

Civil Justice: Haves, Have-nots and What to Do About Them

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A. INTRODUCTION

[1] For thirty years I specialised in the legal problems of the “haves” — government, state-owned enterprises and large corporations.¹ The legal equivalent of Victor Borge’s doctor who specialised in diseases of the rich.

[2] But for the last five years I have had a far wider remit. As a trial Judge, and now appellate Judge, I frequently confront deficiencies in the civil justice system I had only a limited appreciation of as a practitioner. And I have seen those deficiencies get worse in my five years on the bench.

[3] In this address I am going to look at the haves and the have-nots in the civil justice system and consider what might be done about them. My focus today must be on the have-nots. Principally those who simply cannot afford effective legal representation and are, therefore, self-represented.

[4] If we are considering what is good, and what is bad, about our civil justice system, then it is worth reflecting on the fact that the well-respected World Justice Project Rule of Law Index metric for civil justice ranks eight countries ahead of New Zealand. What is interesting is that all of those except one (Singapore) are civil law countries, using more inquisitorial systems of civil justice.² Using that metric,

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¹ As solicitor, partner, barrister and Queen’s Counsel. For the latter half of that time I also lectured in civil procedure at Victoria University of Wellington.

² World Justice Project *WJP Rule of Law Index 2015* (2015) <worldjusticeproject.org> at 30.

Norway and the Netherlands receive ratings of 0.86. New Zealand, coming in ninth, gets a rating of 0.78.³

[5] Plainly we can do better. I am conscious of the nineteenth-century statesman Daniel Webster's aphorism: "A strong conviction that something must be done is the parent of many bad measures." But the problem of access to justice is an acute one. It is time for some new things to be done.

B. REASONS FOR, OBJECTS OF, AND OBSTACLES TO CIVIL JUSTICE

1. Reasons for civil justice

[6] It is axiomatic that civil procedure exists to promote the resolution of disputes. Why is this important? What happens if we do not have effective dispute resolution systems? Three answers emerge.

[7] First, there is the risk of public disorder. If civil dispute resolution institutions are inaccessible, people take the law into their own hands. The common law tends to be contemptuous of self-help, except where issues really are trifling. Instead the common law asserts the superiority of collective justice initiatives — primarily the Courts. As Professor Eduardo Couture said:⁴

Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities. A civil action ... is civilisation's substitute for vengeance.

We see this disorder rise like liquefaction in querulent behaviour in civil cases. Querulents do not believe the justice system delivers justice for them. The purpose of their applications is often more obstructive than constructive. Courts are treated with the same contempt as the querulent's true opponent. The querulent, by obstruction and unpleasantness, seeks to regain control from those statutorily empowered to resolve their dispute.

³ The scores in between are Singapore 0.84, Denmark 0.83, Germany 0.82, Sweden 0.81, Korea 0.80 and Austria 0.79. Canada, a jurisdiction New Zealand is often compared to, scores 0.70.

⁴ Eduardo J Couture "The Nature of Judicial Process" (1950) 25 Tulane L Rev 1 at 7.

[8] Secondly, there is the risk of devaluation of, and discouragement of, investment. The World Economic Forum Global Competitiveness report uses as its “first pillar” (of 12) the quality of a country’s legal and administrative institutions. It ranks New Zealand third for this, after Finland and Singapore.⁵ Overall, New Zealand is sixteenth out of 140. The World Bank “Doing Business” 2015 report has as two of its ten essential indicia the enforceability of contracts and resolving insolvencies.⁶ It places New Zealand second, after Singapore.

[9] Thirdly, there is the risk of corruption, and the development of a grey economy. An effective justice system is essential to the ability to enforce contracts and property rights without resort to corrupt means of enforcement or means to avoid enforcement. The Transparency International Corruption Perceptions Index looks at effectiveness of civil justice systems amongst other indicia. New Zealand ranks second overall, this time after Denmark.⁷

2. *Objects of civil justice*

[10] The core *objects* of civil justice in New Zealand are expressed in r 1.2 of the High Court Rules:

1.2 Objective

The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application

[11] We may contrast this with some notorious jurisdictions — such as Chancery in the nineteenth century and some current Commonwealth jurisdictions, where proceedings may take more than ten years to be resolved through the Courts.

[12] The focus of r 1.2 is on three values. The first is *justice* — which often, but not necessarily, requires participation of an independent decision-maker such as a Judge. The second is *speed* — which sometimes conflicts with justice: the faster you

⁵ World Economic Forum *The Global Competitiveness Report 2015–2016* (2015) <reports.weforum.org> at 278.

⁶ World Bank Group “Ranking of Economies” (2016) *Doing Business: Measuring Business Regulation* <www.doingbusiness.org/rankings>.

⁷ Transparency International *Corruption Perceptions Index 2014* (2015) <www.transparency.org>.

go, the more mistakes you make, and the more imperfect the knowledge and analysis of participants will be. And the third is *economy* — which usually does go with speed, given that lawyers like to charge by the hour and are disdainful of fixed fee arrangements.

[13] On the other hand, the focus is not necessarily on two further values. First, *cooperation* between parties and their counsel. Secondly, the *revelation of truth* as the overriding object of the process. Those — as I note later — are concomitant objectives of an inquisitorial civil justice system. They are not part of an adversarial system. But in New Zealand vigorous case management has had a real impact in embracing those two additional values and thereby in bridging the two systems.

3. *Obstacles to civil justice*

[14] I turn now to *obstacles* that lie in the way of effective and efficient civil justice, and the three primary values “just, speedy and inexpensive” resolution of disputes. There are four primary obstacles.

[15] First, *delay*. Lawyers are slow. Good lawyers are busy, and so even slower sometimes. The same may also be said of expert witnesses. Files get put aside for long periods. If the lawyers are left in charge, cases may drag out. This has been one of the main catalysts for intrusive case management — particularly the High Court’s Earthquake List in Christchurch and the Leaky Building List in Auckland.

[16] Second, *cost*. Every time a file is picked up, it costs something. Every time it is put down it costs even more because, if there is a real gap in time, time and cost is spent relearning the file. New Zealand is a small economy. Even though the number of lawyers has increased faster than the rate of population, demand has increased faster. People use lawyers more, and cases have become more complex. The result is that hourly rates have not fallen.

[17] Third, *inequality*, on which I intend to focus here. The exemplar is the unrepresented litigant. That too familiar figure presents all sorts of problems that I

will discuss shortly. Although the statistics are only now being kept, anecdotal evidence from the judiciary is that this problem is increasing year by year.

[18] Fourth, *confusion*. In many ways, I think confusion is the main cause of wasted cost. Cases are more complex. But so often parties and their counsel simply misconceive their case. Either from the outset — through ill-considered pleadings — or by delay they lose the plot along the way. Early attention to what the real issues are, and really what is capable of being proven and what isn't, can save an enormous amount of time, cost, and encourage earlier settlement. That is why case management initiatives, based on civilian systems, have focused on issue identification at a much earlier stage than the traditional adversarial approach.

C. THE HAVE-NOTS

[19] As mentioned a moment ago, the exemplar “have not” is the unrepresented litigant. Some unrepresented litigants prefer that state of affairs. They distrust lawyers and will not have one at any cost. That sort of litigant will often enjoy the courtroom forum for its own sake. Querulents fall within that group.

[20] But most unrepresented litigants would prefer that they had a lawyer with them. Dr Bridgette Toy-Cronin's research involved a survey of 35 litigants in person.⁸ Of those 35, 29 had initially engaged a lawyer or made attempts to do so. Many of these did not qualify for legal aid, and could not afford legal services. As one put it:

You can't pay \$500 per hour when you earn \$500 per week.

[21] Formal statistics as to the increasing trend of unrepresented litigants are not yet available. There is however clear anecdotal information from the judiciary and registry staff that their numbers are growing. In Justice Winkelmann's 2014 Ethel Benjamin address she referred to a snapshot of 2014's statistics: 32 out of 60 civil applications for leave to appeal to the Supreme Court filed by unrepresented litigants; 56 of the 228 active civil files in the Court of Appeal involving

⁸ Dr Bridgette Toy-Cronin “Keeping up appearances: accessing New Zealand's Civil Courts as a litigant in person” (PhD thesis, University of Otago, 2015) at [87].

unrepresented litigants; 40 per cent of judicial review cases and 30 per cent of appeals in the Auckland High Court registry having one or more unrepresented litigants.⁹

[22] Party A has a QC. Party B is self-represented. This creates a number of problems. First, is that going to deliver justice? A fair outcome when there is such disparity of resources? Secondly, the Court is not given the assistance it needs from one side of the argument. This skews the balance in favour of the better-represented party. In criminal and public interest cases this problem is sometimes fixed, at public expense, by appointing an *amicus curiae*. Thirdly, if the Court steps into the fray to try and rebalance things, there is a risk of it becoming captured by the side it is trying to help.

[23] Professor Adrian Zuckerman of Oxford, the leading English academic authority on civil procedure, has identified two broad difficulties with the litigants in person. His observations match the New Zealand experience. The first problem, which he calls the “efficiency deficit” results from the unfamiliarity of unrepresented litigants with Court procedure and substantive law. Pleadings are often shambolic, additional case management is required, defaults on Court imposed timetables are rife, and the Court is required to “devote disproportionate time and effort” to their cases.¹⁰ The second (and, as Zuckermann says, more serious) concern is the disadvantage unrepresented litigants suffer in comparison to their represented counterparts. Zuckermann calls this the “justice deficit”. As he puts it:¹¹

In order to project their rights persons need to know the relevant substantive law and what the rules of procedure require in order to take a dispute to Court. Persons who lack legal knowledge are therefore poorly placed to defend their rights in Court, as well as outside it. If obtaining justice calls for legal expertise, then those who cannot afford to pay for it are in effect denied access to justice.

[24] As noted earlier, there is a small minority of unrepresented litigants who prefer it that way. They prefer their own representation. Should we prefer the

⁹ Justice Winkelmann, “Access to justice — who needs lawyers?” (Ethel Benjamin address, 7 November 2014) (2014) 13 Otago L Rev 229 at 235.

¹⁰ Adrian Zuckermann “No justice without lawyers — the myth of an inquisitorial solution” (2014) CJQ 355 at 355.

¹¹ At 355–356.

approach of civil law countries such as France and Germany, and insist they be represented? Putting to one side the practical difficulty of imposing a lawyer on an unwilling client, that has never been the English or New Zealand legal way. Rather, we recognise a constitutional right on the part of a litigant to represent him or herself.¹² That does not mean, however, that the Court should not intervene to ensure that a just and efficient outcome is delivered for all parties.

D WHAT TO DO ABOUT THE HAVE-NOTS

[25] How, then, are we then to address Professor Zuckermann's joint deficits — justice and efficiency? Let us look, first, at some old ideas, and then move on to some new.

1. Old ideas

[26] First I want to look at some existing responses to this access to justice gap. None I suggest have stemmed the increasing flow of disadvantaged persons appearing in the Courts.

(a) Legal aid

[27] Civil legal aid funding has declined markedly in New Zealand in the last five years. In 2012, \$52,476,949 was expended on family legal aid. In 2015 the number was \$43,212,132. In the same period applications declined from 21,998 to 16,665. Application levels are not, of course, a measure of demand. They also reflect constraints and access. General civil legal aid funding in the same period declined from \$7,086,414 to \$5,537,051. Numbers applying declined from 2,310 to 1,424. The same caveat applies. Justice Winkelmann noted in her Ethel Benjamin address, the financial threshold for (in)eligibility for legal aid is set very low.¹³

[28] However I think it is recognised across the board that simply increasing legal aid is not the answer. In a small economy with an aging population base, we probably cannot afford it. New Zealand spends 0.07 per cent of GDP on legal aid.

¹² *R v Brown* [1998] 2 Cr App R 364 (CA) at 369 per Lord Bingham.

¹³ Justice Winkelmann, above n 9, at 234.

That is the same as the Netherlands and Norway, more than Australia (0.04 per cent), Sweden (0.056 per cent), Denmark (0.034 per cent) and Canada (0.05 per cent) but much less than the United Kingdom at least used to (0.19 per cent).¹⁴ There is no point simply shovelling more money at a defective system without first undertaking sensible structural reform.

[29] What we cannot humanely do, though, is to just retrench civil legal aid and not implement alternative reforms to enable access to justice. To put it another way, there is no point institutionalising self-representation and still expect the adversarial system to work. For those who want and need help, it is illogical, inefficient and inhumane to deny it. We do not ask surgery patients in the public health system to manage their own anaesthetics.

(b) *Pro bono aid*

[30] Justice Winkelmann's Ethel Benjamin address called on the legal profession to engage more in the provision of pro bono service (while recognising the great good work that has been done already).¹⁵ I endorse that call, although with somewhat limited confidence. I am aware that the New Zealand Bar Association is doing work on this topic. In overseas jurisdictions (the United States in particular) young members of the legal profession have driven large firms' growth in pro bono service. Indeed the provision of such service is seen as a significant recruiting force. Magazines such as *The American Lawyer* undertake comparative assessments of the extent of pro bono service offered by each of the major firms in that country.

[31] Understandably, however, such pro bono service tends to be focused on high profile causes, such as the Innocence Project. Or on particular cases involving an apparent miscarriage of justice. Mundane but important individual cases risk being left in the gutter by a disorganised and erratic charitable response. Pro bono assistance for such cases is limited.

¹⁴ Ministry of Justice *Legal Aid Factsheet — International Comparisons* (April 2011) <www.justice.govt.nz>.

¹⁵ Justice Winkelmann, above n 9, at 234.

(c) *Fee structure reform*

[32] There have been some significant changes in relation to the way in which legal fees can be charged. A major one has been the liberalisation of contingency (or conditional) fees and litigation funding arrangements.¹⁶ Pure contingency fees, while common in the United States (where there really are a lot of lawyers), have not been popular in New Zealand amongst leading legal practitioners.

[33] The more effective solution has been litigation funding arrangements. In these cases, a third party (really a merchant bank with an interest in litigation) agrees to fund the case for a percentage of any winnings (typically 20 to 25 per cent). The funder takes the risk; the lawyers' fees are guaranteed, although a very strict eye is kept on them by the funder. This has proved more popular with the legal profession. But it does not work in cases where the winnings are not necessarily monetary, or capable of being easily calculated at 75:25. The impact of litigation funders in the Christchurch earthquakes aftermath has been relatively limited.

(d) *Class actions*

[34] Class actions enable costs to be shared where there is a common issue. Reform of the rules to make class actions possible has been on hold for some years.¹⁷ That is so despite occasional judicial prodding.¹⁸ The rules currently provide for representative proceedings, but that is a narrow concept.¹⁹ Lack of a properly designed class action procedure is skewing the approval of such cases. It is time this reform was disinterred. But genuine potential class actions are a small part of the unrepresented litigants that we see.

¹⁶ Lawyers and Conveyancers Act 2006, ss 333–336.

¹⁷ Rules Committee *Minutes of meeting held 3 August 2015* (4 August 2015) at 10.

¹⁸ Justice Miller “Reflections on the earthquake litigation” (New Zealand Insurance Law Association Conference, September 2014); Paul McBeth “Class suits legislation still ‘in purgatory’, Appeal Court judge says” *National Business Review* (27 July 2015) quoting Justice Miller; Justice Kós “Disaster & Resilience: the Canterbury earthquakes & their legal aftermath” (Supreme & Federal Courts Judges Conference, Brisbane, 26 January 2016).

¹⁹ High Court Rules, r 4.24. For the use of this procedure, see *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 and *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

(e) *Compulsory mediation*

[35] The Courts cannot compel parties to mediate. Some jurisdictions permit this; for example, the Federal Court of Australia.²⁰ In my experience, however, mediation does not resolve problems with imbalance, where one party is unrepresented, and out-gunned. The short point is that the Courts are there for all to come to and to have their disputes resolved. The courtroom door is not a revolving one.

(f) *More tribunal-based justice*

[36] The Disputes Tribunal has jurisdiction up to \$15,000 (and \$20,000 with consent).²¹ Lawyers are excluded from the Disputes Tribunal. Very simple pleadings are filed. The Disputes Tribunal works in a much more inquisitorial fashion. The maximum jurisdictional level should be lifted. But so long as the referees are not lawyers, there is a limit to how high one may and should go.

2. *Something old and something new: case management*

[37] All cases in the High Court are case managed to a limited extent. Judicial case management represents a departure from traditional adversarial techniques. In adopting case management, the New Zealand courts have borrowed from the civilian systems.

[38] In two instances in particular, case management is particularly rigorous: the Auckland Leaky Building List and the Christchurch Earthquake List. I was a Christchurch Earthquake List Judge between 2013 and 2015. In another speech given recently, I discussed the working of that list in some detail.²²

[39] The purpose of case management (at least in the Earthquake List) is to ensure from an early stage that the parties understand the cases they are advancing are facing, have engaged appropriate expert assistance, and that all interlocutory matters are dealt with rapidly so the case can be set down for trial within approximately six

²⁰ Federal Court Rules, r 28.02.

²¹ Disputes Tribunals Act 1988, ss 10 and 13.

²² Justice Kós, above n 18.

months of filing. In addition, and unusually in New Zealand, parties are required to exchange their evidence immediately after setting down — even if trial is some distance away. The power to impose such directions is found in r 7.2(3) of the High Court Rules:

At any case management conference, the Judge may give directions to secure the just, speedy, and inexpensive determination of the proceedings, including the fixing of timetables and directing how the hearing or trial is to be conducted.

[40] An issues conference is held within a month of filing of a statement of defence to identify exactly the issues between the parties, and the evidence that will be needed to address those issues. At that point the parties were expected to have appointed experts, and the Court, using the power in r 7.2(3) will direct the exchange of expert reports. Any interlocutory matters will also be timetabled. A second case management conference will be held after the exchange of expert reports (and the provision of a joint report by the experts to the Court). Typically that occurs between three to five months after the first conference. The case is then set down for trial, and directions are made as to the exchange of all evidence in the case over the ensuing two to four months.

[41] Case management of this kind is an important development in New Zealand. Where all parties are represented, it will ensure the smooth passage of a case to trial. And through the early exchange of evidence, may obviate the need for trial altogether. It is, however, of relatively limited use where a party is unrepresented. As things run now (with an adversarial system), the Judge simply cannot descend into the well of the Court and provide enough assistance to the unrepresented litigant to make up for the efficiency and justice deficits Professor Zuckermann identified.

[42] It is interesting to compare the approach taken in Denmark and Sweden. Case management there is far more intensive than in New Zealand. That is despite the fact that in civil (as opposed to criminal) proceedings the Danish and Swedish approach is essentially adversarial.²³ The Danish and Swedish judiciary is well

²³ Pers com Judge Ulla Otken (City Court, Frederiksberg) 29 February 2016; Judge Rebecca Hellgren (District Court, Stockholm) 1 March 2016; Alexander Layton and Hugh Mercer (ed) *European Civil Practice* (2nd ed, Sweet and Maxwell, London, 2004) vol 2, at 90 and 543.

resourced to take a more active role. The population of New Zealand is 4.5 million; Denmark's population is 5.6 million — 22 per cent higher. New Zealand has approximately 200 professional Judges; Denmark has approximately 600.²⁴ The Swedish population is double New Zealand's, yet it has over 1,600 Judges. Approximately 450 of those are Associate and Junior Judges who undertake judicial functions including case management. Legally trained clerks working for the Swedish court system also take a prominent role assisting with case management.

[43] Chapter 42 of the Swedish Code of Judicial Procedure (1998) provides for civil proceedings being initiated by an application for summons. The application is required to state a distinct claim, an account of the circumstances invoked as the basis for claim, an outline of the essential evidence to be offered, why the Court has jurisdiction and what relief is sought. The application is then processed by the Court to see if it meets that requirement. This is generally undertaken by a legally trained Court clerk, but in some more complex cases by a Judge.²⁵ If the application fails to comply with the requirements just outlined, or is otherwise incomplete, the Court directs the plaintiff to cure the defect. If the plaintiff fails to obey that direction, the application is dismissed “if it is so incomplete that it cannot be used as a basis for legal proceedings without considerable inconvenience”.²⁶ In that case it is simply never referred to the intended defendants.²⁷

3. *Some new ideas*

[44] New and more tailored solutions need be looked at seriously. In particular, two kinds of limited assistance arrangement. The first might be called *pleadings aid*, where all parties are required to at least have legal assistance in the drafting of their statements of claim and defence. The second is *limited representation* (or “unbundled” legal services), which the New Zealand Law Society is presently exploring. Before considering these I touch on a third idea.

²⁴ This includes trainee Judges, but who do assist in case management.

²⁵ Pers com Judge Rebecca Hellgren, 1 March 2016.

²⁶ Swedish Code of Judicial Procedure (1998) ch 42, s 4. Interestingly the original English translation of this code in 1968 was undertaken by Associate Justice Ruth Bader Ginsburg of the United States Supreme Court.

²⁷ The Danish civil procedure system is very similar: pers com Judge Uila Otken, 2 March 2016.

(a) *Professional McKenzie Friends*

[45] In the United Kingdom attention has been given to the idea of further empowering professional McKenzie Friends to provide quasi-legal assistance to unrepresented litigants in Court.²⁸ A Society of Professional McKenzie Friends exists there.

[46] I have to say I have real reservations about this proposal. Unless these lay assistants have appropriate legal training, and ethical and disciplinary obligations, it seems to me there is a real risk of their doing more harm than good. In this country the Courts keep an eye on the identity of McKenzie Friends and may, in some cases, decline permission for a particular individual to serve in that role.²⁹

(b) *Pleadings assistance*

[47] Every Judge knows how critical pleadings are. Whether it is a statement of claim, a statement of issues, or a notice of appeal, it sets the direction of the case and the issues to be tried or determined. It is in defining the case at the outset that the unrepresented litigant seems to have the most trouble.

[48] Take this pleading for example:³⁰

My ... son, [A] had a motor bike accident on [...]. He was admitted to the [...] Hospital with head injuries and was put on life support. The doctor asked for consent to take his [organ]. Consent was refused. The doctor himself terminated the life support and [A] died the next day [...]. Although consent to take [A's] [organ] was refused, I always believed they illegally took my son's [organ] anyway.

After many years of seeking an explanation it was disclosed to me that [A's] [organ] had been illegally removed and that [part of the organ] had been implanted into another person.

I was shocked to discover this, as I have said permission was never granted to remove [A's organ], let alone use any part of [A's] organs.

²⁸ See, for example, the current Working Group chaired by Asplin J: <www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016.pdf>

²⁹ *Reid v Attorney-General* [2013] NZHC 2386.

³⁰ Details have been changed to protect the identity of the plaintiff.

That was the whole of the substantive pleading. On appeal the plaintiff told the Court it was a claim for breach of statutory duty. He could not elucidate which statute and seemingly had never effectively been asked to.

[49] It is a false economy for cases to begin and proceed with pleadings mispremised. A relatively small step to reversing the efficiency and justice deficits would be to require initial pleadings in all cases to be certified by a lawyer. In most cases pleadings are prepared by a lawyer, so that is not a problem. But in other instances, where a litigant in person is involved, civil legal aid to that extent should be provided. Perhaps after initial review of the pleadings by the Court along the Swedish model.³¹

(c) *Limited representation:*

[50] A good proposal in my view is limited representation, also known as “limited retainer” or “unbundled legal services”. This involves a lawyer providing limited legal assistance to an otherwise unrepresented litigant. Typically such assistance may relate to the preparation of pleadings or appearing in a particular hearing (but without broader responsibilities for the case). They do not serve, therefore, as a solicitor on the record. The New Zealand Law Society has recently issued a practice briefing on this subject.³²

[51] Limited retainers are relatively common in the United States. They have also featured in the United Kingdom. In that country the Court of Appeal considered the retainers in a professional negligence claim brought against a solicitor. In *Lincoln v Lesley Landsberg* the Court of Appeal held that solicitors acting under a specific limited retainer did not owe a broader duty of care to clients going beyond the terms of that retainer.³³ The clear definition of the scope of retainer was obviously essential.

³¹ See [43] above.

³² New Zealand Law Society “Practice Briefing: Guidance to lawyers considering acting under a limited retainer” (4 February 2016).

³³ *Lincoln v Lesley Landsberg* [2015] EWCA Civ 1152.

(d) *Increasing inquisition*

[52] I believe there is room to borrow yet more from European inquisitorial systems. Case management was a start. But it is not the logical conclusion to reform.

[53] I want to dwell for a little on the distinctive features of the adversarial system (which we have, along with other common law countries) and the inquisitorial system (used by civil law systems).

[54] The first thing we have to say about this is that no system is purely adversarial or inquisitorial. Those represent perfect poles but, rather like the geographical poles, no one occupies them.

[55] The three fundamentals of the *adversarial* process are these: First, the focus is on determination of rights at a trial. Secondly, the truth is not necessarily the end object. Thirdly, the adversarial system gives greater autonomy to parties to define issues and present the evidence they see fit. The judiciary is less controlling, more passive. I will talk about each briefly.

[56] The focus on the trial is partly a result of common law's former enthusiasm for civil jury trials. While these are still common in the United States, they have fallen away in Anglo-Canadian-Antipodean common law jurisdictions. A jury can be convened only once, for a limited time, and under strict instructions that it is not to engage in fact finding of its own. That encourages an adversarial approach.

[57] The adversarial process is not necessarily concerned with the identification of truth. Certainly it is much less concerned with it than the inquisitorial. If the adversarial system was more concerned with the identification of truth, then why would it permit limits to pre-trial discovery of documents — for instance, because they are covered by legal professional privilege? Why would it permit imbalance in representation?

[58] The same of course is even more true of criminal justice where the defendant is given a “sporting chance” by the right to silence, and the very limited obligation to give pre-trial disclosure (save in the case of alibis).³⁴ Criminal justice is the last refuge of true adversarialism.

[59] But we are kidding ourselves if we think *civil* justice is not significantly inquisitorial already. First, there is the revolution caused by intrusive case management. Secondly, there is the quite different degree of judicial intervention at trial. In *criminal* trials, Judges tend to ask very few questions because the adversarial nature of the process is respected. It is the prosecution’s job to prove its case, and wrong for the Judge to blunder prominently into that process.³⁵ In *civil* trials, however, judicial questioning can be extensive. Here the Judge is the tribunal of fact and focused directly upon identifying the truth.

[60] Dean Roscoe Pound described the adversarial system as “the sporting theory of justice”.³⁶ That is, inequalities of representation are not adjusted by the tribunal, for fear it becomes partisan. If one party turns up with a first division team, and the other party with a third division one, and the first division team wins 36-0, then so be it.

[61] But not all Judges see it that way. Some gently try to adjust the process to make it fairer. This is the question of “imbalance” that I referred to before. But in adjusting the process, necessarily the Judge intrudes on the playing field. Let me give you an example.

[62] Many years ago I was instructed in a civil trial. It raised issues of fraud, and I was briefed by the defendant, an American corporation. The plaintiff was an individual. He worked as a boiler attendant in a university. There was no doubt he had been defrauded. The person who defrauded him had been sent to prison. But there the plaintiff was, now suing the fraudulent franchisee’s franchisor, my client, the American corporation, on the basis of vicarious liability. The plaintiff went to a

³⁴ Criminal Disclosure Act 2008, s 22.

³⁵ See for instance *M (CA5082014) v R* [2015] NZCA 183.

³⁶ Roscoe Pound “The Causes of Popular Dissatisfaction with the Administration of Justice” (1906) 40 Am L Rev 729 at 742.

general practitioner in the provinces. He issued proceedings. He probably hoped we would settle, but we didn't. So we went to trial. The trial took a very unusual course, and at the time I didn't understand why. Subsequently I found out. It turned out that the provincial solicitor, realising he was badly out-gunned in the contest, and having little litigation experience, managed to nab the Judge as he was walking to the courthouse in the morning. Somehow he managed to blurt out that he was completely out of his depth. The Judge told him not to worry and to do his best.

[63] The case began. I cross-examined the plaintiff. He made some useful admissions. He had very little knowledge of the American corporation. His dealings had been with the man now in jail.

[64] I had two witnesses. I called the first. He gave evidence convincingly. By the end of it we had two victims — the plaintiff and the American corporation. The plaintiff's solicitor stood up to cross-examine the first witness. He asked a couple of rather faltering questions, and then looked stricken. Cross-examination was not a skill he had acquired. But then the Judge took over. He briskly cross-examined my witness. The same thing happened with my second witness.

[65] At the end of it the Judge gave an oral judgment in favour of my client. As a matter of law, that was right. As a matter of adversarial process, what the Judge did was wrong. As a matter of civil justice, it was quite right. The plaintiff could not say, at the end of that process, that his case had not been properly presented, and that mine had not been properly tested.

[66] What had the Judge done? He had conducted a sort of inquisitorial trial.

[67] The inquisitorial system is very different to the adversarial. In civil law countries like France and Germany, for instance, the Judge controls the evidential process. The Judge defines the issues (based on the pleadings), and engages the experts. Sometimes there is simply a single Court-appointed expert. The Judge will decide how much discovery is required to meet the issues. Written briefs of evidence are submitted. The Judge undertakes primary questioning (not cross-examination) of witnesses. Counsel have a very limited role: they may suggest

questions and they may, with the Court's permission, engage in limited cross-examination.

[68] The trial tends to be a staged process, taking place over a number of hearings. Some of them are short. Essentially the Judge is undertaking an inquiry, rather than conducting a climactic trial. The judgment will be briefer and more summary in nature. To that extent it is perhaps less authoritative. There is a greater proportion of appeals brought in inquisitorial rather than adversarial countries. But another reason for that may be that, after an inquisitorial adjudication, parties still have resources left with which to bring an appeal.

[69] Inquisitorial hearings require less engagement and preparation by the lawyers. As a result the hearings are much cheaper. It has been suggested that a typical patents case in Germany will cost half the equivalent United Kingdom cost.³⁷ But it is a myth that they exclude lawyers altogether. Quite the contrary. In a number of civil jurisdictions legal representation is compulsory.³⁸

[70] The inquisitorial process in France is in fact something of a recent invention in that country. The Napoleonic Code made no provision for it. Instead it gave the Court an essentially passive role — consistent with an adversarial approach. The result, by the end of the nineteenth century, was all the problems that infested our system before case management: adjournment, delay, use of delaying tactics, and excessive cost. It took a decree in 1965 to put French Judges firmly in charge of the content of the litigation process. The Code was amended to provide:³⁹

Everyone is bound to cooperate with the administration of justice with a view to revelation of the truth.

No such provision exists in our High Court Rules.⁴⁰

³⁷ John Hansen "Court Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View" (2007) 11 Otago L Rev 351 at 375.

³⁸ For instance, France and Germany: Layton & Mercer, above n 23, at 156 and 193.

³⁹ French Civil Code, art 10. See JA Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 53 ICLQ 281 at 290.

⁴⁰ Compare ss 7–10 of the Civil Procedure Act 2010 (Victoria) which puts these and other obligations on parties, counsel and the Courts.

(e) *A mixed model in the District Court?*

[71] One idea I have been thinking about is adopting a limited inquisitorial approach in the District Court:

- (a) for all cases up to say \$100,000; and
- (b) for all cases where one party is not represented (and cannot reasonably be expected to be represented).

[72] Might it not be fairer (and certainly cheaper) to limit the role lawyers in such cases and commission the District Court to proceed in a more inquisitorial way?

[73] How might this work?

[74] First, the plaintiff would file a short statement of claim. Applying the Swedish model, this would be reviewed by an assessor appointed by the Court. If satisfactorily pleaded, the case could proceed. If not, pleading aid would be arranged. If the deficiency was irremediable, the case would not be allowed to proceed at all (subject to a right of judicial review).

[75] Secondly the assessor would meet the parties, identify what the real claims and defences are, and devise a list of issues. Parties would then need to produce any documents adverse to their case on those issues. Following that, short affidavit evidence addressed to the issues.

[76] Thirdly, the Court, acting inquisitorially, would then confer with the parties in a case management conference. Consideration would be given to convening a judicial settlement conference. If trial was needed, a decision would be made as to which witnesses need to be questioned, whether the Court should appoint an expert, and whether any witnesses should confer to look for common ground. In short, enhanced case management.

[77] Fourthly, a merits hearing would then take place. Relevant witnesses would be examined by the Court on their evidence and the documents. By leave, additional

questions might be asked by the parties or their counsel. A reasonably brief decision would then be delivered.

[78] It is, essentially, the French model — with some Scandinavian tweaks. But confined to cases below a certain level, or to cases where a party is not represented (and cannot reasonably be expected to be). Essentially it would involve making part of the District Court’s jurisdiction primarily inquisitorial, and leaving the rest of it primarily adversarial.

[79] What might the objections be?

[80] Well, it is novel for New Zealand. But why not? This is hardly, however, a dangerously radical suggestion. Aspects of it have been mooted by the current Lord Chief Justice of England and Wales, Lord Thomas, by a former Chief Justice of Australia, Sir Anthony Mason and by the United Kingdom Judicial Working Group on Litigants in Person, chaired by Hickinbottom J.⁴¹

[81] Secondly, truly inquisitorial systems such as France and Germany *require* legal representation. It is mandatory there.⁴² But that practice does not seem to me to justify denial here of a more just procedure in the very case where greater litigant assistance is needed — that is, when they are *unrepresented*.

[82] Thirdly, I acknowledge the risk referred to by Professor Zuckermann of “confirmation bias”.⁴³ That is, the Judge providing greater assistance unduly identifying him or herself with the litigant being assisted. An answer to that concern — if it is a substantial objection, which is unclear in a judicial context — is to separate the case management and determinative stages. That in part is why I have suggested a separate assessor be involved, borrowing from Scandinavian

⁴¹ See, for example, Report on the Judicial Working Group on Litigants in Person (2013) Judiciary of England and Wales, available at <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf> (“the Hickinbottom Report”) at 5.11; Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales “Reshaping Justice” (speech delivered to the organisation Justice, 3 March 2014); Sir Anthony Mason “The Future of Adversarial Justice” (17th Annual Australian Institute of Judicial Administration Conference, Adelaide, 7 August 1999).

⁴² See [68] above.

⁴³ Zuckermann, above n 10, at 361.

jurisdictions. It is also a rationale for limiting the represented party's lawyer's role, so the Court is not required to fill a significant vacuum on one side only.

[83] Fourthly, adopting any sort of inquisitorial approach, whether enlarged case management or my mixed model idea, will require some additional judicial resource. On my approach, however, this would be primarily non-judicial assessors. And we would still have far fewer Judges per capita than our Scandinavian compatriots.

E CONCLUSION

[84] Two realities confront us. The first is that there are very serious issues about the delivery of civil justice to involuntary self-represented litigants in an adversarial system. The second is that with the advent of intrusive, intensive case management we are moving to a more inquisitorial system of civil justice anyway. Given the different emphasis of civil justice — where the Judge is tribunal of fact and more focused on determining directly the truth — there is nothing alien about this shift in a civil context.

[85] It seems to me that adopting a still more inquisitorial model in the case of involuntary self-represented litigants, along the lines outlined in this address, is simply a natural extension of existing developments. It draws on existing, better practice in Scandinavia. It would be a method of delivering improved civil justice in New Zealand. Justice that meets the objectives we set for ourselves, but singularly fail to achieve in the case of involuntary self-represented litigants.