

SIR OWEN WOODHOUSE AND THE MAKING OF NEW ZEALAND LAW

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*In the 2022 Sir Owen Woodhouse Memorial Lecture, I considered what it means to make law in New Zealand. Using examples from Sir Owen Woodhouse's illustrious career as a judge and law reformer, I argued that there are important differences in judges' and law reformers' conceptions of "making law". The common law is best seen not as a collection of rules but as a custom as to how to go about recognising what the law is. As a result, it is better to think of what New Zealand judges do as making common law in New Zealand, rather than remaking a New Zealand common law outside pre-existing traditions. The lecture illustrates this point by analysing the Supreme Court's decision in *Ellis v R* (Continuance), which was decided between the lecture being given in Wellington and its being given in Auckland in October 2022.*

I INTRODUCTION

A What I Want to Say

One of the advantages of doing a talk twice is that you get helpful feedback after the first lecture. In Wellington, a prominent judicial figure asked me quite directly, "But what does it all mean? What are you asking us to do?"

So let me begin first with what I want you to take from this lecture:

- (i) I want to use Sir Owen Woodhouse's *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Woodhouse Report) and the universal,

* Professor of Law, Victoria University of Wellington | Te Herenga Waka. I first wanted to pay tribute to our Acting Dean Petra Butler at the time of this lecture whose term was bookended by an occupation and industrial action (neither of her own making) with a financial crisis and the most challenging year of our careers. Petra steadfastly focused on what is most important in any institution, our colleagues and our students. I would not be delivering this lecture without her encouragement. I acknowledge the help of my research assistant Antonia Smith in getting this lecture ready for publication; Antonia not only suggested corrections and references, but also helped me make enough sense of what I spoke about to get it written down. I would also like to acknowledge the superb commentaries given by my friends Tai Ahu (in Wellington) and Professor Claire Charters and Dr Nicole Roughan (in Auckland). I am also very grateful for the skilful editing of the lecture by the student editors.

no-fault accident compensation scheme as an example of the kinds of things that policymakers and legislators can do, in contrast to the kinds of things that judges can do.¹ Judges have an important role in the interpretation of such reforms by considering both the nature of the reform as well as the words used in executing it.

- (ii) But the common law is different. It is a kind of tradition. At its heart, it is rooted in what lawyers are, according to their customs, prepared to recognise as law.
- (iii) New Zealand is a sovereign country. New Zealand judges need to determine the common law for New Zealand. Unquestionably, that will mean some limited development or change in the common law, if only because the common law will move on in other places. Other countries will prompt the question of what the law should be in New Zealand, or novel situations will come in front of the courts that are not quickly resolved by the application of precedent.
- (iv) It would be better to see this development as the development of the common law *in* New Zealand rather than of "New Zealand Common Law" or the "common law *of* New Zealand". While there is plenty of justification for encouraging the former, the development of the latter is problematic and should be approached with a degree of caution that some commentators and students do not necessarily appreciate.
- (v) In developing the common law in New Zealand, lawyers and judges should be aware of the frailties of judicial attempts at law reform. They should also be aware that the realities of New Zealand law and the relative paucity of cases mean that uncertainties created by enormous leaps of doctrine, or significant divergence from overseas jurisdictions, may well create difficulties.
- (vi) That does not mean New Zealand should not continue to reform its law actively. We should adopt the Woodhouse approach of approaching problems comprehensively. However, our history teaches that reform, at least of a more everyday type, is not best accomplished in the courts.

This lecture was given twice, on either side of the Supreme Court releasing its decision in *Ellis v R (Continuance)*.² This version will be slightly different from the one given in Wellington, which preceded the *Ellis* judgment by two days. The lecture in Auckland contained what I might consider "hot takes" on *Ellis* and what *Ellis* tells us, not so much about the role of tikanga in our law, but about what the common law is.

1 *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (December 1967) [Woodhouse Report].

2 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

B Why This Lecture?

There is a multitude of possible subjects on which to write a Woodhouse lecture. Sir Kenneth Keith has discussed safety and the law.³ In his usual understated way, Sir Geoffrey Palmer has spoken of failing to properly implement the *Woodhouse Report*.⁴ Susan St John has also talked about the failure to incorporate all those elements that should be within the *Woodhouse Report's* scope.⁵ Richard Gaskins, whose lecture was long delayed, returned to the lessons to be drawn from Sir Owen's approach.⁶ These are important issues; the accident compensation scheme should be completed. We desperately need a new, more inclusive statute and lawyers and others cannot continue to think about legal problems in silos. But I cannot improve on what these four have said or will say. Tonight's question is the one that has long fascinated me: what does it mean to create New Zealand law?

C The Question of Our Legal Times

The question of what the law of New Zealand should be has been around in my head since I started learning law in 1987, just after Sir Owen retired from the Court of Appeal. It was an essential question for his generation and for the judges immediately following him. After the Privy Council refused not only the appeal, but even to consider the substantive merits, of the Court of Appeal's decision in *Invercargill City Council v Hamlin*,⁷ the battle seemed to have been won and there was a lull in debates. However, now, the issue of what it means to make New Zealand law has returned in full force.

The contemporary challenges of giving force to te ao Māori and the tikanga project, associated with this debate, force us to consider what lawyers have been doing since *Hamlin* and what we want for the future of our law. The argument in *Smith v Fonterra Co-operative Group Ltd* shows the urgency of these issues. In this case, the plaintiff is seeking to hold large-scale emitters liable in tort law for the effects of climate change, or at least to use tort law to prevent them from continuing to emit at such significant levels.⁸ There are three causes of action: negligence, nuisance and an unnamed tort.⁹ The Supreme Court heard an appeal in August 2022 from the Court of Appeal's decision to

3 KJ Keith "Promoting Safety Through Law, National and International, and by Other Means" (2018) 49 VUWLR 229.

4 Geoffrey Palmer "A Retrospective on the Woodhouse Report: The Vision, the Performance and the Future" (2019) 50 VUWLR 401.

5 Susan St John "Reflections on the Woodhouse Legacy for the 21st Century" (2020) 51 VUWLR 295.

6 Richard Gaskins "Woodhouse Heresies" (Sir Owen Woodhouse Memorial Lecture, Victoria University of Wellington, Wellington, 18 October 2023).

7 *Invercargill City Council v Hamlin* [1996] AC 624 (PC).

8 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284.

9 At [6].

strike out the cause of action.¹⁰ If one can put aside the existential threat of climate change, at its heart, *Smith v Fonterra* (much more so than *Ellis*) is about what the common law is, how much flexibility it can be said to have, and what judges might realistically achieve in changing it. The plaintiffs presented a heady cocktail of 19th-century cases from the Industrial Revolution, somewhat open-ended statements about the law of torts from New Zealand judges and, perhaps most importantly, the suggestion that, whatever the law might have been, it should be shaped by at least asking what tikanga might require.¹¹ The defendants' key arguments were that the case was not a common law one, that the history did not match what was needed for the future and that the case lacked the necessary relationships or direct harm caused by the alleged defendants. This lecture is not about how to resolve that case but calls for a greater understanding of what is at stake in the law.

D A Poem as a Point of Departure¹²

The skeleton of the moa on iron crutches
 Broods over no great waste; a private swamp
 ...
 Interesting failure to adapt on islands,
 ...
 Not I, some child, born in a marvellous year,
 Will learn the trick of standing upright here.

When I first read this poem, I was 14. Like all poems by great poets, its meaning changed as I encountered the world. The image of the doomed moa and the promise of the "marvellous year" have always stayed with me and are a kind of symbol for our endeavours as a nation. But it also presents a particular view of New Zealand that I know now to be wrong. Curnow must have known this too. The moa did not fail; it did not rule over a private swamp; and, most importantly, children have been learning to stand up here for maybe a thousand years. Nonetheless, the poem remains for me an emblem of a kind of attitude – a view of generations of my people, who were displaced English, Scots or Irish, that this place is somehow incomplete, a copy of somewhere else. This attitude is not that of my generation or our students at all, but it is part of the story that I want to tell today. My basic thesis is that New Zealand law is caught between my 14-year-old reading of Curnow's poem, that it is our job to stand upright, and my all too current understanding that we have always been doing so. I want to get you all to think a little differently about what it means to find, create or invent (whatever your jurisprudential or political theory) New Zealand law. It worries me that we sometimes do not think

10 *Smith v Fonterra Co-operative Group Ltd* [2022] NZSC 35.

11 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5. The judgment was released just before this issue went to print. It is therefore not substantively considered in this article.

12 Allen Curnow "The Skeleton of the Great Moa in the Canterbury Museum, Christchurch" in *Early Days Yet: New and Collected Poems 1941–1997* (Carcant Press, Manchester, 1997) 220 at 220.

deeply or carefully about what that means. I want to be clear from the outset that nothing I say should be taken as reflecting on the appropriateness of the tikanga-as-law project. The foundational claim of that project, that tikanga was understood by Māori to be law, and that it should have been understood by the New Zealand legal system as law, seems undeniable. I instead suggest that we need to think a little more about the common law and statutory side of the equation. Also, I would like to disavow any sense that what follows is reactionary or at least big "C" Conservative – law is a tradition; traditions have always been about conserving the good bit, but to do that, you have to understand what those traditions are. This is expressed elegantly by Glenn Colquhoun's reply to Curnow in a poem, whose stanzas neatly contrast a Pākehā view of life with a more obviously Māori one:¹³

The art of walking upright here
is the art of using both feet.

One is for holding on.
One is for letting go.

II REFLECTIONS ON SIR OWEN

Before I get into my argument, which is inspired by Sir Owen's career, I want to first acknowledge him and his contributions to New Zealand and its law, and also humbly to my own career.

First, I want also to acknowledge that Sir Owen was not just a public person. I had the honour of representing the Law Commission at his funeral. While the then-Chief Justice and Sir Geoffrey's addresses were impressive, I was especially struck by the love his grandchildren expressed. Tonight most of us here honour a public man; my heart goes out to those who still must miss the private one. I was lucky to meet Sir Owen Woodhouse on, I think, three occasions. I am, therefore, at a disadvantage compared to the other speakers in this series who have known him most of their professional lives. Sir Owen has, however, been a substantial indirect influence on me.

I have often described Sir Owen's five principles (community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency) as being like the Ten Commandments – no one seriously disagrees that we must follow them. However, we might have our own version of what they might mean or how they might apply to us. I have spent a lot of time trying to think and teach about accident compensation, here and overseas. I even once taught it in Iowa, where there was an exclamation from the back row, "but Professor, that is just communism", from a student who later admitted that private insurance might be far worse.

13 Glenn Colquhoun "The trick of standing upright here" in Paul Morris, Harry Ricketts and Mike Grimshaw (eds) *Spirit Abroad: A Second Selection of New Zealand Spiritual Verse* (Random House, Auckland, 2004) 176 at 177.

ACC is an exemplar for anyone interested in law reform, not just because it got done but also because of the simplicity with which Woodhouse dealt with a complex problem. I was lucky enough to be a Law Commissioner at the Commission which he and Sir Geoffrey founded. A copy of the *Woodhouse Report* always sat on my bookshelf at the Commission, as it has at my law school office. But my other great impression of Sir Owen was how hard it was to get him to enter ACC debates publicly. We struggled to get him to talk publicly about his accomplishment or what should happen next. It was almost as if he knew that he had done what he could and it was time to get out of the way of others.

Grant Hammond, President of the Law Commission when I was there, even made Woodhouse into a kind of verb. "To do a Woodhouse" meant for him to cut through the Gordian knot with a simple solution, resolving pretty much everything by jettisoning what was unnecessary or counterproductive. In my experience at the Law Commission, there were always lots of very good, not-so-convincing reasons not to do something, especially if it was just not the way that it had been done in the past. The trouble is that not all projects can be "Woodhoused", or at least not all law reformers have Sir Owen's ability to simplify complexity. Solutions for criminal law problems like sexual violence eluded us at the Commission; they elude New Zealand still. As I have said in the years since I left the Law Commission, a significant regret was the lack of progress that was made appropriately preventing, and dealing with, sexual violence – but as Warren Young, my colleague, explained in the 2021 Lecretia Seales Memorial Lecture on criminal justice, reform in that area is also uniquely unsuitable for successfully "doing a Woodhouse".¹⁴

Sir Owen was a judge for 25 years. He left a vast amount of material – 488 reported cases in which he appeared as judge, from *Kilbride v Lake*,¹⁵ a criminal case in which the defendant successfully claimed his warrant of fitness had blown away, to the epic and ultimately doomed *Takaro Properties v Rowling*.¹⁶ Sir Ivor Richardson described him in the following way:¹⁷

Sir Owen had ... by far the greatest range and depth of experiences shaping him as a lawyer through the Depression, wartime and post-war years. I felt that experience and his intellectual curiosity had given him a particular understanding of contemporary New Zealand. He was also a remarkable lateral thinker, a valuable quality in a lawyer and judge. Presiding in Court he moved cases along, sometimes disconcerting counsel with an elliptical comment on the issues followed by an enigmatic "You know what I mean". His own judgments reflected the thought he always put into their development and his careful choice of

14 Warren Young "Trials, Tribulations and Occasional Triumphs of Criminal Justice Reform" (Lecretia Seales Memorial Lecture, Victoria University of Wellington, Wellington, 4 August 2021).

15 *Kilbride v Lake* [1962] NZLR 590 (SC).

16 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (CA).

17 ILM Richardson "Some Impressions of the Permanent Appellate Judges: 1958–2002" (2016) 47 VUWLR 663.

language. And, importantly as a good leader, he shared the judgment writing around both for cases dealt with on the day and those reserved.

III ACC AS AN EXAMPLE OF LAW-MAKING

Perhaps the best way of illustrating how making common law is different from making law generally is to draw on Sir Owen's introduction to the 1967 *Woodhouse Report*:¹⁸

The Problem—One hundred thousand workers are injured in industrial accidents every year. By good fortune most escape with minor incapacities, but many are left with grievous personal problems. Directly or indirectly the cost to the nation for work injuries alone now approaches \$50 million annually.

This is not all. The same work force must face the grave risks of the road and elsewhere during the rest of every 24 hours. Newspapers up and down the country every day contain a bleak record of casualties.

The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole. They receive this only from the health service. For financial relief they must turn to three entirely different remedies, and frequently they are aided by none.

The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation which needs to be changed.

When making common law, judges do not get to frame problems like this. Most of what they do is bound to the facts of the cases before them. More general realities, or consequences, are often beyond this scope. They cannot reimagine the problem of a tort committed by one party on another in the way that Sir Owen does in this passage – as a social problem. For Sir Owen, the culpability of the parties is almost beside the point in resolving the problem of accidents. For a common law judge, the culpability of the parties is really the only thing that can be considered. Although, in deciding who is culpable for what, the judge can, and even must, have a wider lens: the facts of the case in front of him or her remain central. In contrast, a policymaker's intervention logic (a hideous term that loosely translates to the "reason we are doing this") might seldom refer to individuals at all.

The policy problem fits uneasily with the common law perspective because it does not focus on individual situations in the way that cases do. But one of the things I think Sir Owen's success showed

18 *Woodhouse Report*, above n 1, at 19.

us is that the common law's great weakness is also its great strength: it forces decision-makers to focus first on the particular rather than the general. In the end, it was the individual experience of lawyers and their clients in the tort "system" that showed why it was not equipped to deal with Sir Owen's problem. Somewhat paradoxically, policy attempts to roll back ACC have often largely defeated themselves because they paid almost no attention to the consequences of doing so.

IV THE ROLE OF JUDGES AND SOCIAL LEGISLATION

Perhaps sitting between reform and the common law is the judicial approach to legislation. New Zealand judges understand the need to interpret statutes according to their intent and purpose. What they have often struggled with, in my view, is articulating a process by which purposes can be ascertained. This was an essential part of Woodhouse's career as a judge. He is well known, for instance, for his early interpretation of the Matrimonial Property Act 1963. He wrote in *Reid v Reid* (the "hypnotic influence of money" judgment) that the starting point for interpretation was the fact that the Act was social legislation:¹⁹

Although the Act operates upon "property" as a subject-matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "[worldly] goods" should the marriage come to an end. In that respect it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society.

The role of the judge in interpreting legislation is a major part of his 1983 Auckland Law School Centenary Lecture, "The Judge in Today's Society".²⁰ He records with some pride that the number of cases under the Matrimonial Property Act and the Family Protection Act 1955 has dwindled (I am not sure that some present-day High Court judges would agree with that observation):²¹

In all this the judiciary has been engaged in a working partnership with the legislature of the kind that is intended and so obviously needed by our constitutional arrangements. For individual families and consequentially for the development of this part of the law, the judges have been giving legal form to the statutory principles that have been passed across to them for the detailed attention that could not be undertaken in advance by Parliament itself.

Throughout this lecture, he urged greater attention to the critical subject of statutory interpretation. But his is not the dry technical statutory interpretation that might have been, and is still partly, the norm. It comes with an appreciation, which everybody who has been involved with the actual drafting

¹⁹ *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580.

²⁰ Owen Woodhouse "The Judge in Today's Society" in LCB Gower and others *Auckland Law School Centenary Lectures* (Legal Research Foundation, Auckland, 1983) 87.

²¹ At 91.

of statutes feels keenly, that language is imperfect and that details cannot always be fully described because they frankly cannot always be imagined. Thus, in Sir Owen's view, judges are law reform collaborators, rather than perhaps the more neutral arbiters of statutory meaning that we, at least at this university, still often teach our students.

V COMMON LAW

A *Common Law in New Zealand, or New Zealand Common Law, or Both*

The actual phrase "New Zealand Common Law", at least from searching the New Zealand Law Reports, is much more recent than might be thought; it first appeared in 1976, almost as an aside recognising that, in some minor respect, law in New Zealand might be different from that in England.²² It subsequently appears sporadically within court judgments.²³ Cooke J used it to assert the importance of a "New Zealand point of view" in local legal developments and, more recently, it frequently appears alongside discussion of tikanga.²⁴ However, for the most part, this phrase accompanies consideration of which particular rules exist, or do not exist, within the New Zealand legal system.²⁵

It seems to me that we are now seeing a very different, more meaningful and profound claim: the claim that the common law of New Zealand involves changing the rule of recognition, the method by which we have gone about determining what the common law is; that, rather than trying to figure out what the common law in New Zealand consists of, we are, or should, be determining what the common law of New Zealand might be. What is the difference? The common law *in* New Zealand is a much more modest enterprise – it accepts that New Zealand is part of a wider legal tradition and that changes in the law to fit New Zealand circumstances are incremental and in many ways marginal. I think that, despite switching to the terminology of "New Zealand Common Law", New Zealand judges in fact are continuing to apply a traditional common law approach that seeks incremental adaptation rather

22 *Davis v Lethbridge* [1976] 1 NZLR 689 (SC) at 693.

23 See *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 733; *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 428 and 431; *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* (2001) 1 NZCC ¶55-020 (CA) at [19]; *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [42]; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] and [152].

24 *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) at 193; *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504 at [369]; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [377].

25 See *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [86] and [90]; *Kain v Wynn Williams & Co* [2012] NZCA 563, [2013] 1 NZLR 498 at [18]; *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [88]; *Christie v Foster* [2019] NZCA 623, [2020] 2 NZLR 238 at [71]; *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [65]; *Craig v Slater* [2020] NZCA 305 at [45]; and *E (CA727/09) v R* [2010] NZCA 202 at [59].

than reinvention. The bigger claim implicit in the phrase "New Zealand Common Law" is that, somehow, what we do here is intrinsically different from other places.

B People Are More Interested in Changing the Common Law Than Explaining What It Is

For lawyers, the common law is like the air we breathe; we worry about it only when we hit a rule that we do not like or which might defeat our client. We rarely think about the common law or how it works. There appears to be greater calls for changing it than for understanding it. This seems to me a shame. If the law is comprised of traditions, we must understand those traditions. For example, the Law Commission's comprehensive study paper, *He Poutama*, included the common law as part of what it describes as "state law".²⁶ It is uncontroversial that the common law has been used for all kinds of capitalistic and colonial agendas. Still, it is difficult to say that the system that gave the world the trust, one of the great systems of collective ownership, is individualistic or necessarily capitalistic. Similarly, the common law has been used by the state. However, it is wrong to say, as some recently have, that the common law, which not only has no theory of the state but is also largely anti-state, is somehow part of state law.²⁷ These are just some examples of how not thinking about the common law enough can lead us to forget some of its important features.

VI WHAT IS COMMON LAW?

A A System of Particular Rules

The common law is a system of rules, and sometimes perhaps even a collection of spells. I once taught a non-lawyer friend to use the magic of detinue to get a tow truck company to return his car. Such rules are countless and none of us could hope to know them all – for that, we rely on those great volumes in our library, the common law library. This library is our hive mind, collecting and distilling rules to varying degrees of specificity and generality. Almost any rule can be changed without altering the common law, but changing some rules in some ways may not be permissible. What we teach in our law schools is how to know what can be changed, and how to execute change without being accused of not being a "lawyer".

The claim to a New Zealand Common Law could be the claim that any rule in the books could be changed into a New Zealand version. But that does not mean that we have a New Zealand Common Law, only that we have New Zealand rules. To use a recent example, we could change the common law rule on contractual penalties,²⁸ perhaps drawing on similar changes in other places. But that does not mean we are not still using a common law of contract. Similarly, so long as you are prepared to risk the sanction of a New Zealand Law Journal missile from the first floor of the Old Government

²⁶ Law Commission *He Poutama* (NZLC SP24, 2023) at [5.1] and [5.4].

²⁷ See Law Commission, above n 26.

²⁸ See *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] 1 NZLR 179.

Buildings, you can change or refuse to change the rules of admission of extrinsic evidence in interpreting a contract, or even just how contracts are interpreted.²⁹ However, you are still using the common law of contract. There is also nothing distinctly "New Zealand" about these changes; it is just a matter of doing what lawyers have always done, based on how they have always conceived of the law. There is a cost to change, as explained by the Chief Justices in their lectures in this room that I will talk about shortly. Stability has its value: too much alteration imperils the system.

However, changing rules is still doing common law; you just have to do it in a common law way. And that is perhaps why, despite all the fuss that surrounded *Ellis*, it is not really doing the common law any differently at all. That is why it disappointed my colleague Professor Carwyn Jones, who might have wanted a truly indigenous approach in New Zealand.³⁰ To get a sense of what I mean, consider that the case was supposed to be about the role of tikanga Māori in our common law. Although the Judges all discussed this issue, the case was ultimately decided by a consideration of whether New Zealand should adopt a Canadian approach to whether dead people can still appeal their convictions. If you focused on the tikanga Māori parts of the decision, that consideration would still be key. The Canadian approach helped our Judges understand what the common law tradition tells us about those kinds of appeals, and what change is not only appropriate but possible within the system.

B A Culture That Says What Customs Are Laws

The idea that the common law is not just rules is at the heart of what I want to get you to think about tonight. Common law schools are not Hogwarts, where all you have to learn is a bit of fake Latin or dimly remembered Norman French. What we teach is a shared culture that determines the kinds of arguments that are legal and the kinds of customs that are law (this is why the former Chief Justice is entirely right to claim that, to understand the law, you need to read the law – the process of making law, not just its rules). Brian Simpson, in his extraordinary essay "The Common Law and Legal Theory", put it like this:³¹

... the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may

29 David McLauchlan "A new conservatism in contract interpretation?" [2020] NZLJ 312 and then David McLauchlan "The lottery of contract interpretation" [2021] NZLJ 295, commenting on *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

30 Carwyn Jones "OPINION: Dr Carwyn Jones – Does the *Ellis* decision recognise the authority of tikanga?" *Waatea News* (online ed, New Zealand, 14 October 2022).

31 AWB Simpson "The Common Law and Legal Theory" in AWB Simpson (ed) *Oxford Essays in Jurisprudence: Second Series* (Clarendon Press, Oxford, 1973) 77 at 94.

be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes. The ideas and practices which comprise the common law are customary in that their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning.

C The Importance of a Rule of Recognition

Brian Simpson counterposed his work to that of mid-20th-century positivism and its priest, HLA Hart.³² However, I think they both had the same insight – that the essence of law is not just the rules that we apply, but also what rules we recognise.³³ It is just that, in Simpson's version, the rule of recognition is fuzzier, relying more on shared understanding.³⁴ It is arguably a lot less definite or definable than what Hart might have meant. At the heart of Simpson's essay is the contention not only that common law rules are customary, but also that the common law itself is a custom, a shared understanding of what law is and how it comes to be law.³⁵

This is why I think my colleague Professor Carwyn Jones has been a lot more guarded than some who welcomed *Ellis*.³⁶ In his words:³⁷

The majority seem to recognise that tikanga is an independent legal system but then fail to recognise their own role in maintaining the common law's control over the recognition of tikanga, with the "tikanga as an ingredient" approach.

Perhaps we can't expect common law courts to do anything other than reassert the supremacy of the common law. Yet the tikanga experts in this case seem to understand the kind of mutual recognition of authority that is required in the development of a bi-jural legal system.

32 I acknowledge there is much written on what the rule of recognition is, or whether it exists, that I do not have the space to do justice to. See for example Timothy Endicott, Hafsteinn Dan Kristjánsson and Sebastian Lewis (eds) *Philosophical Foundations of Precedent* (Oxford University Press, Oxford, 2023), especially the contribution of one of the commentators to the Auckland version of this talk, Nicole Roughan "Escaping Precedent: Inter-Legality and Change in Rules of Recognition".

33 See HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1994) at 108.

34 Simpson, above n 31, at 94.

35 At 94.

36 For a more academic account of his concerns generally before *Ellis*, see Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 *Legalities* 162.

37 Jones, above n 30.

In my view, this decision is another illustration of the limitations of the courts' ability to engage with matters of tikanga and just reinforces the need for us to pursue the kind of constitutional transformation envisioned in the report of Matike Mai Aotearoa.

In *The New Zealand Herald*, prominent political journalist Audrey Young, on the other hand, claimed that the decision was audacious and seemed to accuse the Court of exceeding the judicial role:³⁸

The Government is entitled to grapple with the major issues of the day by identifying issues, getting expert views, formulating policy, introducing legislation, getting feedback from the public and passing laws. The unelected Supreme Court knew that was happening on the issue of tikanga but ignored it to impose its own views on an issue after contriving to be confronted with it.

But this wildly overstates the matter. *Ellis* changed almost nothing. Even if it did abolish a rule that cast tikanga as foreign custom, it essentially still subjected tikanga to the common law's customary process of deciding what is legal and what is not.

VII WHAT DOES IT MEAN TO MAKE NEW ZEALAND COMMON LAW?

What does this all mean for the making of New Zealand law? It might mean that when we talk about New Zealand Common Law, we are talking about changing the custom of recognition, the custom by which we recognise different things as law or we recognise certain people as entitled to make law. Alternatively, suppose the enterprise is just to create different rules. That, in fact, would merely be developing the common law *in* New Zealand. That enterprise is in itself an interesting enough thing, especially as common lawyers like to argue about rules. I contend that the generation led by Sir Owen tended to see New Zealand Common Law in this light.

A The Common Law in Canada and Australia

The emergence of national rules was, of course, not just a development in New Zealand. A similar process occurred earlier in Canada. The great comparative lawyer H Patrick Glenn used the phrase "the common law in Canada" to describe this process and asked many of the questions that I ask now about the common law in New Zealand.³⁹ In an excellent article published in 2021, Mark Lunney explained Australian developments through the career of Windeyer J and the contemporaneous dawn of an Australian refusal to automatically follow English common law.⁴⁰ Interestingly, one of the essential texts of Windeyer J's project was an address to the 1966 New Zealand Law Conference in

38 Audrey Young "Peter Ellis case: Supreme Court's audacious decision on tikanga" *The New Zealand Herald* (online ed, New Zealand, 10 October 2022).

39 H Patrick Glenn "The Common Law in Canada" (1995) 74 Can Bar Rev 261.

40 Mark Lunney "From *Parker* to the Australia Acts: Sir Victor Windeyer and the Short-Lived Triumph of the Independent Australian Britons" (2021) 74 CLP 61.

Dunedin.⁴¹ Lunney's conclusion was that Windeyer J was not arguing so much for "an independent Australian law" but rather the law of what he called "a nation of independent Australian Britons"⁴² (an echo here of what James Belich has called "Better Britons" in the New Zealand context).⁴³

Unquestionably, in the different parts of the old Empire, there are different shades of rules that might reflect local elites' visions of how their "new" countries might be a little different from the old one. But there remains a shared method or jurisprudential scaffolding that, while not immediately comprehensible and recognisable, is completely familiar.

B Bognuda – The Unpromising Rebirth of the Common Law in New Zealand

Returning to Sir Owen's era, the reawakening of New Zealand Common Law was spurred by the initially unpromising 1972 *Bognuda v Upton & Shearer Ltd*,⁴⁴ the case that established that there is a common law obligation to support a neighbour's property. In Wellington – water-soaked, built on clay and dependent on retaining walls – there can be no more crucial common law decision (and none more cursed, I am sure, by Wellington City Council lawyers). English common law had long held that, subject to a prescription period of 20 years, there was no such right.⁴⁵ This created a problem in New Zealand, where rights by prescription are barred by statute. The Court of Appeal (North P, Turner and Woodhouse JJ) held decisively that New Zealand should not follow the House of Lords. It seems to me that there are two grounds for this ruling: that *Dalton v Henry Angus & Co* was, on its own terms, nonsense; and that it would have been decided differently (especially in the view of Woodhouse J) in light of *Donoghue v Stevenson* and the requirements of local circumstances (the statutory prohibition on prescription).⁴⁶

Woodhouse J, for instance, wrote:⁴⁷

We were invited to keep in mind that the rule in *Dalton v Angus* has stood in England for nearly a century and that it is a decision of the House of Lords. In this regard I wish to associate myself with all that the President has said concerning judgments of that body. A decision of the House of Lords continues, of course, to have in New Zealand the high persuasive influence to which he has referred. But subject to the

41 Victor Windeyer "Unity, Disunity and Harmony in the Common Law" [1966] NZLJ 193.

42 Lunney, above n 40, at 64.

43 See James Belich *Paradise Reforged: A History of the New Zealanders From the 1880s to the Year 2000* (Penguin Press, Auckland, 2001).

44 *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (CA).

45 *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 (HL).

46 *Donoghue v Stevenson* [1932] AC 562 (HL).

47 *Bognuda v Upton & Shearer Ltd*, above n 44, at 771–772.

ultimate control of the Judicial Committee of the Privy Council the responsibility of this Court is to decide cases upon the law as it has been developed and made applicable here for contemporary New Zealand needs and conditions. We are not bound to follow a decision of the House of Lords and it would be quite inappropriate to do so where the rule in question has been based (as in the present instance) upon a derivative application of principles that unquestionably are inapplicable in New Zealand.

However, my reading of the case is not that there should be a New Zealand Common Law, but that the common law in New Zealand should be different. Indeed the very reason for the decision was that English law had actually changed since the decision.

C The Example of a Negligence Case as New Zealand Common Law?

Strangely, in my view, Sir Owen is also associated in my torts course with the somewhat odd refusal of tort law to die, or at least die completely. His time on the Court of Appeal brought a series of cases descending from *Bowen v Paramount Builders (Hamilton) Ltd*, a building case in which by a majority the Court of Appeal recognised a duty of care to the purchasers of a house.⁴⁸

But from Sir Owen's perspective, tort law's afterlife was not strange at all. In a 1983 lecture at the Auckland Law School, he said:⁴⁹

Questions of precedent and judge-made law must be mentioned in the course of these remarks. However at this point a few judicial achievements deserve some brief attention. And having spoken of the removal of personal injury claims from the immediate responsibility of the judges in this country it is worth noticing the way in which the in-built vitality of the common law concept of negligence has been extended during the past ten or fifteen years by the domestic courts in New Zealand. Its implications for the injured may have disappeared, but as the result of an explicit recognition by New Zealand judges of such policy considerations as the opportunity open to various classes of defendants to obtain insurance against the risk of liability it has been put powerfully to work, for example, in respect of those responsible for shoddy-built houses. It has been applied to over-casual auditors and to the misleading information given a shareholder by the director of a private company. And despite the real pain in the eyes of our conveyancing friends, it has been used on behalf of a potential beneficiary against solicitors who had delayed until it was too late in the provision of a new will for an instructing client. Indeed extensions of that kind into the jealous field of contract law or to do justice where there has been negligent misrepresentation may mean that we are witnessing opening moves in a mortal attack upon the evidential requirement of consideration as support for an agreement not under seal. Lord Mansfield himself failed to achieve that.

48 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

49 Woodhouse, above n 20, at 90 (footnotes omitted).

This is reflected in the Judge's presentation of his philosophy and his 1983 lecture. Like our current judges, he clearly set out the need for stability but also the need to adapt:⁵⁰

The critical matter is to find a proper balance on the one hand between the practical need for stability, in the sense that legal issues should have reasonably foreseeable answers, against the essential need to keep modern applications of the law abreast of modern conditions. And surely it would be wrong if the balance were allowed to swing too frequently or too much in favour of the legal logic of our predecessors so that our ability to meet the needs of our own times would be frustrated.

The Judge then went on to cite the experience of California, drawing on an account by the great progressive legal historian, G Edward White, of the shift from:⁵¹

... an impressionistic frontier justice of the second half of the nineteenth century to a situation where the legal system is now geared to grapple with the massive industrial and commercial complexities of that society today.

Not all who heard the address were necessarily enamoured of Woodhouse's general philosophy. Not for the first time, and certainly not for the last, Don Dugdale, who expressly confined himself to being "polite", railed against what he saw as "Judicial Empire Building".⁵²

D Making Different Rules/Making New Zealand Common Law – The Example of the Building Cases

The building cases (which remain the best-known example of New Zealand Common Law, and in which the courts have steadfastly continued to recognise that builders and local councils owe duties to house owners), of which *Hamlin* sits at the forefront, originated in Sir Owen's time on the bench and the following decade. Curiously, they claim legitimacy in a mix of English cases like *Dutton v Bognor Regis Urban District Council* and *Anns v Merton London Borough Council* (which by the time of *Hamlin* in 1994 had themselves been overruled) and in local circumstances.⁵³ It is easy to read the headline of *Hamlin* as having been the refusal of the Court of Appeal to align itself with a new English take on council liability without looking more closely at the methodology. There is, of course, the soaring quotation from Cooke P:⁵⁴

50 At 97.

51 At 97, citing G Edward White *The American Judicial Tradition* (Oxford University Press, New York, 1976) at 294.

52 DF Dugdale "Judicial Empire Building" [1984] NZLJ 57.

53 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) and *Anns v Merton London Borough Council* [1978] AC 728 (HL), overruled by *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

54 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 523.

One need hardly labour that Judges in different common law countries may legitimately differ in their conclusions in such a field. ...

While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The ideal of a uniform common law has proved as unattainable as any ideal of a uniform civil law. It could not survive the independence of the United States; constitutional evolution in the Commonwealth has done the rest. What of course is both desirable and feasible, within the limits of judicial and professional time, is to take into account and learn from decisions in other jurisdictions. It behoves us in New Zealand to be assiduous in that respect.

Cooke P's judgment has always struck me as a "better common law" approach – that is, *Murphy v Brentwood District Council* was wrong;⁵⁵ *Anns* was right; and the Court should just continue to follow *Anns*. Richardson J's approach was profoundly different. It asked *why* New Zealand should be different from England. Regardless of whether his justifications can themselves be critiqued, his idea seemed to be that the law should be similar unless the circumstances differ. To me, Cooke P's approach always seemed somewhat more perilous.

Why? Because New Zealand is not like the United Kingdom, Canada or Australia for one important reason: our reserve of significant common law cases is tiny. Generally, New Zealand law does not feature a gradual development or correction of doctrine; it is characterised by one big case and then relatively little (for example, there was a decade between the Supreme Court's last substantive negligence case and *Smith v Fonterra*).⁵⁶ If we just assert that New Zealand Common Law is different from the common law elsewhere, we risk robbing ourselves of much-valued certainty. The Sir Ivor approach at least allows us to default to particular rules unless there are compelling reasons not to. It gives us access to a vast corpus of rules that we do not know about until a particular situation or case requires them. New Zealand will remain, it seems to me, a net borrower of common law rules from England and other places. That which is borrowed may not relate to really high-profile issues but may consist of the thousands of more mundane, and often unknown, common law rules that are needed to fill out the system and make it work.

However, if the building cases were a high point of judicial independence in New Zealand, they also point to the weaknesses of judicial law reform – weaknesses that Woodhouse himself exposed in his report, but that he seems frustratingly blind to within his lectures and his own common law judgments. Subsequent cases have failed to fulfil his report's principles – there remains a lack of

55 *Murphy v Brentwood District Council*, above n 53.

56 See *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297. There were two other decisions since: *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 and *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278, but one was a rather inconclusive strike-out and the other a simple affirmation of the scope of council liability.

comprehensive entitlement, real compensation or administrative efficiency. The system we have for negligently constructed buildings is, in fact, close to a regulatory basket case that replicated all the flaws of the tort system that Sir Owen comprehensively dismantled with ACC.⁵⁷ This should warn us that, while our law schools still look to the courts to provide meaningful legal change, policymakers and Parliament will do a better job in the end.

VIII WOODHOUSE, NEW ZEALAND COMMON LAW AND THE 21ST CENTURY

It is impossible in a short lecture to fully, or even fairly, review how the current, post-Woodhouse generation of judges approaches the common law. Instead, for this lecture, I will refer to three important lectures by three of our best judges, then look to *Ellis* as an example of how these themes played out in this most high-profile of cases. It is my contention that these texts show more of a desire to do common law in New Zealand than to make New Zealand Common Law. These lectures and the Supreme Court judgments in *Ellis* show a clear interest in principles and accept that principles might lead to change, but it is method that lies at the heart of their explanations about what makes common law.

A Three Judges' Approaches to the Common Law

The importance of method is well stated by Elias CJ in a March 2019 lecture on the eve of her retirement. She focused on methodology:⁵⁸

The common law method then is intensely contextual. That makes those who long for certainty and who like the security of rules very nervous. But it is part of the strength of the common law. The virtue of public reasoning in court judgments is that it lays out all sides of a matter. At times, such public reasoning has slowed down significant controversies that might have been destructive of social harmony and allowed the political processes to catch up.

The common law, however, depends on methodology which is careful, incremental, and modest. If that methodology is not adhered to, there is trouble.

She also warned of the pitfalls identified by Lord Goff: the "temptation of elegance", "oversimplification", the "fallacy of the instant, complete solution", and dogma.⁵⁹ She elaborated:⁶⁰

57 This is discussed more in my "Legal doctrine, the leaky homes crisis and the limits of judicial law-making" in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Brookers, Wellington, 2011) 3.

58 Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL 1 at 4.

59 At 4, citing Robert Goff "The Search for Principle" in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 2004) 313.

60 Elias, above n 58, at 4.

To this list of pitfalls I would add the temptation of overconcentration on the latest case, or the latest law review article. Principles do not often emerge clearly except by reading a lot of law. And restatements of leading authorities are rarely improvements in exposing the thinking that led to the innovation in the first place. Original thinking is usually the best springboard for fresh thinking as to whether authorities remain compelling in the constant reappraisal that is the method of the common law.

When I read her Honour's comments, I think inevitably of her deep dislike of strike-out applications that prevent the discovery of facts in decisions like *Couch v Attorney-General*,⁶¹ which concerned the issue of whether a claim existed against a parole officer for failing to properly monitor a parolee who committed murder. I also think of her extraordinary concentration on facts in cases like *Proprietors of Wakatū v Attorney-General*, which enabled her to do something quite radical at the same time as being relatively conventional (the short passage about the certainty of subject matter to one side at the moment).⁶²

In her 2020 Robin Cooke Lecture, the current Chief Justice presented her model of the common law as one of principled change:⁶³

... through continuity of process and principle, the common law method both provides the stability and cohesion that underpins our society, and enables change, ensuring that the law and its processes remain connected to the community it serves. That ability to change lies at the heart of this method and ... of judicial legitimacy.

But method remained very important, perhaps even more important than change. Drawing on her own family's cloth-making history, she presents principles as the warp, giving the law shape, and the individual cases as the weft, giving the law its colour and detail:⁶⁴

Even binding precedent does not provide a code containing all the answers. That is because the common law, although contained in the detailed precedent deriving from individual cases, is made up of values that are big enough and flexible enough to allow the law to change to meet the needs of place, people and times. And because these values and concepts (the warp of the law) contain big and flexible ideas, they must be applied carefully to the facts of each case. It is this concern – a concern to ensure that the values and concepts that determined the outcome in the case cited as precedent also apply in the case before the court – that lies behind the common law technique of distinguishing cited case law.

61 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

62 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

63 Helen Winkelmann "Picking Up the Threads: The Story of the Common Law in Aotearoa New Zealand" (2021) 19 NZJPIL 1 at 2.

64 At 4.

In identifying the principles, she wrote:⁶⁵

Today, we would agree at least with the values of honest dealing and good faith. We would add in new values such as fairness and its procedural sister natural justice. We would add values and concepts such as restraining the abuse of power, reasonableness, proportionality and predictability (stability).

But these principles seem largely procedural, perhaps because they reflect a more public law orientation than a private law theorist might adopt. Her Honour then returned to the nature of change and, perhaps relevantly for this lecture, described the duty of care as an example of more radical change.⁶⁶

The incorporation into the underlying common law of new ideas, concepts and values from the sources discussed below leads to change in the law. Because of the steadying effect of precedent, the change may be incremental – but it is not inevitably so. The common law can be creative and even dynamic in responding to the needs of society.

This crafted approach of weaving facts and principles is very evident in her Honour's judgment in *Ellis*. This was also the approach that my colleague Nicole Moreham took to the common law in her inaugural lecture on the common law of privacy.⁶⁷ The Chief Justice's focus on methodology perhaps explicates what I was trying to explain earlier. Method for common law is, to return to an earlier theme, like oxygen. We cannot exist without it, even if we often only notice it when it is missing. Perhaps one thing that is left unanswered in these lectures is how exactly the common law might be done differently in New Zealand, as opposed to how it might on occasion produce different results. In an intriguing essay 20 years earlier, Robert Fisher attempted to articulate how the common law might have actually been done in New Zealand.⁶⁸ He argued that there perhaps existed a certain lack of ambition in New Zealand's legal culture. He wrote for instance of the approach to novel questions:⁶⁹

... New Zealand legal method has traditionally leaned towards creative formalism. Policy considerations have obviously played their part, particularly in the Court of Appeal since about the 1970s. But in other Courts, and even occasionally in the Court of Appeal, the use of policy as an aid to the making of necessary choices has been modest.

⁶⁵ At 5.

⁶⁶ At 5.

⁶⁷ NA Moreham "Conversations with the Common Law: Exposure, Privacy and Societal Change" (2021) 52 VUWLR 563.

⁶⁸ Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 25.

⁶⁹ At 59 (footnotes omitted).

He later continued:⁷⁰

New Zealand Judges and lawyers traditionally inhabited a world of black-letter law, unleavened by public and policy issues and related disciplines. Few sought to understand, still less to influence, the bigger picture.

Tā Joseph Williams is a little different, I think, in both his judgments and his extra-judicial writing, which seem to reflect the wisdom of the poets that I referred to before. In his excellent and much-cited Harkness Henry Lecture "Lex Aotearoa", Tā Joseph did much to explore and promote a vision of Kupe's law.⁷¹ However, his conception of the common law appears a little bleaker, perhaps reflecting how the common law was used in Aotearoa or, indeed, had come to be used in 19th-century England, rather than its underlying nature. He writes:⁷²

So by this stage in the evolution of western, and particularly British values, the autonomous individual freely interacting with others was the operative cultural myth (I use myth without pejorative intent). The law expressed this through contractarian theories of human relationships and proprietorial conceptions of rights in wealth including natural and physical resources. In fact the contract metaphor was also used increasingly to define the relationship between citizens and the state – at least after the reformation and the revolutions in America and France. Though the British were subjects not citizens, even they were increasingly seen as ruled only by their agreement to be ruled.

His Honour then went on to note the arrival of *Donoghue v Stevenson* as a constraint on autonomy:⁷³

It comes as a surprise to lay people these days that the non-contractarian general law of negligence does not enter the common law lexicon until *Donoghue v Stevenson* – well into the 20th century. Even then, as Lord Atkin conceived of it, the obligation underlying it was cultural – indeed biblical – in origin. He called it the neighbourhood principle. He perceived it as a necessary limit on the default position of individual autonomy. Necessary he said, in light of complex post-industrial revolution life in modern western society. It was still seen as highly controversial in its time such was the hegemony of contract as definer of legal relationships.

70 At 65.

71 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1. The lecture has advice that I also should have followed: "It also turns out that you should never come up with a name for a lecture before having written it": at 1.

72 At 6.

73 At 6 (footnotes omitted).

For what it is worth, I prefer the version of the common law that Tā Joseph presented in *Attorney-General v Family First New Zealand*, in which he emphasised the selfless nature of the common law version of charity as providing more organisation:⁷⁴

But one problematic effect of adaptive incrementalism with little guidance in principle has been the steady encrustation of contradictory decisions onto the charitable purpose canon ...

While the reference to guiding principles is similar to the Chief Justice's, Tā Joseph's concerns seem different to me. There are parts of "Lex Aotearoa" that suggest that the guiding principles or values of the common law are more important than methodology and that they go beyond the kinds of procedural values that the Chief Justice identifies as her principles. The point of "Lex Aotearoa" seemed not to lie in its descriptions of the past, but in a search for a syncretic future – neither Kupe nor Cook's law, but perhaps a fused te ture.

B The Common Law in Ellis

Like all big cases, *Ellis* contains multitudes. I cannot here say anything like all that should be, will be or indeed has been said about *Ellis*.⁷⁵ But I want to suggest that *Ellis* was not, and perhaps was never going to be, the major point of departure for the creation of New Zealand Common Law. Indeed, the case's major significance is that it does not do that at all. True, the majority find a greater space for tikanga Māori, but they do not, and perhaps could not, consider how New Zealand Common Law might differ from English Common Law other than by, potentially, having different rules. That is not to say that there is not a sense of change in the judgments of the three Judges who expressly approach the issue of empowerment of tikanga. Glazebrook J wrote, for instance:⁷⁶

I stress that the common law is in a state of transition. The caselaw to date on tikanga as part of the common law has been relatively limited. Further development will be gradual as cases arise. Certainty, consistency and accessibility are strong values in our legal system. Precedent will still bind as it does conventionally, unless distinguishable. This is why the common law method is generally for the law to develop incrementally as it will continue to do with regard to the application of tikanga in the common law.

My reading of *Ellis* also acknowledges that judges are aware of the importance of principle. Winkelmann CJ, for instance, asserted:⁷⁷

⁷⁴ *Attorney-General v Family First New Zealand* [2022] NZSC 80, [2022] 1 NZLR 175 at [164].

⁷⁵ See Dean R Knight and Mihiata Pirini "Ellis, tikanga Māori and the common law: Relations between the first, second and third laws of Aotearoa New Zealand" [2023] PL 557, which partially disagrees with me about the overwhelming significance of the case.

⁷⁶ *Ellis v R (Continuance)*, above n 2, at [127].

⁷⁷ At [163].

... I distinguish between the common law and the common law method. The common law is the principles that can be extracted from the body of case law. The common law method is the process that courts use to decide the case before them which may, in a case such as this, require them to develop the common law to enable them to do that.

But she continued by reaffirming that at the end of the day what is important is methodology. Part of that methodology seems to involve taking a very broad approach:⁷⁸

The judge will have reference to any principles in other areas of the law that can be applied by way of analogy, and to underlying values that emerge from the case law and which assist with deciding the case. But they may also look elsewhere for values, and sometimes for detailed rules. They may look to the values in the society — which are of course themselves shaped by the law, but are also shaped by other forces at work in our society. In this regard, judges look to relatively permanent values within society and not to "transient notions" which may emerge in reaction to a particular event. They may look to customary practices within society, and also to international conventions and charters to which New Zealand is party. They may also look to other sources for ideas and inspiration — such as the values expressed in statute law, the law of other jurisdictions and academic writing.

She ultimately returns to the basic notion that judges must come back to the kinds of arguments that lawyers would recognise as doing law, rather than some other kind of social decision-making:⁷⁹

This method itself serves certain values: fairness (including the procedural and substantive fairness provided by a fair hearing), certainty and predictability in the law. Each of these values makes an essential contribution to stability within society.

The task of developing the law through the common law method is therefore incremental in its essence, in the sense that it proceeds on a case-by-case basis.

In discussing the interaction of the common law with tikanga, her Honour further elaborates on her view of the common law. She notes that tikanga was the first law to operate in Aotearoa⁸⁰ and had shaped society, especially in relation to family and the environment.⁸¹ Lastly, she asserts that the law has to serve all in society.⁸² She acknowledges the difficulties associated with the common law's

78 At [165] (footnotes omitted).

79 At [166]–[167].

80 At [173].

81 At [173].

82 At [174].

incorporation of tikanga, but concludes that the case-by-case method of the common law is well suited to dealing with the complexities involved.⁸³

The Chief Justice's preference for a fact-based methodology over a rules-based one seems to lie behind her and Williams J's rejection of the Canadian-steeped approach in *R v Smith*⁸⁴ to determining whether a deceased's appeal should be allowed to proceed. She notes that the majority prefers this approach, despite it creating a higher barrier that might exclude justified cases.⁸⁵

Methodology is also important in Williams J's judgment. But just as in his lecture and his *Family First* judgment, his search for principle seems to go deeper, and certainly beyond a focus on the mere procedural. For example, in applying the tikanga approach to the question of whether an appeal might be continued, his Honour proceeded with a comparison of foundational values:⁸⁶

It is plain, at least to me, that these tikanga principles provide a very helpful perspective on the issues in this case. This is not because they provide any particular answer. Rather it is because the Māori legal tradition, whose values are so different from those of the common law, still echoes, in its own way, the underlying considerations which the common law takes into account.

But, like the Chief Justice's, Williams J's application of principle was to be tempered and constrained by common law methodology:⁸⁷

The common law is structurally more sensitive to the context of the case than is legislation, so even if there appears to be no space for tikanga to apply, it may also [be] necessary to ask whether space should now be made. Resolving this question will involve the application of ordinary common law reasoning. That is, considering whether the particular context of the case renders the leading authority distinguishable on the point or justifies adjustment of the relevant principle.

This belief in methodology as a way of reconciling two ways of legal thinking perhaps obscures the very real difficulties of reconciling two different legal systems. It will doubtless frustrate those who might wish for either much greater progress or much greater acknowledgement of incompatibility. In the end, I suspect that further elaboration will be needed. Williams J's deep-diving into underlying principles, and the syncretic melding of traditions that might result from it, is what is needed in Aotearoa. But the question really remains whether the common law courts are best placed to do that.

83 At [179]–[183].

84 At [207] and [236], discussing *R v Smith* 2004 SCC 14, [2004] 1 SCR 385.

85 At [208].

86 At [256].

87 At [266].

IX CONCLUSION

This lecture has sought to ask its listeners, and now its readers, to use Sir Owen's extraordinary career to think more deeply, and hopefully more critically, about what it means to make New Zealand law. Sir Owen's significance for us lies not just in what he did as a law reformer or a judge, or as an occasional author. It lies in how he thought about his task as a law reformer and judge. Broadly, Sir Owen's career as a law reformer or interpreter of law reform seems a more promising model than his judicial law reform. Law is always in the process of being remade. As we seek to make a common law in New Zealand, or even a New Zealand Common Law, let us follow Sir Owen, both in his vision of what we do and in his insight into how we do it.

