Supreme Court Judge) noted the mixed response this development has had.

94 See *M(K) v M(H)* [1992] 3 SCR 6 at [106]; and see *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

95 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301.

96 See *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 at 671, *per* Davison CJ; *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 435–436, *per* McGechan J; *Gillies v Keogh* [1989] 2 NZLR 327 at 330–332, *per* Cooke P; at 345–346, *per* Richardson J; and at 350, *per* Bisson J; and *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 at 359, *per* Cooke P; and at 365, *per* McMullin J.

97 [2022] 2 SLR 457.

98 *Lankow v Rose* [1995] 1 NZLR 277; *Almond v Read* [2019] NZCA 26. See also preceding *dicta* in *Hayward v Giordani* [1983] NZLR 140 at 148, *per* Cooke J; at 149, *per* Richardson J; and at 153, *per* McMullin J.

61 Another Singapore case plays an interesting role in New Zealand's legal history in the area of equity: *Sumitomo Bank Ltd v Kartika Ratna Thahir*[99] ("*Sumitomo*") which was decided by the Singapore High Court in 1992. In that case Lai Kew Chai J departed from English authority in finding that a fiduciary who accepted bribes held those funds on constructive trust.[100] Almost simultaneously, the New Zealand Court of Appeal had rejected that very notion in the case of *Attorney-General for Hong Kong v Reid*[101] ("*Reid*"), finding the fiduciary could be liable only to account. The New Zealand court considered itself bound by the very same authority the Singapore court had rejected.[102]

62 The New Zealand case *Reid* was appealed to the Privy Council, and the appeal was allowed. The Privy Council preferred the Singapore decision in *Sumitomo* over the earlier English authorities which the New Zealand court had applied.[103] Lord Templeman took the opportunity to comment that the New Zealand Court of Appeal could not have meant what it said in relation to the precedential effect of decisions of the House of Lords, since for many years the New Zealand courts have not regarded themselves as bound by decisions of the House of Lords.

V. Procedural innovation

63 My final topic brings together all four narrative strands I identified at the outset – *tikanga*, the Treaty of Waitangi, innovation and New Zealand's freedom to develop its own distinctive way of doing things. I previously noted that there were, in the early colonial years, procedural innovations. Some of these were designed to provide fair process for Māori, who found the English language, but to an even greater extent, the processes of the common law, alien.[104] We can suspect that part of the thinking behind these innovations was to support Māori acceptance

99 [1992] 3 SLR(R) 638.

100 *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1992] 3 SLR(R) 638.

101 [1992] 2 NZLR 385.

102 *Attorney-General for Hong Kong v Reid* [1992] 2 NZLR 385.

103 *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 at 9. See Stephen Kós, "'This May Seem Hard': Temporal and Personal Perspectives on Fiduciary Law", speech at Society of Trust & Estate Practitioners New Zealand 2021 Conference (29 November 2021).

104 Māori proved to be very skilled at language acquisition. *Te reo Māori* was not written prior to first significant contact with European settlers. Missionaries assisted in creating a written lexicon of the language, with Māori rapidly acquiring literacy with reading and writing. At the same time Māori were acquiring literacy in *te reo Māori*, they were also acquiring a second language, English, at a rapid rate. See Melissa Derby, "A History of Māori Literary Success" (2021) 9 *Journal of Indigenous Research* 1.

of the jurisdiction of the courts – that acceptance was by no means a foregone conclusion. But by the second half of the 19th century, those innovations had fallen away.[105]

64 I close with this topic, because it seems to me that the common law is not just about the substantive content, and the common law method. It is also about the courtroom procedures, the people in those courtrooms, and even the courtroom as the theatre in which the common law processes play out.

65 The abolition of appeals to the Privy Council and the establishment of a domestic court of final appeal, *Te Kōti Mana Nui o Aotearoa* (the Supreme Court of New Zealand), in 2004 was a significant step in creating a court system more responsive to the nation it served.

66 The statute establishing the Supreme Court contained a purpose provision which directly links to the topic of this paper. The purpose of the Act was said to be to establish within New Zealand a court of final appeal comprising New Zealand judges, which would (amongst other things) recognise that New Zealand is an independent nation with its own history and traditions. It would also enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions.[106]

67 Other work has been done to reflect the fact that our court system serves an island nation in the South Pacific. Throughout the courts there is increasing use of Māori language and culture in the rituals of the courts. This includes a change in robes by the Senior Courts from the red and ermine robes, inspired by the red robes of the English judges, to robes with cultural references that acknowledge the cultures of the two founding nations of New Zealand.[107]

68 The lower courts have been a particularly fertile field for innovation, particularly in their youth and criminal jurisdictions. For instance, since 2008, a number of special Youth Courts, called Rangatahi Courts, have been established to address youth offending. These courts hear cases at Māori *marae* (communal spaces) rather than in courthouses.

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105 Alan Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Australian National University Press, 1974) at pp 294–307; Sian Elias, "Sailing in a New Direction", speech to UK-NZ LINK Foundation, London (12 November 2002) at p 11.

106 Supreme Court Act 2003 (New Zealand) s 3.

107 The new robes, adopted in 2017, feature the pattern of the cone of the kauri tree (a native species), a braided Māori *poutama* pattern and, on the shoulders, the three *kete mātauranga* (baskets of knowledge) from the Māori creation legend.

Many of the formalities of court are replaced by Māori cultural customs, and the family and community of the offender (and often the victim) are closely involved in proceedings.[108] There is an equivalent model called the Pasifika Court which incorporates Pacific Island cultural practices. The goal of both models is the diversion of youth offenders away from the criminal justice system. They are highly effective interventions, utilising the concept of therapeutic justice – the idea that you address the causes of the offending, rather than focus upon punishment.

69 A number of other specialist courts have been set up in recent years, with the common goal of giving offenders opportunities to change their lives and avoid reoffending. There are now specialist courts in Tāmaki Makaurau (Auckland) and Te Whanganui a Tara (Wellington) to deal with offenders who are homeless, ensuring that necessary social and health supports are provided to address the underlying causes of offending. The Matariki Court sits in the Far North region and provides culturally appropriate rehabilitation programmes to certain qualifying offenders. In the Wairarapa region, the Personal Individual Needs Court deals with repeat low-level offenders, working with community organisations to address their individual needs and avoid reoffending.

70 Following from the successes of these and other specialist courts, the District Court – the generalist court of first instance in New Zealand – has adopted a nationwide strategy called *Te Ao Mārama*. There are two basic concepts that underpin *Te Ao Mārama*. The first is to support those who engage with the court system to fully participate and understand the proceeding. The second is to provide space for the community and government agencies to identify and address the circumstances that have led to the offending, or in the family law context, to address the conflict that brings the participants to court.

VI. Conclusion

71 In 1988, Sir Robin Cooke, then-President of the Court of Appeal, put the matter as high as this: that "in virtually every major field of law New Zealand law is radically, or at least very considerably, different from English law".[109] The image he creates is of a country as legally distant from the rest of the common law world as it is geographically. The narrative I have set out above is more complex than that.

108 Carolyn Henwood & Stephen Stratford, *New Zealand's Gift to the World: The Youth Justice Family Group Conference* (The Henwood Trust, 2014) at pp 126–131.

109 Robin Cooke, "Fundamentals" [1988] NZLJ 158.

72 For most of its existence, the New Zealand common law has closely mirrored that of England. It is only in the last 60 years that is has begun to develop to reflect New Zealand's conditions, history and traditions – reflecting the four strands I identified at the beginning. In part, this has been spurred on by institutional reform and legislative innovation. In part, it was the work of gifted and visionary common lawyers of the latter part of the last century, some of whom served for a time on the New Zealand Bench. More fundamentally, this development has simply reflected the common law operating as intended.

73 The common law flourishes when it responds to domestic circumstances. But it must also draw strength from developments and discussion in other jurisdictions. Where once we looked only to the laws of England, we are now avid readers of the decision of the courts of Singapore, Australia and Canada, to name but a few. New Zealand has benefited from this common law conversation, with our common law *whānau* (family), and is eager for that conversation to continue. Each of these strands has been, and I have no doubt will continue to be, part of the New Zealand common law story.