**Proposed reform of the High Court rules**

**Raynor Asher QC**

*Big problems in civil litigation which we have failed to fix*

1. Efforts have been made to tinker with the existing adversarial system since the significant reform of the rules in 1987. However, despite the excellent measure taken, litigation procedures have only got more expensive and unusable.
2. As this has become more and more apparent there have been various calls to arms, in particular introduction of case management in the 1990s, and the Legal Research Foundation seminar, “Civil Litigation Crisis - what crisis?” in 2008. More recently there have been significant reforms in discovery and case management. There have been attempts to set up a Commercial list in the High Court, no pleading “Information Capsule” systems in the District Court, and Swift Tracks and Fast Tracks. There have been some improvements, but no change to the underlying problem of civil litigation being beyond the pocket of average New Zealanders, and too slow. The adversarial model for civil litigation is failing throughout the common law world.
3. There are two problems. First, absent self-representation with all its difficulties, lawyers are in charge of the pace and effort of litigation, and can define the issues, control discovery, call witnesses, prepare submissions, and charge what in their view is fair. The trend, year after year, is for more time to be spent on cases, and for the charges to go up.
4. Second, and allied to the first, despite vigorous Court management, the Courts do not control the steps taken in the litigation process. They make decisions and directions on the way, but the control is with the lawyers, and any trial is run by lawyers. Such case management that does occur is relatively reactive, and often by judges who are not expert in case management. Most importantly, the judges cannot take over and dictate how the case will be heard.
5. This is not to beat up on lawyers. It is not that lawyers set out to charge more or make litigation last longer. By and large, Court lawyers wish to do a good job, leaving happy satisfied clients who think they have had good value. It is more that costs and delays are a feature of the common law process, focused as it is on winning and losing, with counsel as the champion in the adversarial contest. More and more time is spent on devising better ways to win; to come up with additional processes designed to improve that chance of winning. The increasing cost spiral has proven impossible to reverse.
6. Within the present existing general adversarial structure, there is no fix available. As I have set out, judges have tried through case management, but despite small successes, this has not created fundamental change. It is up to lawyers as to who is called in Court cases, and what amount of time is spent.
7. In particular, there is not an expert motivated body of judges with the time and specific responsibility of taking over the management from lawyers. Nor could there be given the existing rules, and the pattern of judicial appointment in place at the moment. Judges can only impose time-tables within which things can be done by lawyers. They cannot micro-manage the actions themselves.

*An answer*

1. In my submission the answer lies in moving to the European inquisitorial system for lower-end civil litigation, where judges do micro-manage litigation, deciding what the issues are, what witnesses are to be called, what experts are called (if any), exact time frames, length of hearing, and mode and length of evidence, cross-examination, and length and mode of submissions.
2. The problem in implementing any inquisitorial system is that suitable civil lawyers, who could be the judges who could expertly manage civil files, will stay at the Bar until their late 40s or more likely there 50s, and then if interested in judicial work, will eye the more varied work of the High Court. They will generally not be attracted to a full-time permanent judicial position dealing with lesser civil claims. This means that in our existing system there is no body of expert District Court judges to manage the lower value civil litigation, (despite some outstanding individual appointments).
3. These practicing lawyers who are the ideal candidates to manage litigation, however, when in their 30s and 40s, may well be interested in part-time judicial positions, where they learn the art of judging and can develop a reputation in that area.
4. It is my submission that the way forward is to move to an inquisitorial system for all litigation involving sums of less than $500,000, using younger up and coming civil lawyers as temporary judges akin to English and Wales Recorders or Deputy High Court judges, to manage the civil files.
5. There will be an immediate reaction to the concept of such a radical change, abandoning as it will the wisdom of the adversarial system for flushing out truth. However, the flaws in the existing system that have led to the Consultation paper, show that only a significant change to the adversarial system will fix the problem.
6. The key to an inquisitorial system is that Judges rather than lawyers run the litigation from the start. Lawyers are an optional and welcome extra, but not essential for justice to be pursued fairly.

*The two suggested reforms*

1. Two key reforms could make this possible. If implemented, they would require legislative reform. They could not be achieved within the existing rules, as they would involve the creation of a new type of judge, with changes at least to the District Courts Act 2016, and possibly the Senior Courts Act 2016. There would have to be significant new District Court rules.

*First reform*

1. The first key feature would be the actual creation of and making of rules for a new type of Inquisitorial judge, which could fall under District Court umbrella. We already have in New Zealand ad hoc examples of Inquisitorial decision making, as has been pointed out in the Discussion Paper. The Greater Christchurch Claims Resolution Service has provided an excellent example, and so to an extent does the Employment Authority. The new rules could borrow from those that have been enacted for the Intellectual Property Enterprise Court of the United Kingdom, that offers a truncated form of civil litigation with Inquisitorial features. It appears to be a success.
2. Key features of this new Inquisitorial division could be as follows:
3. The claims would be up to $500,000. All such claims would have to go through the new Inquisitorial process. There would be no other option. The creation of an interlocutory leave option for a party who wishes to seek an adversarial hearing of the old type, could derail and halt speedy resolution.
4. The filing process would be electronic, and the files would be electronic through the process.
5. There would be a standard claim form, adopting the concept of a traditional statement of claim, with the claimant setting out the factual essence of the claim, with a requirement to identify causes of action. A central failing of the earlier District Court Information Capsule rules was that there was no such provision for the filing of pleadings, that forced the claimant to outline the legal and factual basis of the claim. This is necessary if the issues are to be identified and addressed at the hearing.
6. There would a corresponding statement of defence form to filed within two weeks of receipt of the statement of claim, which would have to admit or deny every assertion in the claim, and a set out any positive defences and any counter-claim.
7. There would be an initial conference within six weeks of the initial filing, presided over by the judge who would hear the case. At least an hour would be allocated for this conference. If the case looked complex, or could involve the joinder of other parties, or if it looked worth having a settlement discussion at the conference, a longer time could be allocated.
8. Before the conference the claimant and defendant would have to provide a statement setting out the facts and key documents relied on.
9. Assistance would be available in the Court through a senior Registrar to explain the processes and help a party remedy deficient pleadings. However, if the deficiency was irremediable, the judge could determine at the initial conference that the case could not proceed, or required basic change.
10. At that initial conference the judge would probe to ensure that the real claims and defences were set out, the key issues of fact and law were identified, and what evidence was necessary to determine them. The judge would discuss with counsel, and decide on, the witnesses that were to be called. The judge’s determination as to the hearing process would be final. There would be no briefs or will-say statements.
11. There would be no discovery unless the judge decided it was necessary to do justice between the parties. The judge’s determination on discovery and inspection at the initial conference would be final.
12. The general policy adopted by judges would be that there should be no more than one witness on each side giving evidence on a factual or expert issue. In the absence of a suitable expert the judge could chose an expert. If both sides proposed experts it would be open to the judge to settle on one expert.
13. The judge would probe the question of settlement at this initial conference. If possible, settlement could be pursued there and then. The judge could turn the six week conference into a settlement conference, as has been done in the Christchurch model. The judge would also consider and determine whether a separate judicial settlement conference was appropriate.
14. The judge would have the power to determine that the case would be decided on the papers, these papers being filed electronically within a time frame that was set. However this could only be with the consent of the parties.
15. If a hearing was needed, a decision would be made as to which witnesses would need to be questioned by the judge or counsel, and the judge would have the power to order experts to confer to see if they could reach common ground.
16. A merits hearing would then take place within two months, before the same judge who had presided over the conference. Parties or their counsel could make short openings within a time limit. The relevant witnesses would then be examined by the Judge on their evidence and the documents, following similar procedures to those adopted by Inquisitorial judges in Europe.
17. The parties or counsel would have the opportunity to question witnesses after they have been questioned by the judge, within a time limit. At the end of the hearing the parties or counsel would have a set time in which to summarise their case and make submissions.
18. A decision would be delivered orally or within fourteen days.
19. There would be a right to appeal to the High Court by leave.

*Second reform*

1. The second key step is to address the problem that there would have to be more judges appointed than are presently appointed to do this new work, and they would have to be able to quickly understand, control, and determine, civil cases that could be complex. Where are they to come from? The District Court seldom attracts such persons. High Court judges are unlikely to be content with such a limited diet. To be an effective inquisitorial civil judge involves immersion in the file, interaction with the parties and counsel, the intelligence and experience to see the issues, and how they can be fairly aired and resolved.
2. This problem is overcome in European inquisitorial Courts, because of the different nature of the judicial career. In Europe students chose whether to follow a judicial career from when they leave University. They start judging in their 20s. The lower end civil litigation in Europe tends to be done by these younger judges, who on completion of initial law courses in University have chosen a career in judging. When they are junior they can develop skill and experience while having the energy and motive to run lower end civil litigation. That is their chosen career, with the prospect and a path on to more senior work later.
3. We do not have this in New Zealand, and are unlikely to get it without a massive reform in the Law Schools and legal structures, which is not practical.
4. The way to achieve it in my submission without such radical measures, is to appoint experienced lawyers working in the civil area who are not yet judges, as part-time judges. Their position will have similarities to the English and Wales Recorder or Deputy High Court judge. These part timers would be chosen on the basis of having some experience. They would have the ability and enthusiasm for quickly mastering files, working out the issues, directing how the trial is to proceed, running the trial, and determining the case.
5. Why would they take the job? There would have to be reasonable remuneration on a daily basis, but the key would be in the position being seen as an important community service, akin to doing pro-bono work. It should also be seen as a stepping-stone in a legal path to a full-time judicial appointment as it is in England and Wales, or helpful in terms of general reputation. They need only work in the part-time judicial role for six weeks a year, with the ability to terminate such work. Conflicts would have to be carefully managed, but that is achieved with Recorders and Deputy High Court judges.
6. In England Recorders generally work as judges for six weeks of the year. If this system was implemented they could spend an initial two weeks in the year running conferences, and the remaining four weeks, some two months later, doing the hearings.
7. This would not involve changing law degrees and legal structures, but it could involve the offering of more courses in Law Schools or in the Law Professionals, in managing civil litigation, and some pre-appointment training as is the case in England and Wales. It would not involve any fundamental change to the judicial structures, with the part-time civil judges being part of a special division of the District Court (or possibly the High Court).
8. An appropriate appellate path-way by leave would have to be prescribed, either to a full High Court, or to the Court of Appeal. I suggest that the latter would be a better option.

*A possible further step*

1. I would also propose as an adjunct, a compulsory scale of fees for lawyers who are appearing in the new Inquisitorial Courts, as is the case in Germany under the Court Costs Act (Gerichtskostengefetz). The scale of payment would be in accordance with the value of the claim, and would be designed to provide for an economic return to the lawyer and the client. Cost awards would follow the event. Such a system works in Germany, and could work here.

*Cost*

1. The appointment of these new judges would involve more cost to the government in that there would be a number of new part-time judges to pay, and support teams involving new staff would have to be appointed to the major Courts. There would however be considerable savings, in that the new system should mean that civil legal aid would involve less work, and might in the long term prove not to be necessary. Importantly citizens would be able to have their disputes determined quickly, fairly, and affordably, and access to justice would be markedly improved.