Introduction

This is a symposium issue, the first one for this Law Review in a good many years. The theme of the articles that follow is 'Certainty and the Law'. We thought that theme a good one with which to re-start our old tradition of occasional symposia issues. With the recent calls in New Zealand for simplicity in the law and for fairness in adjudication, certainty as a desirable goal or end of law has tended to be ignored, even disparaged.

In its most extreme form that disparagement runs something as follows:

> (1) Complete certainty in the law, be it statutory rules laid down by Parliament or case law rules slowly built up, altered and refined by the judges, is an unachievable goal. Indeterminacy and uncertainty is an inevitable aspect of all legal rules, whatever their source.
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> Therefore
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> (2) Certainty isn't really worth pursuing at all. Better to concentrate on fairness as the main criterion in adjudicating cases or on simplicity in laying down rules.

This sort of argument relies heavily on the truth of (1) carrying over to make (2) somehow more plausible. But of course (2) in no way follows from (1) at all; it is a *non sequitur*. The true fact that *complete* certainty in law is and always will be unattainable (and H. L. A. Hart made this clear 40 years ago) tells us nothing at all about whether a high degree of certainty of outcome is a desirable (even highly desirable) goal to pursue in a legal system. The sort of disparagement of certainty traced out above is, therefore, fallacious. It is analogous to arguing that because we can never prevent all murders or rapes in society, such prevention isn't really worth pursuing at all. In that form the extreme version of the argument can be seen for what it is, ridiculous.

In fact, it takes only a short glance around the world to see just how desirable some degree of certainty of outcome is in a legal system. Afterall, one of the prime characteristics of what we call the Rule of Law is the notion that there are general legal rules known in advance — laid down rules that will dictate outcomes rather than their being dictated case-by-case by the political preferences of rulers (be they called politicians, wise men, revolutionaries or judges). The point is that the notion of general legal rules *known in advance* pre-supposes a fairly high degree of certainty of outcome in their application. Many bargains to achieve certainty, in other words, are worth the cost.

However, not all versions of the attack on certainty rely on postmodernist-type claims about inherent indeterminacy in language and rules[1] and then make fallacious extrapolations thereon. Most advocates of simplicity or fairness in the law, indeed most of those for whom certainty in the law is not an overly important

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[1] For an excellent riposte to the extremist, deconstructionist view that no text — hence no statute — has any permanent, single, correct meaning see Richard Kay, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses", (1988) 82 *Northwestern University Law Review* 226.

concern, simply prefer to hand much power over to the point of application decision-makers — *viz.*, to the judges. Behind all talk of simplicity and fairness in law is a calculation, explicit or implicit, that judges are more to be trusted than legislators and politicians. Better to enact broad, amorphous provisions (emotively charged if possible) and then leave it to the judges to determine outcomes on a case-by-case basis. In fact, some of those who think concern for certainty is oversold do not even seem to feel that any statutory authorization at all is needed for the judges to make social policy — provided, of course, those judges are reaching the 'fair', 'just', 'equitable' outcome.

The contributors to this symposium issue were approached for their takes on the uncertainty problem in a particular area of law. Two of the contributors to this symposium issue consider the theme of certainty from the perspective of the legislator. What should statutes be like in an age of relatively unconstrained judges, in order to ensure a fairly good degree of certainty? Another contributor considers the theme in the context of the Treaty of Waitangi and the growing recognition it is receiving. Another still looks at the theme in terms of the New Zealand Bill of Rights Act, a statute which seems to be outgrowing its humble origins. A fifth contributor examines the Resource Management Act and its effects on certainty in the law. Then there is family law and the law of civil obligations, both of which lend themselves to discussions of certainty in the law and are the subject of two further contributions. Finally, there is a contribution on human rights law which covers the theme by drawing on not just New Zealand law, but Canada's and South Africa's too.

It should be said, to finish, that the F. W. Guest Memorial Lecture stands on its own. The other articles in this issue were the result of authors being specifically called upon to address the theme of 'Certainty and the Law'; the F. W. Guest Memorial Lecture was not.