ETHEL BENJAMIN COMMEMORATIVE ADDRESS 19 AUGUST 2011

Discretion, diversity, and other matters of judgment

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Delivering an address of this kind provides a chance to explore matters of interest that have been in the back of your mind but otherwise not fully developed. For me, one such topic is the approach to take to appeals. The issue was brought into focus recently by the decision of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*[1] which emphasised that an appellant is entitled to a decision based on the appellate court's own assessment of the merits of the case. The not uncommon practice of the appellate court dismissing the appeal by saying the conclusion under appeal was "open to the lower court" was incorrect if the appeal jurisdiction was a general one.

However, the rule is not uniform. The Court in *Austin, Nichols* recognised that a different approach applied where the decision under appeal was an exercise of discretion.[2] When that is the case, the role of the appellate court is more limited. In order to allow the appeal in those cases, the appellant must show an error of law or principle; that irrelevant principles have been taken into account or relevant considerations ignored; or that the decision is plainly wrong.[3]

· Court of Appeal. I am grateful for the assistance of my clerks (present and former) Sarah Keast and Jennifer Devlin in the preparation of this address.

1 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

2 The recognition that appeals from the exercise of a discretion are in a different category is not new, see the cases discussed in *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [34].

3 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Tipping J for Blanchard, Tipping and McGrath JJ. See also *May v May* (1982) 1 NZFLR 165 (CA) for a discussion of the appellate approach to discretionary decisions.

Naturally, then, the issue arises as to when it is the exercise of a discretion or when is it the other thing – something variously called an evaluative exercise, an assessment or judgment of fact or degree, or a value judgment. That question is the substantive topic I want to explore today in the first part of my address.

I am conscious also that this is the 15th Ethel Benjamin commemorative address. It is a privilege to have been asked to deliver it and I want, in the second part of the address, to change the focus by moving from the nature of a discretion to thinking about whether who is exercising the discretion might make a difference. Accordingly, in the latter part of the address I offer some thoughts on the case for a diverse judiciary.

I want to begin my discussion of discretion by identifying for you some of the decisions post- *Austin, Nichols* that have decided the issue of whether the decision under appeal was the exercise of a discretion or something else. It is not my aim here to offer my own views on any particular assessment. That reflects my approach to the limits on a sitting judge on an intermediate appellate court, but I think it is fair to say that the overview suggests there is scope for further analysis of what exactly is a discretion in this context.

I thought it would be interesting to focus initially on decisions in the family law area. I say that because that was, of course, one of the areas in which Ethel Benjamin practised, particularly in her role as honorary solicitor to the Dunedin branch of the New Zealand Society for the Protection of Women and Children.[4] The categorisation of decisions in this area is also of interest because often the Court is being asked to apply fairly broadly

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[4] Janet November *In the footsteps of Ethel Benjamin* (VUW Press, 2009) at 77-79 and following and see the video produced by Katherine Findlay, "First Lady in Law: Ethel Benjamin" (Dunedin, University of Otago, 2009).

worded tests, something which perhaps initially might have been thought to be an indicia of a discretionary decision.

The matter came before the Supreme Court recently in the family law context in *Kacem v Bashir*, a case involving relocation.[5] The mother of two young children applied to relocate them from Auckland to Sydney against the wishes of their father. The mother's application brought into play those well known sections of the Care of the Children Act 2004: first, the requirement in s 4 that the welfare and best interests of the child must be the first and paramount consideration in decisions relating to the child and then s 5 which sets out a number of principles relevant to the child's welfare and so must be considered in determining what is in the child's best interests. Those familiar with the family law area will know that these decisions involve quite difficult balancing exercises (and some present here today have written quite forcefully on how well the courts are doing them).[6]

Tipping J, speaking for three of the judges of the Court said that it was not "altogether easy" to describe the distinction between a general appeal and an appeal from a discretion "in the abstract".[7] "But", Tipping J continued:[8]

> ... the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.

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5 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

6 M Henaghan "Going, going ... gone – to relocate or not to relocate, that is the question" (paper presented to NZLS Conference – Family Law, Auckland, 18 September 2009).

7 At [32].

8 At [32].

The end result of that case was that whether or not to grant an application for relocation is an evaluative judgment subject to general appeal rather than the exercise of a discretion. The "ultimate objective" of that judgment is to "determine what outcome will best serve the welfare and best interests" of the children in their circumstances.[9]

Other family law cases have been differently assessed.

The Supreme Court in *Ward v Ward*[10] was dealing with the power under s 182 of the Family Proceedings Act 1982, which allows a court, subject to specified constraints, to vary the terms of ante and post-nuptial settlements when the parties' marriage or civil union ends. In that case, the Wards had entered into a post-nuptial settlement which took the form of a trust. On dissolution of their marriage, Mrs Ward applied for an order under s 182. In issue was the Family Court's order in Mrs Ward's favour dividing the trust into independent halves, one for the benefit of Mrs Ward and the children and the other for the benefit of Mr Ward and the children.

Section 182(1) provides that the Court may make such orders as it thinks fit. Section 182(3) refers expressly to what the Court may consider "in the exercise of its discretion" under the section.

The making of the order was treated as discretionary. Focussing on the nature of the decision in issue, Tipping J for the Court explained that the court's role under s 182 was

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9 At [19]. I have focussed only on New Zealand cases. For completeness, I note there are illustrations of the judgment/discretion distinction in other jurisdictions. I note just one example: *R v Secretary of State for the Home Department, ex parte Yousaf* [2003] 3 All ER 649 at [48] per Sedley LJ who said: "The word 'discretion' is most apt to describe a circumscribed area of decision-making which depends on an often incommunicable sense of what is fair rather than on the kind of reasoning which characterises judgment. Statutes constitutive of public authority rarely create a true discretion in this sense."

10 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

to assess how best "in the changed circumstances the reasonable expectations [Mrs Ward] had of the settlement should now be fulfilled".[11] If those expectations had been defeated by dissolution, the relief to which the applicant was entitled is "an order in terms of the section, in whatever form is best suited to the circumstances, restoring those defeated expectations."[12]

In *Surrey v Surrey,*[13] the Court of Appeal said that once domestic violence had occurred, whether a protection order was necessary for the protection of the applicant or a child of the applicant's family is a discretionary decision for appellate purposes. Once both limbs of the statutory test are met, however, there was no room for any residual discretion.[14]

Other decisions which have been treated as discretionary in this area include the impact of a child's views on matters affecting the child and the quantum of an award of interim maintenance.[15]

Finally, although it pre-dates *Austin, Nichols*, I note that the decision whether or not to return to another country children wrongfully removed to New Zealand was treated as discretionary.[16] The decision in issue in *Secretary for Justice v HJ* was made pursuant to s 106(1)(a) of the Care of Children Act 2004. That section provides that the Court "may" refuse to make an order for the return of the child if the application for return is made more than one year after the child's removal and the child is now settled in his or

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11 At [25].
12 At [27].
13 *Surrey v Surrey (CA763/2008)* [2010] 2 NZLR 581, [2010] NZFLR 1.
14 At [67]-[71].
15 *C v S* [2006] 3 NZLR 420 (HC) at [31]; *K v K* HC Auckland CIV-2009-404-4421, 20 November 2009 at [7]. I am grateful for the assistance of Jordan Boyd, clerk to Wild J in relation to aspects of this part of the address.
16 *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289.

her new environment. Tipping J delivering the judgment for Blanchard, Tipping and Anderson JJ said the discretion requires the judge to "compare and weigh two considerations".[17] One is the child's welfare and best interests and the other, the significance of the general purposes of the Hague Convention on the Civil Aspects of International Child Abduction which was in issue.[18]

Given the nature of the decisions in issue in these cases, it is perhaps not surprising that most of them are seen as discretionary.

Looking briefly at other areas, there are some types of decisions which are generally viewed as discretionary, and where there has been no change to the appellate approach to such decisions post-*Austin, Nichols*. Sentencing is the classic illustration.[19] Another is the grant of a particular remedy.[20] Matters of procedure have also been treated as involving the exercise of a discretion.[21]

Other decisions in the criminal justice context such as the grant of bail pending appeal[22] and name suppression[23] have also been treated after *Austin, Nichols* as involving the exercise of a discretion. However, one significant aspect of the criminal law in which there has been a change is in the approach to the admissibility of evidence in a criminal

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17 At [85].

18 Ibid. Although this case related specifically to the "settled child" exception under s 106(1)(a) of the Care of Children Act, the Court of Appeal has ruled the approach in *HJ* would equally apply to the "grave risk" exception under s 106(1)(c): *Smith v Adam* [2007] NZFLR 447 at [13].

19 *Hessell v* R [2010] NZSC 135, [2011] 1 NZLR 607; and see *Heke v R* [2010] NZCA 476.

20 For example, whether to make an order for payment under s 43 of the Fair Trading Act 1986: *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

21 For example, applications for an extension of time for filing the case on appeal under r 43 of the Court of Appeal (Civil) Rules 2005: *Scott v Scott* [2009] NZSC 111 and *Wikio v Attorney-General* [2009] NZSC 79; and the decision to rehear evidence or receive further evidence in appeals: s 145(2) Care of Children Act 2004: *Kacem v Bashir*, above.

22 *Wong v R* [2009] NZSC 64.

23 *Lawrence v R* [2011] NZCA 272 and *Rowley v CIR* [2011] NZCA 160; leave to appeal refused *Rowley v CIR* [2011] NZSC 76.

trial. Until fairly recently, at least in the context of pre-trial appeals under s 379A of the Crimes Act, this was generally treated as a matter of discretion.[24]

In *R v Gwaze*, the Supreme Court said that whether the test in the Evidence Act 2006 for the admissibility of evidence was met was a question of law.[25] The Court of Appeal by contrast had said the question turned on inferences of fact and was an evaluation of fact and degree. The failure to meet the statutory criteria was therefore not a question of law. In reaching the view a question of law was involved, Elias CJ said that although the application of the rules of exclusion in the Evidence Act may raise "nice questions of judgment" they do not give judges discretion as to the admission of evidence.[26] Rather, her Honour stated, the rules prescribe the standards to be observed. The Chief Justice continued:[27]

> Such rules do not therefore assume distinct allocation of responsibility between trial judge and Court of Appeal which restricts appellate oversight. If hearsay evidence is not reliable, the judge must exclude it. If expert opinion evidence does not meet the standard of "substantial helpfulness" set by s 25(1), it is not admissible. ... Whether these standards are met entails judgment, not the exercise of a judicial discretion. If the standards are not met and the evidence is wrongly admitted, the error is one of law which can be corrected on appeal.

Subsequently, the Court of Appeal in *R v Tui*,[28] a decision involving the admissibility of propensity evidence rejected the argument that it was an appeal against discretion, citing *Gwaze*. A similar approach was taken in *Hodgkinson v R* to the characterisation of a judge's decision to admit improperly obtained evidence under s 30 of the Evidence Act 2006.[29]

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24 For example, see *R v Williams* [2007] 3 NZLR 207 (CA) at [292].
25 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734.
26 At [49] citing *Smith v The Queen* [2001] HCA 50, (2001) 206 CLR 650 at [6] per Glesson CJ, Gaudron, Gummow and Hayne JJ.
27 At [49].
28 *R v Tui* [2010] NZCA 243 at [24].
29 *Hodgkinson v R* [2010] NZCA 457 at [47].

In thinking about what types of decision in this area will be seen as discretionary, these decisions raise issues about matters such as assessments about reliability, whether admissibility will prejudice a trial or bring the criminal justice system into disrepute and so on. It may be that these decisions will defy easy analysis, a point which I think emerges from some of the literature I am about to discuss. There may well be varying views about the consistency of these approaches.

In this next section of my address, I offer some more theoretical discussion about the nature of discretion against which these decisions may be measured. Although, as will be seen, the characterisation of the decision-making power is influenced by context, I thought it would be useful to start with the ordinary, dictionary, meaning. I then discuss some of the writing which favours defining discretion by reference to the existence of choice and, finally, I discuss commentary which prefers to identify discretion by contrasting it with judgment.

The dictionary meaning of "discretion" suggests that it will be a process involving making some judgment or exercising some discernment. The Shorter Oxford English Dictionary definitions include the "faculty of discerning"; the "[f]reedom to decide or act as one thinks fit, absolutely or within limits; having one's own judgment as sole arbiter".[30] In terms of law, the Shorter Oxford refers to "A court's degree of freedom to decide a sentence, costs, procedures, etc".[31] The second meaning given in Black's Law Dictionary is "Individual judgment; the power of free decision-making".[32] These definitions seem to envisage an overlap between judgment and discretion.

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30 *Shorter Oxford English Dictionary on Historical Principles* (5th ed, Oxford University Press, Oxford, 2002) at 696.

31 At 696.

32 B A Garner (ed), *Black's Law Dictionary* (West Group, 2009) at 534.

Turning to other sources, the question of what is meant by discretion in the legal context is not new. Sir Edward Coke[33] in 1823 uses a Latin phrase which is defined variously. In one instance the definition is to know through law what is just.[34] I also like the description of the Latin from The First Part of the Institute of the Laws of England which reads as follows:[35]

> ... to discerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion.

Some of the legal literature supports the view that the key concept underlying what is a discretion is making a choice amongst a range of options (all of which are lawful) where there is no one "right" answer. For example, Aharon Barak describes discretion as "the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful".[36] Barak accordingly refers to a "formal zone of legitimacy" which draws the line between the decisions for which there is discretion and those for which there is not.[37] In other words, he says, discretion is built on there being "a real fork in the road" at which point the Judge has to choose.[38]

De Smith similarly emphasises the ability to make a choice between alternative courses of action or inaction.[39] Again this approach presupposes that discretion exists where

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33 Cited in S A de Smith *De Smith's Judicial Review* (6th ed, Sweet and Maxwell, London, 2007) at [5.010] "Discretion was *scire per legem quod sit just um*; it was "a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not do according to their wills and private affections".

34 D Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Thomson Reuters, London, 2010) at 721.

35 Sir Edward Coke *The First Part of the Institutes of Laws of England: Vol 2* (16th ed,1809) at section 367.

36 A Barak *Judicial Discretion* (Yale University Press, 1989) at 7 and 8. See also K C Davis *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1980) at 4. Davis states that "[A] public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction".

37 At 12 and 90.

38 At 9.

39 De Smith, above n 33, at [5-007].

there is no one "right" legal answer, although the author acknowledges there may be circumstances in which the discretion can only be exercised in one way.[40] In one sense, that choice may involve matters of judgment, for example, judging what is the best course to follow, or at least some evaluation of the options. But there has to be, first, some scope for choice and it is that fact of choice which suggests discretion rather than judgment.

A variant on choice as the indicator, but nonetheless consistent are two factors Sir Kenneth Keith draws from a reading of the cases. The first of these is where the "area for personal appreciation" residing in the decision-maker is large.[41] In the context of considering when the process of applying the law to the facts is the exercise of a discretion, the Court of Appeal described this factor as a "key indication" of a discretion.[42]

The other factor identified by Sir Kenneth I want to highlight as an indicator of the existence of discretion is where the inference, if that language is used, is as to the future. Sir Kenneth gives as an example "the future welfare of the child".[43] This is very much a focus on the nature of the decision, and I suggest perhaps an underlying idea that with decisions such as these there is not a right answer.

Another theme in the literature links the idea of discretion with acting fairly and justly. (This can be seen as a link back to Coke's view in 1823.) Lord Bingham says an issue comes within a Judge's discretion if:[44]

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40 Ibid.

41 K J Keith "Appeals from Administrative Tribunals" (1968–1970) 5 VUWLR 123 at 135.

42 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 at [37].

43 At 135.

44 Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000) at 36.

> ... being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion.

Interestingly for New Zealand, Lord Bingham in this essay treats the ability to make awards for the division of property under the New Zealand Matrimonial Property Act 1963 as a discretion. I note in passing that he records the views of some that this discretion was "so mechanically applied by judges [as to] ... subvert the object of the legislation".[45]

The statutory powers given to judges to exercise discretion to deal with problems as they arise was described by Professor John Burrows as comprising a kind of "statutory equity".[46] Again, drawing on the concept of what is just.

As the cases I have referred to indicate, discretion of course, is not limited to choice about substantive matters. As K C Davis notes, it extends to matters of procedure and method and other "subsidiary" factors.[47] This is something I come back to.

Other writers, and Bennion is a good example of this, see the contrast as being between discretion on the one hand and judgment on the other.[48] On Bennion's approach, discretion offers choice but judgment is confined, "because its sole purpose is to arrive

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45 At 50.

46 J F Burrows "Statutes and Judicial Discretion" (1976) 7 NZULR 1 at 1.

47 Davis, above n 36, at 4.

48 F A R Bennion *Understanding Common Law Legislation* (Oxford University Press, 2001) and F A R Bennion "Distinguishing judgment and discretion" [2000] PL 368. Kent Greenawalt "Discretion and judicial decision: The elusive quest for the fetters that bind judges" (1975) 75 Columbia Law Review 359 at 366 suggests there may not be a strict dichotomy but rather a spectrum "of ranges from simple factual judgment to wide freedom of choice".

at a conclusion of fact or law which accurately reflects reality".[49] The example Bennion gives is of the person, J, asked to stand at the finishing line of a race and note down the order of those finishing the race. Bennion says that this task involves a matter of judgment not discretion although, if there was a close finish, different judges in J's position "might honestly reach different conclusions".[50] The fact of possible different conclusions does not detract from its essence as judgment rather than discretion. Yet, Bennion also describes discretion as subjective and judgment as objective. He refers to discretion as involving a "built-in looseness of outcome".[51]

Another point Bennion makes is that the laying down of guidelines can be a sign that the decision thereby being guided is a discretionary decision since judgment forming should not need guidelines. It is interesting then to look at the example he gives of guidelines governing a discretion. Schedule 2 of the United Kingdom Parliamentary Constituencies Act 1986 deals with the establishment of parliamentary constituencies. Some of these rules are quite explicit. For example, there are some rules setting the maximum numbers of constituencies in the various countries.[52] Clause 4 provides some geographical type limits, for example, in Scotland "regard shall be had to the boundaries of local authority areas".[53] The Boundary Commission is then given the ability to depart from the strict application of some of the clauses if special geographical considerations "appear to them to render a departure desirable".[54] But then, in cl 7, it is made clear the Commission is not duty bound even to aim at giving full effect in all circumstances to these rules.

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49 F A R Bennion *Understanding Common Law Legislation* (Oxford University Press, 2001) at 115.
50 Bennion above, n 49 at 115–116.
51 F A R Bennion "Distinguishing judgment and discretion" [2000] PL 368, at 368 and 371.
52 Clause 1(2).
53 Clause 4(1)(b).
54 Clause 6.

Intuitively, what are termed guidelines here seem less like guidance than rules or express strictures because they are not very open-ended. However, the fact they can be departed from supports the view they are intended to guide rather than compel.

In a review of Keith Hawkins' book, *The Uses of Discretion,*[55] David Feldman says it is apparent from the essays in the book that there is no agreement as to what discretion is.[56] The question he asks is whether it is present in all situations where people exercise choice, in some such situations, or in none?[57] Feldman says one of the themes emerging from Hawkins' book is that it is important to see the exercise of the discretion in the context of the process of which it forms part.[58]

The sense I have is that the context of the discussion can be highly relevant to how an author defines discretion.[59] For example, K C Davis discusses discretion in the context of seeking to ensure there are appropriate constraints on its exercise. Hence, at the start of his treatise Davis says, "Where law ends, discretion begins, ...".[60] In some of the literature, the writers are seeking to debunk other theories about law and different aspects of law. That is apparent, for example, in the writing of Roscoe Pound who challenges Dworkin's idea that there is one simple ultimate concept of law.[61]

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55 K Hawkins (ed) *The Uses of Discretion* (Clarendon Press, Oxford, 1993).

56 D Feldman *"*Discretions, choices and values*"* [1994] PL 279 at 279. Nicola Lacey *A life of HLA Hart* (Oxford University Press, 2004) at 188 refers to a regular legal philosophy discussion group in which Herbert Hart participated and notes that one of the group's themes for discussion one semester was discretion. She observes that Hart provoked a "stormy debate" among American lawyers "unused to focussing on precise linguistic usage by setting out and analysing a number of different senses in which the term 'discretion' was used."

57 At 279.

58 At 281.

59 Sir Stephen Sedley in his review of David Robertson's book, *Judicial Discretion in the House of Lords* (Clarendon Press, 1998), (1999) 58 CLJ 627 is critical of Robertson's definition of "discretion". He says, "By discretion he does not mean what a lawyer means, namely a relatively narrow band of choice occasionally vouchsafed by law in particular situations. He means the entire process of choosing between or among available outcomes:" at 627.

60 Davis, above n 36 at 3.

61 R Pound "The theory of judicial decision" (1992-1993) 36 Harvard L Rev 642; and see J Raz "Legal principles and the limits of law" (1972) 81 The Yale Law Journal 823; and R Dworkin *Taking Rights Seriously* (Harvard University Press, 1978).

In the context in which the discussion arises for me, namely the nature of appellate review, there are obviously a number of considerations in play. The terms of the appeal right in issue will be the starting point, as this may prescribe the scope of the appeal. Then, in *R v Gwaze*, Elias CJ said that the distinctions drawn between law and fact for the purposes of appeals on points of law, can turn "on policies of efficient allocation of responsibility between trial and appellate courts".[62] So too, I suggest, can the same be said about distinctions between discretion and matters of judgment or assessment in the context of appellate review.[63] Considerations such as the perceived need for finality will also be relevant. That is one of the interesting aspects of the approach to relocation decisions where the interests of the children in finality[64] and the role of the, specialist, Family Court might be seen to suggest more limited appellate review. As would the fact the decision-maker is predicting what will be in the best interests of the child, the "in the future" indicator referred to by Sir Kenneth Keith.

It is necessary also to focus on the way in which the power is described. The typical "signal" of discretion is the use of the word "may".[65] Some statutes refer explicitly to a discretion.[66] Other possible formulations include: "it is lawful to", "thinks appropriate/fit". As Donald Dugdale notes, discretion may be conferred where the statute uses a general word which "necessitates the application of value judgments".[67]

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62 At [50]. Sir Kenneth Keith makes the same point in criticising definitions which are in the abstract and not linked to some purpose: above n 41 at 124.

63 See the discussion of the concept of discretion in the context of an address on the responsibilities of an appellate court for correction of error of fact on general appeal by the Chief Justice, Rt Hon Dame Sian Elias, "Address to the Supreme and Federal Court Judges' Conference", (Canberra, Australia) 26 January 2010.

64 The desirability of putting an end to litigation in custody cases was described as "particularly strong" by Lord Fraser in *G v G* [1985] 2 All ER 225 (HL) at 228 in the context of consideration of whether or not the decision was discretionary.

65 Burrows above n 46 at 2. See also J F Burrows and R I Carter *Statute Law in New Zealand* (Lexis Nexis, Wellington 4th ed, 2009) at 515-516.

66 For example, s 7 Contractual Mistakes Act 1977 as to the nature of relief, and s 335 of the Crimes Act 1961 as to variance and amendment.

67 D Dugdale "The statutory conferment of judicial discretion" [1972] NZLJ 556 at 556.

The inter-play between the use of words creating standards, eg, "harsh and unconscionable" or "undesirable" is one of the themes of the literature in this area.

There may be a prior question, in that it may be the decision will need to be broken down. When that is done, it will be apparent that there is only a discretion once various preconditions are met. This is the point averted to by Lord Bingham in the passage I have referred to earlier, that is, discretion exists once the necessary legal or factual findings have been made.[68] An illustration of this approach is seen in the Supreme Court decisions on whether or not a trial could proceed with ten jurors.

This was the issue in *Rajamani v R* where the trial Judge had ruled Mr Rajamani's murder trial could continue on with 10 jurors.[69] The relevant provision in the Crimes Act 1961 states the court must not proceed with less than 11 jurors except in specified cases.[70] One of the situations in which it is permissible to carry on with less than 11 jurors was where the court considered that "because of exceptional circumstances relating to the trial, and having regard to the interests of justice", the court should proceed with fewer jurors.[71] The section goes on to say that no court may review any such discretion.[72]

The Supreme Court took the view that whether exceptional circumstances exist is not a matter of discretion. Rather it is a matter of fact requiring judicial assessment. The discretion only arises once those circumstances are in place. If they are found to exist, then there is no review of the court's discretion to continue on.[73]

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68 The same point is made by Davis, above n 36 at 4.
69 *R v Rajamani* [2007] NZSC 68, [2008] 1 NZLR 723.
70 Crimes Act 1961, s 374(4A).
71 Crimes Act 1961, s 374(4A).
72 Crimes Act 1961, s 378(4).
73 This approach was applied in another "10 juror" case: *Wong v R* [2008] NZSC 29, [2008] 1 NZLR 1 see [3] and [8].

An application of the *Rajamani* approach is seen in the Court of Appeal's decision in *R v Hughes*.[74] The Court in that case dealt with the test for a discharge without conviction under ss 106 and 107 of the Sentencing Act 2002. The Court treated the question of whether the test under s 107 was met as a matter of fact requiring judicial assessment. Once the s 107 threshold is met, the discretionary power of the Court to discharge without conviction arises.

Another way of putting this point is that the greater the level of prescription, in terms of what is required or the process, the more the exercise of judgment or evaluation will be required. There is an implicit limiting of the scope of judicial discretion in such cases. That seems logical given the link made in the literature between vagueness and discretion.

Drawing the threads of this part of the address together, it seems to me that sometimes the distinction between judgment and discretion will be a fine one because the concepts, at least in the abstract, can overlap. However, it is apparent that in the context of appellate review a number of considerations affect what is treated as discretion. This obviously matters considerably to the parties to the particular dispute because of the impact on the scope of appellate review.

The decisions I have discussed suggest that it is necessary to think carefully about what it is the decision maker is being asked to do and, in particular, to ask whether there are any preconditions that must be met before the discretionary decision can be made. In terms of the latter analysis, sometimes a global assessment of the power as being one of discretion or judgment is undertaken and other times it is divided into the component

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74 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222.

parts with the preliminary steps identified as judgment and a narrower rump left for discretion.

In the literature, discretion is sometimes said to arise out of vagueness in the language used to confer a decision making power or from a direction to apply a fairly broadly expressed test such as to "do what is just" in particular circumstances. Conferral of power in this way may reflect a range of factors. Those factors include the difficulty of prescribing one answer or of dealing with all of the situations that might arise in a particular context or a conscious decision to pass the responsibility for a decision on to another person or body because that is seen as the best way of ensuring a creative response to a problem. The latter point is made by K C Davis who sees this as a way of introducing creative thinking. He describes a process in which the delegated decision maker "nibbles at the problem and finds little solutions for each little bite of the big problem".[75] Davis suggests that "[c]reativeness in the nibbling sometimes opens the way for ... thinking about the whole big problem, and large solutions sometimes emerge".[76] As he says, this is the "basic process of the creation of common law".[77]

What was apparent to me as I read around the topic of discretion and its meaning is that in many ways the discussion reflects the wider debate about the nature of law, its development, and the creativity that can flow from the very fact that decision makers have discretion. In the next part of my address, I want to look at some possible implications in terms of diversity in judicial appointments and discretion.

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75 Davis above n 36 at 20.
76 Ibid.
77 Ibid, at 21.

In his thoughtful discussion on the respective roles of courts and tribunals, John Wallace makes the point that if judges are to administer laws giving them a wide discretion then the "fair and just outcome of any case is very much dependent on the calibre of the Judge".[78] He went on to note that this has implications for how judges are trained and appointed. "[P]lainly", he said, we need "wise men and women as well as good lawyers".[79]

In the New Zealand Law Society's publication "Law Talk" 12 August 2011, Hannah Grant notes that the number of women and men completing law studies has been about the same since the nineties. She asks why we are not seeing those numbers reflected in senior positions in law firms across New Zealand and in the judiciary.[80] Law is not alone in this respect of course. The New Zealand Herald business section recently carried an article from the Economist which discussed what was described as the worldwide trend for the top of the corporate ladder to be "overwhelmingly male."[81] However, my focus is not on the statistics or on the reasons for the current position. Rather, I want to examine an aspect of the discussion about whether diversity matters.

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78 J H Wallace "The Respective Roles of Courts and Tribunals and the Growth of Judicial Discretion" in L B Gower Auckland Law School Centenary Lecture (Legal Research Foundation, Auckland 1983) at 80. Jack Hodder also discusses the judicial process and makes the point that the judicial function "includes a creative potential which ... warrants an examination of judicial personnel": "Judicial appointments in New Zealand" [1974] NZLJ 80. Mr Hodder then undertakes a study of the characteristics such as age, social background, education and legal practice of the judges at the time. It would be interesting to repeat this exercise today and see what comparisons emerge.

79 Wallace, above n 78, at 80.

80 H Grant "Where are the women? *Law Talk* (New Zealand 12 August 2011) and see the NZ Law Society "A snapshot of the New Zealand legal profession" *Law Talk* (New Zealand, 22 April 2011) and J Glover "Women on the bench" NZ Lawyer (New Zealand, 16 April 2010). The Chief Justice in a recent address summarises the current statistics for women judges in New Zealand, Australia, Canada and the United Kingdom. "Address to the Canadian chapter of the International Association of Women Judges' conference" (Vancouver, 10 May 2011). See also Glazebrook J "Looking through the Glass: Gender inequality at the senior levels of New Zealand's legal profession" (Chapman Tripp Women in Law event 16 September 2010) at 1-2; and Human Rights Commission New Zealand Census of Women's Participation (2010) which gives the figures as at 12 July 2010. I add that, as Glazebrook J noted in an earlier address, successive Attorneys-General have been conscious of the need to work towards more diversity: "Gender equality in the workforce: A work in progress" Annual Professional Women's Dinner Canterbury Women's Legal Association, 22 October 2009), at 11.

81 "Women's Work" July 29, 2011.

The writings and other commentary give four main arguments for judicial diversity.[82] First, it is said that diversity will enhance the democratic legitimacy of the courts and so improve public confidence in the institutions.

Secondly, and this is probably a subset of the first, the argument is made that diversity is necessary to provide important role models. Thirdly, there is a fairness or equity argument, namely, that for reasons of equality authority should be shared. Finally, there is the impact argument, namely, that a more diverse judiciary will mean that questions are decided differently or that diversity will lead to an improved quality of decisions.

I want to focus on the last of these, that is, the impact argument. In particular, given the scope for choice that arises through what seems to be a broad conferment of discretions, what truth is there in the now somewhat infamous statement that "at the end of the day a wise old man and a wise old woman reach the same judgment"?[83] In other words, the proposition that diversity will have no impact on outcomes.

I should make it clear that when I refer to diversity in appointments, I mean the idea that benches should be reflective of the society in which they serve. That may be contrasted

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82 Some or all of these arguments are discussed in a range of publications including: Hon Justice Mary Gaudron "Speech to Launch Australian Women Lawyers", Melbourne 19 September 1997 at 5; Rt Hon Dame Sian Elias, Dame Silvia Cartwright Lecture (Auckland, 26 November 2009) at 2; Rt Hon Dame Sian Elias, "Changing our World", IAWJ Conference, Sydney, 4 May 2006 at 3, 7, and 8; Rt Hon Dame Sian Elias, "Address to the Canadian chapter of the International Association of Women Judges' conference" (Vancouver, 10 May 2011) at 5–8; Keith Mason "Unconscious judicial prejudice" (2001) 75 ALJ 676 at 687; Rt Hon Beverley McLachlin "Why we need women judges" IAWJ Conference, Sydney 2006) at 1–3; C Thomas *Judicial Diversity in the United Kingdom and other Jurisdictions, a Review of Research, Policies and Practices* (The Commission for Judicial Appointments November 2005); S Cooney "Gender and judicial selection: Should there be more women on the courts? [1993-1994] 19 Melb U L Rev 20 at 31; Erika Rackley "In conversation with Lord Justice Etherton: revisiting the case for a more diverse judiciary" [2010] PL 655 at 656.; Winkelmann J "Women as agents of change – Can a diverse judiciary ensure it is independent?" (Commonwealth Magistrates' and Judges' Association conference Kuala Lumpur, 18-21 July 2011).

83 L Collins "Number Nine" *The New Yorker* (United States) 11 January 2010 notes that Justice Sandra Day O'Connor made this comment in 1991 but Collins suggests it originally came from a Minnesota State Supreme Court judge, Mary Jeanne Coyne.

with representing particular interest groups.[84] The opposition to the notion of a representative judiciary is put very eloquently by Donald Dugdale and I repeat only part of his colourful quote:[85]

> "But why stop [with ethnicity and gender] ... Somewhere out there is bound to be an organisation called Mothers Against Enjoying Yourself which will want to have its say. Then there is the Business Round Table, and the Matamata South Croquet Club, and the New Zealand Federation of Cactus and Succulent Fanciers. The possibilities are endless."

When I discuss the impact of diversity I am not talking about bringing to bear on decision making a particular agenda. To the contrary. The assumption is, of course, that those appointed to the bench will apply the judicial oath with the requirements for impartiality that entails.[86]

I am a proponent of the impact theory. It seems to me that if there are ways in which the judge can choose, there must be a potential for diversity in appointments to impact on outcomes. As I shall discuss, I think there are various possible ways in which this may occur.

Some of the writers in this area take the contrary view. The most commonly cited writer in this respect is Kate Malleson who argues quite forcefully against the suggestion diversity should be promoted on the basis of any difference in outcome. She

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84 To illustrate the point, the Ministry of Justice's material on the appointment process for District Court Judges (March 2010) Ministry of Justice <www.justice.govt.nz> sets out a number of criteria for appointment such as legal ability and qualities of character. The criteria also include "Reflection of society". Under this heading, the material lists the following:

- Aware of, and sensitive to, the diversity of modern New Zealand Society including of tikanga Maori and Te Reo.
- Experience of community of which the court is part.
- Social awareness.

85 D Dugdale "Choosing Judges" [1995] NZLJ 126 at 126. See also DAR Williams QC "The Judicial Appointment Process" [2004] NZ Recent Law Rev 39 at 48-53. .

86 Erika Rackley makes the point that judges will decide cases where the authorities leave the matter in doubt, where the law runs out or at least calls for a discretion. She says necessarily a judge must turn to "his or her understanding of the purpose of the law, the judicial function, justice and so on for an answer": above n 81 at 657.

refers to the research on decision making outcomes and says the studies show that in terms of sentencing and general adjudication, there are no "clear or consistent" differences between men and women on the bench.[87] In her view, it is only when the issue is one directly related to sex discrimination do any differences emerge and even there the findings are mixed.[88]

It seems to me that it is a mistake to take an individual decision, let us say, a sentencing, and ask how a more diverse judiciary might make that decision differently. Accordingly, the fact the studies referred to by Dr Malleson are unhelpful is unsurprising. In this respect, I agree with my colleague Susan Glazebrook who makes the point that different philosophies and world views among judges are not necessarily gender based.[89] But I think it is hard to resist the proposition that, with greater diversity, there will follow a gradual process of change. Over time, the differences in the cohort of judges must lead to changes in decision making, both in terms of the process of decision-making or judicial method and in the outcomes.

In terms of judicial perspectives, it is interesting to note first the changes, albeit slight, in the views of two of those most commonly associated with the proposition that there will be no difference in outcome between the decisions of the wise old man and the wise old woman. In a recent interview published in *USA Today* Justice Ruth Bader Ginsburg referred to this line which she noted she and retired Justice Sandra Day O'Connor "kept repeating".[90] Justice Ginsburg is reported as saying there are perceptions we have

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87 K Malleson "Justifying equality on the bench: Why difference won't do" (2003) 11 *Feminist Legal Studies* at 6.

88 At 7.

89 S Glazebrook "Looking through the Glass: Gender inequality at the senior levels of New Zealand's legal profession", Chapman Tripp Women in the Law event 16 September 2010 at 11.

90 J Biskupic, *USA Today* (United States, 5 May 2009).

because we are women. She said it was a "subtle" influence and referred to the possibility women may be more sensitive to things said in draft opinions that male justices are not aware can be offensive. She concluded that while one seldom sees a difference in the outcome, that "sometimes" occurred. Justice O'Connor is also reported as having back-tracked, at least slightly, when discussing a study in which the authors had found female judges were more likely than their male counterparts to send women to jail.[91] Lauren Collins discusses a passage in Justice O'Connor's book where she said she thought she knew why this was so, namely male judges were more likely to believe a sob story from a female defendant, "Female judges know better".[92]

Justice Sonia Sotomayer has disputed the wise old man/wise old woman proposition. In a speech from early in her judicial career, she disputed, first, that there was a universal definition of wise but, secondly, went on to express the hope that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life".[93] Her approach was that personal experiences affect the facts judges choose to see.

Justice Sotomayor's approach in that speech has been criticised and more recent commentary suggests both the Judge and those supporting her have qualified it.[94] In a speech given at the time of her nomination to the United States Supreme Court, Justice Sotomayor spoke more generally of her wealth of experiences which have

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91 Collins, above n 83.

92 Collins, above n 83 citing S Day O'Connor *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House, 2004).

93 S Sotomayor "A Latina Judge's Voice" (2002) 13 Berkley La Raza L J 88 at 92.

94 Collins, above n 83.

helped her to "appreciate the variety of perspectives" presented in each case and to "understand and respond" to the arguments of all litigants as well as her colleagues.[95]

However, despite the slight retreat, the differing perspectives Justice Sotomayor has spoken of can be seen in her dissenting judgment on the legality of strip searches on young girls in juvenile detention centres.[96] It is an example referred to in commentary on her decisions.[97] The case arose in the context of strip search policy in Connecticut which said that everyone admitted to juvenile detention centre had to be subject to one.

The Judge referred to consistent recognition in the case law of the highly intrusive nature of strip searches. In her view, the concerns underlying the rulings in this area should only be heightened when the privacy interests of emotionally troubled children were in issue. The Judge considered the government had not shown its interests overcame those concerns, absent reasons for suspicion in relation to a specific individual.

Her Honour's dissenting position is summarised eloquently in this passage:[98]

> The case before us presents facts that provoke all of our typical concerns about strip searches. The detention facility officers on numerous occasions ordered appellants – troubled adolescent girls facing no criminal charges – to remove all of their clothes and underwear. The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat. The young girls described the process as embarrassing and humiliating. Indeed, T.W cried throughout one of her searches. During one of S.C's searches, two other detainees were present. The juvenile detention facilities perform similar searches on every girl who enters, notwithstanding the fact that many of them – indeed most of them – have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.

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95 Full text: Judge Sotomayor's speech *Time* Magazine (26 May 2009). Collins, above n 83, refers to President Obama who, citing Oliver Wendell Holmes, referred to the sort of journey that "can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live."

96 *NG and SG v Connecticut* 382 F 3d 225 (2d Cir 2004).

97 *New York Times* "Sotomayor's Notable Court Opinions and Articles" 10 July 2009.

98 *NG and SG v Connecticut* at [63].

Her position was ultimately upheld by the Supreme Court in a separate case.[99]

In terms of the United Kingdom perspective, Lady Hale notes that she has argued that we should not expect individual women or minority judges to "make a difference".[100] She says however that, along with many other senior women judges from various jurisdictions, she believes a more diverse judiciary will be a better judiciary.

Lady Hale explains why that is so, emphasising that diversity of background and experiences enriches the law. She notes that women and men lead different lives "largely because we have visibly different bodies from men".[101] Lady Hale continues:[102]

> This is not to say that all women are the same, any more than that all men are the same. Some women may lead lives which are very close to men's and (less plausibly) vice versa. But by and large, the interaction between our own internal sense of being a woman and the outside world's perception of us as women leads to a different set of everyday and lifetime experiences. The same is true for other visible minorities. It is just as important that these different experiences should play their part in shaping and administering the law as the experiences of a certain class of men have played for centuries. They will not always make a difference but sometimes they will and should. This is all the more important at present, when equality principles are by no means fully embedded or achieved. People who have experienced their own personal humiliations can bring that experience to the humiliations of others.

Turning to home, the Chief Justice in a recent speech expressed the view that different perspectives cannot but impact on substantive outcomes.[103] The Chief Justice stressed that this does not mean a "new impermissible bias is in play" because personal beliefs cannot "deflect a judge from doing what is right according to law" in each case.[104] The reasons given must justify the result and be convincing in law. But, she continued:[105]

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99 *Safford United School District v Redding* 557 US (2009).
100 Rt Hon Baroness Hale, "A Minority opinion?" (The Maccabaen Lecture in Jurisprudence, 13 November 2007) at 330-332.
101 Ibid, at 331.
102 Ibid.
103 Rt Hon Dame Sian Elias, above n 82 at 9.
104 Ibid, at 10.
105 Ibid.

> ... "how the judge goes about her judging" seems to me to be critical. A willingness to question and to re-think from first principles, a preparedness to try harder, closer attention to facts and context; such *effort* (perhaps prompted by a feminist perspective) may well produce, justifiably, a different outcome than would be reached by a judge with less spur to imagination. I should like to think so. And I think the law can only benefit from such care.

The Chief Judge of the High Court, Winkelmann J, put the point very well, in my view, when she said that a diverse judiciary can improve judicial method and add richness to its content.[106]

To finish with my own thoughts. In terms of the impact on outcomes, it seems to me that, as Justice Ginsburg suggests, sometimes the difference will be subtle. I think that is likely to be the case in terms of the impact on judicial method and on the process of decision-making. Justice Bertha Wilson, a less enthusiastic proponent of the "impact" theory, does accept that women in the law and on the bench have an effect in this area by bringing a "new humanity" to the process.[107] I agree.

Some writers see a greater impact in this respect where decision-making is collective, for example, in the appellate context. Though Kate Malleson considers that arguments for diversity in judicial appointments based on equality are stronger than those based on outcomes, she accepts this is an area where there may be a greater correlation. She says that in the context of more collective decision-making, there is "greater scope for women and men to bring gender differences to the decision-making process" in a way that does not create "such an unacceptably crude correlation between the gender of the judge and outcome".[108]

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106 H Winkelmann, above n 82 at 6.
107 B Wilson "Will women judges really make a difference?" (1990) 28 Osgoode Hall L J 507 at 522.
108 Malleson, above n 87 at 11.

With particular reference to the processes of appellate courts, Lady Hale suggests that "introducing different perspective may help to develop new understandings".[109]

It is difficult of course to assess what if any impact one has in this respect but I can only speak positively about what I have learnt from the sometimes robust debates with my colleagues about all manner of legal issues big and small and about what process should be followed in a particular case or in terms of one aspect of a case.

That last observation leads me to the final point I want to make. Namely, that of course not all decisions involving discretions will be earth-shattering in nature. Richard Posner refers to the discretionary decision to start a hearing at 9.00 am rather than 9.30 am.[110] In these sorts of decisions and in, for example, the numerous decisions made in the course of a trial there are opportunities for choice on the part of the judge which will impact on the experience of justice of the participants. I think that in these small ways also diversity will bring about changes.

I want now to turn back briefly to Ethel Benjamin. Towards the end of the video I watched on her life, the commentator notes that while many of the problems she endured continue, so does her spirit. In preparing this address I have enjoyed going back and reading the writings of some of my heroines (and heroes) and listening to them on the video. I want to say in conclusion how very lucky we are to have in the Otago Women Lawyers Association and the Law Foundation a commitment to preserving the spirit of a very important heroine, Ethel Benjamin.

Thank you.

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109 Hale, above n 100 at 332.

110 R A Posner *How Judges Think* (Harvard University Press, 2008) at 43.