

# COURTS ADMINISTRATION, THE JUDICIARY AND THE EFFICIENT DELIVERY OF JUSTICE

## A Personal View

The Hon Justice John Hansen<sup>‡</sup>

It is a singular privilege to have been invited to deliver the F.W. Guest Memorial Lecture for 2006. When I started law, the faculty occupied three rooms in the Court building and one across the road, in what was then known as the Star building. The course usually consisted of two years full time and three years part time, with many qualifying to be admitted as solicitors at the end of their fourth year. At the end of my fourth year the Law Faculty moved to its first permanent home in what was the old registry building, now the staff club. There was a request from Professor Guest for students to assist with setting out books on the new library shelves. On the night of his death, about four of us assisted Professor Guest in this task. I certainly recall Don McRae being present, and perhaps, David More. At around 10.30 we called it quits and Frank Guest produced a sugar sack from which he removed six bottles of warm DB beer for us to partake in.

Tragically, he died later that night. To me he was a somewhat eccentric and idiosyncratic teacher with a strong leaning to his other discipline, philosophy. But he was an inspirational teacher who instilled the necessary inquisitiveness, and a healthy dose of realism and cynicism, in many of his students.

I rather suspect he would have found my topic this evening somewhat lightweight. It does not pretend to be in the same category as Jeremy Waldron's "Half Life of Treaties", or Sir Ian McKay's "Interpreting Statutes".

It is very much an anecdotal view of someone who has spent 27 years on the Bench. I trust, however, that despite being anecdotal it will exhibit a little inquisitiveness, and some healthy cynicism, although I would prefer to refer to it as realism.

Why such a topic? There are a number of reasons why the efficient delivery of justice is important. While there is proper concentration on the importance of the independence of the Judiciary, and its central role in the continuation of democracy in the form we have come to accept and expect, the judicial resource and the justice industry is an expensive one. As an example, the High and District Courts' share of the Justice budget in the last financial year was just over \$119 million. This, of course, does not include other judicial and quasi-judicial bodies. It is estimated that each High Court Judge, with necessary support staff, premises, library etc., costs the taxpayer in excess of \$630,000 per year, but this ignores the superannuation contribution and the capital set up cost on appointment. The total legal aid budget for 2007 is \$96 million. This represents a lot of taxpayer dollars. The taxpayer is entitled to expect an efficient service from the expenditure of such large sums. As well, it must be recognised that enormous sums are expended by those funding their own litigation, so there is significant financial interest in efficient justice delivery.

There is a second equally vital reason. Those of us involved in the legal system on a professional basis, despite frequent trite words to the contrary, all too often lose sight of

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<sup>‡</sup> Judge of the High Court of New Zealand - the F.W. Guest Memorial Lecture, Otago University on 28 September 2006

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the real participants in the process: the litigants, the accused, the victims, and the witnesses who are often innocent bystanders. Not only those directly involved in Court processes, but society generally, have a vital interest in the efficient administration of justice.

In New Zealand there is no measure of the efficiency of Judges or judicial administration in a formal sense. In Australia it is considered by the Productivity Commission. Recently the media criticised the fact that there was no genuine attempt by the Productivity Commission to measure the quality of the work carried out by the nation's Courts.<sup>1</sup> They said that such benchmarking was resisted by the judiciary on the grounds that it would interfere with judicial independence. The article contended that there were simple ways of measuring quality. It suggested that the Productivity Commission expand its role by producing a national ranking of the nation's slowest Judges, broken down into the time taken to write judgments and the time taken to hear cases. They also suggested it would be easy to show national rankings of Judges most frequently overturned on appeal.

The article concluded by welcoming a forthcoming address by the Chief Justice of New South Wales, James Spigelman, and wondered whether or not he would align himself with those who believe the work of Judges is in a special category that should not be subject to normal measures of efficiency.

In what could be described as a stinging response, the Chief Justice said that the work of the Courts cannot be measured by mere numbers.<sup>2</sup> He accepted that statistics could be usefully gathered to assist with the internal management of Courts, but he validly criticised attempts to measure qualitative matters by pantometry, ie universal measurement.

Interestingly, he went on in the same article to criticise the concentration on statistics in some jurisdictions, and named the United Kingdom and New Zealand. This struck me as somewhat unfounded given that the use of the statistics gathered in New Zealand is almost exclusively to assist with the internal management of the business of the Courts, which had attracted the Chief Justice's approval.

It is not for me to suggest in what way Judges should be held accountable, but given the importance of the work of the Courts and the large sums of money I mentioned earlier, no-one would take issue with the fact that there should be accountability. I am sure Chief Justice Spigelman was not suggesting there should be no accountability, although he did not proffer any alternative to the attempted measures he was criticising. But in my view, people should not have to wait 12 months for a judgment to be delivered; they should not turn up for their court case to be told it will not be reached that day; and nor should witnesses have to hang around courtrooms for hours waiting to give evidence.

The effect of delay on the participants in the court process is all too frequently overlooked by Judges and lawyers. Not only are there significant financial costs (both direct, in terms of legal fees; and indirect, in terms of management costs, lost opportunities and such like), but the associated anxiety is with most litigants as long as the litigation continues. We all too frequently overlook, or ignore, the financial and psychological cost of litigation. All of this impacts on the public perception of the legal system.

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<sup>1</sup> *The Australian*, 15 September 2006.

## Public Expectation

So what is the public entitled to expect from a court system? To my mind it must be the speedy, inexpensive, fair and just resolution of both criminal and civil matters that come before the Courts. Furthermore, the courts must be accessible to citizens. In doing this the Courts must continue to adhere to the core values of a legal system. In an address to the Chancery Bar Association in June of 1998, Lightman J set out the core values as he saw them:

...the four “E’s” Expertise, Equality, Expedition and Economy. The meaning of Expertise is clear: litigators as such, and as prospective Silks and Judges, must be properly educated and trained to meet the ever increasing demands of an ever more complicated system of laws. Equality means two things. First it means equality of opportunity, i.e., the door should be open to the best from all backgrounds (including members of minorities or those of limited means). This is essential, not merely in order to recruit enough of the required calibre, but so as to secure the confidence of the public as a whole in the system. There must be removed not merely obstacles, but what may reasonably be perceived by outsiders as obstacles. Second, equality means equality of access to the Courts and to the ear of the Courts. The powerful with means should not have any undue advantage in the Court proceedings over the weak without means or with limited means. Expedition means that trials and appeals are held expeditiously. It is difficult for anyone who has not faced litigation to appreciate the cloud of anxiety and uncertainty which pending litigation can cast over the lives of the parties to the litigation (and their families) so long as it lasts. Economy means the access to the Court and proper cases must be affordable: that restrictive practices and other occasions for unnecessary costs and obsolete rules which encumber the legal process should be abolished.<sup>3</sup>

In that address, Lightman J was in part addressing what one should expect from the profession, but in my view it is equally applicable to what the core values of a legal system should be. I doubt that many would take issue with those core values, but our system has failed to deliver, at least in relation to expedition and economy. Expertise and equality I will leave for other commentators.

It seems to me that we have got it seriously wrong at the present time. The cost of litigation, including substantially increased Court fees, effectively excludes a significant portion of society from seeking redress for their disputes in the Courts. Of course, for those of limited means, legal aid is available. For the wealthy the very best and most expensive of representation is the norm. But what of the “sandwich class” that make up the bulk of any society? They do not qualify for legal aid, and they are unlikely to be able to afford to fund anything but the simplest and shortest of civil litigation. If an individual is unfortunate enough to face criminal charges and does not qualify for legal aid, the cost of reasonable representation can lead to financial ruin. The horror stories surrounding

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<sup>2</sup> Honourable JJ Spigelman AC, “Measuring Court Performance” Address to the Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 16 September 2006.

<sup>3</sup> Mr Justice Lightman, “Litigation in the 21<sup>st</sup> Century”, address to Chancery Bar Association, June 1998.

costs that are the standard fare of legal gossip are too numerous to warrant enumeration here, but the level of litigation cost is notorious.

All of this is unhealthy. If we deny access to the Courts to a significant part of our society they will have little, if any, respect for the legal system as a whole. Nor should we expect them to.

There remains a strong view that the pace of litigation, especially civil litigation, is for the parties to control, and the Judges and court staff play no part in it. Judges, lawyers and academics such as Professors Zander<sup>4</sup> and Resnik<sup>5</sup> have criticised attempts to reduce delay. Some, including these commentators, question whether there is, in fact, delay that should cause concern. Interestingly, it is those trained in law that suggest there is no problem, never the poor litigants who suffer through the process. The public take a different view. In the United Kingdom a survey revealed 75% of those surveyed thought the civil legal system was “out of date”, “easy to twist”, “slow” and “too complicated”. Only 25% thought the present legal system was “fair to people like me” and “something to be proud of”.<sup>6</sup>

Before turning to the question of delay it is perhaps appropriate that I say something about what is a reasonable time in which litigants can expect to have their cases heard.

In the mid-1990s the National Case Management Committee consulted widely to establish what was considered to be reasonable timeframes for the hearing of the majority of cases that come before the Court. In the context of this paper it is sufficient to say that 90% of High Court criminal jury trials should be disposed of within 39 weeks, and 100% within 52 weeks. 75% of High Court civil cases are to be disposed of within 52 weeks from the date of filing, 90% within 65 weeks, and 100% within 78 weeks. The standards are being met in the breach! Few hearings are held within those timeframes, although in some instances they have been shown to be achievable.

## Delay

Delay has been something inherent in Courts from time immemorial. At the turn of the 20<sup>th</sup> century, Dean Roscoe Pound was urging Judges, lawyers and Court administrators to address problems of delay in administration in the Courts.<sup>7</sup> Since then the problem has got worse. The demands on Court resources continue unabated, and clearly exceed population growth. I must confess that I can give no guarantee of the accuracy of figures in this address, simply because there are many sources that give differing figures. Can I just say a word about the figures I will use. They are, of course, quantitative. I am in complete agreement with Chief Justice Spigelman that quantitative assessments, beloved of modern managers and treasuries, cannot measure the effectiveness of a Judge, any more than they can measure education or health systems. Proper assessment in these areas requires a qualitative assessment. Having said that, I unapologetically use quantitative figures this evening. I hope I will demonstrate that even they show an unquestionable trend that demands debate.

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<sup>4</sup> M Zander, “The Woolf Report: Forwards or Backwards for the new Lord Chancellor” (1997) 16 CJQ 208.

<sup>5</sup> J Resnik, “Managerial Judges” (1989) 96 Harvard LR 377.

<sup>6</sup> *Seeking Civil Justice*, the National Consumer Council, London, 1995.

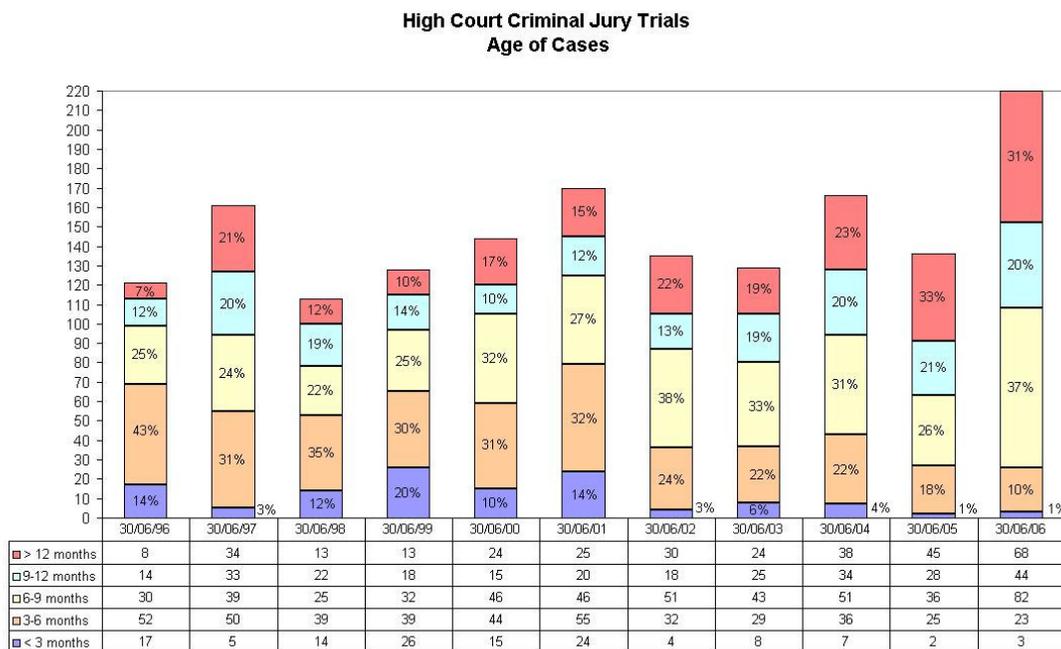
<sup>7</sup> Pound’s 1906 lecture, “The Causes of Popular Dissatisfaction with the Administration of Justice”, reprinted in (1984) 35 FDR 273.

## Crime

Section 25 of the New Zealand Bill of Rights Act 1990 guarantees to everyone who is charged the right to be tried without undue delay. The Courts have found that the appropriate remedy for the breach of rights guaranteed by section 25 is a permanent stay of proceedings.<sup>8</sup> When permanent stays are granted in cases of serious criminal allegations, the damage to public confidence in the administration of justice is self-evident.

For this very reason, enormous judicial and staff resources are committed to the constant monitoring of “at-risk” cases. Monthly reports are generated that identify those cases, and at least in the High Court, there is a weekly telephone conference between the Chief High Court Judge and the List Judges that focuses on at-risk cases. The result is special arrangements often have to be made to accommodate such proceedings, with the obvious downstream effect on other cases.

So what is the extent of delay in criminal trials? The following chart demonstrates the extent of the problem, showing the dramatic increase in cases nine months or more old in the criminal jurisdiction of the High Court:



This chart demonstrates that in 1996, 19% of High Court jury trials were over nine months old by the date of trial. Ten years later this figure had increased to 51%. In actual numbers of cases, it had increased from 22 to 112. While the total number of cases has not quite doubled during the same period, those over nine months old have nearly tripled.

<sup>8</sup> *Martin v Tauranga District Court* [1995] 2 NZLR 419.

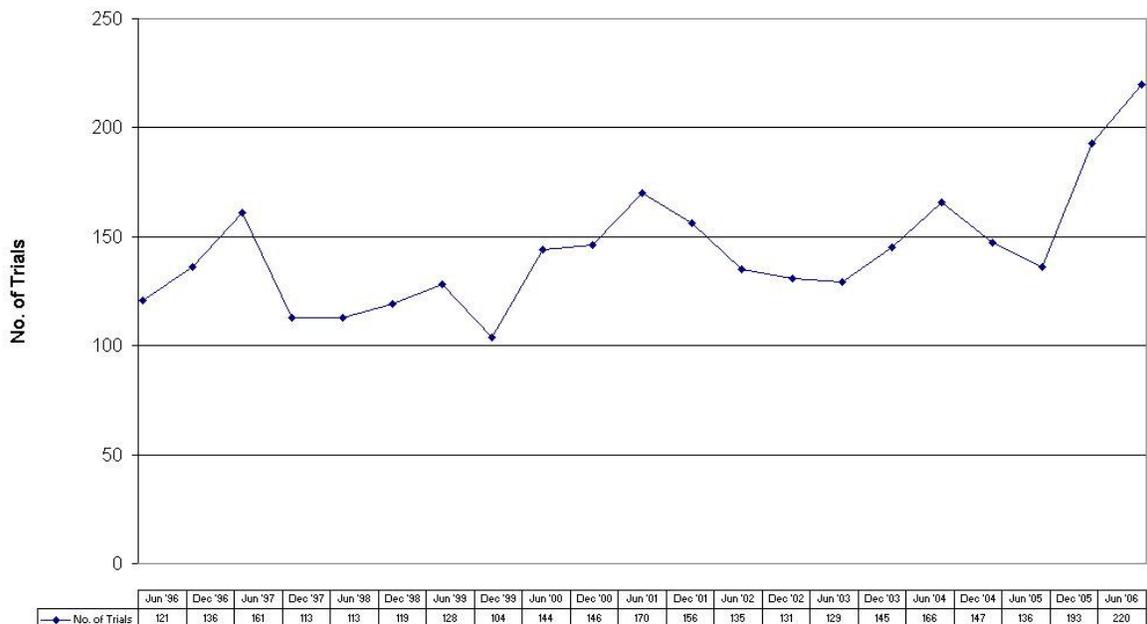
## Civil

In New Zealand today, the reality is that very few standard civil proceedings are heard within a year of filing. In the civil jurisdiction the effects of delay are well documented. There is financial uncertainty, which in many cases can cause significant psychological trauma to individuals. It can have a significant impact on businesses, their future planning, contingencies and lost opportunity costs. As well, as I demonstrated in an earlier article<sup>9</sup>, the longer cases take to get to trial, the greater the quantum of costs. This includes not just the direct legal costs, but also the inevitable costs to businesses and individuals that are usually overlooked.

In that article I dealt with the New Zealand case management response to the problems of delay. I do not wish to speak at any great length on case management tonight, except to say that it has been introduced into New Zealand with only limited success. The limited nature of that success highlights a flaw in case management systems. While some Judges, administrators, and lawyers have embraced the culture of case management, many others have not, and the necessary technological support has been absent. Without that commitment and support only limited success will be achieved in reducing delay. However, I will return to some serious problems that in my view hinder the ability of a case management system to deliver reform.

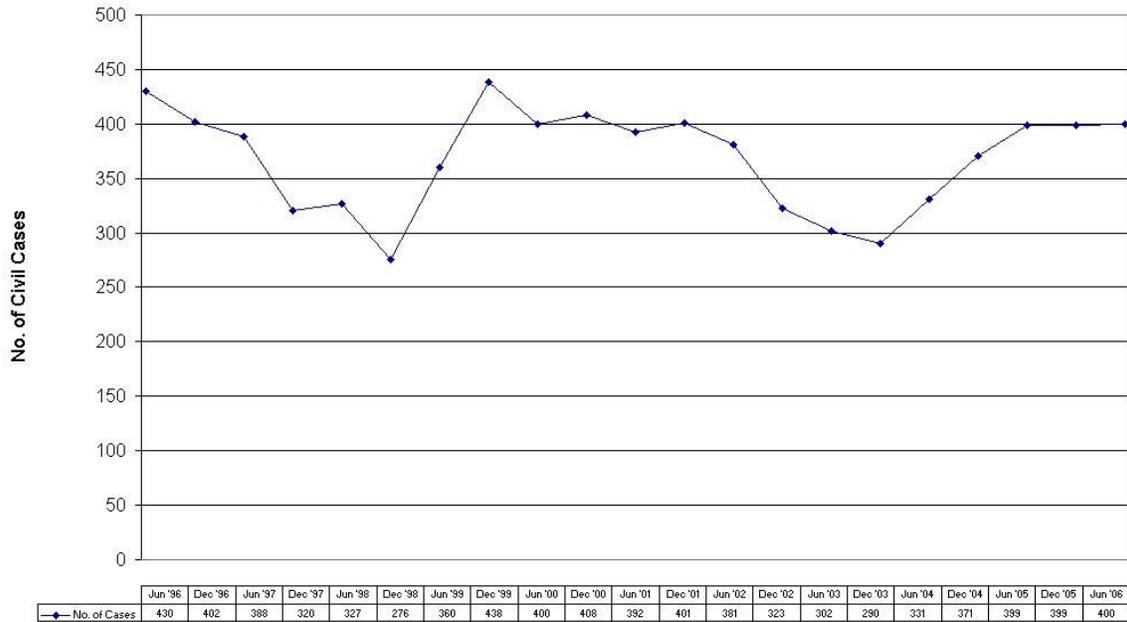
One of the real difficulties in ascertaining the causes of delayed litigation is the absence of empirical evidence. The overall number of criminal cases has increased over the last ten years, but civil work has remained relatively static. The following charts illustrate this:-

**National Total of High Court Criminal Trials on Hand**



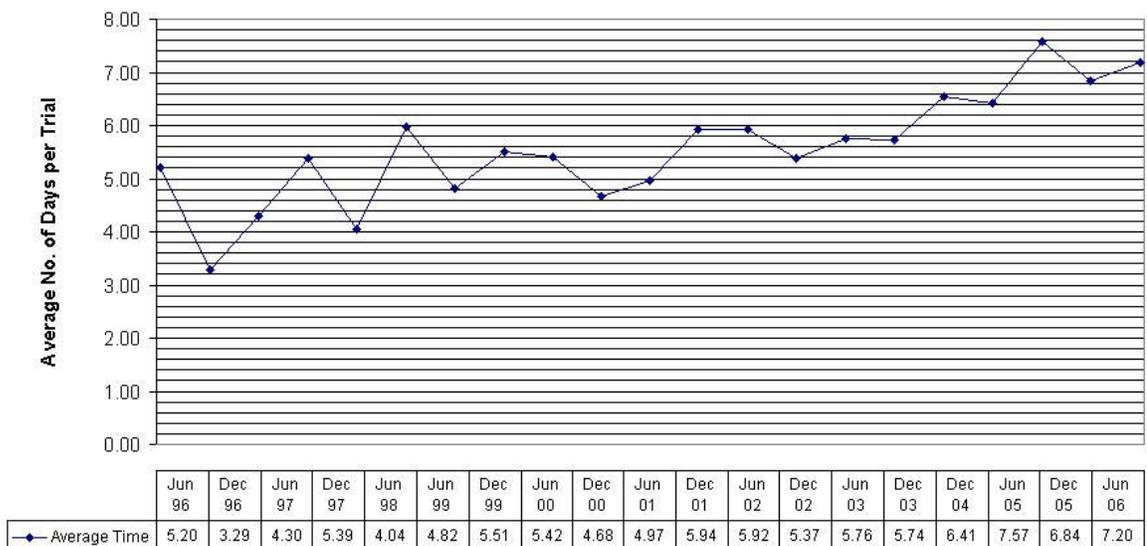
<sup>9</sup> Justice John Hansen, "Case Management in New Zealand Courts" (1998) 9 Otago LR 319.

### National Total of High Court Defended Civil Cases on Hand

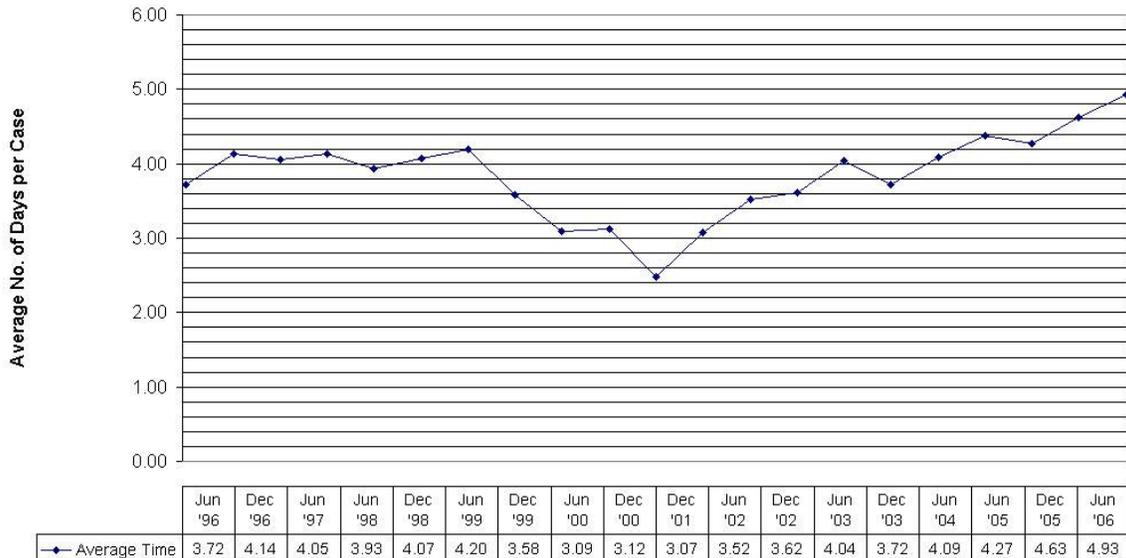


As we will see, it is readily apparent that both civil and criminal cases have increased in average length over the last ten years. The next two charts show the increase in hearing times:-

### National Average Estimated Hearing Time of High Court Criminal Trials



### National Average Estimated Hearing Time of High Court Defended Civil Cases



So our graphs show that there has been an increase of 99 criminal cases on-hand in the last ten years, but that civil cases have dropped by 30 over the same period. The estimated hearing time for criminal trials has increased by two days per trial, or 40%, in the same period, while civil cases have increased by just over a day, or 33%.

While there is much anecdotal evidence as to why this is so, it is impossible to say with any certainty what the real causes are. It is said civil cases, like the commercial transactions giving rise to them, are more complex and it is this complexity that is responsible for increased trial length, but this cannot be established empirically.

While one can appreciate the impact of the Bill of Rights litigation post 1990 on criminal trials, that in itself is not an explanation for the increased length of criminal trials. Most Bill of Rights challenges tend to be pre-trial, and while that can delay the onset of trial it does not explain the increased length.

Methamphetamine cases often feature multi-accused conspiracy trials and lengthy intercepted conversations, and this could be said to cause delay. But again, we lack empirical evidence. All we can say is that in both jurisdictions hearing times have increased, which contributes to delay. We urgently need to discover why.

I now wish to consider the delivery of justice under a number of headings, and to attempt to identify some of the problems that contribute to cost and delay.

## The Judiciary

In New Zealand we have one Judge for every 22,757 people. I have only taken into account the District Court and Higher Courts in this calculation. This appears to be on a

par with countries with similar legal systems. In Ireland the figure is one Judge for every 32,155 people, in Australia, one for every 20,297, in England and Wales the figure is one to 22,486, while Canada is one to 15,686.

But saying that we are on a par is quite misleading. Since 1974 New Zealand has had a no fault accident insurance scheme. As a consequence, there are no personal injury cases before our Courts. This continues to make up a very significant part of the case load of Judges in other jurisdictions, notwithstanding reforms to cope with personal injury cases in most of those jurisdictions. On that basis it is not unreasonable to assume that the case load per Judge in those jurisdictions is greater than New Zealand.

Since 1960, the New Zealand population increased by approximately 73% and the number of High Court Judges by approximately 200%. While filings in the High Court peaked in 1990, they have now declined to a figure slightly below the 1960 figures.

It is interesting to analyse the New Zealand figures and ascertain the number of cases per Judge for each of those years. The figures combine both civil and criminal cases, and are a relatively crude measure. Yet it is the best we have.

<b>Year</b>	<b>High Court filings<sup>10</sup></b>	<b>Number of High Court Judges<sup>11</sup></b>	<b>Average number of cases per judge<sup>12</sup></b>
<b>1960</b>	2610	12	218
<b>1970</b>	3765	14	269
<b>1980</b>	4678	24	195
<b>1990</b>	8044	27	298
<b>1995</b>	4304	32	135
<b>2000</b>	3290	35	94
<b>2005</b>	2500	36	69

This shows a declining number of cases per Judge from 1970 until 1990. The 1990 figures can be taken as an aberration, because they reflect the consequences of the 1987 stock market collapse on civil filings. Most of those filings were summary judgments, bankruptcies and company liquidations that fell to the four newly appointed Masters. If we take out that aberrant year, it can be seen that the number of cases per Judge continued to decline through to 2005.

In terms of resources, that is a factor often overlooked. In Hong Kong, where boom and bust cycles are more regular than in New Zealand, economic downturns were

<sup>10</sup> Figures taken from Department for Courts and Ministry of Justice Annual Reports. Since 1987 filings include work within the jurisdiction of Masters/Associate Judges.

<sup>11</sup> Taken from NZ Law Reports. Includes Masters/Associate Judges, and Temporary Judges, but not the Chief Justice or Acting Judges.

<sup>12</sup> Figures rounded to whole numbers.

estimated to increase civil filings by approximately one-third. We have no comparable figures here.

To my mind, what these relatively crude statistics demonstrate is that simply throwing additional judicial resources at the problem of Court workloads does not solve the issue. It may help to hold a position, when coupled with stringent case management, but recent New Zealand experience would suggest that it cannot improve it.

As I indicated earlier, the immediate response is that trials take longer, and it must be acknowledged that very long trials are now more common. While it is accepted that the reclassification of methamphetamine as a class A drug has led to numerous multi defendant conspiracy trials in the High Court, it does not explain why more straight forward hearings, such as murder trials, are taking longer. There is more scientific evidence, in particular DNA, than there was some years ago. But in the main that evidence is unchallenged, and is not an explanation in itself.

In the Court of Appeal there has been a growth in the number of criminal appeals based on the incompetence of trial counsel. While it is seldom the sole ground of appeal, it features in a large number of the criminal appeals brought in that Court.

Judge O'Driscoll is in the process of carrying out an exhaustive study of counsel incompetence. His research to date shows the increase referred to. My experience is that the success rate of this ground of appeal is low, but again his research will be able to confirm that. The difficulty is that it is seldom the sole ground of appeal, and there may be cases where the appeal is allowed on other grounds which, had they not been present, would have led to trial incompetence succeeding. However, if these increases support the view that there is a higher level of counsel incompetence than previously, one may legitimately ask what those responsible for the profession, and indeed the Legal Services Agency, are doing about it. Retrials are a costly exercise.

It is often said that delays in judgment delivery are due to work pressure, yet in a paper delivered to the Legal Research Foundation, Professor Smillie noted that Israeli research showed that Judges under pressure, at least in Israel, in fact showed greater productivity than those with less pressure.<sup>13</sup> In various American jurisdictions operating an individual list case management system the outstanding files of the individual Judges are published as part of the Judiciary's annual report. That apparently has a salutary effect. There is at least one State in the United States that has legislation saying a Judge's salary will be stopped if there are outstanding reserved judgments older than six months. Having said that, it is essential that a Judge be given adequate writing time to deliver judgments timeously. The present pressure of criminal work impacts on this.

In my view, Judges also need to realise the limited role of a trial Judge in civil disputes. Usually they are there to determine a case between the parties. They should keep the case focused on the real issues. Judgments should be for the benefit of those parties and not the Law Reports or Appellate Courts. There is also, perhaps, a need to reconsider the qualities needed for Judges to be appointed. I take no issue with the time honoured qualities that have traditionally been considered as essential: they remain critically so. But perhaps we should add to the list, if all else is equal, the ability to efficiently dispose of work.

I do not want to be misunderstood here, and be taken as suggesting Judges are lazy compared with their counterparts of yesteryear. Without any question, Judges work far harder than they did 30 or 40 years ago: I can confirm that from my own experience. There is an unrelenting grind of serious crime and difficult civil work. The days of

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<sup>13</sup> J Smillie, "Who Wants Juristocracy?" (2006) 11 Otago LR 183.

relatively straight forward trials involving aggravated robbery, or personal injury with a jury are long gone. The art of oral judgments appears to have been all but lost. What is desperately and urgently needed are solutions that will see less complicated and shorter trials, and greater productivity from the Judges. Whether that is possible under our present adversarial system is problematic.

Appellate Courts also have a role to play. The law ought to be developed in a way that enables it readily to be understood and applied. As Lightman J noted, there should be an avoidance of:

...any undue complications or subtleties, and without imposing undue burdens on litigants or their advisors, or indeed mere puisne judges. Advances must be measured and balanced against their cost. Appellate tribunals remote from the coalface are peculiarly at risk of underestimating the cost.<sup>14</sup>

As an example, I know all trial Judges and juries who have grappled with the problem would be delighted if the appellate courts could come up with a simple and clearly understood definition of provocation.<sup>15</sup>

## Staff

It is impossible for Judges to fulfil their roles efficiently without quality support. Unfortunately, Court staff have suffered from the so-called market reforms of the civil service. We all remember the time when a job in the civil service was a job of permanence, with individual civil servants building up great knowledge and expertise from years of service and practical experience. There was also considerable “in-house” training in the technical aspects of the position. Older members of the profession will readily recall going cap-in-hand to a Registrar, or Deputy Registrar, for some advice, which was freely given.

Starting in the 1980s, along with the rest of the civil service, this began to change, and undoubtedly reform was needed. But in many Courts little attention was paid to training. The Department for Courts arrived, and as a “new broom” determined to “sweep clean”. The way forward was seen to be the application of universal management techniques. As a consequence, huge amounts of institutional knowledge were lost, and the experienced staff, to whom we all went for advice when we started out in litigation, were made redundant. They were replaced by managers from other areas such as health, education, ACC and wherever. There was a promise that these new managers would be trained in the necessary technical skills so they could be both manager and Registrar. That simply did not eventuate. Such “universal managers” are mobile and staff turnover increased. Fortunately, some Courts managed to retain their experienced Registrars and staff. It is interesting to note that in the main those Courts dispose of cases more timeously than others.

Can I illustrate one instance of this problem. By far the busiest High Court is Auckland. The following chart gives staff turnover compared with the civil service average:

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<sup>14</sup> *Supra* n.3.

<sup>15</sup> *cf R v Rongonui* [2000] 2 NZLR 385.

<b>TURNOVER</b>		
<b>Period</b>	<b>Auckland High Court</b>	<b>Civil Service Average</b>
<b>July 2002 to June 2003</b>	<b>28.20%</b>	<b>11%</b>
<b>July 2003 to June 2004</b>	<b>17.10%</b>	<b>12%</b>
<b>July 2004 to June 2005</b>	<b>23.80%</b>	<b>14%</b>
<b>July 2005 to June 2006</b>	<b>12%</b>	<b>not yet available</b>

I wish to emphasise that since the Department for Courts was absorbed back into the Ministry of Justice, serious attempts are being made to bring about adequate training and to increase the quality of support received by Judges. Indeed, these efforts can be seen from the figures I have given for Auckland for the last year, where the Ministry of Justice has expended considerable resources leading to the dramatic improvement shown above, and I acknowledge gratefully the tremendous efforts of the Ministry's Higher Courts group. But it would be wrong to underestimate the task being faced. Can computer based training really be a substitute for years of hands-on experience? Can constant staff turnover lead to an improved service? The answers, I suggest, are self evident.

This means our busiest High Court, as an example, and the one under most pressure of work, faces high turnover and inexperienced staff, ill trained and ill equipped, to carry out their functions. On an individual level, most work diligently to assist Judges, but they are hampered by lack of training and experience, and much time is wasted as a consequence of the problem I have just identified.

Can I give you an example. Recently in Christchurch I was faced with doing an urgent appeal from a circuit Court. I requested the District Court file, which is self evidently something an appellate Judge would be required to read. The person in charge of the particular section responded that I was not entitled to it and refused to send it. That person maintained that they could not find anything in any staff material that showed they had to forward the District Court file to a Judge hearing an appeal. By the time the realities of life were pointed out, and the file forwarded, it was too late for the appeal to be heard and it had to be adjourned.

## **THE PROFESSION**

While in the main lawyers are honest and honourable, there is a small proportion who manipulate the system for their own benefit. In my experience, it is a proportion that is increasing. But there is, perhaps at a subconscious level, a desire by lawyers to cling to what they know. There is, of course, a level of self interest in this, but in the main it comes from the natural conservatism of lawyers.

### **Criminal**

In crime, pleas of guilty are often not entered until after depositions. Of course, an accused person is entitled to test the evidence at depositions if they wish to. But all too frequently, accused who are clearly guilty do not plead until after depositions. The consequence to the accused person of that delay in admitting guilt is that they fail to receive the full allowance available for an early guilty plea. In serious matters that means an accused person can often spend additional time in prison.

In Auckland there is the pilot Public Defenders scheme which receives one in three criminal defence files that would have otherwise gone to the private bar under legal aid. Anecdotal evidence from a Judge at Manukau District Court reveals that the Public Defenders' clients plead guilty at no higher rate than those represented by legal aid lawyers. But the interesting figure is that the vast proportion of those within the Public Defenders' system plead guilty at an early stage, thereby obtaining for their clients the full available benefit. The Judge described the Public Defenders as "a breath of fresh air".

It is extraordinary to find that some depositions take nearly as long as the ultimate trial. While there will often be justification for extensive cross examination at depositions, my experience is that, in the main, all it achieves is to divulge to the Crown what the defence will be or what gaps there may be in the Crown case. The Crown are happy to fill the gaps before trial.

I know there are continued complaints about the poor rates of remuneration obtainable from legal aid. And it is perhaps that which has led to the cynical view many Judges have, that matters run to depositions simply to increase the fee.

This problem relating to depositions, and their contribution to delay, has undoubtedly led to the amendment in the Criminal Procedures Bill. Clause 92 of that Bill reads:

#### **92 New Parts 5 and 5A substituted**

The principal Act is amended by repealing Parts V and VA, and substituting the following Parts:

#### **"Part 5**

#### **"Committal proceedings for indictable offences**

145 Purpose [and overview]

- (1) The purpose of this Part is to reform the law relating to preliminary hearings in criminal proceedings by replacing preliminary hearings with a standard committal procedure (which does not involve a hearing or consideration of the evidence), that is followed unless a party has been granted leave to orally examine a witness (in which case a committal hearing is held).

This has been opposed by the Law Society, and there are legitimate concerns, especially surrounding full and proper disclosure being made by the police. But it seems to me this legislation is a direct response to what I perceive to be an abuse of the depositions process.

The position is compounded by the failure of most District Courts to hear depositions within 84 days of charge. That is the agreed case management standard which is honoured only in the breach. It is met in some circuit Courts, such as Dunedin, that are not particularly busy. However, most busy District Courts fail to meet this deadline. The reality is that the average time for depositions before committal to the High Court is 170 days, double the agreed standard. This delay makes it almost impossible to meet a nine-month time standard for trials.

The figures displayed earlier make it plain that criminal trials are taking longer. I have given some reasons. But there is still room for the profession to assist and improve.

From the perspective of a number of Judges, the Crown, on occasions, overcharges. For example, in methamphetamine trials they tend to sweep all of the peripheral offenders into a conspiracy with the major dealers or manufacturers. As a consequence, some addict who does the rounds of pharmacies, attempting to purchase cold tablets for the necessary pseudoephedrine, is in the same conspiracy as the major offenders. Frequently they plead guilty to the lesser charges but not the conspiracy, because of concerns as to the impact on any term of imprisonment they are facing. However, the reality is that even if convicted, their culpability, and ultimate sentence is seldom affected. I am pleased to say that both the Police and Crown seem to be recognising this problem, and conspiracy charges now, more frequently, concentrate on the main culprits.

As a consequence of the increase in appeals based on counsel incompetence it is noticeable that many prosecutors prosecute defensively. In other words, they are predicting just such a ground of appeal and cover all aspects of evidence, notwithstanding concessions that have been made by trial counsel. This leads to significant increases in trial length.

At trial, both criminal and civil, there is frequently extended, and often pointless, cross-examination with spurious defences being run. In other words, a “muddying of the waters” defence is common. In criminal cases some prosecutors take the view that many trial Judges are not robust enough in controlling this behaviour. There is validity in the criticism. Furthermore, some Judges do not comment when non-essential witnesses fail to be called, but the defence, in addressing the jury, uses that by way of criticism of the Crown case. The same is often the case when defence counsel in closing puts forward a theory or proposition for which there is simply no evidence. I sympathise with the Crown view, and personally agree with it. But in defence of cautious Judges, it is necessary to be careful as to the extent of interventions during trial or during counsel’s address. But as long as comments are fair and balanced, such comments should be made.

Section 367 (1A) of the Crimes Act 1961 reads:-

(1A) Without limiting subsection (1), the Court may give an accused person leave to make an opening statement, after any opening by the prosecution and before any evidence is adduced, for the purposes only of identifying the issue or issues at the trial.

A number of defence counsel avail themselves of the rights set out in that section. It focuses the issues, and allows the jury to concentrate on them. In my view, it can significantly shorten the length of trial, yet many defence counsel do not use the section, preferring to keep the defences away from the jury until the Crown case is concluded.

## Civil

Most civil cases start with a letter making outrageous and self-righteous claims written by a young staff solicitor who seems totally unable to take an objective view of their client's position. From the beginning, they do not seek to resolve matters other than in a confrontational manner. The response from another staff solicitor acting for a defendant is in the same vein, and positions become polarised early on. The necessary stiff dose of reality only arrives when the matter is looked at by a partner, or the instructed barrister, usually just before trial.

I remember as a very young lawyer being in the robing room when the late Alf Jeavons and others were waiting for a jury in a personal injury case. As was the wont of that group, they were chatting over a gin. In the course of it Alf Jeavons remarked, no doubt directed at some of the youngsters in the room, that "the best Court lawyers kept their clients out of Court". Never was a truer word spoken. The problem is caused by a subjective and uncritical acceptance of a client's views of a dispute. I have seen many cases dissolve completely when the plaintiff is cross-examined and has to explain critical and long since discovered documents. The most basic objective preparation for trial would have readily revealed the weakness of the case. But then, of course, the fees would not be so high and I suspect much modern civil litigation culture is fee-driven.

We continue to face the problem of unnecessarily complex and prolix pleadings. Five, six, and even more causes of action are commonly pleaded. This has been deprecated by the Courts on a number of occasions, but such comments from the Bench seem to have little effect. Counsel, when asked how the additional causes of action assist, are usually unable to answer. The reality is that they all depend on proof of the same primary facts, and there are no advantages in available remedies or damages from the additional causes of action pleaded. It is simply poor pleading.

Discovery continues to eat up huge amounts of time and funds. Parties to litigation insist on discovery and inspection over kill, often because of a lack of trust between practitioners. Sadly, such lack of trust is sometimes justified. It seems to me some draconian measures are needed to control this area. It has been grappled with by Rules Committees all around the world without any great success. Perhaps the time has come to visit the consequences of failure to discover on solicitors and place the risk of inadequate discovery on them.

Many of these problems arise today because the primary obligation of lawyers to the Court is often overlooked or ignored if it runs counter to what is perceived to be the client's best interests.

## Legislature

Of course, the legislature is responsible for the creation and passage of laws. It is not for the Judges to be involved in this process, although there are occasions when consideration of the Judges' views would be of value. This would be particularly so in areas such as the new Evidence Act, or reforms of criminal procedure. My concern is that while it is for Parliament to make the laws, seldom is consideration given to the resource implications of that new legislation.

Some time ago in New Zealand legislation was introduced dealing with domestic violence. It was far-sighted, and introduced important reforms. But there is a requirement that hearings be heard as soon as practicable. Understandably, they are given priority. Around 5000 such applications are filed each year.<sup>16</sup> The impact on the Family Court was obvious. But I doubt the legislature gave any thought to the resource implications of the legislation. The extra resources tend only to become available long after the legislation comes into effect, by which time Judges are drowning in a sea of extra work.

In my view, if new legislation has resource implications for the Judges, or staff, it has to be addressed from the introduction of the legislation so the additional resources are in place when the new legislation takes effect.

## Legal Services

Another area that seems to me to need consideration is the operation of the Legal Services Agency, and in particular the certification of those able to do certain work. In my experience, we have more and more relatively inexperienced counsel appearing in serious criminal cases. That inexperience leads to some of the problems I alluded to earlier, as to both length of trial and counsel incompetence as a ground of appeal. The right to counsel of choice has also led to problems. The best of the criminal bar are extremely busy, but are, understandably, reluctant to turn work away. As a result, schedulers within the Court system, in both the High and District Courts, face considerable difficulties because of the unavailability of these trial counsel. Perhaps assigned counsel need to pay more attention to the professional rules for barristers and solicitors. Rule 1.02 reads:

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<sup>16</sup> E Bartlett, *Family Court Statistics 2004*, Ministry of Justice, February 2006.  
<<http://www.justice.Government.New Zealand/pubs/reports/2006/family-court-statistics-2004/index.html>>  
(21 September 2006)

A practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

### Commentary

(1) It would be improper for a practitioner to accept instructions **unless the matter could be handled promptly with due competence and without undue interference by the pressure of other work or other obligations.** Instructions for work, which is outside the field of competence of a practitioner, should be either declined or, with the consent of the client, referred to another practitioner.<sup>17</sup>

And if we want to consider a really draconian approach, perhaps the time has come to introduce a provision equivalent to that found in the old Colonial Hong Kong Legal Aid Ordinance. This empowered Judges to make an order limiting the hearing days for which counsel would be paid. I recall one major matrimonial property case that lasted 15 hearing days. The Judge would only certify the legally aided counsel for ten days, holding that the conduct of the case by legally aided counsel added five days to the hearing time. The Court of Appeal upheld this decision. There was an immediate, and obvious, improvement in hearing times.

### Technology

In many circles technology was thought to be the answer to many of these problems. It is never an answer, although it can assist. But it is essential that any technology response fully understands the business of Courts and meets the critical needs of users.

Starting in about 1998 the Department for Courts introduced a wide-ranging modernisation programme. This was designed to upgrade registry processes and to introduce technological support. The project team for this ambitious undertaking considered it was not their responsibility to ascertain the ability of staff to do their existing job before the new computerised systems were grafted on top. Eventually, at the urging of the Judges involved in the project, it was agreed to carry out an audit of staff readiness. One of the supposed “better” Courts was chosen. In both the District Court Criminal and Family sections it fell woefully short of showing an ability to do the existing job, let alone anything new. This came as a shock to many, but not the Judges. Again, the consequences are all too obvious.

The technology must be user-driven, but frequently is not. Can I give some examples. As part of this modernisation project it was determined that a computerised case management system was needed to support registry staff. Essentially, it was, and is, a document and file management system. In creating the specifications there was

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<sup>17</sup> Rules of Professional Conduct for Barristers and Solicitors, 7th Edition, New Zealand Law Society. See also Code of Conduct of the Bar of England and Wales, 8<sup>th</sup> Edition, Bar Council of England and Wales.

extensive consultation with staff, Judges, lawyers and other interested parties. Critical functionality was identified, and prioritised. But in the course of the building of the system some of the most important functions simply disappeared.

The District Court handles just on one million infringement notices per year. In addition, there are approximately 150,000 criminal summary cases, 7000 in the Youth Court, and over 2700 trials. This generates huge amounts of paper. One of the most highly prioritised functions was the ability of the case management computer system to deal with these electronically. The system cannot do this.

Another critical function was the rostering and scheduling, i.e., the ability to simply enter into a computer system the type of case, the number of days needed for trial, and any other relevant information, and be instantly advised of the available Courts and Judges. The rostering and scheduling system did not deliver this, yet it is commonplace in systems overseas.

Also critical was the ability for staff to update a Court file in Court as soon as the Judge makes a decision. The system did not deliver that. It was also supposed to operate in such a way that when timetable orders were entered into the system after they were made by a Judge or Associate Judge, reminders would automatically populate a case manager's diary. That did not happen.

Finally, the system was meant to generate reports to assist List Judges and managers. This did not happen. The figures in this paper are, in the main, generated from manual inputs.

All of these critical functions simply dropped out of the specifications without advice or consultation. They were essential to the success of the system and its ability to assist staff in providing proper administrative support to Judges. Investigations as to why the most critical functionality disappeared proved fruitless. The closest I got to an explanation was that they "fell through the cracks". Having been relatively closely involved in the project, I consider the problem was that the software writer responsible for writing the programs did not fully understand the operations of the Courts. Neither were there people of sufficient expertise within the Department for Courts administration to ensure that the necessary level of understanding of how Courts operated was communicated to these technicians.

This was coupled with a heavy reliance on outside consultants who again had little understanding of how Courts operate. I can recall dealing with a consultant in an attempt to revive the rostering and scheduling component. After a year of meetings, he still did not properly understand how Court rostering and scheduling worked.

It is pointless to expend substantial sums in computer systems that are meant to assist administration if critical functionality simply disappears and the system does not meet the needs of the users.

Our present system of evidence recording is slow and cumbersome, notwithstanding the outstanding work done by Associates and Court Reporters. Proceedings simply do not proceed in real time. If they did, savings of up to one-third of hearing time could be achieved. In most Courts in the United States, Court reporting services are contracted out. Most of it is done by what is called CAT (Computer Assisted Transcription) which records evidence in real time. The Court Reporter uses a stenograph machine which is a form of mechanical shorthand. It is recorded on a magnetic tape, as well as the normal punched paper. From that magnetic tape, a computer that has already been populated with the Court Reporter's diary instantaneously translates the shorthand into a transcript. It is, however, expensive, and it is difficult to retain skilled operators in New Zealand because of the sums they can earn in other English-speaking countries.

To that end, it has been determined that the appropriate way forward in New Zealand is by way of digital transcription. Under that system the evidence is recorded digitally and transmitted over telephone lines to a central typing pool. When it is typed, it is then transmitted back and printed in Court. The turnaround time is about 20 minutes. This is a very labour-intensive system, but will generate time savings in excess of 20%.

The Judges have been pushing for improvements in the ways we record evidence for many years. The technology is not particularly new, and as the President of the Bar Association, Jim Farmer QC, noted recently, real-time transcription had been introduced in Australia in the 1980s.<sup>18</sup> The same applies to many other overseas jurisdictions. In the same article he commented on the efficiency of a New Zealand trial he had been involved in, where the parties themselves had paid for a CAT system. I can vouch for the accuracy of his comments. Some years ago I conducted a trial in similar circumstances where the hearing time was cut in half. Given the obvious savings in time, Judges have difficulty in comprehending why such projects have taken years to fund and implement, although again I gratefully acknowledge the current initiatives by the Ministry of Justice in this area and also in the case management computer system improvements.

## **Experts**

The Code of Conduct for expert witnesses is set out in Schedule 4 to the High Court Rules, and reads:-

### **Duty to the Court**

- 1 An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.
- 2 An expert witness is not an advocate for the party who engages the witness.

### **Evidence of expert witness**

- 3 In any evidence given by an expert witness, the expert witness must—
  - (a) acknowledge that the expert witness has read this Code of Conduct and agrees to comply with it;
  - (b) state the expert witness' qualifications as an expert;
  - (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
  - (d) state the facts and assumptions on which the opinions of the expert witness are based;
  - (e) state the reasons for the opinions given by the expert witness;

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<sup>18</sup> Deborah Hill Cone, "Lawyers fund tapes to speed up evidence", *The National Business Review*, 8 September 2006.

- (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
  - (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
- 4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
  - 5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

**Duty to confer**

- 6 An expert witness must comply with any direction of the Court to—
  - (a) confer with another expert witness:
  - (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:
  - (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
- 7 In conferring with another expert witness, the expert witness must exercise independent and professional judgment and must not act on the instructions or directions of any person to withhold or avoid agreement.

The code reminds expert witnesses that their overriding duty is to impartially assist the Court. This has long been the case.<sup>19</sup> Notwithstanding this, at the commencement of every brief of expert evidence there is the mantra that the expert has read the Code of Conduct, understands it and abides by it. In most cases from there on the evidence is as partisan as always. Such witnesses are usually called by a party’s lawyer and are generally called because it is believed their evidence supports the party’s case. No doubt objective ones are discarded in favour of partisan ones. As Hon Geoffrey Davies, a former Judge of the Queensland Court of Appeal, noted:-

There is now a substantial body of empirical evidence demonstrating the malleability of memory and how it may be distorted by contact with others during the retention and retrieval phases. This is true, not only with respect to witnesses of fact, but also to opinion witnesses.<sup>20</sup>

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<sup>19</sup> *National Justice Compania Naveria SA v Prudential Assurance Co Ltd* (1993) 2 Lloyds’ Rep 68, 81.

<sup>20</sup> Honourable G Davies, “Civil Justice Reform: Why We Need To Question Some Basic Assumptions” (2006) CJQ Vol 25 32.

Various techniques have been introduced in an attempt to resolve this problem. One, described as “hot tubbing”, has the Judge and the two experts essentially in debate. The only real answer appears to have been Court-appointed experts that occurs in some other jurisdictions.

Notwithstanding such attempts at reform, the reality is that experts continue to be partisan in the evidence they give, and are advocates for a cause. This has the effect of significantly adding to the length of trials where the expert evidence is central to the issues.

## The Way Forward

Perhaps my views are too critical. In 2000 I attended a World Bank Conference in Trinidad and Tobago. As part of the criteria for obtaining a World Bank loan a country has to review its legal system. This conference was aimed at assisting Trinidad and reducing delays in its Court backlog. Our delays pale into insignificance. It was not uncommon for civil cases to take 13 to 15 years to come to trial. However, I must confess to having heard a strike out case in New Zealand for a matter that was some 36 years old.<sup>21</sup>

However, the problem is too serious to be flippant about. Many techniques have been attempted to reduce delay, and although the system is much more efficient than the days of *Jarndyce v Jarndyce*<sup>22</sup> it is still far from satisfactory. But our attempts at reform have essentially been designed to refine our existing system. Cost and delay (and its impact on increased costs) are now having a serious impact on access to justice. Even quantitative figures show a trend that none of the steps we have taken have reduced costs, and they have only had partial success in relation to delay.

Justice Felix Frankfurter said:

The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction.<sup>23</sup>

If we deny access to our Courts to a large proportion of New Zealanders, public confidence in the Courts will erode and the moral sanction will disappear. As well, the Courts are presently under closer examination than ever before. The parliamentary conventions are by and large ignored, and Judges are frequently criticised by politicians for their decisions, especially in the area of sentencing.

There is also increased media examination and criticism, and there are frequent allegations of miscarriages of justice in criminal cases, which used to be relatively rare. In the civil area there have been intensive reforms by rules in the United Kingdom<sup>24</sup> and legislation in the United States.<sup>25</sup>

As I have said, all the reforms attempted have not questioned the validity of our adversarial system. They have all been attempts to modify or amend the way in which our present system is run.

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<sup>21</sup> Kutt v Southland Area Health Board (HC, Inv, A.384/54, 6 August 1990, Master Hansen).

<sup>22</sup> C Dickens, *Bleak House* (1852-1853).

<sup>23</sup> *Baker v Carr* 369 U.S. 186, 267.

<sup>24</sup> The Woolf Reform: Civil Procedure Rules.

<sup>25</sup> Civil Justice Reform Act 1990 (USA).

The major response has been the introduction of case management. But there has been a significant increase in the number of aged trials on hand over recent years, and this has occurred despite the commitment of considerable judicial and administrative resources to managing the problem. Despite these exertions, no satisfactory answer to the problem has been found.

In relation to the Courts civil jurisdiction, case management is now ensconced in the High Court Rules.<sup>26</sup> Notwithstanding that, it can only claim, at best, partial success. Case management has been criticised for adding to costs or to the front-end loading of costs.<sup>27</sup> However, doubt has also been cast on the methodology of that report.<sup>28</sup>

But it seems to me there is a more fundamental problem with case management which I briefly referred to earlier. To be successful, it depends upon the commitment of both Judges and administrators to the process. New Zealand experience has shown there are differing levels of commitment. In my view, a truly effective system cannot be dependent upon the subjective approach of the participants. As a result, the success of case management in New Zealand has been limited and sporadic. And while in many jurisdictions, including New Zealand, case management has held or reduced delay, litigation costs continue to spiral.

Notwithstanding that our tinkering with the present system has not achieved the required results, we cling to our system, self-righteously and self satisfied that it is the best in the world. But it appears to me that we have never seriously considered the alternatives and contemplated the advantages of them. If there are serious flaws in our system, particularly those that effect access to justice, surely it is time to at least question our system, and to debate whether there is a better one.

I am, of course, conscious that such a suggestion raises difficult and serious questions, not the least being constitutional ones and the protection of rights, that would be required to be carefully considered. But surely the time has arrived at least to debate them.

We could, of course, continue attempting to fine-tune the existing system. For example, in criminal cases we could require written statements of defence to be filed. We could stop treating juries as immature by letting them be aware of an accused's bad character, as happens in the United Kingdom.<sup>29</sup>

In civil cases, we could make case management more draconian, with significant cost implications for those who fail to comply. But nothing in our years of tinkering to date gives me any optimism that the problems in our system will be successfully addressed.

It does seem to me that there are also structural faults in our system that require debate. I imagine that the public at large would think the object of trials would be to ascertain the truth and to arrive at a just result. But our adversarial system is not designed for that. There are judicial pronouncements to this effect in the civil jurisdiction.<sup>30</sup> I suspect society would also want a criminal system that pursued the objective truth.

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<sup>26</sup> Rule 425 and following.

<sup>27</sup> "The Rand Report (The Rand Corporation, Santa Monica, California, 1996).

<sup>28</sup> "Codifying the Practice of Discretion: Reflections on Civil Justice Reform Act (1990) The Civil Jury and the Rulemaking Process" Professor Judith Resnik, unpublished, March 1997; and "A Study of Differential Case Management Implemented Pursuant to the Civil Justice Reform Act 1990 in the Federal District Court for the Northern District of Ohio" (1996).

<sup>29</sup> Section 101 Criminal Justice Act 2003 (UK).

<sup>30</sup> *Air Canada v The Secretary of State for Trade* [1983] 2 AC 394 (per Lord Denning at 411 and per Lord Wilberforce at 437).

In a series of recent articles<sup>31</sup>, Hon Geoff Davies, has strongly suggested that it is the adversarial system itself that prevents reform. He considered there are two underlying assumptions in our civil justice system. The first is that once proceedings are commenced they will be resolved by trial and judgment. The second is that the best way of resolving a dispute is by a contest between competing adversaries. He considers these assumptions fallacious. In relation to the first, because the vast majority of proceedings are resolved by agreement in any event. As to the second, he gives three reasons. The first is that adversarialism, by its nature, tends to distort the truth, whether that be fact or opinion. The second is that the main reason for the high cost of legal services is that the adversarial system is labour-intensive, and it is the adversarial nature of the system that makes it labour-intensive. The third fallacy, in his view, is that “it is wrong to think or assume that, even if our system is very costly and does not require a search for or necessarily uncover objective truth, it has the advantage of fairness. In practice, however, it is fair only between parties of equal bargaining power and, more often than not, that is not the case.”

In his 2006 article in the CJO he is also critical of the adversarial mindset of Judges and lawyers that exists because of our legal training, the natural conservatism of lawyers, and the fact that the economic driver is the business of litigation. He considers there is a subconscious reluctance by lawyers to embrace reforms which, it is perceived, will reduce incomes.

Clearly it is not a view that finds favour with all Australian Judges. In Chief Justice Spigelman’s address<sup>32</sup> he stated:-

Our system for the administration of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of Government. We have deliberately chosen inefficient ways of decision-making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of Government decision-making in order to ensure that the Government operates with the consent of the governed.

The Chief Justice seems to be suggesting that the legal structures of European countries, as an example, fail to protect rights and freedoms, which can only be guaranteed by the English common law system. I doubt the Chief Justice meant that, but if he did, it is questionable.

In the 2003 Edward Bramley Memorial Lecture, Lightman J considered six areas of development in recent times.<sup>33</sup> The first three of these were the reforms introduced by Lord Woolf, the rise of alternative dispute resolution (ADR), and the Human Rights Act. He noted the success of the Woolf Reforms and alternative dispute resolution, but concluded:-

But it must be acknowledged that for all these advances, litigation of any substantial size (most particularly in the High Court) remains an extravagantly expensive and unpredictable exercise. As I recently said at a

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<sup>31</sup> Supra n.20; Honourable G Davies, “Court Appointed Experts” (2004) 23 CJC 367; and “Civil Justice Reform” (2006) JJ 19 Volume 16, N 1, 5.

<sup>32</sup> Supra n.2.

<sup>33</sup> Mr Justice Lightman, “The Civil Justice System and Legal Profession – The Challenges Ahead”, The 6<sup>th</sup> Edward Bramley Memorial Lecture, University of Sheffield, 4 April 2003.

conference on the primary form of ADR, namely mediation, the present system affords limited grounds for any confidence that any proceeding will result in a correct or just result: at best it affords a limited bias in that direction. These facts constitute a deterrent for any but the most gung-ho litigant whatever the merits to making or defending a claim.

Of the adversarial system, he said:-

The adversary system has a number of disturbing features for those who are more interested in the achievement of justice than in the playing of the game.

Lightman J then turned to consider three negative developments. Two of these have application in New Zealand. The first point made, which is one I have already stressed, is that the cost of litigation has reached such a level that it cannot be afforded by the mass of the population. The second point was the metamorphosis of the legal professions into legal businesses. He said:-

A change has occurred of the foremost significance but very largely unrecognised. It is in respect of the standing and structure of the legal professions. In a word, whilst the legal competence of members today is significantly higher than it was thirty years ago, the law today is less a profession than a business where financial pressures and inducements in place of traditional standards are the driving force.

At least in the area of civil litigation, surely there is enough evidence to suggest we should be seriously considering alternatives to our costly system which prices the bulk of citizens out of the Courts. I believe we need a radical rethink as to how we resolve disputes. The law is no longer a profession – it is a business. The Lawyers and Conveyancers Act 2006 will likely exacerbate that. The Act allows law firms to be incorporated with shareholders other than lawyers.

At long last we need to confront a conflict that has always been inherent in legal practice. That is the conflict of the need of a lawyer to make a living and the interest of the client. They do not always coincide. The best answer for the client does not always maximise fees.

In 1998 the Lord Chancellor's office in the United Kingdom conducted a series of conferences considering the then proposed Woolf Reforms. At one of these, Judge Jergen Bier, of the Commercial Appeal Court in Berlin, spoke of the German experience. It was apparent from his address that trials were shorter, the Judge asked questions before counsel and controlled who were called as witnesses, and the lawyers were paid on the basis of a set fee for their work. People that I have spoken to in the United Kingdom with extensive experience of civil litigation in Europe, say the cost there would be well under half that for litigating in the United Kingdom.

Apparently, since 1998 things have moved even further forward. As Lightman J noted:-

It is sufficient to say that increasingly informed advisers wisely recommend prospective litigants ... in order to make savings in terms of cost, where it is practicable, to sue on the Continent e.g. in Holland, Belgium or Germany, rather than here. In those countries at least equal

justice is obtainable at a fraction of the cost. The movement of litigation to foreign courts for this reason has been particularly noted in the field of intellectual property and most especially patents, where the forum of choice is Germany.<sup>34</sup>

If regular litigants are taking their dollars elsewhere, surely we should all sit up and take notice. Unfortunately, such options are far from practicable in New Zealand, but that should not prevent us from properly exploring the benefits of other systems.

In an address to the 1999 Australian Institute of Judicial Administration's Annual Conference, I concluded by saying:

It will be pointless in ten years' time to say that the case management experience has been no more than a finger in the dyke and not a complete answer. We must immediately consider whether the adversarial system is the most cost efficient and fair way of meeting litigants' expectations. We must also, in the interests of litigants, begin inquiries into ways in which substantive and procedural laws of other jurisdictions can be incorporated into our existing body of law to meet litigants' expectations. Commercial litigants expect greater harmonisation than presently exists.

Seven years on I have concluded that case management is no more than "a finger in the dyke". There is little evidence to suggest the challenge I issued has been taken up, and the great bulk of the population continue to be effectively denied access to the Courts. The time has come for a more radical rethink of our approach to litigation. The concern I have is that I doubt this will be seriously and objectively considered. Judges and lawyers are perhaps too wedded to our present system to objectively consider change. I would like to think the same would not apply to academic lawyers, notwithstanding their backgrounds being the same as Judges and lawyers, but my reading of Zander and Resnik suggests otherwise.

I believe we must have this debate if we are going to allow citizens to reclaim their Courts. I would like to think that Professor Frank Guest would have approved of the debate being initiated by this faculty, in the same way they have tackled other controversial issues in recent years.

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<sup>34</sup> Supra n.33.