ADDRESS AT MEMORIAL SITTING FOR THE RT HON SIR IVOR RICHARDSON, PCNZM

Hon Justice Ellen France*

The address was given at No 1 Court, Court of Appeal, Wellington, on Friday 1 May 2015.

Thank you Chief Justice. At his final sitting in this Court on 23 May 2002, Sir Ivor noted that in his time on the Court he had sat with more than 50 judges – three Chief Justices, four earlier Presidents, 14 other permanent judges of the Court, and as well, with 36 High Court judges sitting on divisions or on secondments for longer periods.

Against that background, it is particularly appropriate that we sit today with so many colleagues on the Bench and a number of whom sat with Sir Ivor. Welcome to you all who have come to honour Sir Ivor's memory.

On behalf of my colleagues on the Court of Appeal I add our warm welcome to Jane, Helen, Megan and Sarah, and the granddaughters.

Our Court of Appeal colleague, Justice Rhys Harrison, is sitting in Auckland today and is unable to attend. He sends his apologies and asks to be associated with these remarks.

We have already heard about various aspects of Sir Ivor's career and contribution to the law and to the community more generally. I am going to focus on Sir Ivor's contribution to the administration of the Court and then address, necessarily briefly, aspects of his contribution to the work of the Court.

Sir Ivor approached the administrative aspects of the President's work with characteristic discipline and rigour. On appointment as President, he undertook two reviews, one of the organisation of case management and processing, and secondly a review of the court office. Sir Ivor explained the latter as involving an analysis of current and future workloads to "[determine] the best

* President of the Court of Appeal of New Zealand.

blend of information technology and human resources to perform the tasks required, and [redesign] systems and processes".[1]

Various changes were made as a result of these reviews, ranging from new standard court forms and letters to new Practice Notes and new Rules in 1997 replacing the Court of Appeal Rules 1955 and the older Criminal Appeal Rules of 1946.[2] In publishing the Practice Notes on a provisional basis in July 1996, Sir Ivor referred to their various objectives including a desire to reduce hearing times to "[enable] the judges to have more time out of court for consideration of cases and judgment writing".[3]

The implementation of the new Rules was an important step in clarifying the Court's procedures. As noted in the Court's Annual Report for 1997, the new Rules omitted "much of the kind of detail" in the old Rules with a view to simplifying and streamlining the appeals process.[4]

There were also changes made to this building, including the move of the Registrar's office, and I interpolate here that it is good to have former Registrars with us.[5]

Out of these reviews also emerged a system of regular meetings of a panel after the hearing of an appeal to discuss the case. In addition, at this time monthly meetings were implemented to review outstanding judgments. Sir John McGrath, in the tribute that has already been referred to Sir Ivor, referred to the description of these meetings as "squirm time".[6]

It is a part of Sir Ivor's legacy that the Court today maintains the practice of post-hearing meetings and of the monthly meetings at which we review our reserved judgment list.

---

1 Ivor Richardson "Court of Appeal Reforms" (paper presented to the New Zealand Bar Association Conference, Queenstown, 27 July 1996) at [2]. See also Ivor Richardson "Appellate Case Management Techniques in New Zealand" (paper presented to Second Worldwide Common Law Judiciary Conference, Washington DC, May 1997); and Ivor Richardson "The Permanent Court of Appeal: Surveying the 50 Years" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Portland, 2009) 297 at 304–305.

2 Court of Appeal (Civil) Rules 1997; and Court of Appeal (Criminal) Rules 1997.

3 "(Provisional) Practice Notes" (1996) 460 LawTalk 13 at 13. The Practice Notes were issued in final form in late 1997 and came into effect on 1 January 1998: [1997] 3 NZLR 392; and [1997] 3 NZLR 513.

4 Martha Coleman and Kenneth Keith *Court of Appeal Report for 1997* (Court of Appeal, March 1998) at 25.

5 The Court also developed its internal database to enable active caseflow management: Ivor Richardson "The Courts and Access to Justice" (2000) 31 VUWLR 163 at 167.

6 John McGrath "Tribute to Rt Hon Sir Ivor Richardson" (2015) 46 VUWLR 1 at 10.

However, I cannot help but note Sir Ivor's recollection that, as at the end of June 1996, only two judgments had been outstanding for more than a month and one of those was the *Port Nelson* case which had involved seven hearing days[7] – so not much to squirm about at that point.

Part of the background to these changes was the Court's increasing workload which the Attorney referred to.[8] Importantly, though, the reviews reflected Sir Ivor's awareness that, as Dame Silvia Cartwright put it, "if the Courts are not efficient they will not be effective in their primary task: the fair resolution of disputes".[9]

A consistent theme in a description of Sir Ivor's approach in bringing about these changes is that it was an inclusive one. Sir Ivor notes that Justices Henry and Blanchard, for example, were involved particularly in the preparation of the new Practice Notes[10] and, as I understand, the new Rules.

Material about these reviews and their objectives is available to us primarily because Sir Ivor was open in these matters, as he was about the Court's processes generally. He explained these changes to the profession and spoke publicly about them.[11] That transparency of approach was reflected also in occasions held to meet with members of the media and other groups with whom the Court interacted. I add here it is marvellous that Sir Ivor's scholarly papers are available now online,[12] courtesy of the Victoria University and the Law Faculty.

The discipline which was a feature of Sir Ivor's approach to the administrative work of the President was also a feature of his approach to judging. That intellectual rigour was apparent in the fact, as has been referred to, that Sir Ivor was always prepared for a hearing with an excellent grasp of the material; he listened carefully and the reasons in his decisions reflected his thoughtfulness.

Sir Ivor's 25 years on the Court, as he noted, saw tremendous change in New Zealand society.[13] That change was apparent in the statutory changes over that time affecting both the private and

---

7 Richardson "Court of Appeal Reforms", above n 1, at [4].

8 At [4].

9 Silvia Cartwright "Opening Address" (2002) 33 VUWLR 447 at 449. See also Ivor Richardson "Educating lawyers for the 21st century" [1989] NZLJ 86 at 87; Richardson "Appellate Case Management Techniques in New Zealand", above n 1; and Ivor Richardson "The Courts and the Public" (1995) 5 JJA 82 at 92.

10 Richardson "Court of Appeal Reforms", above n 1, at [6].

11 Richardson "Court of Appeal Reforms", above n 1; and "(Provisional) Practice Notes", above n 3.

12 "Richardson, Ivor" Social Science Research Network <www.ssrn.com>.

13 Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64 at 65; Richardson "The Permanent Court of Appeal: Surveying the 50 Years", above n 1, at 309–310; and see Ivor Richardson "Economics and the Law: The Courtroom Reality" (paper presented to the New Zealand Law Society Economics and the Law: The Application of Economics in Legal Practice Seminar, December 1990) at 6–7.

public law fields. New legislation over the period included the Official Information Act 1982, the Goods and Services Tax Act 1985, the Commerce, Fair Trading and State-Owned Enterprises Acts of 1986, and the New Zealand Bill of Rights Act 1990 (Bill of Rights), to mention a few. These changes and changing social conditions over the period had an impact on the Court and its role.[14]

The changes in what we now call employment law provide a good illustration of legislative change which brought the Court into an area that, at the time of Sir Ivor's appointment, was generally dealt with outside of the courts.[15]

In one of the series of essays published in honour of Sir Ivor after his retirement, Gordon Anderson noted the inevitability:[16]

> … in a period of ideological conflict over the nature of a field of law [that] the courts are placed in a role that is bound to be controversial and [this] Court ... as the final court in matters of employment law was thus at the centre of the controversies that surrounded employment law during the 1990s.

One issue the Court had to grapple with was redundancy. Sir Ivor's dissenting approach to this topic in *Brighouse Ltd v Bilderbeck*[17] was subsequently adopted as the correct view in the *Aoraki Corporation* case.[18]

Against this background of legislative change, Sir Ivor's purposive approach to statutory interpretation was obviously important and continues to illuminate.

Reference has been made on earlier occasions to his focus on the "twin pillars"[19] of the scheme and purpose of the legislation.[20]

---

14 Rt Hon Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 261 at 267.

15 Gordon Anderson "Employment Law: The Richardson Years" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 467 at 467; Kit Toogood "Facilitating and Regulating Employment" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 517 at 517; and Ivor Richardson "The role of the courts in industrial relations" (1987) 12 New Zealand Journal of Industrial Relations 113.

16 Anderson, above n 15, at 470.

17 *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 (CA).

18 *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).

19 Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Australian Tax Forum 3 at 8.

20 John McGrath "Reading Legislation and Ivor Richardson" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 597 at 605, 607 and 610–612; and John Burrows "The Changing Approach to the

Two examples of cases from the early days of litigation under the Bill of Rights illustrate Sir Ivor's approach. In *Ministry of Transport v Noort* heard at the end of 1991, the Court dealt with an appeal from a decision that the breath and blood alcohol testing scheme for drivers did not allow scope for the driver to consult a lawyer because of the delay that would cause to the process.[21] The case required an analysis of the Transport Act 1962 and of the Bill of Rights to determine whether there was room under the breath and blood-alcohol regime for the operation of the protection in the Bill of Rights of the right to consult and instruct a lawyer.

Sir Ivor's analysis of the Bill of Rights involved consideration of that Act – he noted it was not supreme law but of a special character – and a close attention to purpose. For example, he focused on the fact the long title used words such as "affirm" and "promote", which are "expressive of a positive commitment to human rights and fundamental freedoms".[22] He also observed there was legislative recognition of the limitations on the "absoluteness and generality" of the rights, either in the particular rights themselves or via the "general governing" provision in s 5.[23]

Sir Ivor considered an approach focusing on purpose required identification of the particular right – what was it that the right to counsel preserved?[24]

In answering that question, Sir Ivor considered the constitutional significance of the right to counsel, its international heritage, and the practical realities faced by an accused person. Sir Ivor observed that the right to counsel enabled an accused person to make informed decisions and was a practical way of ensuring the individual knows his or her rights and duties and how to exercise them.[25] The other aspect of the right was to ensure independent representation.[26]

If those two aspects were to have practical recognition, Sir Ivor said the right must be exercisable without delay.[27]

Sir Ivor's judgment then addressed the scheme of the Transport Act.

Drawing on empirical data about road accidents and the impact of drinking on those accidents, Sir Ivor saw it as "obvious enough" that an important purpose of the statutory scheme was to protect

---

Interpretation of Statutes" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 561.

21 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

22 At 277.

23 At 277.

24 At 279.

25 At 279. See Ivor Richardson "Assumptions Underlying Legal Rules" [1999] NZ L Review 149 at 156.

26 At 280.

27 At 280.

and ensure the safety of others on the road.[28] He then discussed the detail of the breath/blood-alcohol scheme.

His conclusion on the interaction between the two schemes provided for a recognition of the right but with the requirement this be done within a reasonable time so as to meet the operational needs of the breath/blood-alcohol scheme.[29]

In this way, the purpose of the right was met, while accommodating the other statutory imperatives. In these early days of the jurisprudence of the Bill of Rights this practical but principled approach was an important marker. It reflected also clear views about the respective roles of the judiciary and of the legislature; views further developed in cases such as *R v Hines* dealing with witness anonymity.[30]

The case of *R v Jefferies* dealt with the right in s 21 "not to be subjected to an unreasonable search or seizure".[31] Again, the approach taken was to place s 21 in its context acknowledging its counterpart in other human rights instruments and the approach taken in the common law dating back to the historical cases such as *Entick v Carrington*.[32]

Sir Ivor considered that the unreasonableness test required a consideration of the values "underlying the right" and a balancing of the relevant values and public interest.[33] That recognition of the need for a careful balancing was a feature of his analysis reflecting his concern that absolutist positions should be avoided. That did not mean however, that Sir Ivor shied away from protecting values that were difficult or that all were to be reduced to a common standard.[34]

Importantly, in terms of the later jurisprudence, Sir Ivor acknowledged in *Jefferies* that expectations of privacy could be different in different situations and different values attached to those different privacy interests.[35]

Sir Ivor did not have an overblown view of the role of the judge, quite the contrary. In an article on the Bill of Rights experience, he made the point that judges focus on the particular case before

---

28 At 280.

29 At 284–285.

30 *R v Hines* [1997] 3 NZLR 529 (CA) at 539.

31 *R v Jefferies* [1994] 1 NZLR 290 (CA).

32 At 300; and *Entick v Carrington* (1765) 19 St Tr 1029 (KB).

33 At 305.

34 Richardson "Educating lawyers for the 21st century", above n 9, at 89.

35 At 305.

them and on exercising judgment in relation to these matters[36] and so he said it was "a mistake to be trying to further a vision of the rule of law".[37]

But he said:[38]

> [I]t is not a mistake to look carefully at the implications of a potential decision, where it will take the law. However, we delude ourselves if we are thinking of our place in posterity, seeking to have an effect on future generations.

And he continued:[39]

> The inevitable reality is that the changing tides soon wash over the great majority of our judgments – as they do over the great majority of decisions of the custodians of the other branches of government. And that is healthy for democracy in a changing world.

The absence of any ego on his part notwithstanding, it is noteworthy that his approach to statutory interpretation and eye for the development of the law continue to influence the work of this Court, as the Attorney has noted.

One example will suffice. In a recent decision that dealt with oppression under the Companies Act 1993, the Court noted the leading authority remained *Thomas v HW Thomas Ltd*,[40] a judgment of the Court delivered by Richardson J – as he then was in 1984 – on the predecessor to the current provision.[41]

In conclusion, it is appropriate to return to another observation Sir Ivor made at his final sitting in this court. He quoted from the first President of this Court, Sir Kenneth Gresson who said: "Well in this job you have simply got to take a shot at it."[42] Sir Ivor of course made an extremely good shot at it and in doing so has made a tremendous contribution to the work and life of the Court for which we are all the beneficiaries. In closing, I want to extend our condolences to Jane, Helen, Megan and Sarah and the other members of his family who are here today.

---

36 Ivor Richardson "The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce" (2004) 10 Canta LR 259 at 268; and see Ivor Richardson "The role of judges as policy makers" (1985) 15 VUWLR 46 at 46.

37 At 268.

38 At 268.

39 At 268.

40 *Thomas v HW Thomas Ltd* [1984] 1 NZLR 686 (CA).

41 *Sturgess v Dunphy* [2014] NZCA 266 at [131]. Miller J noted that in *Thomas* the Court had held "after surveying the legislative history that Parliament created a broad and flexible remedy" and drew also on Sir Ivor's discussion of the link between wrong and remedy.

42 See also Richardson "The Permanent Court of Appeal: Surveying the 50 Years", above n 1, at 359.