

COMMON LAW AMONG THE STATUTES: THE LORD COOKE LECTURE 2007

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It is an overwhelming honour to be asked to give this lecture in memory of this great jurist. His judgments and his many extra-judicial writings made such a difference to the law, both in this country and elsewhere. I will not do him justice tonight, although it is some consolation to know that very few could.

I have chosen to talk about a dangerously wide topic, the relationship between common law and statute. It is a topic in which Lord Cooke had a real interest, and on which he and I had interesting conversations.

For present purposes, I shall define common law as law made by the judges in the process of deciding cases, and statute law as law made by or under Act of Parliament. Those definitions, particularly the first, are not entirely accurate,¹ but they will suffice for my purpose.

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1 In its origins the common law was more than just the product of judicial decisions. It was said to include the "common custom of the realm," and contained a healthy infusion of civil law and law merchant. Early statutes, which existed before "Parliament" was known in its modern sense, were once a loose collection of pronouncements by the monarch. "They were not so much exact formulas emanating from supreme Parliamentary authority, as broad rules of government and administration, intended for guidance rather than as meticulous instruction. ..." Carleton Kemp Allen, *Law in the Making* (7 ed, Clarendon Press, Oxford, 1964) 454; also 124-125.

My first question is, how do statute and common law get on together these days? Do they live comfortably together in the same legal system?² If you will permit me to indulge in a little legal history, there was a time when they got on badly – when judges and legal scholars thought the common law was excellent, and statute law most definitely was not. This attitude was at its height in the 17th and 18th centuries. You see it in the writings of Chief Justice Coke, Hale and Blackstone. They spoke of the common law in terms approaching rapture. They saw it as the refined product of the wisdom of the ages, and as embodying everything that was English. Hale said it was "a law very just and excellent, singularly accommodated to the disposition of the English nation, and such as by long experience and use is as it were incorporated into their very temperament."³ Blackstone called it "the best birthright and noblest inheritance of mankind."⁴ Coke described it as "the perfection of reason."⁵ One finds eulogies of this kind well into the 20th century. As late as 1957 Professor Radzinowicz described the common law as an "integral part of the national heritage which discharges a political, social and moral function which is much more precious than the shapely codes [of the Continent]."⁶

On the other hand, the ancient sages did not like statutes much: at least they did not like many of them. There was perhaps some reason in this. Statutes were often harsh. Many of them provided for the death penalty for relatively minor matters such as impersonating a Chelsea pensioner or damaging London Bridge. Some reeked of political expedience (we must remember that this was before the time of modern representative democracy). Most importantly, a lot of them were regarded as simply of poor quality. Coke described some of them as being "made by men of none or very little judgement in the law",⁷ and Blackstone said that while the original common law was a

2 For discussion of the relationship between common law and statute, see Jack Beatson "Has the Common Law a Future?" (1997) 56 CLJ 291; P S Atiyah "Common Law and Statute Law" (1985) 48 MLR 1; Paul Finn "Statutes and the Common Law" (1992) 22 West Aust LR 7; John Burrows "The Interpretation between Common Law and Statutes" (1976) 3 OLR 583; Roderick Munday "The Common Lawyer's Philosophy of Legislation" (1983) 14 Rechtstheorie 191; Jack Beatson "The Role of Statutes in the Development of Common Law Doctrine" (2001) 117 LQR 247; Paul Finn "Statutes and the Common Law" in Suzanne Corcoran and Stephen Bottomley (eds) *Interpreting Statutes* (Federation Press, Annandale (NSW), 2005) 52. Beatson spoke of the relationship between the two as being a type of "legal apartheid" and as being like "oil and water": Beatson "Has the Common Law a Future?", *ibid*, 308.

3 Sir Matthew Hale *History of the Common Law of England* (Book III, London, 1713) 45.

4 *Commentaries on the Laws of England* (Vol 1, Book IV, 1765-1769) 443 (436).

5 *Co Litt* (1628) s 97b.

6 Sir Leon Radzinowicz's "Selden Society lecture on the life of Sir James Stephen" (1957) quoted in Eva Steiner "Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?" (2004) 25 Statute LR 209, 215.

7 Preface to Coke's Reports (Part 2).

"regular edifice of beautiful symmetry" it had been "mangled by various and contradictory statutes". He described these statutes as "preposterous additions of different materials and coarse workmanship."⁸

The ancients did not mince their words. The extremity of their language showed the passion with which they held their views.

Of course these views were not entirely fair. For one thing, some of the finest and most fundamental principles of English law, principles such as equality before the law and no imprisonment without due process, derived from statutes like Magna Carta and the Statute of Marlborough.⁹ Moreover, Coke himself was one of the first to articulate the purposive approach to the interpretation of statutes,¹⁰ indicating that he believed at least some of them had a policy which deserved generous implementation. For another, while some parts of the common law were indeed excellent and highly principled – the rules of natural justice being among them – some parts of it simply were not. Cromwell described the rules of real property as a "tortuous and ungodly jumble."¹¹ The early rules of what we now call the law of contract were an equally ungodly mixture of debt, covenant and then assumpsit complicated by some difficult learning about conditions.¹² And why, if the common law was so excellent, did equity have to be invented to mitigate its harshness and rigour? The common law was not all sweetness and light.

Yet, however they may have misrepresented the position, it was the common law advocates who carried the day. An anti-statute bias became ingrained at an early stage, and survived well into the 20th century. In the famous words of Harlan Stone statutes were "treated like an alien intruder in the house of the common law."¹³

This manifested itself in at least two ways.

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- 8 Blackstone, a letter of 1745 quoted by Roy Goode "Removing the Obstacles to Commercial Law Reform" (2007) 123 LQR 602, 602.
- 9 Indeed, given the lack of records in the old days, judge-made law and statute probably got mixed up a little. The origins of some of English law's fundamental principles have been obscured by the mists of time. See Sir Carleton Kemp Allen *Law in the Making* (7 ed, Clarendon, Oxford, 1964) 124.
- 10 *Heydon's Case* (1584) 3 Co Rep 7a (Exch).
- 11 Thomas Carlyle *Cromwell's Letters and Speeches: With Elucidations* (Chapman and Hall, London, 1861) 296: the quotation dates from 1650. There were some statutes in the property law mix, but most of it was common law.
- 12 See J H Baker *An Introduction to English Legal History* (4 ed, Butterworths, London, 2002) 317-361. Charles Bruce Morison *The Principles of Rescission of Contracts* (Stevens & Haynes, London, 1916) shows well the pervasive difficulty of the concept of condition.
- 13 Harlan Stone "The Common Law in the United States" (1936) 50 Harv L Rev 4, 15.

First, when the judges developed the common law, they did so by reference to their own precedents, and did not look to statute law at all for ideas. The material for development came from within the common law itself. Perhaps the greatest common law case was *Donoghue v Stevenson* in 1932.¹⁴ It decided that a manufacturer of contaminated ginger beer was liable in negligence to the ultimate consumer. The judgments made no reference to any statutes on the subject, not even to place the issue in context. Yet there were statutes dating back to Victorian times imposing liability for distributing contaminated and harmful food.¹⁵ Should not such social policies, implemented in legislation, at least have been relevant? As late as 1979 in the United Kingdom, when Stephenson LJ was asked to apply the analogy of a statute when deciding a common law matter, he said that the suggestion had "nothing to commend it but its audacity."¹⁶

In the second place, statutes were for the most part interpreted literally, and at times even more narrowly than that, so that they would do as little damage as possible to the legal fabric. There was a presumption that statutes were to be construed as not intended to alter the common law. In discussing this presumption, Fortunatus Dwaris said:¹⁷

The best interpretation of a statute ... is to construe it as near to the rule and reason of the common law as may be and by the course which that observes in other cases. ... When we consider the constant vehemence and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of all reason and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction and its careful observance.

I have been referring to English authority. One might have thought that New Zealand courts could have done better.¹⁸ From an early time New Zealand had a programme of innovative legislation responsive to the needs of New Zealand society. Moreover the English common law which we inherited from the United Kingdom in 1840 must surely have seemed more remote from our national character than it did from Hale's "English nation." I think overall we did do a little

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

15 The history is traced in Ross Cranston, Julia Black and Colin Scott *Consumers and the Law* (3 ed, Butterworths, London, 2000) 318-321.

16 *Malone v Metropolitan Police Commissioner* [1979] 1 All ER 256, 266 (CA).

17 Fortunatus Dwaris *A General Treatise on Statutes: Their Rules of Construction and the Proper Boundaries of Legis* (2 ed, W Benning, London, 1848) 564.

18 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago LR 1 and "The Usages of Society and the Fashions of the Times" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003). See also her "Interweavers: The Contribution of the Judiciary to New Zealand Law" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission* (LexisNexis NZ, Wellington, 2007) 55.

better, although not much. The reason was simple. For a long time we had little in the way of New Zealand legal text books, and we used the English texts. Lawyers of my vintage were brought up on them. In particular, we used the English books on statutory interpretation, *Maxwell* and *Craies*. I know of no New Zealand common law cases using analogies from statute until well into the second part of the 20th century. As late as 1963 Denzil Ward wrote in the New Zealand Law Journal that in far too many cases the purposive direction in section 5(j) of the Acts Interpretation Act 1924 was forgotten, and statutes were given a literal interpretation which failed to give effect to their purpose.¹⁹

Of course this attitude could not survive. Statutes are the instrument of modern government. They are the means by which government policy is implemented. To fail to facilitate the smooth working of statutes is to obstruct the smooth operation of the state. Moreover, today's statute law overwhelms the common law by sheer force of numbers. One crude way of demonstrating that is to note that whereas in 1926 about a third of the cases in the New Zealand Law Reports were pure common law, by 2006 that proportion had dropped to about one eighth.

So the unfriendly attitude to statute law which used to prevail could not survive. Nor has it in any legal system. Dating from around the last quarter of the 20th century, statute law and common law have become much friendlier with each other. There has been a reconciliation.

Statutes are now generally interpreted purposively. Their underlying intent and purpose are seen as more important than the dictionary meaning of their words. In other words the principle of the statute is more important than the literal construction of the language in which it is expressed. That is not a world away from the common law method by which we distil principle from the judgments of the courts. It is at least closer than it used to be.

Furthermore, the presumption that statutes should be construed so as not to alter the common law has been greatly weakened. Many statutes are obviously intended to reform the common law because that law has become unsuitable. By and large the courts do embrace these reforms. The purposive approach would be meaningless if they did not.²⁰

19 Denzil Ward "A Criticism of the Interpretation of Statutes in New Zealand Courts" [1963] NZLJ 293.

20 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298-299 McHugh J. Sometimes the courts may embrace the reform with more fervour than even the reformers intended. One example is s 9 of the Contractual Remedies Act 1979, which allows a reasonable sum to be awarded on cancellation of a contract for breach. That has been gratefully seized upon to bypass the complex old common law rules for the assessment of damages: see for example *Thomson v Rankin* [1993] 1 NZLR 408 (CA). The same may perhaps be true of s 10 of the Defamation Act 1992. Does it dispense with the need for public interest in the honest opinion defence? See Stephen Todd (ed) *The Law of Torts in New Zealand* (4 ed, Brookers, Wellington, 2005) 696-697.

However, there is a far more important movement. Statutes are now feeding into, and contributing to, common law development. Sometimes they are referred to in describing the legal landscape in which a new rule of common law will have to fit. So, when the Court of Appeal in *Lange v Atkinson*²¹ decided that there needed to be an enlarged privilege for political discussion in the law of defamation, they were at pains to refer to Acts like the Official Information Act, and even our electoral legislation, as evidence of the value our modern society places upon freedom of expression and political debate.

Sometimes it goes further, and a principle originating in a statute is applied by analogy in a similar common law field. The concept of apportionment of damages enacted in the Contributory Negligence Act, for example, has been applied in assessing damages for breach of fiduciary duty even though the Act has no direct application there, it being confined to tort actions. The *idea* has been appropriated for use in a cognate area.²² There are many more examples.

The old lawyers would have had none of this. Can you imagine Coke or Blackstone's reaction?

These new developments are now well accepted. Lord Cooke himself contributed strongly to them in this country. Statutes now "feed and refresh"²³ the common law.

I would like to pause to reflect a little on this. It has something, I think, to do with the demise of the declaratory theory of common law. There is now open acknowledgement that judges make law. It was once dogma that they simply declared it, but as Lord Reid famously said in 1972 "we do not believe in fairy tales any more."²⁴ Yet, if judges do make law, they must be seen to have tangible materials with which to construct it. In answer to the question "what shall we do", it is no longer enough to answer "what we did last time." Hence, the modern tendency is for judges to refer to much more contextual material, and statutes are part of that material.

Another factor at play in New Zealand is our mature nationhood. If the common law created by the judges is to fit the special needs of New Zealand, it should align itself with New Zealand statutes.²⁵

21 *Lange v Atkinson* [1998] 3 NZLR 424 (CA); [2000] 3 NZLR 385 (CA).

22 *Day v Mead* [1987] 2 NZLR 443 (CA). For further examples see J F Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 372-373.

23 The words of Lord Bingham in "The Common Law: Past Present and Future" (1999) 25 CLB 18, 27.

24 Lord Reid "The Judge as Lawmaker" (1972) 12 JSPTL NS 22, 22.

25 See Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182.

However there are some risks in the practice. Statutes can change with changing governments. They can, as a continental jurist has beautifully put it, "fade like shadows."²⁶ There is little point in aligning common law with a particular statute if that statute is going to disappear in the next Parliament. There needs to be a trend of statute law and a probability of continuity.²⁷ One must also be cautious about the inferences we draw from statutes, because sometimes there can be an argument both ways. When the majority of the Court of Appeal in *Hosking v Runting*²⁸ confirmed that there is a tort of invasion of privacy in this country, they were fortified by the number of recent statutes here which recognise aspects of privacy. They regarded those statutes as setting the scene. Yet, Keith J, one of the dissenters in *Hosking*, drew exactly the opposite conclusion.²⁹ Parliament, he said, had deemed those and only those aspects of privacy worthy of protection, and it was not for the courts to proceed beyond the point where Parliament had decided to stop.

However, with those caveats, the common law is prepared to be informed by statute. Common law and statute now align better than they did. We have come a long way.

Does all of this suggest that the common law is less vigorous than it once was? I think not. The common law member of the legal family is smaller than it was, but it can still exert considerable authority. We have noted recent examples of its continuing vitality in New Zealand: the creation of a tort of invasion of privacy;³⁰ an extended privilege in defamation;³¹ the abolition of barristers' immunity.³² But in this lecture I am not so much concerned with that type of vitality. I am more interested in common law's new relationship with statute. Are we anywhere near the ideal of which Harlan Stone spoke: the ideal of "a unified system of judge-made and statute law woven into a seamless web by the process of adjudication"?³³

To answer this we need to look at some areas which common law once had to itself, but which statute has now begun to regulate: areas where, as it were, the common law finds statutes in its

26 Reinhard Zimmerman "Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective" (1997) 56 CLJ 315, 315.

27 *Erven Warnink AV v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 (HL) Lord Diplock.

28 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

29 *Ibid*, paras 205-206 Keith J.

30 *Ibid*.

31 *Lange v Atkinson*, above n 21.

32 *Lai v Chamberlains* [2007] 2 NZLR 7 (SC).

33 Stone, above n 13, 12. "The seamless web theory is extremely radical, both in the boldness of its attribution of 'gravitational force' to statutes, and in its disregard for legal categories": Peter Cane "Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law" (2005) 25 OJLS 393, 399.

backyard. How does it handle this? This inquiry reveals that the common law still has much life. Let me examine a number of possible situations.

First, there has been a resurgence recently of certain of those truly basic common law principles and values which lie at the heart of our legal system: those which guarantee human rights and which support the rule of law. The right of access to the courts, and the right to natural justice, are among them. They remain strong, and statutes are still interpreted consistently with them. Indeed it can sometimes be hard to find words apt to exclude them.³⁴ There is even one version of this approach which would go further and say that statute cannot exclude them. Some of the stronger statements in the United Kingdom are by Sir John Laws. It is interesting to read what he says, for it contains echoes of Hale and Blackstone. Whereas, he says, "reasonableness is a defining feature of the common law, it is no more than an adventitious feature of legislation."³⁵ On this view the common law is inherently reasonable, whereas statute is only occasionally so, and even then by good luck rather than good management. Thus, in Sir John's view, these fundamental principles are "a higher order law to which even Parliament is subject."³⁶ Not everyone shares that view: in New Zealand it may be hard to reconcile it with section 4 of the Bill of Rights Act 1990.

Let me give some rather more humdrum and less controversial examples of the common law's continuing vitality.

First, there is what I might describe as the auxiliary function, the function of filling gaps and supplying omissions in statute law. The Contractual Remedies Act 1979 provides a prime example. That Act sets out in remarkably economical form the rules about cancellation of contracts for breach. Experience has shown it may be too economical. The slender and skeletal framework of the Contractual Remedies Act could never expressly cover all situations that might arise in practice. When an hiatus is discovered, it is perhaps not surprising that the courts reach back into the common law to fill it. They have done so when finding that an unpaid deposit can be recovered from a defaulting purchaser even after the contract has been cancelled;³⁷ that cancellation for a bad reason can be justified by a good one, discovered only after cancellation;³⁸ and that generally

34 See for example *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 131 (HL) Lord Hoffmann; *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

35 Sir John Laws "Wednesbury" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Clarendon Press, Oxford, 1998) 185, 199.

36 Sir John Laws "Law and Democracy" [1995] PL 72, 84. Lord Cooke himself once said so, the clearest statement being in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA). See also the elegant exposition by McLachlin CJ in "Unwritten Constitutional Principles: What is Going On?" (2005 Lord Cooke Lecture, Victoria University of Wellington Law School, 2005).

37 *Garratt v Ikeda* [2002] 1 NZLR 577 (CA).

38 *Thompson v Vincent* [2001] 3 NZLR 355 (CA).

speaking a party in breach cannot himself or herself cancel the contract.³⁹ The Act provided no obvious answer to these questions. Rather than reinvent one, why should the courts not use the old common law answer?

That is one example of the gap filling function. Another slightly different one is provided by the Accident Compensation legislation. When the scope of ACC cover was cut back in the 1990s, the courts were able to find that the old common law action for damages sprang back into life in certain areas where there was now no statutory cover.⁴⁰ To adapt Bennion's nice metaphor, when the ACC carpet was trimmed back the common law became visible again around the edges, and available for use.⁴¹

Secondly, there is what I might describe as the "survival" phenomenon. There is sometimes a tendency for a new statute to be interpreted in the light of the common law. Usually this does not happen because of any antipathy to statute, but rather because there is comfort and convenience in continuity. It saves us from formulating and learning new law. The common law is an old friend and we are reluctant to abandon her. Indeed, at times the statute may be so dependent on common law thinking that it may be very difficult to abandon her.⁴²

When the Fair Trading Act 1986 first provided that no person in trade will engage in misleading or deceptive conduct, there was a tendency, and there still is in some quarters, to assume that "misleading or deceptive conduct" is the same as misrepresentation at common law. This might be colloquially described as "thinking in the common law groove." But misrepresentation at common law is a relatively narrow concept. The natural meaning of the statutory phrase may be wider.⁴³ To interpret in accordance with common law concepts may be to deprive the Act of some of its potential.

39 *Noble Investments Ltd v Keenan* (2005) 6 NZCPR 433 (CA).

40 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA). See Ailsa Duffy "The Common Law Response to the Accident Corporation Scheme" (2003) 34 VUWLR 367; Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ Law Rev 37.

41 F A R Bennion *Statutory Interpretation: A Code* (3 ed, Butterworths, London, 1997) 133, cited by Richardson P in *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646, 664 (CA).

42 In "Accident Compensation – What's the Common Law Got to Do With It?" [2008] NZ Law Rev 55 Geoff McLay examines the relevance of basic common law concepts to the interpretation of the Accident Compensation legislation.

43 One might mention, too, the tendency under the Fair Trading Act to pigeonhole damages into either "contract" or "tort". See *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA), especially the dissent of Tipping J, 40.

It will be interesting in this regard to see how the Evidence Act 2006 beds down, and whether its provisions will be interpreted in line with past case law, or by reference to the words of the new Act alone. The Court of Appeal, disagreeing with earlier High Court authority, has indicated a preference for the latter in relation to one of its potentially controversial provisions: section 43 on evidence of propensity. The Court of Appeal advocates a clean slate approach of interpreting the words according to their most natural sense, rather than assuming they preserve the old common law on similar facts.⁴⁴ There is sense in this: what is the point of a new Act, passed in the interests of accessibility, if we still have to canvass the old authorities?

Another, stronger, instance of the same phenomenon is where it first appears that statute might have got rid of a common law right or remedy, only for a court to hold that the common law survives as an alternative to the statute so that the parties have a choice. Thus the common law about restitution still runs side by side with section 94B of the Judicature Act 1908 which provides for money paid under a mistake.⁴⁵ It has even been held that the concept of a common law trademark continues alongside our trademark legislation,⁴⁶ and that passing off continues to be available even though section 9 of the Fair Trading Act can do the same job. There are many situations where common law and statute run in parallel as alternatives. It makes for longer pleadings in statements of claim.

There are however some less comfortable situations, in which the common law remains uncertain where it stands in relation to a statute. The interface between the Contractual Mistakes Act 1977 and the rules of offer and acceptance is a jagged one indeed.⁴⁷

Let us step back for a moment and look at the whole picture. Our legal system now handles statutes much better than it did. Statute is without doubt the dominant force in the system. Statutes are interpreted purposively. The common law borrows ideas from them. Yet, even in the face of statute, the common law has remarkable vitality. It can plug gaps in the statute law and supplement it; sometimes it remains as an alternative to it. Yet what we have is far from Harlan Stone's ideal of a seamless web. Our legal system is a pragmatic and not very coherent collection of bits and pieces.

44 *R v Healy* [2007] NZCA 451.

45 *National Bank v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA).

46 *North Shore Toy Co Ltd v Chas Stevenson Ltd* [1973] 1 NZLR 562 (SC) (But was there such a thing as a common law trademark?) The inherent jurisdiction and powers of the courts are particularly difficult to dislodge by statute: a good recent example is *Transport Accident Investigation Commission v District Court* (5 June 2008) HC WN CIV-2007-485-1902.

47 See D W McLauchlan "Mistake as to Contractual Terms under the Contractual Mistakes Act 1977" (1986) 12 NZULR 123. The interface between the trademarks legislation and the tort of passing off is also uncomfortable: Mark Lim and Gene Kwek "Conflict Between Common Law and Statutory Trade Mark Rights" (2004) 24 EIPR 36.

There is occasional overlap between statute and common law. Sometimes they run in parallel. There are sometimes jagged and awkward interfaces. For the experienced it is a Pandora's box of choice. For the inexperienced it is a fertile source of mystery and confusion. It is not tidy. Not many legal systems are tidy: they have to deal with too diverse a world.

I have considered first the relationship between common law and statute. I now turn to another aspect of my topic. It is time to ask how they compare as types of law, and as types of lawmaking. My title is "Common law among the statutes", so I shall make common law the main focus.

The common law has virtues which have been eloquently expounded by others:⁴⁸ It is flexible, it is grounded in the practicality of individual fact situations, it is the refined product of the wisdom of many minds, it is free from political influence, and it is relatively stable. But it is now 2007. Time marches on, and our expectations of law change. The common law, when compared with statute law, has shortcomings.⁴⁹ I shall outline some of them.

First, let us look at its accessibility. In the 21st century we are increasingly concerned that the law should be accessible and understandable.⁵⁰ People will not respect it and may be unable to obey it if it is not. For a shamefully long time New Zealand and English lawmakers ignored this accessibility requirement. Until quite recently our statute law was in a poor state in this regard. It was drafted in verbose impenetrable language. There is still a great deal wrong with our statute book, but a start has been made on fixing it. At least our drafters are now drafting in plain English, and it has made a world of difference. It is at last being realised that law has to be communicated.

How does the common law stand up in terms of accessibility? The answer, I am afraid, is: rather badly. The common law exists in the judgments of the courts. One has to find the relevant cases in what A W B Simpson called "the untidy shambles of the law reports."⁵¹ On most topics there are likely to be many more cases than one. The judgments may be 20 pages long, sometimes more. In the higher courts there may be three or more judgments, each of them different. There are some cases where there is a unanimous decision, but where no single rule is to be found in the several

48 For example Elias "The Usages of Society and the Fashions of the Times", above n 18; Lord Goff "The Future of the Common Law" (1997) 46 ICLQ 745; Lord Bingham "The Common Law: Past Present and Future" (1999) 25 CLB 18.

49 Useful articles are Justice Scarman "Codification and Judge-made Law: A Problem of Co-existence" (1967) 42 Indiana LJ 355; Cane, above n 33; and Maimon Schwarzschild "Keeping it Private" (2006) 25 UQLJ 215.

50 See the Law Commission Issues Paper *Presentation of New Zealand Statute Law* (NZLC IP2, Wellington, 2007) Chapter 1.

51 A W B Simpson "The Common Law and Legal Theory" in A W B Simpson (ed) *Oxford Essays in Jurisprudence* (2nd series, Clarendon Press, Oxford, 1973) 77, 99.

judgments.⁵² Sometimes, even in a single judgment, there can be disagreement as to how one authoritatively expresses the rule it is supposed to stand for. To quote A W B Simpson again at his delightfully provocative best, the common law is "repelled by lucidity, brevity and system."⁵³ Popular dictionaries define law as a system of rules. The common law poses challenges for that definition.⁵⁴

What does this mean? For one thing, it means that the uninitiated cannot find the common law without help. When a group of eastern European lawyers wanted to examine English commercial law with a view to seeing whether it might be suitable for adoption in their own country, Lord Goff reports that "they found two problems. The first was that nobody knew precisely what English commercial law consisted of, and the second was that nobody knew where to find it."⁵⁵

It also means that when researching common law, almost no-one goes to the original sources first. They are too diffuse. There is heavy reliance in the first instance on the text writers. When I am studying statute law, I go to the statute first then to the commentary. When I am studying common law, I start with the commentary and then (hopefully) go to the cases. One hopes, not always with complete justification, that the text writers get it right. It is impossible to overestimate the influence of text writers in the history of the common law. They have played a far greater role than is often appreciated in shaping it. It was Anson's text book on contract in 1879 which effectively imposed a framework on the hugely disparate body of cases. Anson's table of contents set the scene for the modern law of contract. He virtually invented offer and acceptance (or "proposal and acceptance" as he called it). His framework bore no relation to the way earlier writers such as Addison had organised the law. Anson charted the direction for the future.⁵⁶ The text-writing tradition continues today, although not quite as dramatically or influentially as this. Text writers are self appointed, and they have no democratic mandate. Yet, because of the difficulty of accessing the common law's original sources, they have exerted a not inconsiderable influence over the years.

52 May I say that I understand the reasons for multiple judgments, and I understand that the potential they create for legal development. I am concerned here solely with access and clarity.

53 Simpson, above n 51, 99.

54 Frederick Pollock said that the common law "professes to develop and apply principles that have never been committed to any authentic form of words": *A First Book of Jurisprudence for Students of the Common Law* (3 ed, Macmillan, London, 1911) 249. A W B Simpson explores the idea of the common law as a system of rules in his masterly essay: Simpson, *ibid*. He believes that H L A Hart in *The Concept of Law* failed to take account of the common law: A W B Simpson "Herbert Hart Elucidated" (2006) 104 *Mich L Rev* 1437, 1456. See also Cane, above n 33, 404.

55 Lord Goff, above n 48, 750-751.

56 See Richard Austen-Baker "Gilmore and the Strange Failure of Contract to Die After All" (2002) 18 *JCL* 1, 5-7; A W B Simpson "Innovation in Nineteenth Century Contract Law" (1975) 91 *LQR* 247, 258.

So there is a problem of access.

The second feature of the common law I wish to explore is related to the first. Once one has located the relevant common law and analysed the cases, the resulting product is sometimes very difficult to understand and master. It is not all like that of course: some areas of the common law are simple and principled. But some are not. Indeed, some are very uncertain. In 1998 Lord Cooke himself reviewed a book of essays on the law of contract in honour of Guenter Treitel.⁵⁷ He concluded that virtually every essay demonstrated how unclear and uncertain that area of the law was. He said: "Uncertainty in contract law is rampant. That is not altogether a bad thing. If the law was certain all that academic lawyers would have to do would be to teach and expound it; so we would be deprived of books like this."⁵⁸

Other parts of the common law, rather than being uncertain, are just plain difficult. Judges try to do justice in deciding individual cases. Sometimes to achieve it they have to circumvent the roadblock of earlier inconvenient precedent. They resort to fine distinctions. This is compounded in our adversarial system by the fact that judges are addressed by lawyers, each doing their best for their clients, and at times espousing extreme arguments. Those lawyers are not concerned about the symmetry of the legal system; they are quite correctly concerned about winning the case. Courts may be swayed by their arguments. So the common law is full of distinctions manufactured to achieve a just result. It is full of artifice and fiction. There are collateral contracts, and there are process contracts, erected so that one can get at auctioneers who wrongly advertise sales as being without reserve,⁵⁹ and persons calling for tenders who do not adhere to their own tender documents.⁶⁰ It is also full of concepts which have been distorted beyond definition. I do not think anyone can define "consideration" in contract any more. And can anyone produce a coherent definition of "defamatory statement?"⁶¹ Parts of the common law occasionally arrive at a state which is almost beyond understanding, although many of the worst of them have now been rescued by statute. Contractual mistake is an example.

57 Robin Cooke "Review of *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel*" (1998) 114 LQR 505.

58 Ibid, 510.

59 *Barry v Davies* [2000] 1 WLR 1962 (CA).

60 *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 (HC).

61 Of course statutory concepts can also be distorted in the course of interpretation, but at least the authoritative form of words in the statute provides a base from which one cannot deviate too far. With the common law there is no authoritative form of words.

That wonderful legal historian S F C Milsom puts it cruelly, but accurately: "The life of the common law has been in the abuse of its elementary ideas."⁶²

Thirdly, the common law, when it has been discovered, sometimes bears the marks of its age. I do not just mean the facts of, and the characters in, its leading cases. Those cases are populated by a colourful cast of Dickensian characters: Mrs Carlill and her Carbolic Smokeball, Mr Felthouse who wanted to buy his nephew's horse, Miss Brooks who plied her illicit trade in an ornamental brougham, and Ms Donoghue who probably found a dead snail in her ginger beer. These people are part of our legal folklore. The cases involving them are still cited in court and they are staple diet for law students. How sad we would be to lose them. The antiquity of these cases is no cause for criticism in itself, because the principles they illustrate are often adaptable, and have indeed been adapted, to modern circumstances – although I confess I was once asked by a student of the relevance in the 21st century of a case depending on how long it took to get by horse and cart to Harper's Ferry in 1819.⁶³

A more serious matter, though, is that not all of the cases have adapted so well. Some of the principles laid down in those early cases bear the imprint of the time they were decided. Most of the great cases of the common law derive from the Victorian era. As Lord Devlin has put it,⁶⁴ the predominant values of that time (the "Victorian Bill of Rights" he called them) were "the liberty of the individual, the freedom of contract, the sacredness of property and a high suspicion of taxation."⁶⁵ Some of the fundamentals of the law of contract and tort still bear that imprint. *Rylands v Fletcher*,⁶⁶ rendering a landholder liable for escapes onto a neighbour's land, is still a tort of strict liability. It is also still generally true that if I sign something I am bound by it, however unreasonable it may be and however little choice I really had in signing it. It is also still true in the commercial world that if I make a contractual promise I must deliver on it, short of total frustration of the contract. That principle always worked better in single transaction contracts like the sale of goods. It is much less satisfactory in relation to long term relational contracts which can be at the mercy of a myriad changes of circumstance from which the classic common law gives no relief.⁶⁷

62 S F C Milsom *Historical Foundations of the Common Law* (2 ed, Butterworths, London, 1981) 6.

63 A reference to *Eliason v Henshaw* (1819) 4 Wheaton 225; 17 US 225.

64 Lord Devlin "Judges and Lawmakers" (1976) 39 MLR 1, 14. In relation to contract, see P S Atiyah *An Introduction to the Law of Contract* (5 ed, Clarendon Press, Oxford, 1995) 8 and Atiyah's magisterial work *The Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford, 1979).

65 *National Bank v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA).

66 *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

67 See John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (3 ed, LexisNexis NZ, Wellington, 2007) 663-665.

In other words, some of the principles of the common law are based on a philosophy which is not so comfortable today. It has not been possible to rescue all of them, and when rescue has occurred it has tended to be in small bites, usually statutory, which have increased the untidiness.

The fourth outstanding feature of the common law is that it has been created and built, and continues to be developed, by judges deciding cases. Common law method is cautious and pragmatic. Judges usually say no more than is necessary to decide the case before them. The result is that in one of those rare leading cases where a court decides to take a larger step than usual, and effectively create new law, it is quite unable to lay down detailed rules for the future in the way that a statute can. The new law will have a lot of holes in it, they can only be filled when appropriate cases arise. So the common law needs litigants. It depends on the accidents of litigation for its development.⁶⁸

Appropriate cases may take a long time to arise. They may never arise. Let us take *Hosking v Runting*,⁶⁹ in which the Court of Appeal confirmed by a majority that there is a tort of invasion of privacy in New Zealand. The main elements were outlined in very clear fashion: there must be facts in respect of which there is a reasonable expectation of privacy; there must be publicity given to those facts which is highly offensive to an objective reasonable person; there is a defence of legitimate public concern. That leaves a great deal to future decision. In what circumstances is there a reasonable expectation of privacy? Are there different standards of offensiveness for different cultures? Can dead people have privacy? Can corporations have privacy? Are there any other defences than public concern? How are damages to be assessed? What degree of privacy, if any, can one have in a public place? The new tort is full of gaps and uncertainties, and they can only be dealt with if and when appropriate cases arise. It is the same with the new defamation privilege affirmed in *Lange v Atkinson*; its boundaries are still unclear.⁷⁰ We are still not entirely sure of all the ramifications of promissory estoppel to which Denning J gave birth in the *High Trees* case in 1947.⁷¹ After over a century we still do not know for sure what happens if the offer of a unilateral contract is withdrawn before the act of acceptance is complete. The walk to York is the classical hypothetical example.⁷²

68 "Without a litigant the process cannot start and adventurous litigants with an enthusiasm for law reform are not easily come by": Lord Devlin in a lecture cited by Scarman, above n 49, 366.

69 *Hosking v Runting*, above n 28.

70 *Lange v Atkinson*, above n 21.

71 *Central London Property Trust v High Tree House Ltd* [1947] KB 130.

72 See Burrows, Finn and Todd, above n 67, 69-71.

Of course even statutes cannot provide for everything in advance. That would be beyond the powers of human foresight and the resources of language. But they can do much better in planning a new law in detail. The American writer Bloustein gave another of those harsh but accurate criticisms of the common law. He said:⁷³

The common law is a hit-and-miss and rough-and-ready process responsive to sporadic cries for relief by litigants, rather than a planned scheme of development intended to answer all problems at once in a systematic fashion.

Slowness of development is more marked in some areas of the law than others. I suspect that privacy will attract few litigants because those whose privacy is infringed have avenues of redress outside the courts. It will therefore be a long time before the new tort can lay any claim to completeness. Commercial law and the law of contract are afflicted with a different problem, in that many disputes are now going to arbitration or other forms of alternative dispute resolution. The speed and confidentiality of those modes of redress are attractive. It is as well that they are, because the courts already have enough to do. But the downside is that arbitration and alternative dispute resolution have no lawmaking function: they create no precedents to enrich the legal system. The more these new forms of dispute resolution are resorted to the more the common law will atrophy. Its gaps will remain unfilled.

The incompleteness of the law, and the consequent uncertainty, are more serious in some areas than others. Uncertainty is not so much of a problem in the tort of negligence for instance, because negligence is more about cleaning up after people's mistakes than about prescribing rules of conduct. But uncertainty can be a real problem where people need to know what the law is so that they can conduct themselves accordingly. The tort of invasion of privacy is more in that camp I think: the media and others need to know where they stand. The common law delivers them very much less than complete guidance at the moment.

A fifth limitation of common law as a type of law has been much discussed. There are some areas of law which are inappropriate for judicial lawmaking. As it was put by Sir Ivor Richardson in *R v Hines*, "The larger the public policy context, the less well equipped the courts are to weigh the considerations involved."⁷⁴ Courts do not have the equipment that Government and Parliament have to access relevant information, to consult the community, and to do cost-benefit analyses.

73 Edward J Bloustein "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well" (1968) 46 Texas LR 611, 615.

74 *R v Hines* [1997] 3 NZLR 529, 539 (CA) Richardson P. He continued: "Litigation under the adversary processes of the Courts is not an ideal vehicle for conducting a social or economic policy assessment ... [W]e rarely receive adequate empirical data and so are being asked to make what is necessarily a largely intuitive assessment. The real problem ... is that the Court processes do not allow public policy to be

If anything the gap between the two forms of lawmaking is widening. Since the mid-1980s nearly all Bills before Parliament go to select committees which hear public submissions. Since the mid-1990s MMP has ensured much more input and examination by the parties in Parliament. Statutory lawmaking is now, more than it ever was, subject to democratic process. Compare Lord Goff's analysis of judicial lawmaking in the United Kingdom in a 1997 lecture. He said that judicial decision "is the fruit of an amalgam, an amalgam of his, the judge's, knowledge of legal principle, his experience as a lawyer, his understanding of the subtle restraints with which all judges should work, his developed sense of justice and his innate sense of humanity and his common sense."⁷⁵ No doubt that understates the case a little. In New Zealand at least, judges now do receive economic and social material (a sort of Brandeis brief)⁷⁶ and they do allow interest groups to be joined as interveners: in *Hosking v Runting*, for instance, the Commonwealth Press Union and the Commissioner for Children appeared. But these processes, while welcome, are still nowhere near the thorough and far-ranging inquiries which are undergone when statutory change is contemplated.

A word of qualification. I would not wish to be understood as saying that there are no areas which are more appropriate for judicial lawmaking. There are. Areas like natural justice and judicial review are probably among them. Judges have an objectivity and independence which is not always possessed by the competing parties in an MMP Parliament: the political compromises which find their way into legislation are an unhappy mark of the way parliamentary lawmaking sometimes works these days. That, however, does not alter my main point. There are branches of our law where Parliament is far better equipped to do the job, and I think their proportion is growing.⁷⁷

So let us conclude. How is the common law surviving in today's world? While smaller than it was in bulk, it is still lively and still strong. However, it is increasingly unsatisfactory in a number of respects in meeting society's legitimate expectations of a modern legal system. What should we do? Any answer has to be sensible, achievable and proportionate. So for that reason I am not an advocate of complete codification. Some areas of the common law are doing well enough on their own. Judicial review and the law of negligence may be two such. Such areas would probably not be improved by codification. Indeed, how could one codify the law of negligence in a way which did

developed in the systematic way that is regarded as desirable elsewhere in government." See also E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2003) 31 VUWLR 5, 32. Schwarzschild says that "common law rules ... tend not to be sharply controversial, or at least not to be points on which society is most divided politically": Schwarzschild, above n 49, 223.

75 Lord Goff, above n 48, 754.

76 Sir Ivor Richardson called for counsel to present such material: "The Role of Judges as Policy-Makers" (1985) 15 VUWLR 46, 51-52.

77 See Cane, above n 33, 416.

not leave wide scope for judicial creativity? But I think we do need to continue picking off the really unsatisfactory areas and progressively putting them in statutory form. We in the former colonies are better at this than they are in the United Kingdom.⁷⁸ There is still a degree of sentimental resistance to codes there. There is still no criminal code in the United Kingdom, and the English Law Commission some time ago abandoned its objective of codifying the law of contract.⁷⁹ We have always been rather better at this, as witness our Crimes Act, the new Evidence Act and the contract statutes. Let us continue along that path.

Yet, let us never expect perfection. There will always be untidiness in our legal system. Our existence in a complex and changing world guarantees that. In the words of the old song, "that's life I guess."

78 See Barry Wright "Self-governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples" (2007) 26 UQLJ 39.

79 Let us, however, not forget those remarkable English codes of the late nineteenth century, in particular the Sale of Goods Act, the Partnership Act and the Bills of Exchange Act.