

ADDRESS TO THE SUPREME AND FEDERAL COURT JUDGES' CONFERENCE

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“A painful and uncongenial obligation”? Appellate correction of error of fact in the electronic age.”

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I am asked to address the responsibilities of an appellate court for correction of error of fact on general appeal. A number of questions have been suggested for consideration. Do modern methods of evidence recording prompt reconsideration of the scope of rehearing undertaken on appeal? Does the technology require appellate responsibility today to extend beyond issues raised by the parties where error is apparent from the record? To what extent is it now necessary for an appellate court to review the evidence in the court appealed from? Do modern recording methods affect the traditional acceptance that the trial judge has particular advantages which an appellate court should be slow to interfere with? Although the focus of this session is on civil appeals, I am not convinced that there is sound basis for a difference in appellate function between civil and criminal appeals, at least beyond the heightened responsibility that rightly attaches wherever issues of transcendent importance to the community fall for consideration. That is however an essentially contextual approach I would not confine to criminal cases alone. Such heightened scrutiny is prompted also by cases which concern institutional competencies, or general legal principles, or human rights.

The extent to which an appellate court should defer to the judge of first instance is, I have been told, a matter of some controversy on this side of the Tasman. (It would be odd if it were not, because it is a hardy perennial). A recent decision of the New Zealand Supreme Court on the point, affirming the obligation of the appellate court to come to its own determination,¹ which I had thought uncontroversial, has been cited so many times by intermediate appellate courts in New Zealand in the last two years as to suggest that it has caused some surprise if not consternation. I want to start with a little background about appeals and how the record of court proceedings has evolved before turning to my principal points. They are that an appeal court on first general appeal cannot defer to first instance determinations and that judges should obtain all the help they can get from modern technology, as I think the wider community would expect.

What are appeals for?

If attitudes to appeal in common law jurisdictions sometimes appear ambivalent, perhaps it is because appeals are statutory impositions of comparatively recent origin. Initially at least their scope was limited by the

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¹ *Austin Nichols v Stichting Lodestar* [2008] 2 NZLR 141.

inscrutability of verdicts of the jury, the principal fact-finding body in both civil and criminal cases. In addition to the impenetrability of verdict, the oral nature of trial and the absence of effective recording of the proceedings (and indeed often the reasons for judgment), effectively precluded supervision even by an appellate court minded to second-guess verdicts.

Those were the conditions in which appellate function developed, largely constricted by the case-stated carapace and upon a strict distinction between facts and law which was thought to mark the limits of the institutional competencies of jury and judge. In an age when methods of trial and judgment are very different, it is questionable whether the strict division between law and fact (always blurred at the margins) is indeed useful in considering appellate responsibility for general appeals. (Even where appeals are confined to error of law, maintaining the distinction continues to vex). The earlier wave of technology which brought us evidence recording (in increasingly useful form) and reporting of judicial decisions led to a shift in judicial methodology at trial and appellate level. Video recording is simply another extension of the technology.

When the garbled reports to be found in the Year Books were replaced with accurate records, so that inadequacy in judicial reasoning was laid bare for all to see, there clearly had to be a revolution in judicial methodology at trial and appellate level. If reasons are given, they have to justify the outcome. Sir William Wade once explained the oddity of judicial review for error of law on the face of the record on the basis that it was more that judicial flesh and blood could bear.² It is not only judges who find error unacceptable and decisions which are wrong rankle equally whether the error is one of law or fact.³

The advantage modern recording brings to appellate function meets a shift in public expectations of law. Technological advance not only make capture of judicial reasoning and the evidence upon which it is based available, it coincides with modern popular expectations of rationality and justification. Such expectations are to be seen in all areas of public decision-making, as illustrated by Official Information legislation⁴ and Ombudsmen⁵ and other mechanisms by which modern government is checked. International human rights initiatives treat a right to appeal as part of the right to fair criminal trial⁶ and statements

² M Aronson, BD Dyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed. (Sydney, 2004), p 104 citing W Wade and C Forsyth, *Administrative Law*, 7th ed. (Oxford 1994), p 306. This passage was dropped from the current edition of Wade.

³ As Cooke P saw in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

⁴ Official Information Act 1982.

⁵ Under the Ombudsmen Act 1975.

⁶ The New Zealand Bill of Rights Act 1990, in implementation of the International Covenant on Civil and Political Rights, makes it part of "minimum standards of criminal procedure" under s 25 that there is a "right" in respect of both conviction and sentence "to appeal according to law to a higher court against the conviction or against the sentence or against both".

of rights to civil justice may yet be interpreted or expanded to include effective appellate review .

In his Final Report on Access to Justice Lord Woolf suggested that appeals serve two principal purposes:⁷

the private purpose which is to do justice in particular cases by correcting wrong decisions, and the public purpose which is to ensure public confidence in the administration of justice by making such corrections and clarifying and developing the law and establishing precedents.

Second tier appellate review is often explained according to a division between “error correction” (the task of intermediate courts of appeal) and the development of law (a task from which intermediate courts of appeal are not excluded but which are generally acknowledged to be principally the responsibility of the final court of appeal). I am not concerned here with correction of error of fact on second appeal and note simply in passing that, as cases such as *Dederer*⁸ in Australia and *Brooker*⁹ in New Zealand illustrate, one appellate judge’s concurrent findings of fact is another appellate judge’s concurrent error of law . More relevantly here, the distinction may not be useful on first general appeal and indeed has unfortunate tendencies if it builds up a sense that correcting fact distracts the appeal court from the more important task of correction or development of law .

In the age of justification, as Chief Justice Gleeson and others have referred to our age,¹⁰ distinctions between correctable error of law and irremediable error of fact no longer convince. They may look suspiciously like devices employed by appellate courts to cut down their workloads or, worse, to avoid a function seen by appellate courts as demeaning. To the extent appellate courts have been able to avoid such work because of limitations now able to be overcome by modern technology, the bluff has been called. In a culture of justification, appellate judges lag unacceptably behind community expectations if they are prepared to concede substantial deference to trial judges in areas of fact and evaluation, if such deference is no longer defensible for reasons of institutional advantage. The correction of error in civil as well as criminal judicial determinations is a public as well as a private good.

I want to address two reasons for deference that I think need to be questioned before moving on to other reasons which may be rather more valid. They are the advantage that the trial judge was formerly thought to possess and

⁷ *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor’s Department, London, 1996), Chapter 14, para [440].

⁸ *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] 234 CLR 330.

⁹ *Brooker v Police* [2007] 3 NZLR 91 (SC).

¹⁰ M Gleeson, “Outcome, Process and the Rule of Law” (2006) 65 Australian Journal of Public Administration 5, p 12.

institutional deference. First, I should say something more about appeals by rehearing on the enhanced record.

Rehearing on the enhanced record

Appeal is not a second opportunity to run the trial. Decisions of first instance courts are not provisional and it is exaggeration to suggest that close appellate scrutiny treats them so. First instance decisions are binding unless set aside on an appeal in which the appellant has the burden of demonstrating error. Apart from rare cases where full rehearing of a case is mandated by statute (and with which I am not concerned here),¹¹ such an appeal takes place on the record of the lower court supplemented occasionally and only where leave is given by additional evidence. The appellant must show that the decision appealed is wrong. In the unlikely event that the appellate court is left in a state of equipoise as to the correctness of the decision below, it must be affirmed.¹²

Today it seems extraordinary to think how recently the only record of proceedings was that taken by the Judge in his Notebook or that reports from trial judges had to be regularly sought by appellate courts to supplement the record available. With the revolution in record-keeping in courts, the appellate court can check the conclusions drawn by the trial judge against the evidence and documents produced at trial. The scope for deference in fact-finding has shrunk considerably. Even within the area of credibility assessment, in which the advantage of the trial judge is still generally acknowledged, recordings which contradict or supplement the flat transcript may erode the advantage.

Video recordings and links have proved their worth at first instance in determination of challenges to the admissibility of confessional statements and as a means for getting before the court the evidence of vulnerable witnesses. Where video-recorded evidence is admitted at trial, appellate courts in New Zealand have reviewed the recordings, which are exhibits in the proceedings, where the argument on appeal indicates that it would be helpful for the Court to make its own assessment of them.¹³ Video records of evidence must be

¹¹ An example is the appeal provision in issue in *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) (appeal from the Lakes District Waterways Authority to the District Court).

¹² In England and Wales the task of the appellate courts under the Civil Procedure Rules has changed from “rehearing” to “review”. The shift in wording seems to have been to correct popular misconception while preserving the technical understanding applied in Australia and New Zealand. Certainly the Court of Appeal has concluded that the approach of the appellate courts remain the same: *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 (CA).

¹³ See, for example, *R v Clarke* [2009] NZCA 219; *R v Clayton* (CA 302/06, 11 October 2006, Robertson, Williams and Panckhurst JJ); *R v Panoff* [2008] NZCA 188; *R v Bain* [2009] NZCA 1 (on appeal the Supreme Court did not review the recording in issue on the basis it accepted the disputed words were “there to be heard” but did not consider that outweighed expert evidence that it was impossible to know whether they were in fact words or expelled breath: [2010] 1 NZLR 1). In *R v Pawa* [2007] NZCA 281, where the issue was whether

similarly helpful. The opportunities are not reasonably to be resisted in cases where trial conduct is in issue and cannot be determined from the transcript or where the transcript is ambiguous and the manner of delivery may clear up the meaning of the witness. In the past it has been necessary for appellate courts to receive evidence of those who were present at the hearing as to their recollection of what they saw and their impressions.¹⁴ An audiotape of the Judge's directions to the jury were admitted for the same purpose in Scotland.¹⁵ Where video records of the evidence at trial are available, the appellate court must be better served by direct access to them. The need for such recourse is not likely to be frequent. The appellate court is entitled to the assistance of counsel in identifying the sequences which are material. As at present is the case with review of the written record, the basis on which the conscientious discharge of appellate responsibilities requires review (as will usually be necessary for example where application of the proviso following determination of trial error is in issue),¹⁶ will have to be made out and in addition, the basis on which recourse to the video of the trial is required instead of a review of the written record. But in those cases where the impression made by a witness or the body language of the judge may be significant, can reviewing the superior record be responsibly avoided?

I do not think that the greater accuracy and scope of electronic records present difficulties of kind for appellate courts not present in the past. Of itself the accessibility of a more complete record is not an invitation to appellate judges to stray beyond the arguments addressed to them by the parties. In general there are good reasons why appellate courts should not take it upon themselves to identify points not raised by the parties. The common law tradition is that judging gets done "from the ground up",¹⁷ without agendas. Although development of law in a common law system is a consequence of appellate determinations, the function being performed is checking for error in an actual controversy identified by the parties. From time to time it is necessary for appellate courts to respond to injustice insufficiently identified by counsel, particularly where the judges have responsibilities under legislation such as the New Zealand Bill of Rights Act 1990 or where there are issues of such importance as to compel intervention. Whether there is sufficient justification will no doubt always be controversial. But in such cases, the superior record available is to be welcomed if it aids correction of error, as it is equally to be welcomed in those cases where it assists in the determination of errors raised by the parties.

questioning in a police interview was unfair, overbearing and intrusive, the Court of Appeal indicated that it might have been interested in viewing the tape but did not because neither counsel had invited it to do so (para [7]).

¹⁴ As in *R v Fotu* [1995] 3 NZLR 129 (CA).

¹⁵ *Clark v Her Majesty's Advocate General* [2000] Scot HC 79.

¹⁶ As in Australia, in the "real review of the trial" referred to by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at pp 126-127, so in New Zealand (*R v Matenga* [2009] 3 NZLR 145 (SC)) an appellate court must review all evidence in deciding whether the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on the evidence.

¹⁷ Associate Justice David Souter, "Gerald Gunther" (2002) 55 Stanford Law Review 635, p 636.

There are challenges to the administration of justice in the enhanced records of evidence quite apart from their use on appeals. Control of such records is likely to be rather more difficult. In New Zealand exhibits such as video-recordings of interviews with accused have been sought by television producers. (No doubt they are encouraged by the access they have to televise proceedings). Decisions in New Zealand have recognised that the public interest in open justice supports access by the news media to the record of the Court. A majority of the Supreme Court has suggested such access may be necessary to enable the public to assess whether court rulings are correct.¹⁸ This reasoning has implications for video records of trials. It may well be argued that open justice requires the provision of the video record of a hearing to enable the public to form its own view of the correctness of judicial determinations or jury verdicts. Privacy, confidentiality, the interests of finality and rehabilitation and other interests will have to be brought into the assessment whether release of such records is appropriate. As we have seen in New Zealand in the case of television recordings of trials, it is very difficult to control use of such recordings once made and that is likely to be the experience with video records of evidence once released.

Improvements to the record have already led to closer appellate scrutiny of findings of fact at first instance, including the facts behind jury verdicts where convictions are said to be unsafe. Although continued deference to jury verdicts in criminal cases is partly urged on the basis of the separation of institutional responsibilities between judges and jurors,¹⁹ recent cases may be moving away from such division of responsibilities justification.²⁰ On that view, the difference between a jury verdict and the finding of fact by a judge at first instance is simply in the demonstration through reasons of the path taken to the finding by the judge. While that may provide more opportunity for an appeal court to find error in approach, an appeal on the basis that the evidence did not support the conviction, like appeal on the basis that the findings of the judge are not supported by the evidence, requires the appellate court to review the evidence to establish whether the ground is made out not on a deferential basis but to its own satisfaction according to the standard of proof required. These grounds of appeal require conscientious review, as the High Court of Australia has emphasised. The latest technological developments do not make matters more difficult for appellate courts. Indeed, the search methods available and the quality of the transcripts make conscientious review easier.

The advantage of the trier of fact

In the past the supposed advantage of the trier of fact was the principal reason given for deference to the findings of fact made at first instance. That

¹⁸ *Television New Zealand v Rogers* [2008] 2 NZLR 277.

¹⁹ See, for example, Lord Rodger of Earlsferry, "What are Appeal Courts For?" (2004) 10 Otago Law Review 517, p 521.

²⁰ *Chamberlain v R* (1984) 153 CLR 521, *Morris v R* (1987) 163 CLR 531. See, in New Zealand, *R v Matenga* in which the Supreme Court made it clear that it is the opinion of the appellate court that is critical, not a prediction of what a jury would do ([2009] 3 NZLR 145 (SC)).

advantage has shrunk. In the first place, the role of oral evidence has diminished, not only because of the increased reliance upon documentary primary evidence in civil trials but also because of other records made possible in modern society: those produced by surveillance cameras, electronic financial transactions, and our telephone, email, and computer dependency. DNA analysis and improved forensic science also diminish reliance upon the memory of witnesses. Findings of fact increasingly depend on inferences from records such as these. It has been long accepted that appellate courts are under no disadvantage compared to trial courts in their ability to draw such inferences themselves.

Secondly, senior judges at least since Lord Devlin²¹ have expressed misgivings about comfortable assumptions that a trial judge can assess credibility by observing the demeanour of the witness. More than 20 years ago Lord Bingham expressed the view that “to rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm”.²² Similar scepticism is expressed in the Australian edition of *Cross on Evidence*, referring to Australian authority.²³ The cognitive illusions shown by psychological studies are dealt with by Keith Mason in his article “Unconscious Judicial Prejudice”.²⁴ Kirby J identified five reasons for erosion of the justifications for the traditional view in *State Rail Authority of New South Wales v Earthline Constructions*.²⁵ Modern research supports these doubts and suggests that confidence in the ability to make assessments of credibility from demeanour is often the result of acculturation amounting to unconscious bias.²⁶ Rosemary Pattenden cites growing awareness that “appearance and demeanour are poor indicators of credibility in the stressful environment of a trial”:²⁷

The internal consistency and plausibility of evidence, which can be gauged from the transcript, may be a better guide to a witness’s honesty.

In those few cases where the way in which a witness gives evidence may indicate evasiveness or invention which cannot be captured in the written transcript, review of a video may be a complete answer, making deference unnecessary.

²¹ See *The Judge* (Oxford, 1989), p 63.

²² “The Judge as Juror: the Judicial Determination of Factual Issues”, (1985) 38 *Current Legal Problems* 1, p 8.

²³ (Looseleaf, July 2009), para [11150].

²⁴ (2001) 75 *Australia Law Journal* 676.

²⁵ (1999) 160 *ALR* 588 (HCA).

²⁶ See discussion by Kirby J in *State Rail Authority of New South Wales v Earthline Constructions* at para [88]. As to assessment of expert witnesses see Porter and Parker “The Demeanour of Expert Witnesses” (2001) 33 *Australian Journal of Forensic Sciences* 45, p 48, expressing the more generally applicable view that how a person appears or acts is an unreliable guide to truth.

²⁷ “The standards of review for mistake of fact in the Court of Appeal, Criminal Division” (2009) 1 *Criminal Law Review* 15, p 27.

The traditional approach, that credibility findings are largely unreviewable by an appellate court, remains the position in many jurisdictions. It is for example by the Federal Circuit in the United States.²⁸ In Canada, the appellant must demonstrate “palpable and overriding error” before an appeal court will authorise disturbance of findings of fact made at trial.²⁹ Although in *Fox v Percy* the High Court maintained the traditional approach that findings of credibility must be clearly wrong to justify an appellate court taking a different view,³⁰ Gleeson, Gummow and Kirby JJ referred to the reduction in the occasions when witness credibility is critical, largely because of developing insight that the ability to tell truth from falsehood by observing the demeanour of a witness is suspect.³¹ Instead judges now look for contemporary context and contextual likelihood in coming to their conclusions. Ipp J has expressed support for this development, considering that findings based on demeanour are “often idiosyncratic and unpredictable”.³² The modern emphasis on reasons for judgment also encourages greater search for objective measurement. It is rare today to see the formula widely employed in my youth by magistrates and a few judges that “having seen and heard the witnesses, I prefer the evidence of the plaintiff (or defendant). Judgment accordingly.”

Despite the caution required in credibility findings, the appellate court must undertake a “real review”, weighing conflicting evidence and drawing their own inferences and conclusions.³³ That I think is the position also in New Zealand (although Ipp J expresses some doubt about it). Ipp J acknowledges “compelling policy reasons to limit fact appeals” but considers that appellate courts “should regard demeanour-based findings of fact, contrary to the probabilities, as appealable error if adequate reasons are not given for them”:³⁴

Such a rule would advance the administration of justice. The virtually untrammelled power of trial judges to make what, practically speaking, are final determinations affecting the fate of individuals on the ground of what the judges happen to feel about witnesses’ physical reactions when testifying, is an anachronism in a system of justice that prides itself on objectivity and rationality.

There are advantages a trial judge has over an appellate court. They include the ability to see the whole picture developed, usually in some logical sequence, and the opportunity provided by the trial progress to reflect on all the evidence.³⁵ So it may be accepted that caution in differing from the

²⁸ “Standards of Appellate Review in the Federal Circuit: Substance and Semantic” (2002-2003) 11 Fed Circuit Bar Journal 279, pp 306 - 307.

²⁹ *Housen v Nikolaisen* (2002) 211 DLR (4th) 577.

³⁰ (2003) 214 CLR 118.

³¹ At para [31].

³² “Problems with fact finding” (2006) Australian Law Journal 667, p 669.

³³ *Fox v Percy* (2003) 214 CLR 118 per Gleeson CJ, Gummow and Kirby JJ at para [23].

³⁴ “Problems with fact finding” (2006) Australian Law Journal 667, p 674.

³⁵ This is the key factor identified by P Gillies and S Galitsky in their article “Is the judge sovereign in fact?” (2006) 28 Australian Bar Review 192, p 196.

assessment of the trial judge is appropriate. But such caution prompts appellate effort, not deference.

Institutional deference

The second argument for deference which I think no longer passes muster is the view that unless a margin of appreciation is conceded to the trial judge, insufficient recognition is given to Parliament's conferral of trial responsibility on the first instance court.³⁶ This is an argument of institutional usurpation and legitimacy.³⁷ Associated with it is the persistent notion that the position of the first instance judge is demeaned by appellate intervention that is not sufficiently deferential and that such approach undermines confidence in the trial courts.³⁸ I question the validity of these objections. They seem to me to be wrong-headed. Indeed, they may be mischievous in encouraging over-personalisation and resentment of appellate correction.

Some of the arguments for institutional deference arise out of the use of the jury as trier of fact and where juries are retained, principally in criminal cases, deference on the basis of institutional division of responsibility is still urged on the basis that juries and judges draw on different skills and that the division of responsibility between them is constitutional. So there are suggestions by the Privy Council on appeal from New Zealand in *R v Howse*,³⁹ echoing similar remarks by the Court of Appeal in *R v Mcl*,⁴⁰ that where there has been significant trial error application of the proviso would usurp the role of the jury. More recently, the Supreme Court in New Zealand in *R v Matenga* held that if an appellate is "sure of guilt", there is no room for institutional deference and the proviso must be applied.⁴¹

Whatever the special position of the jury (which is called upon to make community judgments), it does not follow that similar deference is due to a fact-finding judge. Where there is a statutory right of general appeal, first instance jurisdiction is conferred subject to that institutional check. I am not concerned here with more limited appeals. But the general appeal, conducted by way of rehearing on the record, requires the appellate court to determine the controversy on appeal in accordance with its own opinion.⁴² Although appeals in England and Wales are now subject to leave requirements, the requirement of leave is directed at weeding out unmeritorious appeals, not ones in which the

³⁶ Lord Rodger of Earlsferry, "What are appeal courts for?" (2004) 10 Otago Law Review 517, p 521; R Nobles and D Schiff, "The Right to Appeal and Workable Systems of Justice" (2002) 65 Modern Law Review 676.

³⁷ Cf R Nobles and D Schiff in "The Right to Appeal and Workable Systems of Justice" (2002) 65 Modern Law Review 676, pp 677 – 678, although they acknowledge appeal in itself confers legitimacy on first instance decision-making.

³⁸ T Jenns, "Is it all Downhill for Second Appeals?" (2006) Civil Justice Quarterly 439, pp 441 - 442.

³⁹ [2006] 1 NZLR 433 at para [45].

⁴⁰ [1998] 1 NZLR 696 at pp 711 - 713.

⁴¹ [2009] 3 NZLR 145.

⁴² *Austin Nichols v Stichting Lodestar* [2008] 2 NZLR 141.

determination at first instance may be wrong but upon which refusal of leave could be justified by a conceded margin of appreciation.

It is often said that an appellate court should defer to the assessment of the court appealed from where the conclusion under appeal is one upon which “reasonable minds could come to different conclusions” or where the decision is one that was “open” to the lower court. Associated with this reasons for a “hands off” approach is the view that factual findings, particularly those entailing evaluative assessments, are in the nature of a discretion. So, in one article it is said of fact finding responsibility:⁴³

What is delegated to decision-makers usually involves discretion: there are a number of ways to assemble the evidence required for a decision, and the decision itself is a matter for judgment. In this situation, successful delegation depends on the appeal body not interfering whenever it would, in the same situation, have come to a different conclusion. To adopt such a basis for appeals is potentially to undo what has been delegated.

Care needs to be taken with the concept of discretion. Lord Bingham tells the story of the formidable Judge of his youth who would ferociously demand of counsel, “Is this not a matter within my discretion?”⁴⁴ and who, when cowed counsel hastily conceded the point, would subside thankfully in the knowledge that he was immune from appeal. He would not rest so easy today. Conferral of jurisdiction in itself cannot properly be described as conferral of discretion.⁴⁵ Evaluative conclusions are properly seen as inferences of fact or fact and degree on which an appellate court has no institutional disadvantage.⁴⁶ Where jurisdiction is conferred subject to general appeal no judge has discretion to be wrong, if error is the estimation of the appellate court. I do not here refer to the supervisory jurisdiction exercised where true discretions, usually as to remedy, are conferred upon a first instance tribunal and where manifest error or error in principle must be shown before an appellate body can intervene. But cases which suggest of evaluative determinations that if different minds could reasonably come to different conclusions the appeal court should defer treat general appeal as though judicial review or appeal on point of law only.⁴⁷

⁴³ R Nobles and D Schiff, “The Right to Appeal and Workable Systems of Justice” (2002) 65 *Modern Law Review* 676, p 678.

⁴⁴ “The Discretion of the Judge” in *The Business of Judging, Selected Essays and Speeches* (Oxford, 2000) 35, p 35.

⁴⁵ A point made by Lord Diplock in relation to the inherent power to strike out proceedings for abuse of process in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p 536.

⁴⁶ I am not dealing here with appeals from expert tribunals which may raise different considerations and in respect of which appeals are generally restricted to points of law.

⁴⁷ As Lord Woolf has suggested, writing extra-judicially, there is little difference between the two. H. Woolf, “A Hotchpotch of Appeals – the Need for a Blender” (1988) 7 *Civil Justice Quarterly* 44, p 48.

The baggage of *Wednesbury* review which suggests that, in the absence of defect in procedure, reviewable error occurs only where the decision-maker has taken leave of his senses is not appropriately applied to general appeal on fact. It is the reasonableness of the decision in the estimation of the reviewing or appeal court that matters, not the rationality of the decision-maker. A “margin of appreciation” for domestic implementation of an international commitment or to a decision-maker entrusted with a true discretion is one thing. Its application to appellate review is quite another, even in cases where a determination is a matter of evaluation or judgment. Statements to the effect that such decisions are comparable to the exercise of discretionary jurisdiction were rejected by the New Zealand Supreme Court.⁴⁸ The House of Lords has deprecated a suggestion by judges in the English Court of Appeal that a margin of appreciation is to be conceded on general appeal to the first instance court.⁴⁹ Lord Mance, with whom other members of the House of Lords agreed on the point, considered that conceding a margin of appreciation went too far by seeming to “equate the approach of an appellate court to findings of fact with its approach to decisions taken in the exercise of a discretion”.⁵⁰ He considered such approach to be wrong.

Access to justice arguments for appellate deference

If the advantages of the trial judge and notions of institutional competence no longer convince as arguments for appellate deference, there remain policy considerations based on access to justice and finality of litigation. They are behind some of the reforms in the United Kingdom which followed the Woolf Report⁵¹ and influenced the recommendations of the Auld Report.⁵² In the United Kingdom they have prompted greater use of leave provisions and rearrangement of appellate responsibilities in large part to avoid overloading the courts of intermediate appeal. It may well be that, in New Zealand, if not in Australia, the workload of the Court of Appeal will prompt statutory reassessment of its criminal appellate responsibilities at least.

I do not seek to minimise the impact on the justice system of increasing the number of appeals. There are risks to achieving finality in litigation and questions of access to justice if intermediate appellate courts are overworked. But they need to be squarely confronted and by the appropriate institution. The overload of an intermediate court of appeal does not however justify the court itself in using deference on fact finding as a means of managing its caseload. On second appeal leave provisions generally set up criteria such as the public interest, a point of general principle, or miscarriage of justice, and permit greater scope for appellate management of workload through refusal to reconsider all factual findings. The interests of finality in litigation and cost

⁴⁸ *Austin Nichols v Stichting Lodestar* [2008] 2 NZLR 141.

⁴⁹ *Datec Electronic Holdings v United Parcels Service* [2007] 1 WLR 1325.

⁵⁰ At pp 1347 – 1348.

⁵¹ *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor’s Department, London, 1996).

⁵² *A Review of the Criminal Courts of England and Wales*, (Lord Chancellor’s Department, London, 2001).

become more important. But on general first appeal, deference to the court appealed from in matters of fact or evaluation amounts to refusal of jurisdiction. These policies in finality and rationing of appellate resources are best confronted by statutory limits on appeal as through leave provisions or perhaps provisions for summary disposition or screening, if the community considers such rationing is preferable. The proper scope for judicial management may be more modest and along the lines of the ideas floated by Gault J in New Zealand⁵³ and Kirby J in Australia⁵⁴ for skeleton reasons and party-preparation of reasons. Corner-cutting in such matters may be dangerous, as illustrated by the Privy Council decision in *R v Taito* which, to huge embarrassment, held that the practice of the New Zealand Court of Appeal in considering appeals on the papers (and without the submissions of counsel were appellants were denied legal aid by the court) was inconsistent with the Court's statutory duty and the New Zealand Bill of Rights Act.⁵⁵

More ambitious limits on first appeal may not be well received by the wider community. It is not clear that arguments of finality, access to justice, and cost will be seen to outweigh the value placed on right result. Rule of law rhetoric may have more popular hold. I think judges should be cautious here. The availability of appeal on fact gives legitimacy to the exercise of authority by the trial court and fits within wider expectations for accountability and safeguard against error. It serves a public purpose to correct such error.

Conclusion

Justice Michael Kirby has referred to the time when re-examination of the facts was considered beneath judicial dignity and "a painful and uncongenial obligation," a description I have used in my title. But such attitudes he believed could "safely be consigned to the history books".⁵⁶

It is true that conscientious discharge of the appellate function was more limited in days when the record was incomplete. But it is hard to think that anyone would want to go back to those days. In the past the huge areas left to first instance courts to decide facts without effective review must have led to considerable injustice. In his "Fairytale Speech" to the Public Teachers of Law in 1972 Lord Reid estimated that nine-tenths of the time of a judge at first instance "is taken up with getting at the facts":⁵⁷

More often than not once the facts are determined the law is clear. If it is not and the judge goes wrong the Court of

⁵³ "Whose Day in Court is it Anyway?" in D Carter and M Palmer (eds), *Roles and perspectives in the law: essays in honour of Sir Ivor Richardson* (Wellington, 2002) 631.

⁵⁴ "Appellate Advocacy – New Challenges", The Dame Ebsworth Memorial Lecture, London, Tuesday 21 February 2006).

⁵⁵ [2003] 3 NZLR 577.

⁵⁶ *State Rail Authority of New South Wales v Earthline Constructions* at para [88].

⁵⁷ "The Judge as Law-Maker (1972) 12 Journal of Society of Public Teachers of Law 22, p 22.

Appeal can set him right. But if he gets the facts wrong his mistake is generally irretrievable.

I do not think such outcome can be countenanced today.

Attitudes as to the extent of appellate review appropriate inevitably swing around, sometimes according to whether complacency in such things has been recently jolted, as such complacency always is from time to time by discovery of miscarriages of justice that have passed appellate muster. Such miscarriages of justice remind us for a time to keep appellate eyes on the ball. But vigilance inevitably relaxes over time or retreats under the press of cases and has to be rediscovered. These shifts make it important to keep in mind what appeals are for. Is it romantic to take the view that the role of any court is to permit citizens to obtain right according to law, as the judicial oath provides? Sir Gerard Brennan thought the purpose of any court is “the pursuit of justice according to law”.⁵⁸ Lord Devlin considered that the “social service” the judge renders to the community is “the removal of a sense of injustice”.⁵⁹ In fulfilling their different functions, these ends are equally the responsibility of appellate courts as they are of trial courts.

The improvement in the record and modern emphasis on reasons for decisions has reduced the area of effective immunity from appellate scrutiny. In the past deference was a consequence of inadequacies in the record. Now that those impediments have shrunk, deference cannot be elevated to a standalone principle of appellate conduct without leaving large areas of judicial determinations effectively unsupervised, a result that cannot be regarded with equanimity. Miscarriages of justice brought to light by modern scientific tools such as DNA cannot have been confined to cases in which such tools can be used. Appeal courts, perhaps conscious of their own contribution to miscarriages of justice, have been more prepared to be conscientious in review. This climate is not to be treated as unwelcome. It fulfils the statutory responsibility of appeal.

If removing a sense of injustice is a function of appellate courts, conscientious check of facts is appellate responsibility and conscientious check must be conscientiously carried out against the record now available. Far from undermining the position of the trial judge, conscientious discharge of the responsibilities of general appeal without institutional deference is essential to the legitimacy of trial courts. We live in an age that insists on accountability for the exercise of all public power and within a culture of justification that requires the full reasons for exercise of such power to be laid out. Public expectation in such a culture is that the institutional responsibility of appellate courts is correction of error however it arises.

⁵⁸ “Why be a Judge”, Speech to the New Zealand High Court and Court of Appeal Judges’ Conference, Dunedin, 12 – 13 April 1996.

⁵⁹ “Judges and Lawmakers” (1976) 39(3) Modern Law Review 1, p 3.

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