Memorandum

To: Sebastian Hartley,
Clerk to the Rules Committee

From: Grant Cameron
GCA Lawyers

Re: Submissions on Discussion Paper "Improving Access to Civil Justice"

Date: 29 August 2020

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1. The Rules Committee has sought submissions on possible rule changes that would promote 'improving access to justice'. The Chief Justice and others have noted that there is an apparent **"justice gap"** in New Zealand.

2. Two 'symptoms' have been suggested as evidencing the existence of the justice gap:

    a. *The large number of civil litigants who now choose to appear unrepresented* – in this regard it is suggested that this is because many cannot afford representation.[1]

    b. *Undefended civil claims* - of the total civil claims filed, only 4% are defended.[2]

3. I perceive those to be but two 'symptoms' of many. However, in combination with others, these symptoms evidence a crisis, namely; **the apparent irrelevance of the civil court jurisdiction for the majority of New Zealanders.**

4. As a practitioner of 40 years' experience specialising in plaintiff and class action litigation, I perceive the justice gap to be of dramatic proportions. Therefore, I endorse efforts to gain a better understanding of the justice gap and to conduct this review with that reality in plain sight. (For my incidental thoughts on the justice gap and the increasing irrelevancy of the civil courts, see **Schedule A**).

Dispute Resolution.

Where parties are engaged in a civil dispute and no settlement can be agreed between them, they generally look for third party assistance. Inquiries commence as to how a binding decision might be imposed as often there is no agreement as to the most appropriate dispute resolution mechanism[3]. The choices are limited: mediation, arbitration, court proceedings.

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[1] Rules Committee "*Improving Access to Civil Justice - Initial Consultation with the Legal Profession*" 11 December 2019 at [5]

[2] At [7]

[3] If one party is obstructive, the other party may quickly find they have no options whatsoever.

5. Generally, as a means of obtaining justice, the court process is largely seen as irrelevant[4]. However, its one small saving grace is that, failing anything else, a party to a dispute can file proceedings in court and thereby force a binding decision to be imposed. Of course, ultimate decision can only be achieved if they can first overcome the myriad of obstacles still before them. One hopes that this review will at least remove some of those obstacles.

6. I now discuss the proposal that I think carries most potential for meaningful and effective reform.

Introduction of an Inquisitorial Process, and lessening the adversarial nature of the current courts.

7. If it is assumed that all citizens should have access to justice then does a highly prescriptive set of rules (the High Court Rules) actually facilitate, or inhibit that objective?

8. I suggest that a prescriptive process can often inhibit access to justice as interlocutory decisions are commonly made by reference to 'the rules', and not by reference to desired outcomes i.e. 'a just speedy and inexpensive outcome'. Such an outcome is not simply in a litigant's best interests. It's also in society's best interests for the civil court system to provide quick, cost-effective and fair outcomes.

9. If the prescriptive nature of the present rules might inhibit both access to justice and achievement of quick, cost-effective and fair outcomes, new rules should be provided or, such rules should provide power for the courts to circumvent, leave aside, adapt, and modify the existing rules in the interests of achieving the **overarching objective** of ensuring quick, cost-effective and fair outcomes.

10. Although Rule 1.2 currently expresses the objective of the rules as being to *"secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application"*[5] this doesn't reflect:

    - primacy of this rule over all others;

    - a requirement for Judges to always give it primacy;

    - to be effective the rules should provide sufficient powers for Judges to: control the court process so that the overall goal can be best achieved, have inquisitorial power, the flexibility to design bespoke processes, the ability to ignore some of the standard rules, and ultimately, the power to conclusively control and direct the process. (Thus the Judge becomes the leading character in the process, not the respective Counsel).

11. Although it is commonly suggested that rules provide certainty, simple application of rules without regard to the overall objectives of the courts, and of the parties to a proceeding, will often cause cost and delay. Often, recourse is had to 'the rules' if they are thought to provide an advantage to one side in the conventional tactical warfare.

12. The process can be inhibited by misguided clients and/or lawyers, and so rather than focusing on a party's 'rights' to present whatever they like, and how the rules might support them in that

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[4] And is perceived as the province of only the very rich and powerful.

[5] Arguably, 'justice' should be a given in all circumstances and so the word 'just' might be replaced with 'procedurally fair', to highlight fair process throughout.

quest, the rules should provide clear power to the judge to apply common sense and to direct the process so the overriding objective is secured.

13. Further, it might be noted that **most litigants are concerned to obtain a 'fair' result, not 'a legally perfect' one.**[6] Although there must be a right to secure a definitive legal judgment at the end of the process, many prospective plaintiffs would enter the process if they had a reasonable degree of certainty, that a very early facilitation process overseen by a Judge, held high prospects of success, and so offered significant prospects of resolution short of trial.

14. It seems inappropriate for a Judge to maintain a neutral position while a well-resourced and represented party, demolishes a poorly resourced or poorly represented one, where its plain the outcome may have been different had there been a level playing field. Proactivity by the judiciary is required to level the playing field, to ensure fairness etc, and in turn, the rules must support judicial leadership and proactivity.

15. I firmly support the introduction of inquisitorial powers for the whole interlocutory process (and for elements of the trial).

The Panckhurst Process

16. I have personal experience of the earthquake Insurance claim process managed by Sir Graham Pankhurst, as I had a leading role in designing it.[7] (I refer to it as the 'Panckhurst Process').

17. This process was designed in 2017, in the course of the Crown settling a class action brought by GCA Lawyers, against Southern Response Earthquake Services Ltd, a Crown entity.[8] This particular dispute resolution process was encapsulated in a contract between the parties which detailed the process.

18. I believe the principles within the Panckhurst Process should be adapted and be included in the High Court Rules.

19. Although the Rules Committee has noted that the Panckhurst Process *"provided the basis for the Greater Christchurch Claims Resolution Service"* (GCCRS) it should be noted that the two processes are different in important ways. For the reasons set out below I believe the Panckhurst Process to be much more effective.

The Panckhurst Process

20. This is only <u>one process,</u> but it proceeds in two phases:[9]

    a. Facilitation

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[6] The Pareto principle would seem to apply in that 80% of cases may result in 'fair' and 'agreed' outcomes by application of this sort of judicial resource (application of an inquisitorial approach) , but proceeding to a 'legally perfect' outcome will consume 80% of resources. For many, 'merely fair' is perfectly acceptable.

[7] After agreeing with the Crown that a settlement would occur, the parties had to create a bespoke determination process whereby individual policyholder entitlements could be fairly and finally determined. GCA Lawyers and Bell Gully were ably assisted by respective Counsel, and by Miriam Dean QC, who acted as a facilitator in the design of the final process.

[8] The particular process, was adapted from earlier determination processes where GCA Lawyers had settled claims against the Crown. (Claims brought by the Estates, survivors and families of the Cave Creek disaster – a process overseen by Sir Duncan McMullin; resolution of the Lake Alice claims [involving unlawful application of ECT to children in social welfare care – currently a focus of the Royal Commission into Abuse in Care] – a process overseen by Sir Rodney Gallen).

[9] In my view, the GCCRS made an fundamental error in assuming that there were two mutually exclusive processes, first a mediation, and second an arbitration. This severely hobbled the process and rendered much less effective.

b. Adjudication

Phase 1 - Facilitation

21. 'Facilitation' is a phase in which the parties are encouraged to present their issues, and to then talk through their differences, with a view to trying to reach an agreement of their own.

22. However, this is not a mediation. In a mediation, the mediator is required to be neutral. The mediators should not advocate for a particular view, and instead should merely lead the parties through a process that is calculated to best assist them toward reaching an agreement for themselves. It's all about the process.

23. Ostensibly, any resulting agreement has value because it is something reached by the parties themselves (i.e. it is not imposed by a third party). It is not necessarily an agreement 'according to law' and the parties are free to settle on terms which might infringe one parties strict legal rights.

24. In my experience, where parties are not commercially experienced, there is equality of arms, and neither could contemplate going to court, the process can have merit, providing there is a good mediator.

25. However, where there is a large well-resourced, commercial party on one side[10], and an impecunious individual on the other, the inequality of arms removes any merit in the process. Essentially, the well-resourced party will spend a long period (many hours if needed) demeaning the individual's understanding of their rights, the legal issues, the quality of their legal team, their prospects in a courtroom etc. Often this has no relation to reality and is simply intended to create doubt and uncertainty in the individual's mind and this is aided by the physical attrition inherent in long hours. (Indeed, arguments and theories produced in a mediation, often never surface before a High Court Judge where the matter proceeds to trial i.e. there are quite different strategic objectives at play in these different processes).

26. The mediator has no ability to take issue with such matters and so will remain silent on all matters other than process. All parties understand that, as there is no viable access to court for the individual, there is no alternative but to 'settle' at the end of such a process. There is no 'just' outcome and the weaker party is often exploited in real degree.[11]

27. In marked contrast, in the Panckhurst Process the Judge was expected and required[12] to be proactive, and to provide leadership and direction to the parties, and to actively deter bad faith tactics, fanciful legal theories, or any form of pressure or harassment.

28. The Judge was required to ensure that **'all stages of the process followed are fair and just, flexible, efficient, cost-effective and prompt.'** These might be thought of as the overriding and guiding principles of that process and they might be usefully considered alongside the present rule 1.2.

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[10] Often represented by a leading legal team, with one token 'manager' to represent 'the client's' interests – such manager having no 'skin in the game' whatsoever.

[11] In many quake cases the degree of capital loss could often be measured in 6 figures.

[12] By contract.

29. The Panckhurst Process provided for little formality, and at the outset the parties had the right to make submissions as to what process might be followed in the facilitation phase. After considering those submissions the Judge determined the actual process to be followed. The Judge had full authority and control over the process and could decide what evidence would or would not be presented, how long openings might be,[13] that submissions/evidence would be on the papers where possible, whether witnesses would be required,[14] how much time each party might have to present their views, how long general debate might be permitted, and when the facilitation process would close.[15]

30. Knowing that the Judge had such authority and power, the parties made sensible suggestions as to process, the evidence to be traversed, and proceeded to make sensible arguments, and to act in good faith.

The critical value of having one process and one Judge

31. Of critical importance was the recognition by both parties that if they failed to reach agreement through the facilitation process, then the same Judge would proceed and would then impose a final decision. Because **the same Judge** would hear both phases in the process, there was no possibility of negative, obstructive, or bad faith tactics creeping in, as has often been the case with mediations generally.

32. This factor alone, forced the parties to focus on the best outcome for them and the prospects of an agreement being reached between the parties at facilitation, were massively improved.[16]

33. It was important to have a retired Judge involved in the Panckhurst Process because only a Judge has the experience and expertise to weigh evidence, recognise good and bad legal arguments, recognise good and bad tactics, good and bad faith etc. (Not all mediators are Judges and they have no power to direct or control).

34. That experience and expertise meant that any leadership or direction was done after fair consideration of both parties' submissions and all were treated fairly. However, the progression of the matter was never held up because of an appeal on an interlocutory point because there was no such right. Nor was there recourse to what 'the rules' might say, or even case law (other than in passing). The Judge could note such matters but could proceed to make an immediate decision directed at ensuring the process remained **fair and just, flexible, efficient, cost-effective and prompt.**

35. It's important to note that moving to an inquisitorial model does not require a Judge to behave much differently to how he might currently, in the High Court. Much could be achieved by simply noting that, although there may be facts or arguments about which he might presently not be aware, the particular point or argument did not seem persuasive. Opportunity would be afforded to a party to elaborate or explain if they wished, but some guidance and clarity could be imparted, quickly and positively. There was the right for the Judge to confer with each party individually, and such occasions often served to bring matters rapidly back on track.

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[13] e.g. very short.

[14] personal appearance deterred in facilitation except for key experts.

[15] A reasonable and conventional 'day' was employed so there was no possibility of physical attrition arising.

[16] In the event, about 6% of claims being considered in the SRADR process, went to adjudication. The leadership, direction and control supplied by the Judge, ensured the parties acted constructively and in good faith. Had it been otherwise, such would naturally be noted by the Judge and would properly impact his decision making in phase 2.

36. Consequently, a Judge does not need to be an advocate in this phase, but they should certainly 'stress test' whatever is being served up by the parties, whether by way of evidence of argument. (There should be no risk of bias if the Judge does not advocate for a particular point of view. He need only inquire, seek elaboration, clarification, etc).

Phase 2 – Adjudication

37. If the parties cannot reach agreement in the first phase, it will seamlessly proceed into Adjudication. The 'adjudication' label was used to distinguish it from 'arbitration'.

38. Arbitration is seen to be closely aligned with High Court processes and to suffer the same rigidity and prescriptive constraints. For the same reasons that civil litigation is not considered an option by many prospective litigants, arbitration is seen in the same light.

39. The object of the Panckhurst Process was to bring about:

- A prompt resolution (which meant it had to be cost-effective and efficient)
- A fair and just resolution (which also required flexibility).

40. At the point where the parties failed to reach their own agreement through facilitation, the Judge was obliged to move on and to impose a binding decision on the parties. Therefore, the adjudication phase was simply continuation of the overall process.

41. Again, the parties could make submissions on the particular adjudication process to apply in the circumstances, and the Judge would make final decisions.[17]

Adjudication – not a hearing de novo

42. Importantly, **the key principle here was to confine the adjudication to those elements of the overall dispute that had not been already sufficiently heard or resolved during the facilitation.**

43. Most facets of the relevant evidence would inevitably be traversed in facilitation (and in the written submissions, briefs, expert evidence provided in advance). Matters that had been sufficiently traversed in facilitation need not be heard again in adjudication. That's not to say these matters could not be referred to in final submissions[18] but the adjudication phase **is not a hearing *de novo*.**

44. Adjudication should be a refined inquiry that adds to, or supplements all the evidence, argument, submissions already heard in phase 1. The inquiry here is necessarily much more confined and will be directed to <u>what is left</u>, to best position the Judge to make a fair and final judgment on the issues.

45. By this means, in practical terms, the Judge is best positioned to make an early and fair decision. He has lived through the whole process, observed and heard all facets and so adjudication is likely to simply refine his thinking, rather than to ignite new thought processes.

46. In the final analysis, the Panckhurst Process was highly effective and fair to both parties.

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[17] Again, the Judge had complete power to define any remaining steps to be taken by the parties, and the specific adjudication process to be followed.

[18] Although again, this is in the discretion of the Judge.

No appeal or review

47. There was no provision for appeal, or judicial review and so the outcome represented absolute finality for all parties. That was appropriate in that case, but this element may need adaptation for the rules i.e. appeal rights must be limited.

48. The key elements in its success was in ensuring that:

- the process was seen as one process, albeit in two stages; and
- the same Judge managed the whole process from beginning to end;
- the Judge had inquisitorial power, and could control and direct all facets of the process;
- there was no opportunity to 'game the system' and bad faith tactics could not creep in.

Comparison of Panckhurst Process to GCCRS

49. Finally, it might be noted that in our experience, the GCCRS process was significantly different because full inquiry about the Panckhurst Process was not made. I suggest that some of those involved in its creation mistakenly decided that facilitation/adjudication was really just, 'mediation' and 'arbitration' under another label. That was a fatal mistake as it immediately caused the process to be broken into two.

50. Those elements were viewed as two separate and independent processes. Thus, the disadvantages of mediations were preserved through the first stage, and the disadvantages of arbitrations were maintained through the second.

51. Worse, traditional views about why judges who might have to later decide a matter, should not be involved in earlier mediation, meant that one Judge did not oversee the whole process.[19] Consequently, the process was significantly hobbled in comparison to the Panckhurst Process.

The Rules Committee comments

52. I now address the Rules Committee's comments:

1. *Similar to the Disputes Tribunal, with little formality. Final decision to be made by Judge with limited rights of appeal.*

   The process could be thought of as being akin to the Disputes Tribunal but the Judge is accorded the same status and respect as normal. The lack of formality does not mean no structure. The parties lawyers will make submissions as to how their cases will be presented in much the same way as usual but there will be leadership and direction by the Judge that will assist in cutting through to a common sense and bespoke solution that will best assist the parties to achieve the overriding objectives of being **fair and just, flexible, efficient, cost-effective and prompt**.

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[19] A perception soon arose in the Christchurch profession that the process preserved the ability of large defendants to indulge in detrimental tactical 'games' in mediation, and that in overall, the scheme did not provide the desired fairness. This seems a consequence of design flaws.

Ample opportunity is given to the parties to reach their own decision and this phase serves to fully inform the Judge of all the issues. Adjudication ensures finality and a binding outcome. Limited rights of appeal are necessary if the key objectives are to be in fact met.

2. *Foreseen to be much quicker and inexpensive.*

   By enabling a bespoke process, not constrained by existing rules (the Judge must have power to override existing rules if that will better serve to achieve the overriding objectives) significant time and cost savings can be had.

   Also, significant cost savings can be made by constraining the process in various ways[20]. Permitting a Judge to have inquisitorial powers and the right to be proactive, does not mean automatic departure from the usual position, but it does permit bespoke processes that best suit the circumstances and the parties in particular cases.

3. *Claims/defences filed submission style, up to 30 pages. Initial hearing to follow akin to a judicial settlement conference. In the event no resolution was reached the judge would need to issue a decision.*

   The Panckhurst Process would be easily adopted/adapted in the courts. The 'initial hearing' (first phase) would be akin to a JSC and should be very flexible[21]. If there is no agreement reached by the parties then adjudication becomes necessary. However, our experience has been that with goodwill, proactivity, leadership and direction by the Judge, a very high proportion of matters will be resolved by the parties.[22]

4. *The judge would decide the next steps required for the judge to reach a decision, including interviewing witnesses/experts, or receiving additional docs. This process would not be expanded in any rules and would largely be up to the judge.*

   I agree with this statement and it should be recognised that the Judge has the right to devise a bespoke process after hearing the parties. The flexibility can only be maintained by an absence of rules coupled to faith in the quality of the Judges hearing these matters.

5. *Brief decision to be issued by judge.*

   For reasons discussed above, unless there are exceptional circumstances, decisions should reflect a fair and reasonable outcome and not a 'perfect outcome according to law'.

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[20] A particular advantages in permitting a bespoke process is that a Judge is free to choose appropriate elements of some of the other reform models promulgated by the committee (or from elsewhere) i.e. a Judge can pick and choose the elements that might seem most appropriate for the particular case and circumstances.

[21] One retired Christchurch barrister is of the view that when JSCs were first introduced, they proved to be highly successful because Judges were immediately proactive and were diligently looking for solutions. All parties were happy and settlements were common. Then, 'the Ministry' is thought to have circulated a memo indicating that Judges must always be neutral, whereupon the proactivity fell away, the value of the process was lost and the process became mechanical and ineffective and generally, has remained that way ever since.

[22] And this may well stem from the respective legal teams gaining new insight into their theory of the case, and what both parties real 'needs' are, as opposed to strict legal rights. If fair resolution is the overriding objective then these matters become very relevant.

6. *In comparison to a normal judicial review, the judge would be able to give firm views at the facilitation phase, knowing they would be the eventual decider of fact.*

   This is a critical and important factor. It removes the possibility of one or other legal team being misinformed, of having misconceived some or all, of their case. Significant guidance could be given as to what the Judge might feel he may have to do at the next phase if the parties do not find common ground in facilitation.

SCHEDULE A

53. The 'justice gap' is real and it is large. The majority of people with valid civil legal remedies, cannot access them.

54. In dealing with prospective plaintiffs, it's plain that litigation is always regarded as a matter of last resort (if it is to be considered at all). This is because of the time, cost, hassle,[23] and litigation risk inherent in such process. In combination, these factors produce **unacceptable levels of uncertainty** for those considering such a process.

55. Ultimately, the worth and relevance of the civil jurisdiction is to be measured in how its users, and potential users, view it. The real-world perception is decidedly negative.

56. Of particular concern is the fact that citizens of means will not use the process, even when they have most of their personal assets at stake. Perhaps the best example of the real-world constraints, are the experiences of the thousands of policyholders in Christchurch who were obliged to make insurance claims following significant damage being suffered to their homes during the earthquake sequence. For most, their home represented their lifetime savings i.e. often the equity in their home was their only substantive asset.

57. Therefore, when faced with insurers who were habitually proposing settlements of claims that were about 40-50% of actual repair values, large numbers of disputes arose.[24] Despite having their one major asset under significant threat and perceiving that it "was all on the line", the majority still did not see litigation as a credible option. I touch on the four key reasons for this at paragraph 69 below.

58. However, some sense of the irrelevance of the civil courts can be obtained by comparing the following factors.

    a. *The total number of insurance claims filed with insurers after the Christchurch earthquakes, seeking compensation for damage suffered.*

       In about 2014,[25] GCA Lawyers sought data on the overall number of claims lodged with insurers, as a result of the Christchurch quakes, and seeking compensation for damage to buildings.[26] Inquiries then suggested that claims were in excess of 160,000.[27]

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[23] Stress, anxiety, inconvenience.

[24] It might be noted that much larger numbers were unaware of the undervalue in settlement offers, and proceeded to settle without taking legal or expert advice.

[25] I can't be sure of the exact date.

[26] Thus, excluding contents claims, EQC land claims etc.

[27] This was an informal exercise and precision was not required. This number is thought to be conservative.

(Although the GCA inquiry was informal accurate data can be obtained from the Insurance Council[28], from insurers directly, or possibly from government agencies[29]).

b. *The number of proceedings filed in the Christchurch High Court Earthquake List during the relevant period.*

GCA's discussions with a High Court Registrar confirmed that the total number of actions filed in the Christchurch High Court Earthquake List were less than 1% of actual claims made to insurers.

59. Therefore, although it was plain to Christchurch practitioners that major disputes with insurers were rife, relatively few actions were ever filed.

60. I have had large exposure to the needs of policyholders following the quakes with my firm acting for private parties, actual and prospective class action members, totalling many hundreds of people. In addition, I have spoken at numerous public meetings and have had close involvement with the other law firms, and third-party experts,[30] all heavily involved with earthquake claims.

61. It's my opinion that the extremely low number of proceedings filed in the court, did not in any way reflect policyholder satisfaction with the settlements being offered by insurers. At best, perhaps 10-20% of the community were satisfied with their insurer and the terms of their resolution. This left 80-90% of the community in dispute with their insurers and/or dissatisfied with the outcome.

62. The great majority of settlements were for sums less than true policyholder entitlements, and often, substantially so.[31] Such disputes often represented a policyholder's total accumulated life equity. Despite their most valuable and critical asset being "on the line" policyholders did not consider themselves to have any dispute resolution options that would produce their full entitlements, or even a fair result.[32]

63. Fundamentally, our justice system is an adversarial one. The onus is left with the parties to prepare their respective cases, present their evidence and to present their best arguments. The Judge is largely passive and suffers whatever happens to be served up to them. Essentially, the Judge is to decide on the 'best argument on the day'. The 'rules of the game' have been long set, and are designed to ensure that ultimately, somebody 'wins'.

64. For prospective litigants, this presents a strong image of the system being something of a lottery (and many practitioners may agree).

65. Worse, the way the 'game is played' has little or nothing to do with 'justice'. Instead, if justice is actually to be found in a courtroom, the prospective litigant has to first contemplate major barriers placed in their path.

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[28] Currently, the Insurance Council records about 650,000 claims being made to EQC, of which about 168,000 went on to insurers.

[29] E.g. EQC must know the number of claims it received, that were then judged to be 'over-cap' meaning that the balance needed to complete repair, had to be recovered from insurers.

[30] Loss adjustors, structural engineers, geotechnical engineers, quantity surveyors, surveyors etc.

[31] There is strong evidence that some insurers were offering settlements at about 40-50% of actual repair costs.

[32] Arbitration was considered irrelevant for the same reasons that litigation was perceived that way. Also, mediation was often seen to be one-sided and inappropriate.

66. Essentially, 'the game' is about positioning decision makers on the following key strategic points. (The 'decision makers' are the parties themselves i.e. plaintiff and defendant). The intention is to get the decision makers in the other camp to make decisions that favour one's client.

67. In the Committee's paper it has been suggested that the reason the justice gap exists is "the large expenses of civil litigation" and the "culture of litigation".[33] Recently the Chief Justice Helen Winkelman, stated:[34]

> "The legal profession has failed to innovate to make itself available to people. I think it's a failure of the market."
>
> The profession had priced itself out of providing civil legal services to middle and lower income people.
>
> "If it's not the legal profession who innovate, they may find themselves losing their exclusive rights of audience in the court," she says.

68. It's my strong submission that the barriers to accessing justice are not matters of cost alone. There are three other compelling factors at play.

Key strategic issues for the plaintiff

69. Before a plaintiff can decide to step into a courtroom, they must consider the following crucial issues:

a. Time

It is incredibly important for a prospective plaintiff to understand how long they must wait before achieving their remedy. Put simply, court processes advance at glacial pace and such 'speed' is completely out of step with the needs of ordinary people and of small to medium businesses. They cannot afford to wait 2-5+ years for resolution.

There is ample evidence that of the few actions actually filed, many will still fall by the wayside before trial (and businesses and families, will also fail) simply because the court has no provision for prompt consideration and resolution of claims.

b. Cost

Certainly, legal costs can be expensive but I suggest it is wrong to assume that the whole answer lies in simply trying to persuade the legal profession to drop its fees[35]. The profession operates in a marketplace and the majority take a cost/plus approach to setting budgets i.e. they determine their actual costs[36], place a margin on the same and then charge on an hourly rate basis, calculated on the number of authors. Their

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[33] Rules Committee "Improving Access to Civil Justice - Initial Consultation with the Legal Profession" 11 December 2019 at [11]

[34] Rob Stock "'No silver bullet' for fairer access to civil justice, says chief justice" (2 February 2020) Stuff https://www.stuff.co.nz/business/119196703/no-silver-bullet-for-fairer-access-to-civil-justice-says-chief-justice

[35] And the vast majority of lawyers are not working in litigation.

[36] Which the marketplace determines.

costs are driven by the market and professional rates 'are what they are'[37]. They result from competitive pressures and generally, will reflect the litigation services market.

In litigation, much of the cost is generated by the process itself, the documentation that is required, the interlocutory nonsense that is permitted, the many opportunities for delay and obfuscation, and the constraints on control and direction from the court itself. (Of course, these are the very issues that are the focus of the present review).

Further, although the profession could assist with a range of innovative and creative fee arrangements (stretching through various hybrid models[38] to outright contingency) the profession perceives constraints, and little or no support for them in moving to adopt apparent risk[39] in these areas. Proper assessment of such matters, education, and encouragement to other pricing models would assist litigants.[40] Also, the profession is probably poor in referring would-be litigants to third parties to obtain funding/finance whereby they could spread cost and cope with this issue.

c. Hassle

Any prospective plaintiff must seriously address the critical consequence of the present process, namely **stress, anxiety, extreme inconvenience**. Often these dramatically influence decisions on whether to bring proceedings. Here, 'cost' cannot be measured in dollars and cents and so is generally assessed in purely emotive terms.

Of course, the level of stress and anxiety arises in direct proportion to the **fundamental uncertainty** of the process. While plaintiffs face continuing, and high-level uncertainty, aggravated by no definitive timeline to resolution, stress will provide huge barriers to entry to the litigation process. Nobody wants to be on their second or third marriage by the time the process is over.

Additionally, 'inconvenience' is imposed by the process. Whether it is the unexpected and apparently unreasonable interlocutory application by the defendants, or the implications of discovery etc, there remains disruption and uncertainty, and therefore added stress.

<u>This factor is often the critical determinant</u> in final decision making.

d. Litigation risk

Ultimately, even if answers can be found to the above issues, the prospective plaintiff must rely on his advisors to give some indication as to their ultimate prospects of success. All litigators feel compelled to be cautious in this regard, and necessarily, that adds to uncertainty and anxiety.

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[37] I suggest there will be evidence for rates being potentially lower in some areas as various areas of law are commoditised, and IT and competition have their effects. Hourly rates must closely relate to others being charged in the particular market.

[38] These may comprise various mixes of; upfront contribution to costs, variants in hourly rates (during work, and upon success), deferred fee mechanisms, semi-contingent arrangements where the firm may carry some risk etc.

[39] both professional and financial risks are perceived.

[40] Its of note that in Victoria, reform will shortly enable law firms to provide fully contingent fee arrangements to clients i.e. 'no win, no fee'. This is seen as one means of enhancing access to justice.

Many plaintiffs feel cautious and even suspicious of the advice received. Sometimes their decision is aided by receipt of Counsel's opinion. However, much value might attach to receipt of some sort of indication from the court itself at an early stage, as to how things sit and what the respective party's prospects might be. This could arise if soon after filing, there was the early and proactive intervention by a Judge, who could explain their significant powers of direction and control, and what might be fairly expected.

70. A plaintiff must weigh all these issues and make a decision. Sadly, with cumulative uncertainty, decisions are often made for emotive reasons i.e. it is particularly difficult to make rational decisions when under extreme pressure. As currently, there is little in the 'litigation' pathway that might engender confidence and certainty whereby a positive decision to bring an action might easily be made, the courts will largely remain outside dispute resolution processes.

71. **Therefore, if the court would genuinely like to encourage access to justice then it[41] must promulgate a model that demonstrates a crystal clear and simple pathway that will compel cost effective imposition of a binding result within a short period of time.**

Key strategic issues for the defendant

72. For small defendants, strategic considerations will be much the same as for the plaintiff. However, where a defendant of any size is involved, the position quickly changes. Focus is never on the 'merits' of the plaintiff's claim. Instead, such focus is immediately placed on how to obstruct the claim (regardless of its merits).

73. Following the Christchurch earthquakes, an American term was quickly adopted as fairly describing the defendant's strategy: **"delay, deny, defend".**

74. Put simply, this strategy is directed at frustrating the would-be litigant and is directed at forcing the plaintiff to run out of money, or to run out of motivation.

75. Should that be achieved, then there never needs to be any consideration of the merits because the claim simply goes away.

76. Thus, upon an allegation being raised:

- the prospective defendant will engage in obfuscation and **delaying tactics**;
- if the allegation is maintained (and if promulgated publicly or in any formal sense) then **the defendant 'denies'** the same;
- if proceedings are filed, then the defendant will immediately '**defend**' the same.

77. None of those steps requires any consideration of the fundamental merits of the plaintiff's claim, nor how the matter might be reasonably be settled. Instead, a defendant can largely ignore the issue and place it in the hands of their lawyers to deal with. Serious consideration of the merits will only come once the defendants recognise that the plaintiff will not run out of money or motivation i.e. that trial will take place.

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[41] This is a job for the courts and Ministry.

78. Present litigation processes enable defendants to produce seemingly endless ways of delaying and preventing progress. All sorts of 'points' may be taken and relatively innocuous interlocutory points may even be taken through the appeal courts, causing major delays.

79. Often after filing an action, plaintiffs will run out of money and/or motivation and so the defendant's strategy may prove very effective. Once the action terminates, the merits are never considered. This leaves considerable room for significant injustice to remain, and certainly, the court system itself falls further into disrepute as disgruntled and dissatisfied litigants bemoan the shortcomings of the process.

The outcome of the 'strategic war'

80. If a plaintiff can convince a defendant that they have the resources and will appear at the hearing, whenever that might be, then defendants will be forced to look at the merits.[42] At that point often defendants will settle (as a motivated, well prepared and resourced plaintiff will only be at that stage because they have a good case) but in far more instances, the plaintiff will have run out of money or motivation and matters are dropped. In this way for those forced to step out of the process, the courts remain seemingly aloof, remote, disinterested, and consequently irrelevant.

Objective of this review?

81. Against that background I hope the Rules Committee might consider the pressing need for the court itself to **'promulgate a model that will provide certainty'** for those seeking justice[43]. I suggest this should become a primary objective for Rules reform generally. Although the present review is concerned only with specific changes to process which might mitigate the justice gap, a better understanding of the gap, its nature and scope, and the consequent damage to the reputation of the Courts, might bear on wider reforms than those now being considered.

[42] And this common in those few cases where a litigation funder can be introduced.

[43] Following reform, there seems no reason why the Ministry could not introduce proper 'marketing' of the processes available and the present trend might be reversed.