ACCESS TO JUSTICE –

A CONSTANT QUEST

Address to New Zealand Bar Association Conference, Napier

Justice Geoffrey Venning[1]

7 August 2015

The 800th anniversary of the sealing of the Magna Carta reminds us that the quest for access to justice has a long history. Through the ages, citizens, legal thinkers and practitioners have pursued the objective. It remains a fundamental objective that we, as guardians of the rule of law, have an obligation to pursue.

My address today has a High Court focus but the issues I address are relevant to other Courts as well. Using those clauses of the Magna Carta that remain relevant today, I propose to give a short overview of the challenges the Court faces and to note steps the Court has taken and could take to maintain or improve access to justice.

I use the Magna Carta despite the Attorney-General with his typical wit suggesting it is difficult to make a strong case for Magna Carta being the cornerstone of any nation's constitution in the 21st century given some of the content.[2] As he pointed out, much of the original text dealt with grievances that were specific to the time, e.g. – the King promised to give up all Welsh hostages and to no longer compel the building of bridges at every river bank – which are not particularly relevant today.

That said he went on to note quite correctly, the importance of Magna Carta is that it has come to represent a number of fundamental principles.

I want to focus on a number of those fundamental principles as they relate to access to justice in New Zealand in 2015: cost, delay, proportionality and local justice.[3]

So to begin, the first is the statement in clause 40:

> "To no one will we sell, to no one deny or delay right or justice".

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1 Chief Judge of the High Court of New Zealand.

2 NZLS Law Talk, Issue 867, 19 June 2015.

3 These fundamental principles have also recently been recognised by Lord Dyson MR in his speech to The Law Society Magna Carta Event *Delay too often defeats justice* (22 April 2015).

Both cost and delay can lead to a denial of justice.

The reference in Magna Carta to the sale of right or justice was directed at the practices of the King's court at that time, a practice which had existed before King John, but one which he readily adopted. It was said that "Men who wished to obtain a speedy hearing of their lawsuits knew that a good falcon was the gift most acceptable to the King."[4]

While justice is not sold in that way today, any litigant faces significant costs in bringing his or her case to the Court and having it determined. In some instances, the costs may be such that the case is not brought or, if brought, may not be pursued. In such cases access to justice is denied.

The most obvious and direct costs are court fees and lawyers' fees.

A market driven approach to the ever increasing cost of public services is to increase the contribution required from the users of that service towards the cost of provision of the service. In real terms that has led to a significant increase in Court fees over the last 20 years. In 1992 it cost $140 to file a statement of claim in the High Court.[5] It is now $1,350. The fees incurred for a five day hearing in the High Court in 1992, inflation adjusted to today, would be approximately $3,960. A five day hearing in the High Court today will incur fees of $15,680.[6]

Despite these significant amounts, Court fees overall apparently contribute no more than 15 per cent towards the actual costs of operating the Courts. The Minister of Justice recently told the Justice and Electoral Select Committee that the cost of the Court has to be balanced between Court fees paid by litigants and the cost to the tax payer which is currently estimated at 85 per cent.[7]

The pressure to increase Court fees is not unique to New Zealand. In its *Access to Justice Report* [8] in 2014 the Australian Productivity Commission noted that the

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4 Graham E Seel, *King John, An Underrated King* (Anthem Press, 2012) at p130.

5 High Court Fees Regulations 1992.

6 High Court Fees Regulations 2013, filing a statement of claim $1,350, a setting down fee $1,600, half day hearing fee $1,600 for each half day thereafter. Average income in New Zealand to 30 June 2014 approximately $51,500.

7 Justice and Electoral Select Committee, *2015/2016 Estimates for Vote Justice,* p 3.

8 www.pc.gov.au/inquiries/completed/access-justice/report , p 550.

current low level of cost recovery in Australian Courts meant that litigants do not "internalise" the cost to society of resolving their private disputes.[9]

The economist's argument that the tax payer should not be subsidising the resolution of civil disputes between individuals overlooks the importance of the judgments of the Courts in the civil area. Judgments of the courts do not merely provide private benefit.

The judgments of the Court and their precedent effect are an important means by which society and commerce is regulated for the future. It is no answer to suggest that parties to civil disputes have alternative dispute resolution (ADR) available to them. Arbitrations in particular, (and also mediations, at times), are determined against the background of the law as stated by the Court. The judgments of the Court have an economic benefit to society as a whole in providing certainty and a basis for advice and the regulation of conduct.

Before leaving the issue of Court fees I note it is not just a feature of the civil dispute area. In the United Kingdom recent changes see unsuccessful defendants in their criminal courts facing fees "surcharges" starting at £150 for a not guilty plea in the Magistrates Court up to £1200 for a conviction following trial in the Crown Court.[10]

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9 In a recent article in the Sydney Morning Herald, 20 July 2015, it was noted that the Federal Court of Australia was short of six Judges and the Government had threatened not to replace retiring Judges unless proposed higher fees were accepted. The fee for applying for a divorce in the Federal Circuit Court was raised from $845 to $1,200. Other fees were raised by about 11 per cent on average, noting that all the Federal Courts faced a $75 million shortfall with the Government stating that the increase in fees was essential to making the Court's, particularly the Family Court's finances, sustainable. The only alternatives were stated to be cutting frontline Court services, closing registries and not replacing Judges.
The Times of 23 July 2015 reported the cost of getting divorced in the UK was to increase by a third to £550. The higher fees are part of across-the-board increases. The maximum fee payable for money claims rises from £10,000 to £20,000.

10 Times 25/7/2015 "UK Court fee forces the innocent to plead guilty, Magistrate's claim". The report records "Dozens of Magistrates have resigned over an outrageous surcharge for criminal defendants of up to £1200 for standing trial. The Courts have no discretion over fees introduced in April, which can quadruple if defendants pleaded not guilty and are then convicted. Magistrates say that there is evidence that the charge is putting pressure on defendants who maintain their innocence to plead guilty to avoid risking a higher bill. … The surcharge starts at £150 for a guilty plea for a summary offence rising to £180 for a guilty plea for a more serious offence that can also be tried in a Crown Court. It increases to £520 for a conviction after a not guilty plea for a summary offence and £1,000 for a conviction after a not guilty plea for an offence that can also be tried in the Crown Court. In the Crown Court the charges are £900 for a guilty plea and £1,200 for a conviction after a not guilty plea."

The other direct cost is lawyers' fees. The Court can only have an indirect influence in relation to such fees through the case management of the proceedings before it, a matter to which I return later.

Civil legal aid provided for under the Legal Services Act 2011 is only available to a limited number of litigants. The income threshold is set at relatively low levels.[11]

While there is no income threshold for legal aid in criminal cases, recent changes to the rates at which lawyers are paid has led to some more experienced counsel declining to take cases on legal aid.

I do acknowledge that the Public Defence Service (PDS) has in part addressed the availability of representation in criminal matters, particularly at the levels 1 and 2 of legal aid work. This representation is of good quality. The Ministry of Justice annual report for the year ended June 2014 records that a survey of District Court Judges disclosed a judicial satisfaction level of 93 per cent with services from PDS.[12]

The profession has not ignored the impact of the cost of taking a case to Court on access to justice. Many of you provide pro bono services at legal advice centres and work with groups needing representation. Professional bodies have promoted the extension of pro bono work and web-based initiatives. However such attempts should not have to be progressively relied on in order to plug the gap that exists in the provision of legal aid which is a social good.

The issue of the cost of legal services and the provision for legal aid will be for others to discuss in more detail later in this conference. From the Court's point of view, a principal impact of reduced access to legal aid is found in the increasing number of litigants appearing for themselves.

In 2013 at this conference the former Chief Judge identified an unmet justice gap because of the cost of accessing justice which, although there was no research to

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[11] In the absence of special circumstances the income threshold is set at a maximum level before tax of $22,366 for an individual or for example, $57,880 for a person with a spouse and two dependant children.

[12] PDS currently operates from 10 offices and oversees the duty lawyer service in courts where it operates. In implementing the PDS, Cabinet determined it should handle 33 per cent of criminal legal aid nationally and within each Court in the areas where it operates it is entitled to 50 per cent of provider approval level 1 and 2 legal aid work. It may take provider approval level 3 and 4 work with the defendant's agreement.

quantify it, was seen by Judges in the increasing numbers of unrepresented litigants.[13] That trend continues.

Today I want to focus on the issues posed by litigants who have to represent themselves in civil litigation because of cost considerations. Some represent themselves from the start of proceedings. Most however have had assistance from solicitors and counsel at earlier stages of the proceedings but funding has run out and the representation has been terminated.

We are also seeing many more litigants in person appearing in judicial review applications and civil appeals even though, in the case of appeals, they may originally have been represented before the District Court.[14] So we are dealing with litigants who would prefer to be represented but who are not because of cost.

Such litigants pose particular issues for a Judge. They are not personally difficult to deal with in conferences or in Court, in that they want to understand and follow the process, but additional time has to be spent to ensure they understand the process and the requirements on them of pleadings and discovery for example. At trial the Judge is required to explain the difference between questioning witnesses and the litigant giving their own evidence or making submissions.

To ensure a fair process and to understand the litigant's case a Judge may become drawn into eliciting the substance of the unrepresented litigant's case. That poses another issue for a Judge. The opposing party will have engaged a lawyer at their own cost. A Judge has to be careful not to effectively become an advocate for the litigant in person. While the overriding obligation of the Judge is to provide a fair trial, in doing so the Judge must maintain his or her impartiality. A Judge should not give the unrepresented litigant a positive advantage, nor should he or she give them legal advice or effectively conduct their case for them.[15]

So what else can the Court do?

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13 NZBA Conference 2013: *Efficient Justice.* Speech given by Co-Chair Winkelmann J.

14 Figures collated from registry staff in Auckland, for example, suggest 40 per cent in judicial reviews and 30 per cent of appeals.

15 *Tomasevic v Travaglini* [2007] VSC 337; *Reisner v Bratt* [2004] NSWCA 22.

With input from the Judiciary the Ministry of Justice has developed a website *Representing yourself in the High Court* to assist such litigants.[16] The website provides assistance with basic forms and procedure, but is no substitute for and cannot replace legal advice from counsel. It does not address the difficulties with the presentation of cases.

One feature that is particularly disruptive to court administration and wider access to justice is when representation is withdrawn shortly before the fixture because of a lack of funding. That inevitably leads to an application for adjournment. If the adjournment is granted the other party incurs wasted costs. As these issues arise shortly before the hearing, it can be difficult to bring on other cases in its place. That affects other litigants waiting for a hearing. If an adjournment is not granted the litigant in person can be placed under considerable pressure which exacerbates the issues I have referred to.

It has been suggested and I raise for consideration a proposal that at the close of pleadings date, counsel should file a memorandum confirming representation through to completion of trial. I do understand the economics of running a practice. I am not suggesting that counsel are obliged to work for nothing. What I am suggesting is that the issue of suitable fee arrangements for trial be raised and any problems identified and addressed at an earlier stage than is the case at present.

I turn to the issue of delay as a denial of justice. In addition to clause 40 of the Magna Carta there is the well known quote of Chief Justice Edward Coke:[17]

> "Must be libera, free; for nothing is more odious than justice let to sale; plena, full, for justice ought not to limp or be granted piecemeal; and celeris, speedy - - - because delay is a kind of denial".

While accepting in principle that delay in the hearing and ultimate determination of a case can amount to denial of justice, it is important to identify what is meant by delay and timeliness in this context. The concepts are nuanced.

Complex legal and human problems and disputes that come before the Court require a certain amount of time to be prepared for hearing, heard and resolved. Also there

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16 *Representing yourself in the High Court of New Zealand* <www.justice.govt.nz/courts/high-court/self-represented-litigants >

17 Institutes of the Laws of England (1642).

are a number of participants involved in the process who contribute in their own way to the time taken to resolve the dispute – lawyers, legal services agencies, registry staff, witnesses, (particularly expert witnesses), and Judges. The principal issue is not the extent of the time taken to resolve the dispute but whether the time taken is reasonable or not, which may well vary from case to case.

So how might we define what is "a reasonable delay" and what is not?

A Background Report developed by the Australian Centre for Justice Innovation for its conference in 2014[18] suggested that any definition of timeliness of legal proceedings should incorporate the concept of minimising or eliminating "avoidable delay" throughout the process on the basis of what is appropriate for that particular category of dispute and, importantly, that the dispute resolution process must be perceived as fair and just.[19]

The International Framework for Court Excellence describes timeliness in legal proceedings as a balance between the time required to properly obtain, present and weigh the evidence, law and arguments, and "unreasonable delay" due to inefficient processes, and insufficient resources. [20]

In addition to the desire of the courts and the profession to reduce unreasonable delay, we live in an era of measurement, public accountability, efficiency drives and limited (and reducing) public resources. There is pressure to reduce the time cases remain within the system. The challenge for those of us charged with judicial administration is to ensure that in responding to those demands judicial independence and the quality of justice delivered by the Courts is maintained. Measuring the work of the Courts is legitimate, but relying solely on statistics on the time taken and numbers of cases processed, particularly or when associated with measurements of cost is inherently difficult. They can just miss the point. The Court does not deal with

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18 *The Timeliness Project, Background Report, (Monash University, 2013)* at [8.25]. <www.monash.edu/law/centres/acji/research/timeliness>

19 The Australian Centre for Justice Innovation is a joint initiative between the Faculty of Law at Monash University and the Australian Institute for Judicial Administration.

20 *The International Framework for Court Excellence* (2nd Edition, March 2013), p 4. <www.courtexcellence.com/resources/the-framework.aspx>

and produce a uniform product. Fundamentally the Court's role is to provide justice in the sense of a fair outcome arrived at by a fair procedure. That of its nature is really incapable of simple measurement. There is no measurable performance indicator for the quality of judicial decision making.[21]

The Court has a role to play and has accepted responsibility to reduce unreasonable or avoidable delay in proceedings before it. In the criminal jurisdiction we aim to bring serious cases to trial within a reasonable time for the benefit of the community as whole, victims and for the defendant. I define a reasonable period of time in this context as one which allows the prosecution to assemble its case, for defence counsel to be properly briefed, obtain full instructions and obtain whatever evidence, including expert evidence may be required and for pre-trial issues to be determined. In the High Court we have determined this to be 12 months.

Since the commencement of the Criminal Procedure Act 2011, we have made some progress. The Court is able to deal more effectively with category 4 cases which the Court case manages from second call. We still have work to do in this area.

Another initiative the Court has recently implemented is to reduce the time between conviction and sentence. One of the main determinants for the setting of sentencing dates is how long the Court had to wait for pre-sentence reports. In practice, the content of pre-sentence reports in the High Court is much simpler than in the District Court as generally sentence options need not be canvassed. The Corrections Department has recently agreed with the Ministry to provide pre-sentence reports to the High Court within 15 days of sentence. This will allow sentences to be set down from 20 days after conviction. I hope that after a scheduled review in six months time the Corrections Department will be in a position to provide pre-sentence reports for murder and manslaughter convictions within 10 days of conviction.

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[21] A former Chief Justice of New South Wales, Chief Justice Spigelman has spoken at length on this issue. "Open justice does not provide the most efficient mode of dispute resolution. Nor indeed does democracy provide the most efficient mode of government. In both respects we have deliberately chosen inefficient modes of decision making. … Not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature, incapable of measurement." *Judicial Accountability and Performance Indicators* Paper given to the 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, 10 May 2001.

In the civil area, the High Court adopted case management in the mid 1990s. From that time the Court and its Judges accepted they have a role to play in progressing cases through the system. There are now at least two generations of lawyers who look to the Courts to progress their case and direct events rather than taking the initiative themselves to progress it.

Active case management by Judges has led to a number of amendments to the High Court Rules over the years. The most recent amendments reflect the concept of proportionality which is the second concept raised by Magna Carta that I want to refer to. Clause 20 of Magna Carta states:

> "A free man will only be punished for a trivial offence in accordance with the seriousness of the offence. For a grave offence he shall be fined correspondingly"

While raised in the context of criminal proceedings proportionality is also directly applicable to civil proceedings.

Like litigants, the Court does not have unlimited resources so through its rules and practice it has taken a proportionate approach to proceedings before it.

Since 2013 civil cases in the High Court are triaged by Judges to determine whether they are complex or not.[22] Complex cases are case managed by Judges, with the number and timing of case management conferences tailored by the Judge managing the case. The vast majority of cases are classified as ordinary cases. They are case managed by Associate Judges and activities such as case management conferences are limited.

Proportionality is also reflected in the 2012 discovery rules and the requirement for co-operation between counsel. Counsel are encouraged to resolve the issues of

[22] High Court Rules, r 7.1 providing for the triaging of files – confirms the purpose of the case management conference is to ensure costs are proportionate. Rule 7.9 confirms a conference can be cancelled if counsel have devised an efficient way of conducting the hearing. In *SM v LFDB* [2014] NZCA 326 the Court of Appeal noted that the new regime is designed to achieve the objective in rule 1.2 "by isolating the issues and trying them fairly, swiftly and efficiently with regard to what is at stake".

discovery and other interlocutory matters without the need for unnecessary interlocutory applications. Technology can enable electronic discovery.[23]

The Court has also responded to the needs of certain types of cases before it which exhibit similar characteristics by the introduction of management techniques tailored to such cases. The leaky homes and earthquake lists are examples. Standardised quantity survey reports are called for in earthquake cases dispensing with a case by case determination of what needs to be considered. Leaky building cases are very likely to settle so the Court sets down a number of cases each quarter.

Despite those innovations, there are other forces at work. We all have to ask ourselves why civil cases which even 10 to 15 years ago would have been dealt with within a week are still taking two weeks; why murder trials which would have taken a week are now taking two to three weeks; why judicial reviews which would have taken a half day are now taking a day or sometimes two days.

Both the profession and Judges have a role to play in this. One reason is the increased amount of information that is now available, in both civil and criminal cases. However, rather than just accepting the proposition trials are longer because they are more complex, we must ask whether we are using this additional material to get to the nub of the issue in dispute.

In criminal trials, extensive disclosure is now available. This is entirely appropriate in terms of preparation for trial. But is it necessary to rehearse so much of it during the trial process? Is it relevant to the trial issue? We cannot just keep doing things the way we always have if unnecessary cost and delay are the outcomes.

In civil cases we have to ask whether written briefs have reduced the trial time or have they increased it? This is an area this Association has debated in the past. A Rules Committee proposal to revisit this in 2009 did not receive sufficient support from the profession to lead to significant change.[24] My personal view is that written briefs, certainly those of factual (as opposed to expert) witnesses, add to the length of a case.

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[23] Rule 8.2 provides for the co-operation of counsel to ensure that discovery and inspection process is proportionate to the subject matter.

[24] Rule 9.10 provides for an oral evidence direction.

Proportionality is also relevant to the hearing of cases. I consider Judges have a responsibility in this area. Judges control the Court. The Judge should, if he or she considers it appropriate, question counsel about the relevance of evidence, and if necessary control the length of cross-examination and submissions. I accept however that not all may share that view.

The last principle arising from the Magna Carta which may be seen as directly relevant to the Court's role in providing access to justice in New Zealand in 2015 is found in Clauses 17 and 18:

Clause 17:

> "Common pleas shall not follow our Court about, but shall be held in some fixed place".

And clause 18, which provided for Justices to be sent to:

> "…each county four times a year, who along with four Knights of each county chosen by that county, shall hold the excise in the county and on the day and in the meeting place of the county court."

These clauses confirm the principle that cases are to be heard and justice dispensed from a fixed place and also that justice should be local.

New Zealand is a geographically diverse country with its population spread from the Far North to the South. The High Court sits in 17 cities and towns where the Court has registries although the Judges are only based in three central areas – Auckland, Wellington and Christchurch.

It is important that the Court continue to dispense justice in regional areas so that criminal trials are dealt with in the community in which the offending has arisen and civil trials are dealt with in the area where issues arose so that witnesses are not inconvenienced and the community is able to attend the Court hearing, which is itself an important part of ensuing access to justice.

There are ways to speed up time to trial and reduce costs to parties in those areas. One is centralisation of case management into the home courts. For some time a matrix system has operated where files in the South Island registries have been managed in Christchurch. Starting as a pilot in May 2013 all civil and criminal cases

filed in Whangarei have been case managed through Auckland with Judges travelling on circuit to deal with substantive matters in Whangarei. This has been successful. The model may be extended further.

Technology can provide for enhanced access to justice in circuit courts. AVL technology enables preliminary and interlocutory hearings to be heard by the Judge at the home Court with counsel appearing in the regional Courts. Such hearings enable the case to be scheduled earlier than would otherwise be the case if the hearing had to await the physical attendance of the Judge or Associate Judge at the circuit Court.

Technology can also assist access to justice in the criminal area. Second appearances in category 4 cases in circuit courts are generally conducted by AVL which has permitted the time frames under the Criminal Procedure Rules 2012 to be met in circuit registries.

Across the High Court there have been a number of instances where world leading experts have been engaged and have given evidence by means of AVL. The cost of having those experts available and present in Court physically for two to three days might well have been prohibitive and prevented the prosecution or defence access to them.

AVL also provides the opportunity for defendants in custody to attend interlocutory hearings which they may not otherwise have been able to attend and, from time to time, prisoners have been able to attend the Court of Appeal hearings by AVL in cases where they may not otherwise have physically been brought to the hearing.

To conclude, as the Magna Carta celebrations remind us, concerns about access to justice are not new. Access to justice is fundamental to the maintenance of the rule of law and the rule of law is a cornerstone of civilised life. In joining the legal profession every one of us accepted a responsibility to maintain or improve access to justice in some respect.

I look forward to the discussions on the issue in the sessions that lie ahead at this conference.