A polite response to Mr Justice Thomas

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In this note, Mr Dugdale responds to the recent VUWLR monograph written by his Honour, Mr Justice Thomas. He questions whether judges should be free to depart from the doctrine of precedent and whether public and professional opinion would act as checks on arbitrary judicial decision making.

It would be wrong to leave unanswered the provocative monograph of Mr Justice Thomas.[1]

On 23 February 1990 Mr Justice Thomas was sworn in as a High Court Judge. He has from the start made it plain that he is not as are other puisne judges content with the humdrum task of shifting the work and that he marches to a drumbeat that is all his own. In his judgment delivered on 23 October 1990 in *Powell* v *Thompson*[2] the mere fact that a particular requirement (that a third party must have knowledge of the fraud to be liable for knowingly assisting a breach of trust) had stood for 100 years did not deter his Honour from reaching a contrary conclusion.

In *Rowlands* v *Collow*[3] although to do so was not necessary to his decision he took time to explain to us why the decision of the Court of Appeal in *McLaren Maycroft & Co* v *Fletcher Development Co Ltd*[4] should not be followed.

In *Howick Parklands Building Co Ltd* v *Howick Parklands Ltd*[5], the Judge said

> Irrespective of the Illegal Contracts Act, I consider that notwithstanding a statutory illegality, the Courts possess a residual power to enforce a contract where it will be inequitable or unconscionable in the circumstances of the particular case to allow the defendant the benefit of a finding that the contract is illegal and void.

an observation that is obiter, startling and totally wrong. One could cite other examples of his Honour's spirited rejection of the normal judicial constraints.

Now we have Thomas J's *apologia*. The author believes that a judge should not be bound to follow precedents that lay down rules with which he happens to disagree. If

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1 *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy*, published as a separately paginated part of (1993) 23 VUWLR No I, Monograph 5.

2 [1991] 1 NZLR 597.

3 [1992] 1 NZLR 178.

4 [1973] 2 NZLR 100.

5 [1993] 1 NZLR 749, 765.

the author had his way "Cases would continue to be cited, but they would not necessarily be regarded as precedents prescribing a rule to be followed. Rather, principles would predominate and would guide the application and direction of the law".[6]

And the source of these principles? They are to be found it seems by some unparticularised process of divination in "the community's basic concepts of justice and fairness".[7] "It is the task of the judiciary to interpret and administer this sense of justice which is immanent in the community".[8] "Ultimately, therefore, it is the personality of the Judge and not the accumulation of precedent which is the best guarantee of justice for the individual, and which provides the most assured medium for serving the social goals which justify the law".[9] It is a bit like a seeker after political office saying "I have no manifesto, but trust me".

Dress it up how he may, all the author by this formula offers is Cadi Thomas under his palm-tree. And not just Cadi Thomas; if one accepts the logic of his argument the freedom the author claims for himself must also be available to the humblest master or district court judge.

To the objection that his proposals make the law entirely unpredictable the author gives the response so commonly employed by proponents of arbitrary justice, namely that the law is in any event less than perfectly certain. This of course is so, but why make things worse? The author displays an imperfect understanding of the fact that the law has a dispute-avoiding as well as a dispute-resolving function. Sensible people prefer to steer clear of legal disputation. They want to have answered the question "Is it my legal obligation to go down Path A or Path B?" It serves no recognisably valid social end if one's response has to be "For some centuries it has been settled that the proper path to follow in these circumstances is Path B, but I have to warn you that Mr Justice Thomas may take the view that the sense of justice which is immanent in the community requires him to rule that you should have gone down path A".

Predictably enough the author rejects reliance on the legislature for law reform. In his view "Undue adherence to the doctrine of precedent undoubtedly retards the Court's ability to reform the law long before it has become an embarrassment requiring legislative intervention".[10] "Contract, tort, trusts and the like can, and should be advanced to meet the community's needs and expectations without the necessity of an occasional statutory boost.".[11]

One can perhaps test the author's claims on this point by considering the effect of judicial law reform on one particular tort, the tort of negligence. Two matters may be

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6 Above n 1, 2.
7 Above n 1, 56.
8 Above n 1, 57.
9 Above n 1, 53.
10 Above n 1, 28.
11 Above n 1, 29.

noted. First, ever since the unhappy Court of Appeal decision in *Bowen* v *Paramount Builders (Hamilton) Limited*[12] the law of negligence in New Zealand has been in a state of disarray that no statutory law reformer would ever countenance. Secondly, there have been extensions of liability (of local bodies for example) (presumably on the basis of some loss-spreading philosophy) without the courts being in possession of the information which alone would justify such law changes.

For the author the paradigm cases of excessive judicial subservience to precedent are the New Zealand Court of Appeal decision in *Ross* v *McCarthy*[13] and the High Court of Australia decision in *State Government Insurance Commissioner* v *Trigwell.*[14]

In each case the Court refused despite the obvious *cessat ratio* argument to overthrow the common law rule that a land owner was under no liability for damage caused by the escape of his stock on to the highway. But in fact in New Zealand the admittedly anomalous rule has since been disposed of in precisely the way it should have, namely after enquiry into the implications of the change, with an opportunity for public input, by Parliament in the Animals Law Reform Act 1989.

The author rejects the suggestion that his proposals would result in arbitrary decisions based on gut-feeling and hunches for "Judges are answerable for their decisions at the bar of professional and public opinion."[15]

The bar of professional and public opinion. First as to the public the simple position is of course that although there is public curiosity as to criminal trials and the occasional civil *cause célèbre* that is all. There is no public opinion on such technical issues as concurrent liability in contract and tort or the probanda of a constructive trust, and it is absurd to suggest otherwise.

As to professional opinion, the author is no doubt sincere in his belief that a maverick judge can be restrained by some sort of peer group pressure. But experience suggests that life is not like this. Has the author forgotten all those eccentric stipendiary magistrates of his youth who persisted in their several tiresome idiosyncrasies impervious to all criticism until finally silenced by death or retirement? Lord Denning was slapped down often enough but never mended his ways. It is difficult to categorise as an act of contrition the suggestion by Sir Robin Cooke in his recent Balliol address that possibly political criticism had taken its toll on the majority judges from whom he dissented in *New Zealand Maori Council* v *Attorney-General.*[16] In Thomas J's own case the polite derision which greeted *Powell* v *Thompson* in which he adumbrated the arguments developed at length in the monograph under review has not led to any observable repentance. His suggestion that we can trust to protect us

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12 [1977] 1 NZLR 394.
13 [1970] NZLR 469.
14 (1979) 142 CLR 617.
15 Above n 1, 55.
16 [1992] 2 NZLR 576.

from deviant decisions "the judicative discipline to which the judiciary is subject"[17] is simply wishful error.

The author tells us that "a man or woman who has sat on the bench is never quite the same again. To sit in the seat of Solomon is an enervating experience at once abasing and uplifting for the human soul."[18] The fear of his friends and admirers (among whom I hope I may count myself), a fear which his monograph will do nothing to allay, is not that the author has been changed by sitting on the seat of Solomon but that he has not changed enough.

Had E W Thomas entered the church he would no doubt have wanted to write his own Bible. One can see him as a great actor-manager, ruthlessly and without compunction eviscerating the Shakespearean canon in order to do it his way.

But in fact Mr Justice Thomas is to be found not in the pulpit or on the boards, but on the bench, where he must learn that what he calls judicial autonomy the rest of us call indiscipline, and that the bold self-confidence that brought him such merited success at the bar needs to be subjugated to the judicial oath he swore on 23 February 1990. Be it for better or worse, there is in that oath nothing permitting judges to make up the law as they go along in reliance on what they divine to be the sense of justice immanent in the community.

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17 Above n 1, 54.
18 Above n 1, 75