

# SIR KENNETH GRESSON : A STUDY IN JUDICIAL DECISION MAKING.

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## I. HISTORIOGRAPHICAL AND BIOGRAPHICAL INTRODUCTION

Despite a recent upwelling of interest in New Zealand's legal history,<sup>1</sup> writing in the field remains scanty. Much of what has been written over the years is invaluable in that it creates an accessible public record of events, institutions or the activities of individuals. Relatively few of the older writings display to any significant degree any attempt at analytical history of law and legal development — perhaps because much of the extant corpus is written for lawyers by lawyers; other works are on occasion limited because non-lawyer authors have not managed to master the legal issues involved in the events of which they write. Judicial biography is a specialised form of legal history, and in the limited number of biographies<sup>2</sup> of New Zealand judges so far published, instances of both these difficulties may be found. But these are not the reasons for scholars to take care with biographical writings. In New Zealand, as in most other Western countries, judicial biography is often undertaken by persons with familial or personal relationships to the subject of their study.<sup>3</sup> Such accounts are often what Posner calls “edifying” accounts — that is they are designed to provide models or antimodels for the reader's own life;<sup>4</sup> others are attempts to lay a claim to the subject's place in history. Critical appraisal cannot be expected to form any significant element in such writings.<sup>5</sup> Total objectivity may not be expected of any biographer,<sup>6</sup> but without some approach thereto the resultant biography is of but limited value for later scholars.

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- 1 Since 1990, books on legal history topics include Brewster *A History of the Early Law Firms in Rotorua 1898-1948* (Rotorua, East Brewster, 1992); Millen, *The Story of Bell Gully Buddle Weir (1840-1990)* (Wellington, Bell Gully Buddle Weir, 1990); Spiller, *The Chapman Legal Family* (Wellington, Victoria University Press, 1992); Stone, *The Making of Russell McVeagh* (Auckland, Auckland University Press, 1992); Frame *Salmond. Southern Jurist* (Wellington, Victoria University Press 1995) and Spiller, Finn and Boast *A New Zealand Legal History* (Wellington, Brookers, 1996). No comparable corpus of works of legal history has been published in any other decade. Articles on legal history topics have also become much more common, and more scholarly.
- 2 No account is here taken of the brief biographical profiles often to be found as elements of more general historical works such as Cooke (ed) *Portrait of a Profession : the Centennial Book of the New Zealand Law Society* (AH and AW Reed, Wellington, 1969) and Cullen *Lawfully Occupied, the Centennial History of the Otago Law Society* (Dunedin, the Society 1979); while useful as starting points for biographical enquiry such works seldom if ever present a sustained and detailed treatment of any individual.
- 3 See as examples JG Denniston *A New Zealand Judge. Sir John Edward Denniston* (Dunedin, Reed, 1945), WD Stewart *Portrait of a Judge. Sir Joshua Strange Williams PC* (Wellington, Whitcombe & Tombs, 1945) and A Alpers and J Baker *Confident Tomorrows: A Biographical Self-portrait of OTJ Alpers* (Auckland, Godwit, 1993). As noted, the problem is endemic in all jurisdictions; compare Michael J Gerhardt “The Art of Judicial Biography” (1995) 80 Cornell LR 1595, 1596.
- 4 Richard Posner “Judicial Biography” (1995) 70 NYULR 502, 503.
- 5 Compare Dennis J Hutchinson “Judicial Biography: Amicus Curiae” (1995) 70 NYULR 723, 724.
- 6 J Woodford Howard (1995) 70 NYULR 533, 547; Posner “Judicial Biography” (1995) 70 NYULR 502, 514 suggests lawyer authors are conditioned to write biographies which are defensive of the subject.

The nature and scope of biographies may also limit their value in other ways. Both scholarly and lay biographies of judges tend to focus on judges whose lives were noteworthy for their activities off the bench — frequently, but not invariably, in politics.<sup>7</sup> Yet such biographies are often less than helpful in understanding the development of the law — which is as much or more the province of judges less known to the public.<sup>8</sup> It is inherent in our view of judges as at least semi-autonomous actors that they may bring to the decision of cases a range of personal values and principles which inform and influence their judgments, at least in cases where the judge is not involuntarily constrained by authority.<sup>9</sup> Biographers may assist us to understand how the judge fulfilled that role.<sup>10</sup> As one American writer puts it

A biographer's challenge is to clarify how the subject decided cases and, in particular, to explain the judge's approach to judicial decision making.<sup>11</sup>

To understand and evaluate a judge's contribution to the development of the law, we need to know how, and why, the judge came to decide between competing outcomes in the way he or she did. In some studies there is simply no adequate discussion of relevant elements in the subject's judicial life. Judicial biographers often, and quite understandably, do not attempt to cover the diverse legal issues that confront a judge in the course of a judicial career— instead focussing on specific areas, usually those public or constitutional law areas which may be the more readily comprehended by a lay reader (and perhaps also by a lay writer).<sup>12</sup> In New Zealand only two works, Spiller's biography of the Chapmans<sup>13</sup> and Frame's biography of Salmond,<sup>14</sup> attempt any substantial analysis of the subjects' legal reasoning in a number of areas of law. Even so the focus of Spiller's work is not on the Chapmans qua judges, but on other aspects of their lives and Frame concentrates, naturally and properly, on Salmond's stellar career before he was appointed as a judge.

This essay attempts to place its primary focus on the judicial career of Sir Kenneth Gresson, and puts forward a hypothesis as to his judicial reasoning which may allow a better understanding of his contribution to

7 An exceptional instance is WH Dunn and ILM Richardson *Sir Robert Stout A Biography* (Wellington, Reed, 1961) which contains but one chapter, of 15, on Stout's lengthy career on the bench. A similar, if less marked, emphasis is evident in Guy Lennard *Sir William Martin* (Christchurch, Whitcombe & Tombs, 1961).

8 Posner "Judicial Biography" (1995) 70 NYULR 502, 516.

9 See G Edward White "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 NYULR 576, especially at 579, for an illuminating discussion of the epistemological consequences of perceiving humans as rational actors capable of controlling their destiny and the premising of biography on the theory that truth may be objectively examined.

10 JA Thomson "Judicial Biography: Some Tentative Observations on the Australian Enterprise" (1985) 8 UNSWLJ 380, 381-2.

11 Michael J Gerhardt "The Art of Judicial Biography" (1995) 80 Cornell LR 1595, 1597. Other writers hold different views of the function of judicial biography - as for instance that the primary concern is to "develop a convincing account of the meaning of a human life" Robert Post "Judging Lives" (1995) 70 NYU LR 548, 551.

12 See the discussion by Gerald Gunther " 'Contracted' Biographies and other Obstacles to 'Truth' " (1995) 70 NYULR 697, 699; see also John Philip Reid "Beneath the Titans" (1995) 70 NYULR 653, 654-55.

13 Peter Spiller *The Chapman Legal Family* (Victoria University Press 1992). While there is some discussion of Denniston J's exercise of his judicial role in SG Raymond's account of Denniston as a judge which is included in JG Denniston et al *Memoir of Sir John Denniston* (Christchurch, Gaskell & Co, 1926), the later more formal biography, JG Denniston *A New Zealand Judge: Sir John Edward Denniston* (Dunedin, Reed, 1945), is less helpful in this regard.

14 Alex Frame *Salmond: Southern Jurist* (Wellington, Victoria University Press 1995).

the law of New Zealand. Gresson is a suitable subject for study, as there is a very substantial corpus of reported judgments on which to draw.<sup>15</sup> This corpus naturally falls into two parts — the decade he spent as one of New Zealand’s most frequently reported puisne judges and the culmination of his judicial career in the five years he spent as first President of the permanent Court of Appeal from 1958. In those years Gresson played a pivotal role in shaping the practice and jurisprudence of the new Court. His role as President gave greater scope for him to expound legal principle than he had enjoyed as a puisne judge, even one who sat frequently on the Court of Appeal in its earlier incarnation. More importantly, it is suggested that Gresson played a significant, if much misunderstood, role in the development of by the new Court of a more self-reliant jurisprudence which asserted a hitherto-unclaimed independence of English precedent.

Sir Kenneth Macfarlane Gresson (1891 - 1974) is probably the best known member of one of New Zealand’s foremost legal families, principally because of his service as the first President of the New Zealand Court of Appeal when it was set up in 1957 as a separate court. Prior to that he had been a judge of the Supreme Court for 10 years. KM, as Sir Kenneth was widely known, had strong family connections with the law through his grandfather Henry Barnes Gresson (1819 - 1901) who was one of New Zealand’s first Supreme Court Judges — serving in the Canterbury district from 1857 until he resigned when the government proposed to transfer most of the Supreme Court judges to different centres. Henry Barnes Gresson was also a very prominent member of the Anglican Church which then dominated Canterbury. KM’s father, John Beatty Gresson (b. 1845) was admitted to the bar in 1873 and practised in Christchurch, though apparently not with marked success until his death in a railway accident in 1891<sup>16</sup>, some months before Kenneth’s birth. He was the youngest of seven children. One of his elder brothers Maurice James Gresson (1884 - 1948) also became a very successful lawyer; his son Terence Arbuthnot Gresson was a judge of the Supreme Court from 1956 to his death in 1967; their descendants practice law in divers part of the country. On several occasions Kenneth Gresson sat in the Court of Appeal when his brother, or his nephew, or both were arguing cases; no objection to this appears ever to have arisen.<sup>17</sup>

Sir Kenneth was brought up in somewhat straitened circumstances, even after his mother re-married in 1893. He was however principally educated at Wanganui Collegiate, a private Anglican School in the town where his family then lived, (1903 -1911); in which time he completed as an external student some of the courses required for a LLB degree from Canterbury University College. He moved to Christchurch in 1912, where

15 The competition between the New Zealand Law Reports and the Gazette Law Reports ensured few if any noteworthy judgments escaped report.

16 If indeed it was an accident. The coroner’s jury returned a verdict of death following an accidental fall from the train (*Christchurch Press* 24 March 1891); but the jury heard only evidence suggesting J B Gresson was in poor health and had had attacks of “giddiness” and “vertigo”. The reports of witnesses (see *Christchurch Press* 18 March 1891 and 24 March 1891) could assign no external reason for Gresson’s fall, and made mention that he was, unusually, sitting in an outside seat on the train. No mention was made that Gresson was in financial difficulties. It appears this drove him at some point to embezzlement of client’s funds ( see the statements of the facts in *McGrath v Freer* (1892) 10 NZLR 688. I am indebted to Cynthia Hawes for this reference). It may be thought that the facts leave open a real possibility of suicide.

17 As for example in *NZ Waterside Workers IUW v NZ Waterside Employers Industrial Association of Employers* [1948] NZLR 1164; [1948] GLR 489 and *J M Heywood & Co Ltd v Attorney-General* [1956] NZLR 668

he was articled as a law clerk and continued his studies for the LLB (though exempted attendance at lectures). Kenneth was commissioned in the NZ Territorial Forces in 1911 (promoted lieutenant 1912) and on the outbreak of war in 1914 served as a Captain and second-in-command of a company of the Canterbury Battalion which left New Zealand in October 1914. He served with the battalion at Gallipoli (where he was promoted to major) until evacuation following a severe wound in the abdomen. Following prolonged treatment and repeated operations in Egypt, New Zealand and England he returned to Christchurch where he served as military representative on the Canterbury Military Service Board for the remainder of the war. He was at this time awarded the LLB without, it seems, sitting any examination. In 1918 Gresson was admitted to the bar and began his professional career, first in partnership with others and from 1930 on his own account, specialising in trusts, wills, administration and company work.<sup>18</sup>

KM was active within the Canterbury District Law Society, including serving as its president in 1937. He had a major impact on the legal profession in Canterbury as a teacher in the Law Faculty of Canterbury University College (1923 - 1947), and Dean of the Law Faculty from 1936 to 1947 (thus being a teacher of courses he had been exempted as a student). He was also a member of the first Law Reform Committee appointed by the Minister of Justice in 1937, in which capacity he was very influential in the enactment of the Law Reform Act 1944.<sup>19</sup> He also found time for extensive involvement with the Anglican Church, serving in many capacities, including Chancellor of the Christchurch Diocese from 1943 to 1946 and four times representing Christchurch at the General Synod of New Zealand.<sup>20</sup>

Kenneth Gresson was appointed as a Judge of the Supreme Court in 1947, sitting in Wellington though circuit duties took him to all parts of the lower North Island. In addition he sat frequently as a member of the Court of Appeal of that time ( a panel of three or more Supreme Court Judges sitting together twice a year). In this time he consistently is among the “most reported” judges, and appears to have sat in a very significant proportion of the Court of Appeal sittings (though this may be as much a function of his frequent presence in Wellington as his capacity as a judge). There are certain areas of law where KM very rarely had cause to venture — he appears to have given judgment in only a single intellectual property case<sup>21</sup> and although he sat in two cases involving Maori claims to lands on the basis of aboriginal title arguments, he in fact gave a substantive judgment in only one of these.<sup>22</sup>

18 Personal information principally from Gresson’s privately published memoir “*A History of the Gresson Family and in particular An account of the life and work of Henry Barnes Gresson*” c1971, with additional material and genealogical tables by CM Gordon. ; other biographical data is from archival sources, from papers in the possession of Gresson’s daughter and conversations with her.

19 This Act was recast as the Law Reform (Testamentary Promises) Act 1949. For Gresson’s role, see Anon, [1947] NZLJ 262, and autobiographical sketch in KMG papers. He was to give the most detailed and extensive of the judicial analyses of this act in the first case where it was considered by the Court of Appeal: *Nealon v Public Trustee* [1949] NZLR 148; [1949] GLR 85

20 Anglican Church Diocesan Yearbooks and proceedings of General Synods, in Archives of Anglican Church, Christchurch Diocese.

21 *Goldpack Products Ltd v Citrus Products Ltd* [1956] NZLR 661.

22 *In re the Bed of the Wanganui River* [1962] NZLR 600. He also sat in *In re The Ninety-Mile Beach* [1963] NZLR 461.

His reported judgments in the field of wills and estates are perhaps his most substantial judicial contribution to the law, though this is not an area where any of his judgments caused much discussion or controversy. He also wrote leading judgments in criminal law and evidence<sup>23</sup> and administrative and public law. In that latter field we find some of his most interesting judgments and some of those that are most difficult to analyse.

When a new specialist and permanent Court of Appeal, was created in 1957, Gresson was appointed as the first President of the new court and served there until his mandatory retirement in 1963 on reaching the age of 72. His judicial career concluded with his sitting as a member of the Judicial Committee of the Privy Council for some months in 1963 — something Sir Kenneth (as he was by then) had initiated by writing to the British Lord Chancellor, thus initially bypassing the New Zealand authorities.<sup>24</sup> During these months he heard at least a dozen cases. Unusually for the period he gave the opinion of the Privy Council in two of these cases.<sup>25</sup> In later years he served as the first Chairman of the Indecent Publications Tribunal (1964 -1967). He died in 1981.

## II. ASSESSING GRESSON AS A JUDGE — SELECTING THE FRAMEWORK FOR ANALYSIS

Opinions of his judicial career are somewhat varied — Sir Kenneth has been called conservative and unduly ready to follow English precedent,<sup>26</sup> or more simply “unpredictable”<sup>27</sup> though neither of these assessments are based on extensive analysis. The aim of this paper is to give a more thorough, and it is hoped more balanced, account of KM’s judicial philosophy, and to try to explore and, perhaps, explain some of the seeming idiosyncrasies of his judgments. In his last years on the Court of Appeal Gresson expressed dissenting opinions more frequently than at any other stage of his judicial career. One possible influence in this was that at that time his judicial philosophy differed significantly from the other members of the court. He was in many ways a judicial conservative with a liberal personal philosophy; his colleagues had more conservative personal philosophies but were inclined to permit themselves an active judicial role in reformulation of the law. His decisions are also marked by the strongest regard for individual liberty and autonomy consistent with community needs. Perhaps linked to this was his vigilance to ensure that the position of the judiciary was given proper respect — for instance when President of the Court of Appeal, refusing to attend a ceremonial opening of parliament because he believed that changes to the arrangements for the ceremony downgraded the position of the judges.<sup>28</sup>

Thirdly, Kenneth Gresson believed devoutly that his faith required Christian conduct in every aspect of his life.<sup>29</sup> This Christian belief and his own compassion and humanity meant he was quick to seek to assist those he saw as deserving.

23 Gresson’s leading judgments in the law of evidence are *R v Naidovici* [1962] NZLR 334 (see below n58); *R v Phillips* [1949] NZLR 316; sub nomine *R v Phillips (No 1)* [1948] GLR 270 and *R v Phillips (No 2)* [1948] GLR 271 and *R v Horry* [1949] NZLR 791; [1949] GLR 429.

24 [1974] NZLJ 511, 512.

25 *Aluthge Don Hemapala v R* [1963] AC 859; [1963] 3 All ER 632 and *Ghulab v Khaleq* [1964] 1 All ER 824.

26 Spiller, Finn & Boast, *A New Zealand Legal History* (Brookers, Wellington 1996) p226

27 Sir Richard Wild CJ, [1974] NZLJ 511, 512

28 [1974] NZLJ 511, 512

29 Address by KMG to congregation of Ardnurcher Church, Ireland 1955; copy of text in KMG papers.

Some at least of his more notable judgments accord well with some of these principles, but it is an incomplete explanation. At first sight there are inconsistencies of approach which are difficult to understand — as when very liberal and enlightened dissenting views on censorship in *In re Lolita*<sup>30</sup> or the requirement for a mental element for criminal liability were counterbalanced by adherence to old English authorities on the tortious liability of local bodies for failure to maintain roads<sup>31</sup> or the view that parties appearing before Royal Commission had no automatic right to legal representation.<sup>32</sup> Yet it is necessary to consider whether these perceptions may be inaccurate because of the current norm of scholarship whereby judicial decision-making is analysed in an intellectual framework which assumes judges undertake a balancing of different relevant principles and considerations.

The aim of this article is to offer an alternative interpretation of Gresson's judicial decisions, an interpretation which goes suggests any apparent inconsistencies or idiosyncrasies are indeed more apparent than real. If KM's judgments are considered as being the product of a hierarchical ordering of desiderata or constraints, a much more consistent pattern is seen. To a large extent Gresson appears to have worked with a structure which ranked various norms or considerations in sequence — and the involvement of a higher order norm in any case precluded the lower order norm from being applied.

A simple single-case example of this “hierarchy of norms” is provided by *Snell v Potter*<sup>33</sup> where the plaintiff sought to enforce a contract to transfer part of a farm to him; the agreement being that this would be occur when his existing marriage was terminated by divorce. Gresson J held that even if divorce was recognised by statute, contracts promoting it were still contrary to public policy — the legislative policy did not exclude the moral norm, so the moral norm could be relied on. However Gresson saw the claim to part of the farm as severable from provisions concerning the divorce, and as the plaintiff had substantially complied with the agreement and provided consideration, the plaintiff was entitled to some redress on a quantum meruit. In this case the moral norm as to public policy on divorce could be considered not to apply, so Gresson was still free to utilise a lesser norm, of substantial justice and fairness.

Another more complex example is provided by a cluster of cases where the court was confronted with litigation where the incidence of government benefits or payments might affect the apparent interests of the parties. In *Ramlose v Moul*t in 1952, Gresson J had to consider whether medical expenses were recoverable as damages for personal injury where the doctor in question had in fact been paid by Government sources and not by the plaintiff patient. He considered that they were so recoverable because the relevant Government department had a right (if seldom exercised) to make a claim for reimbursement from the plaintiff.<sup>34</sup>

30 [1961] NZLR 542, discussed below, n38.

31 *Fraser v Beckett & Stirling Ltd* [1963] NZLR 480, discussed below n43; *Attorney-General v Hocking* [1963] NZLR 513

32 *In re The Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96.

33 [1953] NZLR 696.

34 [1952] NZLR 260; [1952] GLR 177.

That case may be contrasted with *McGill v McGill* in 1958, where the issue was whether the court should order permanent maintenance to a wife in the sum of the “allowable income” before her social security benefit abated. On the first occasion this came before him, Gresson J considered that an order so worded might be contrary to public policy as effectively transferring the obligation of maintaining the wife from the husband to the state. He therefore required the party to make a fresh application and to serve copies of the documents on the Solicitor-General in case the Government wished to be represented.<sup>35</sup> When the case was re-argued, Gresson refused to make the requested order:

...the Court is brought face to face with a proposal to benefit a party under an obligation at the expense of the community. The Court can, and in my opinion should, have regard to the effect of the proposed order, and not lend its aid to an agreement which is inimical to the public interest.<sup>36</sup>

The issue of principle surfaced again in *Wood v Attorney-General*<sup>37</sup> where the Crown sought apportionment of damages payable under Deaths by Accident legislation so as to terminate liability for pension payments to the deceased’s dependents. Gresson P, giving the judgment of the Court of Appeal, considered such apportionment would be wrong, because it was no function of the court to consider the incidence of pensions or other benefits — that was a matter statute left to specific governmental bodies.

Any apparent inconsistency in these cases is more apparent than real. In *McGill v McGill* Gresson was concerned to prevent individuals shifting their obligations to the state; in the other two cases the same principle might have applied but for the higher norm of respect for statute, in that that Parliament had conferred the relevant discretions on bodies other than the courts.

This mode of analysis of course assumes that Gresson, consciously or sub-consciously, could identify the hierarchical norms relevant to any particular case. It further assumes that retrospective analysis will be able to make the same identification. The evidence suggests that the first assumption is more than reasonable, though the weight of evidence suggests the process was more sub-conscious or, at most, unarticulated. In the vast bulk of Gresson’s reported judgments there is no evidence of any deliberate ordering of principles to achieve a particular result. Perhaps the closest he ever came to this is in his most famous single judgment, his dissent in *In re Lolita*<sup>38</sup> where he would have held the book not indecent. There has been a tendency to see this as an unusual and somewhat surprising judgment for a normally conservative judge. This may over-estimate Gresson’s personal conservatism — he was certainly far less censorious than some of his colleagues.<sup>39</sup> The question was whether Nabokov’s novel was indecent as “unduly emphasising matters of sex” as the statutory formula required. Gresson rejected the application of a test that the publication was ‘offensive by community standards’ because “..that is not what the Legislature has said” and because the test was unworkable since the community standard was too uncertain a standard for any single judge to apply.<sup>40</sup> While he acknowledged that freedom of expression, something

35 [1958] NZLR 145, 146.

36 *McGill v McGill (No 2)* [1958] NZLR 257, 260.

37 [1963] NZLR 39.

38 [1961] NZLR 543.

39 Compare the remarkable tone of the judgment in *Kerr-Hislop v Walton* [1952] GLR 179.

40 *Ibid*, 549

he thought most precious, must give way to the public interest if a publication exalted “vice, viciousness or cruelty or is an incentive to immoral behaviour”, *Lolita* posed no such threat and the proper response was to let the book into the public area and let parents keep it from their children — if they saw fit and if they could.<sup>41</sup> The majority held otherwise.

The case may reasonably be analysed as one in which Gresson consciously using rank ordered norms to reach his desired end. Primacy is given to applying the actual words of the statute — the highest norm — so that a lesser norm — a judicial rule — need not be complied with. Once it is shown on this level that Gresson is free not to follow the judge-made law, he can have regard to his lesser norms of minimising state interference with the individual and even to the desirability of the law according with practicalities. This analysis does not diminish the value or the ethical worth of Gresson’s judgment, but it does allow a much better appreciation of how he came to the stance he did.

In only one case does it appear that KM found himself really unable to determine satisfactorily the relevant principles he should apply. This occurred in *In re Woodcock and Woodcock*<sup>42</sup> where Gresson J had to deal with an application, under a new statutory provision, for an order dispensing with the prohibition on marriage of stepfather and stepdaughter. Gresson, after indicating that “For myself, I find the idea of a man marrying his stepdaughter altogether repugnant” remitted the matter to the Court of Appeal on the rather unconvincing basis that the first decision on relevant principles should not be that of a single judge.

An analysis in terms of rank-ordered norms also requires that any changes in the norms or their ordering can be identified. This is not difficult in Gresson’s case as the only area of law in which there appears to have been any major change in his thinking over the years is the question of criminal liability being imposed without some mental element. In what appears to have been the last case he heard in the Court of Appeal, *Fraser v Beckett & Sterling Ltd*<sup>43</sup> Gresson P uttered a powerful dissent against the majority verdict imposing absolute liability for an offence under the Customs Act on the basis that imposition of criminal liability without fault was an injustice, and the courts should only read a statute as so providing when the wording was clear. Years earlier, Gresson had held that it was not sufficient for a “special reason” for a conviction not to be entered that the defendant licensee neither knew of the relevant conduct nor was at fault.<sup>44</sup> Even so, these cases might be thought to be reflect different hierarchical norms — in the licensee case earlier decisions on the section did not allow these matters to be considered, so that the “justice” norm had to be subordinated to following established law. By comparison, in *Fraser v Beckett & Sterling Ltd* the statute did not require the court to fix on any particular form of liability, so the “justice” norm was not excluded.

What then were the norms which may be deduced by analysing his judgments, and how was the hierarchy ordered? A more detailed discussion of the separate norms, in the order given below, follows, but the hierarchy may be seen as constituted thus:

41 *Ibid*, 551-552; the words quoted are on p552.

42 [1957] NZLR 960, 961.

43 [1963] NZLR 480.

44 *Gunn v Nicholls* [1949] NZLR 56; [1948] GLR 547.



- the obligation to apply the existing law as declared by parliament or the courts ( the former over-riding the other if conflicting);
- “legal formalism” or obedience to rules as to jurisdiction, pleadings and appellate review;
- restriction of state intervention on individual rights;
- “fairness” or abstract justice [ for the purpose of this article, this is considered in the context of divorce law];
- pragmatism.

### III. THE OBLIGATION TO APPLY THE EXISTING LAW: STATUTORY INTERPRETATION AND PRECEDENT.

Many of Gresson’s judgments, whether in the Supreme Court or Court of Appeal, turned on the application of existing rules Gresson considered to be binding on him. In accordance with standard constitutional rule, statute law took primacy over case law, but having acknowledged that distinction (and therefore the possibility of a subclass within the hierarchy), both kinds of rules can be discussed here.

#### (a) Application of statutes and their interpretation

Gresson had a very strong belief that only in rare cases was it proper for the courts to do anything other than apply a statute in its exact terms.<sup>45</sup>

The Court has no right to fill in a gap which it supposes to exist in a statute but must leave it to the legislature to do so. It is bound absolutely by the language of the statute and must refrain from attributing to the Legislature anything which is not what it has said, since to do so would be a substitution of the Court’s idea as to what would be appropriate for a literal and unimaginative interpretation of words which are direct and unambiguous.<sup>46</sup>

Literal reading of the statute is however only the product of the relevant rule, not its embodiment. In his view, the primary obligation on the courts was to apply the words of the statute *as representing Parliament’s intention* — the primary norm.

In some cases the literal rule could be displaced because the result was not to be taken as Parliament’s intent because it was absurd or productive of injustice or real inconvenience ;

It is well settled that an Act of Parliament is to be construed by giving to the words used their natural and ordinary meaning unless there is some very strong ground, derived from context or reason, why they should not be so construed.<sup>47</sup>

Then and only then were the courts free to search for alternative readings of the statute “to avoid repugnance, absurdity or injustice”.<sup>48</sup> Thus in *Commissioner of Inland Revenue v West-Walker*<sup>49</sup> Gresson considered that a provision in income tax legislation authorising the Commissioner to demand information from “every person” had not removed protection accorded by the common law rules as to legal professional privilege. On

45 Tax statutes in particular were to be read literally: *Commissioner of Inland Revenue v N V Philips Gloeilampenfabriken* [1955] NZLR 868, 882.

46 *Auckland Harbour Board v Kaihe* [1962] NZLR 68, 85. He later cited ( at 86) the well known dictum of Lord Simonds in *Magor and St Mellons RDC v Newport Corporation* [1952] AC 189, 191 about “naked usurpation of the legislative function under the thin disguise of interpretation”.

47 *Bartlett v Bolt* [1949] NZLR 732, 733; [1949] GLR 459, 460.

48 *Hopper v Gear Meat Co Ltd* [1948] NZLR 327, 335 ; sub nom *Inspector of Factories v Gear Meat Co Ltd* [1948] GLR 111, 115. Compare the reasoning in *C & A Ödlin Timber and Hardware Ltd v Gray* [1961] NZLR 411 and *Campbell v Russell* [1962] NZLR 407.

49 [1954] NZLR 191, 212-213.

rarer occasions Gresson did also call in aid the statutory embodiment in the Acts Interpretation Act 1924, s(5j) of the mischief rule.<sup>50</sup>

### (b) Precedent

At the heart of Gresson's judicial philosophy is the idea that judges must work by rule and precedent. In one case he started his judgment thus:

In deciding whether, in the circumstances of the case, the transaction brought about a valid contract of sale the duty of the Court is to 'apply rigorously the settled and well-known rules of law', That was how the Lord Chancellor (Lord Cairns) opened his judgment in the leading case of *Cundy v Lindsay* (1873) 3 App Cas 459.<sup>51</sup>

It is pertinent here to note that, particularly in his later years, he cited little authority, preferring instead to focus on what he saw as the relevant principle.<sup>52</sup> This reflects a continuing view of his that citation of overmuch authority was unhelpful — in one judgment he expressed it thus: "many cases were cited in argument, and I have read them, but they tend rather to perplex than to clarify my mind"<sup>53</sup> and at his valedictory sitting of the Court of Appeal he made special mention of the need for argument in court to be more focussed on principle.<sup>54</sup>

Perhaps the most revealing statement of his view of "justice according to law" came in *Thomas v Thomas*<sup>55</sup> a case involving matrimonial property, where the statute empowered the judge to make "such order as he saw fit". Gresson considered a number of relevant cases, and expressed dissatisfaction with an English case<sup>56</sup> where the English Court of Appeal had suggested that, provided any order made was not contrary to any established principle of law, the judge could deal with the matter by "palm-tree justice" — ie by a discretionary decision according to the judge's personal view of the merits:

With respect, I venture the view that resort to 'palm-tree justice' is a principle, or rather an absence of principle, that is undesirable. The case is a striking illustration of what might be expressed shortly in Latin: *Quot palmae, tot sententiae*.<sup>57</sup>

Given that the courts should apply rule-based justice, whence came the rules? In Gresson's case, from the common law — and the common law was principally that laid down in England. A succinct statement of his views is to be found in his dissenting judgment in *R v Naidovici*<sup>58</sup> as to whether a document used by a witness to refresh the witness's memory and then adopted by that witness was itself admissible as evidence. The majority of the Court held it was, relying on American authority. Gresson would not accept that view:

50 See *Williams v Commissioner of Stamp Duties* [1948] NZLR 662; [1948] GLR 223 and *Kensington v Pearson* [1948] NZLR 695; [1948] GLR 206; *In re Ashton, Siddall v Gordon* [1955] NZLR 193, 200

51 *Fawcett v Star Car Sales Ltd* [1960] NZLR 406, 411.

52 Eg *In re Kallil, Koorey v Kallil* [1957] NZLR 10, 25.

53 *In re Liverton, New Zealand Insurance Co Ltd v McKenzie* [1951] NZLR 351, 363; [1950] GLR 524, 526.

54 [1963] NZLJ 121, 123.

55 [1956] NZLR 785.

56 *Rimmer v Rimmer* [1953] 1 QB 63; [1952] 2 All ER 863.

57 [1956] NZLR 785, 789. The epigram means "There will be as many opinions as there are palm trees" and is a neat play on the well known Latin tag "*Quot homines, tot sententiae*" (There will be as many opinions as there are men).

58 [1962] NZLR 334.

Many American decisions have held that where a witness verifies and adopts the written record of a past transaction it thereby becomes part of the witness's testimony and admissible accordingly, but I am not aware of any decision in England or any Commonwealth country which has modified the strict rule of evidence rendering such a document inadmissible as settled in England by a strong trend of authority and stated to be the law by all the English textbook writers.<sup>59</sup>

In other cases too, Gresson showed his great respect for English appellate decisions:

Whether or not these opinions expressed were obiter dicta or judicial dicta, that is to say, whether they were irrelevant to the cases in which they respectively occurred or whether they were, though forming no part of the ratio decidendi, yet relevant to some collateral matter may, I think, be disregarded. Since they emanated from the House of Lords and the Privy Council, they must command the respect properly due to any exposition of the law proceeding from either of those sources.<sup>60</sup>

In assessing these views of Gresson, it must be remembered that he worked within a very Anglophile professional atmosphere. In many cases it is clear that cases before Gresson were argued by counsel who cited as relevant authority English decisions, even though based on differently worded legislation<sup>61</sup> or of such antiquity as to be of little value.<sup>62</sup> However KM was, from his earliest days, astute to point out cases where such English decisions provided little assistance.<sup>63</sup> It may also be noted that several New Zealand judges, including Gresson, in the 1950s had a curious linguistic habit of using words "the Court of Appeal" to refer to the English court; when the New Zealand Court of Appeal was mentioned, it was "our Court of Appeal".<sup>64</sup>

There were occasions on which Gresson expressed views that a decision of the House of Lords had settled an area of law "beyond question"<sup>65</sup> but such phrases may be found in judgments of many other judges.<sup>66</sup> However KM was ready to distinguish decisions of the House of Lords or Privy Council when he saw proper grounds to do so.<sup>67</sup> His views as to the weight to be accorded English Court of Appeal decisions must also be noted. Although he took no part in the leading decisions of the 1940s and 1950s<sup>68</sup> where the Court of Appeal sought to fetter its own freedom to depart from

59 [1962] NZLR 336-7.

60 *In re McEwen (deceased); McEwen v Day* [1955] NZLR 575.580.

61 Eg see *Brand v Zavos* [1948] NZLR 1 [1947] GLR 492; *Bilderdeck v Manson & Barr Ltd* [1948] NZLR 58; [1947] GLR 507; *In re Brophy, Yaldwyn v Martin* [1949] NZLR 1006, 1016; [1949] GLR 577, 581.

62 *R v Lacey* [1953] NZLR 431.

63 *In re Lowry's Trusts, Logan v Lowry* [1948] NZLR 738; 772; sub nom *Lowry v Logan* [1948] GLR 315, 331; *Bass v The King* [1948] NZLR 777; [1948] GLR 305 and *Hutt Valley Electric-Power Board v Lower Hutt City Corporation* [1949] NZLR 611; [1949] GLR 395.

64 See eg *In re an Arbitration, Hinurewa Kawe v Herlihy* [1952] NZLR 65; [1952] GLR 90 (Fair J); *Fear's Radios and Cycle Co Ltd v Dominion Life Assurance Office of New Zealand Ltd* [1959] NZLR 873 (KMG)

65 *Campbell v Russell* [1962] NZLR 407, 416.

66 *Eg Morgan v Khyatt* [1962] NZLR 791, 794 per Cleary J.

67 See for example *Commissioner of Taxes v Luttrell* [1949] NZLR 823, 858; [1949] GLR 469, 483; *In Re C K, (Deceased), M v L* [1950] GLR 297; *Hibberds Foundry Ltd v Hardy* [1953] NZLR 14 sub nom *Hardy v Hibberds Foundry Ltd*; [1951] GLR 504.; *Watson v Miles* [1953] NZLR 958; *National Mutual Life Association of Australia Ltd v Attorney-General* [1954] NZLR 754; *Peerless Bakery Ltd v Watts* [1955] NZLR 339.

68 *In re Rayner, Daniell v Rayner* [1948] NZLR 455; *Preston v Preston* [1955] NZLR 1251; *Smith v Wellington Woollen Manufacturing Co.* [1956] NZLR 491

English Court of Appeal decisions, it is doubtful whether Gresson agreed with them.<sup>69</sup>

Perhaps the most criticised, and most misunderstood of Gresson's judgments is his dissenting opinion in *Corbett v Social Security Commission*<sup>70</sup> where he held that the court could not go behind a ministerial claim of Crown privilege to prevent the release of documents; the majority held otherwise. The point was difficult because there was a conflict of authority between a decision of the Privy Council and a subsequent decision of the House of Lords.<sup>71</sup> Gresson P makes clear in his judgment that if the matter was one where he believed the Court of Appeal to be free to choose its own view, he would have followed the Privy Council because of the potential for abuse if Ministerial claims could not be reviewed. The real difference is that he, unlike the majority, concluded, that the law required the court to follow the House of Lords where there was a conflict of this nature. Thus the higher norm of obedience to the law, as he perceived it, left no room for the operation of the lesser norm of restriction of unreasonable activities by the Executive.

### (c) Law reform and the role of the courts

For Gresson, one corollary of this rule-based approach was it was not for the courts or the judiciary to change unilaterally any settled rules of law. This underlies Gresson P's dissent in *Hocking v Attorney-General*<sup>72</sup> where he considered that the old, anomalous but established rule exempting local bodies from liability for non-feasance still applied in New Zealand. This did not preclude the courts from pointing out to the legislature the desirability of reform by statute where this was desirable:

I would add that, having regard to the possibility that in some cases a strict application of the statute might well result in considerable hardship, and perhaps injustice, there might well be provided some modification of the stark provisions of the Act. That however is a matter for the Legislature.<sup>73</sup>

Similarly in another case where Gresson was one of the majority holding a plaintiff could not recover damages at common law from the occupier of premises because the plaintiff was only a licensee, he said:

In conclusion I express the hope that, as in England there has been an attempt in the Occupier's Liability Act 1957 to produce order out of chaos by abolishing the common law distinction between invitees, licensees and contractual visitors, in New Zealand there may also be legislation with the same object.<sup>74</sup>

Statutory reform did come in that case, though not for some three years.<sup>75</sup>

69 See in *Manawatu Catchment Board v Taylor* [1949] NZLR 910, 911; [1949] GLR 516 his citation, with approval, of dicta by Myers CJ in *Boyes v Carlyon* [1939] NZLR 504, 511 that the New Zealand Court of Appeal should always follow earlier decisions of its own if they conflicted with English Court of Appeal decisions. One of the minor mysteries of the development of rules as to precedent in New Zealand is why *Boyes v Carlyon* was not referred to in *In re Rayner, Daniell v Rayner* [1948] NZLR 455, *sub nom In re Rayner, Rayner v Daniell* [1948] GLR 51.

70 [1962] NZLR 878

71 *Robinson v State of South Australia* [1931] AC 704 (PC); *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; [1942] 1 All ER 587 (HL).

72 [1963] NZLR 513, 519.

73 *Whitwell v SIMU Mutual insurance Association* [1960] NZLR 433, 443. Compare the suggestion for reform in *In Re F (A protected person)* [1956] NZLR 641

74 *Percival v Hope Gibbons Ltd* [1959] NZLR 642, 658-9.

75 Occupiers Liability Act 1962.

#### IV. LEGAL FORMALISM

Gresson had very clear views that the administration of justice required the courts to respect the jurisdiction of other bodies, judges to respect the decisions of juries and for cases to be dealt with in accord with procedural rules. These beliefs may collectively and conveniently be called “legal formalism”; collectively they make up a vital second-order norm by which Gresson decided cases.

##### (a) Jurisdictional rules

There are a number of cases where Gresson refused to decide matters on the grounds that the questions involved were for bodies other than the Court in which he sat . Thus he was of the opinion that the court should refuse to answer cases stated or questions put to it if these involved findings of fact where statute entrusted the determination of fact to another tribunal.<sup>76</sup> In another case he declined to give a declaratory judgment as to whether certain local body employees were covered by an industrial award, on the basis that the Court of Arbitration was the proper place for such matters to be determined.<sup>77</sup> His reluctance to trespass on the precincts of other bodies continued through his career — in 1962, he took the view, dissenting from his colleagues, that it was a matter for a Royal Commissioner to determine what if any parties had a right to be represented and to participate.<sup>78</sup> Nor was he ready to use the declaratory judgment procedure where facts might be in dispute, since fact-finding was a different element of the court’s jurisdiction.<sup>79</sup>

##### (b) juries, judges and appellate review

In dealing with jury verdicts, there were two relevant principles. In the majority of cases, Gresson was content to proceed on the basis that the determination of facts was the province of the jury and it mattered not that the judge might have had a different view of the facts.<sup>80</sup> In most cases application of that norm sufficed to conclude any argument on the facts.<sup>81</sup> However in a few cases it did not. If the verdict of the jury was totally unreasonable because the finding had no evidence to support it, Gresson would appear to have seen the norm of respect for jury findings of fact as in conflict with the norm that litigants were entitled to have cases determined according to law.<sup>82</sup>

76 *In re Hawke’s Bay Motor Company Ltd and Minister of Railways* [1949] NZLR 445; [1949] GLR 203; *In re an Arbitration, Richards and State Fire Insurance General Manager* [1951] NZLR 695

77 *Wellington Municipal Officers Association (Inc) v Wellington City Corporation* [1951] NZLR 786; [1951] GLR 414

78 *In re The Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96.

79 *In re a Lease, Barber v Hanfling* [1948] NZLR 855 , sub nom *Barber v Hanfling* [1948] GLR 353

80 See among many examples Gresson’s judgments in *Cole v Jones* [1954] NZLR 699, *Hibberds Foundry Ltd v Hardy* [1953] NZLR 14; sub nom *Hardy v Hibberds Foundry Ltd* [1951] GLR 504 and *JM Heywood & Co Ltd v Attorney-General* [1956] NZLR 668. As with most of his colleagues, he was more prepared to intervene where the issue for the appellate court involved drawing inferences from admittedly truthful evidence: *Billy Higgs & Sons Ltd v Baddeley* [1950] GLR 219, 224

81 KMG was strongly of the view that the court’s jurisdiction on issues of law should not be artificially restricted by mis-classification of issues as being ones of fact alone : *Commissioner of Taxes v McFarlane* [1952] NZLR 349, 373-4; [1952] GLR 187, 193. Compare *CIR v Walker* [1963] NZLR 339.

82 *Jensen v Hall* [1961] NZLR 800, 810-11, compare *Hoani v Wallis* [1956] NZLR 395.

Similar, though perhaps slightly different, principles applied to appellate review of decisions by judges sitting alone. Although Gresson was always reluctant to over-ride decisions of fact made by a tribunal which had seen and heard witnesses — indeed his first substantive judgment in the Court of Appeal, only months after he had been elevated to the bench stressed exactly that point<sup>83</sup> — he was readier to over-ride findings by judges sitting without a jury.<sup>84</sup>

In exercising appellate jurisdiction, Gresson's judgments on occasion reveal a conflict of norms as where the norm of respect for findings in the court below clashed with a higher norm imposed by statute or the general law. Thus in a custody case, Gresson dissented from the majority's decision to uphold the trial judge's discretionary decision to award custody of a very young child to the father.

It may be that the restraint to which an appellate tribunal should subject itself is less stringent where the exercise of discretion appealed against is no mere matter of practice or procedure but is a matter of such prime importance as the welfare of an infant whose right to have decided what is best for him or her is the first and paramount consideration.<sup>85</sup>

That passage may be analysed as holding that the statutory or legal rule or norm of primacy of the interests of the child displaces the lesser rule as to appellate respect for the trial judge's findings.

### (c) Procedure

Gresson was always careful to ensure that he did not give a judgment which might affect the position of parties not before the court — in one case involving construction of a statute affecting a right to object to re-grading of a civil servant, he insisted on an adjournment so the Public Service Board of Appeal could indicate either a willingness to be represented in the matter or to abide the decision of the court.<sup>86</sup> In another case, *Glubb v Campbell*<sup>87</sup>, Gresson J refused to give a declaratory judgment as to the powers of the Public Service Board because not all the public service officers affected were parties to the action — he did however give a judgment on the point in issue on the basis that it bound only the present parties. In one early case he went even further, to expressly state that though he gave his opinion on a point, his statements were obiter dicta and he was not to be taken as judicially determining the question.<sup>88</sup>

Perhaps predictably, Gresson's formalist beliefs were shown in his not infrequent (though not always successful) insistence that litigants conduct their cases in strict accordance with the pleadings — "A litigant must be held to the case he sets up..."<sup>89</sup>. In another case he put his view thus:

The Court of Appeal is not, in my view, free to remould the case; its function is to decide whether the judgment of the trial judge on the case as presented was right. If it was, it should not be set aside on appeal.<sup>90</sup>

83 *Caldwell v Kirby* [1948] GLR 335.

84 *In re Rhodes (Deceased)*, *Vennell v Godby* [1961] NZLR 65, 86.

85 *Palmer v Palmer* [1961] NZLR 702, 707.

86 *Bartlett v Bolt* [1949] NZLR 732; [1949] GLR 459.

87 [1950] GLR 79

88 *Walker v Akatarawa Sawmilling Co Ltd* [1949] GLR 286, 287.

89 *Heard v NZ Forest Products Ltd* [1960] NZLR 329, 342 (dissenting in this case). See also *Berryman v Toup-Nicolas* [1958] NZLR 1170.

90 *Reporoa Stores Ltd v Treloar* [1958] NZLR 177, 195. It is interesting to note that F B Adams J, probably Gresson's principal rival among the puisne judges for the Presidency of the Court of Appeal, was much more prepared to allow new matters to be raised on appeal ( see [1958] NZLR 177, (200). One may speculate that Gresson's more conservative views on this point might have influenced his selection ahead of Adams J.

Gresson's belief in the sanctity of the pleadings was not mirrored by any perception that he was limited to the material cited by counsel in reaching his decision. In innumerable cases KM went well into matters very much more deeply than had counsel, and indeed in some cases appears to have taken as the guiding authority cases not cited in argument.<sup>91</sup> However any seeming inconsistency can again be explained if one considers his beliefs to be hierarchical — the principle that cases were to be decided on the pleadings gives way to a belief that cases must be decided according to law.

## V. THE STATE AND THE INDIVIDUAL

A significant number of Gresson's judgments reflect his concern that the state or its agencies should not impinge on individual rights unless proper authority existed for the infringement. He recognised that individual rights could not be paramount, but required invasion of them to be justified:

It is understandable that any owner will resent interference with his proprietary rights but, when it is authorised by law in the general interests of the public, the private owner has to submit with a good grace. But it is equally the case that, where any invasion of private rights is authorised by statute, the terms of the statute must be strictly complied with.<sup>92</sup>

The requirement that governmental agencies have proper grounds for their actions is a recurrent theme, whether in insisting that a municipal by-law authorising the destruction of stock found to be unfit for consumption be squarely within the empowering statute<sup>93</sup> or in declaring that a Cabinet Minister, as an officers of state, had:

no special powers and immunity simply because he is such an officer; any power which he exercises or any immunity which he claims must be based on a proper legal foundation.<sup>94</sup>

Further strong statements of his views appear in *Deynzer v Campbell* where Gresson J was one of two dissenting judges who would have granted an injunction to a public servant seeking to prevent his transfer from the Department of Scientific and Industrial Research to another department after refusing to disclose to the Public Service Commission whether or not he was a communist. Gresson reasoned that although the appellant's contract of employment contained an implied term that the Crown could transfer the employee on "public interest" grounds, the relevant statute required this power be used only after a proper inquiry and hearing

I know of no authority that the Crown can, even where the overwhelming interest of public safety demands, over-ride the provisions of a statute to which it has assented to the extent of denying rights it confers.<sup>95</sup>

and again, even more trenchantly :

A wholesale suspension of law, accompanied by far-reaching powers to the Executive, is common in wartime: if something of the sort, of a more limited character, is expedient in a time of peace (so called) it is for the Legislature to confer it, not for the Commission to assert it without authority.<sup>96</sup>

91 *Drewitt v Price Tribunal* [1959] NZLR 21, 39; compare judgments based on his own research in eg *Shore v Thomas* [1949] NZLR 690; [1949] GLR 270 ; *In re Fox and Fox* [1949] NZLR 722 , sub nom *R v Fox* [1949] GLR 461; *Watson v Miles* [1953] NZLR 958; *R v Greening* [1957] NZLR 906; *R v Cottle* [1958] NZLR 999.

92 *Connolly v Palmerston North CC* [1954] NZLR 1006, 1008.

93 *Everton v Levin Borough* [1953] NZLR 134, 136; compare *Adams v Hutt County* [1957] NZLR 776.

94 *Peerless Bakery Ltd v Watts* [1955] NZLR 339, 343

95 [1950] NZLR 790, 828; [1950] GLR 432, 446.

96 [1950] NZLR 790, 829; [1950] GLR 432, 446.

Another aspect of Gresson's views as to state power and its limits was shown in *Matthews v Dwan*<sup>97</sup> where he had to consider the powers of a police constable to enter private land without a warrant. He gave an extensive discussion of the English case law and held that as the New Zealand statute which governed the point did not authorise entry without warrant, such entry was unlawful.

Because Gresson accorded primacy among his judicial principles to obedience to positively stated law, his concerns about governmental intrusion on individual liberties on occasion had to be subordinated to his normal literal interpretation of statutes. Thus in *Buller Hospital Board v Attorney-General*<sup>98</sup> he held that the plaintiff was not entitled to a declaration that it had been improperly replaced by a Ministerially-nominated commission, because the relevant statute did not require the Minister to act in accordance with any principles of natural justice:

In so holding I am not unmindful that the community relies, and properly relies, upon the Courts to contain executive action within its appointed limits and so to protect the individual against abuse of executive power... However we can only take the section as it is; and, in my opinion, Parliament having seen fit in language which is plain and unambiguous to confer this power upon an Minister of the Crown the rules of natural justice cannot be applied. Whether the Legislature should have given such a power is not for me to say. The Court cannot question the omnipotence of Parliament.<sup>99</sup>

## VI. FAIRNESS AND JUSTICE: THE EXAMPLE OF DIVORCE

It is clear that Gresson's opinions as to divorce were well ahead of contemporary society (including the Anglican Church of which he was such an active member) and very much more progressive than many of his fellow judges<sup>100</sup>. These opinions seem to spring essentially from his views as to the injustice and unfairness of the contemporary law. If no rule required him to decide in a particular way, he would always seek a result consistent with his perceptions of individual justice. Thus early in his judicial career Gresson was one of two dissenters from a decision that judicial discretion to refuse a decree of divorce should always be exercised against a petitioner who had breached a separation agreement or deed ( in this case by a prolonged failure to pay maintenance):

In the circumstances of this case I do not think this husband petitioner ought to be held, as a kind of punishment, in what is (for him at any rate) the servitude of a marriage which fourteen years ago ceased de facto to be a marriage, merely because of his default, inexcusable though it may have been, over some portion of the fourteen years. A dissolution of the marriage seems to me in this case to be desirable in the public interest.<sup>101</sup>

For most of his judicial career, the court was required, in relation to some grounds for divorce, to refuse a decree if the ground in question had arisen through the "fault" of the petitioning party. Gresson readily recognised that such provisions were often productive of injustice -he thought a judicial discretion was far preferable to an absolute bar of this kind.<sup>102</sup> In one such case, where a petition based on a separation agreement,

97 [1949] NZLR 1037; [1949] GLR 582

98 [1959] NZLR 1259.

99 [1959] NZLR 1259, 1293. Cleary J concurred; North J dissented.

100 See his views in *Wright v Wright* [1954] NZLR 417, 428-9 ( joint judgment with Hay J) and *Crewes v Crewes* [1954] NZLR 1116, 1121.

101 *Davis v Davis* [1950] NZLR 115, 130; [1949] GLR 520, 531. Gresson did point out the wife had a separate action to recover the arrears of maintenance.

102 *Raymond v Raymond* [1958] NZLR 162, 165



had to be declined because the petitioner had caused the separation by associating with another woman, who had subsequently borne several children and who he now wished to marry, Gresson concluded his judgment in words which it is difficult to imagine any other judge of the time expressing:

In conclusion I express the hope that the respondent, having vindicated her position and established that the separation was not due to any fault of hers, may be large-hearted enough to consider the unfortunate plight of the three young children [of the husband and his de facto spouse], for whom life is being made painful and difficult because their father and mother are unable to legitimate them by marriage, and will herself seek a dissolution of her marriage on her own petition, to help these children.<sup>103</sup>

To fill out the picture, it should be noted that although Gresson was in favour of divorce as a means of resolving failed marriages, he was always protective of the rights to proper maintenance of the first spouse.<sup>104</sup>

## VII. PRAGMATISM

In a number of cases where Gresson found no rules of law to constrain his decisions, he sought to find pragmatic and just solutions to problems where the law might operate unfairly or unreasonably — as in *R v Pratt*<sup>105</sup> where Gresson J found that a defendant did not, on the law, have a grounds to challenge for cause jurors who had sat in a related trial, but as it was undesirable these jurors should sit, he would adjourn the trial for a week so a new jury panel would be available. A similarly pragmatic solution is to be found in a case involving an application by trustees to allow the sale of trust property to a trustee<sup>106</sup>, where Gresson noted that the trustee had not put in the highest tender for the property but as statutory approval of the sale was required and would not be forthcoming at any of the tendered prices, there was no objection to a sale to a trustee at the maximum figure for which approval should be given. However pragmatism was never allowed to over-ride legal formalities or requirements where these safeguarded the rights of others, whether or not parties to the litigation or give rise to a risk of the court begin prevented from discharging its duties properly.<sup>107</sup>

This pragmatic view appeared in criminal cases too — as where Gresson, giving the judgment of the Court of Appeal, held that the “exceptional” course of entering an acquittal rather than ordering a re-trial in a case of domestic assault should be taken because:

There are other features which dispose us to this course — namely that the wife has throughout declined to testify against her husband, and we are told that she and her husband are living together and we should be sorry to do anything which might disrupt the home.<sup>108</sup>

103 *Bly v Bly* [1952] NZLR 127,132; [1950] GLR 271, 273

104 *Foster v Foster* [1948] NZLR 860; compare *In re Dalton (Deceased)*, *Dalton v Spence* [1952] GLR 230.

105 [1949] NZLR 425; [1949] GLR 300.

106 *In re Cooksley (Deceased)* [1949] GLR 149.

107 See eg *B v B* [1950] GLR 468; *Re Thomson, ex p Otaki Textiles Ltd* [1950] GLR 310; *In re Bevan (Deceased)*, *Wehipeihana v Guardian Trust and Executor Co of NZ Ltd* [1954] NZLR 1108 and *Yeatts v Ruapekapeka Sawmill Co Ltd* [1958] NZLR 739; compare *R v Burney* [1958] NZLR 745, 748.

108 *R v Campbell* [1960] NZLR 884, 890-91.

In a number of cases Gresson used the power of the court to award or withhold costs as a method of reflecting his views of the merits of the litigants — as where costs were not awarded to a plaintiff because a hearing had been protracted because of the plaintiff's extreme and unreasonable claim<sup>109</sup> or successful appellants were deprived of costs in the Court of Appeal or in the court below because the appeal succeeded on a ground not seriously argued earlier.<sup>110</sup> In one case in the Supreme Court, Gresson J deprived a successful defendant of costs on the basis the defendant had persisted with an unnecessary and unfounded ground of defence up to and at trial, but in that case it is difficult to escape the conclusion that the costs order partially reflected Gresson's expressed view that "...the plaintiff has failed in the action, even though the merits appear to be on his side".<sup>111</sup>

### VIII. CONCLUSION

This article has essayed a novel approach to analysing the factors influencing a judge's determination of cases. Instead of looking to the personal or cultural factors which may have affected or created the values important to the judge, this study of Gresson's judgments has proceeded on the basis that a better understanding of his decisions, and his contribution to New Zealand law, is gained if analysis proceeds by seeking to re-create the intellectual framework within which he operated, consciously or unconsciously than by a traditional scanning of his life for events which may have influenced particular decisions. That consistency allows a much more informed judgement to be made about both his career and about the reasoning underlying any particular judgment. If, as has been contended, the attempt to discover a consistent pattern of applying a set of norms explains Gresson's judicial decision-making, it may be that analyses of this kind may be successfully undertaken for some other judges. In Gresson's case, a search for the underlying structure of his understanding of law, and approach to applying it to cases in which he sat, permits a quite different evaluation of his career. Instead of the surface inconsistency or idiosyncrasy attributed to Gresson, there appears an remarkable underlying consistency in his judgments. He can be seen not as a judicial maverick but for what he was, a deeply humane man who bent his talents to deciding cases according to the principles he believed the law and the legal system required him to apply.

109 *Marshall v Minister of Works* [1950] NZLR 339; [1950] GLR 20 (Compensation Court)

110 *In re Proudfoot* [1961] NZLR 268; *CIR v McLaren* [1961] NZLR 338.

111 *Lyver v Crowe & Sons (in Liquidation)* [1957] NZLR 420, 428. Compare *Rock v Thomsen* [1953] NZLR 612, 616 and *In re Bradley (Deceased, Anderson v Anderson)* [1950] GLR 338.