WHETHER THE ADVERSARIAL PROCESS IS PAST ITS USE-BY DATE - A NEW ZEALAND PERSPECTIVE

Paper by the Hon Robert Fisher QC for the NZ Bar Association and Legal Research Foundation Civil Litigation Conference 22 February 2008, Auckland, New Zealand

Introduction

1. I look forward to Sir Gavin Lightmans paper and address which will respond to the question whether the adversarial process in general is past its use-by date. The paper which follows tackles the same question from a New Zealand perspective.

2. In this I acknowledge two handicaps at the outset. One is that in discussing the future of civil litigation it is difficult for those of us who make our living from it to avoid the subconscious influence of our own role within it. Former judges usually want more arbitration and private mediation. Sitting judges usually prefer major trials of social, commercial or legal significance; few relish case management, interlocutory applications, and high volume trivia. Barristers are usually protective of their role as highly paid gladiators who control the procedural destiny of their own cases. Civil servants usually place the emphasis on throughput rather than quality. Most politicians want to reduce complex problems to populist sound-bites. Academics consider it their painful duty to rein in the dangerously wide freedoms arrogated to themselves by judges. And when was the last time the presenter of a conference paper made his or her mark by applauding the status quo? On a topic like this we are all hopelessly mired in self-interest. All we can do is try to evaluate the idea rather than its source.

3. The other handicap is that a short paper on a vast topic must oversimplify. If any of the possibilities that follow e.g. a more proactive role for judges, truncated hearings, mandatory mediations, combined criminal and civil hearings, or a civil equivalent to public defenders happened to find favour, it could only be after a fine balancing between the many respectable arguments for and against.

4. I will start by considering what we mean by the adversarial process before going on to consider whether New Zealand should throw it overboard in favour of something else.

What do we mean by the adversarial process?

5. An adversarial process is a means of resolving disputes by allowing the parties to present their evidence and argument, and challenge opposing evidence and argument, before a passive judge or jury for decision. The easiest way of identifying its characteristics are to contrast it with its chief western rival, the inquisitorial process. The former is a procedural feature of the common law derived from medieval England; the latter a procedural feature of civil law systems derived more immediately from 19th century France.

6. Essential features of the adversarial process have been helpfully summarised by the Australian Law Reform Commission (ALRC) as follows:

> In the litigation system the trial is the distinct and separate climax to the litigation process.
>
> Courtroom-room practice may be subject to rigid and technical rules.
>
> Proceedings are essentially controlled by the parties to the dispute and there is an emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive. Given the parties opportunity and responsibility for mounting their own case the system is more participatory.
>
> The judiciary possesses an inherent and separate power to adjudicate.
>
> The expense and effort of determination of disputes through litigation falls largely on the parties.[1]

7. They can be contrasted with the essential features of the inquisitorial process which have been summarised by the ALRC as follows:

> In litigation no rigid separation exists between the stages of the trial and pre-trial in court cases. Legal proceedings are viewed as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made.
>
> Rules relating to court-room practice are intended to be minimal and uncomplicated.
>
> The role played by lawyers is less conspicuous with an emphasis on written submissions rather than oral argument. The role of the judiciary is both proactive and inquisitive. The greater directorial role of the judiciary allows less room for the parties to direct their own case. In this sense the system is more hierarchical than participatory.
>
> As officers of the state the judiciary possesses no separate and inherent power to adjudicate.
>
> A greater proportion of the effort and expense of dispute determination through litigation falls on the state.

Current problems with the adversarial process

8. Before asking whether a civil justice regime is a success or failure we need to identify the ends it was designed to achieve. In common law countries the desired substantive ends might be described as the just resolution of disputes, the maintenance of social order, and the clarification of law as a guide to future conduct. The procedural process designed to deliver those ends must do so with reasonable expedition and economy.[2]

9. Criticism of human institutions is perpetual, healthy and inevitable. Regimes for delivering civil justice are no exception. Every aspect comes under constant fire. That is as it

should be. However I do not detect widespread criticism of the substantive outcomes produced by common law courts. The chief target of complaint is the delay and expense in getting there. It is an argument about process, not substance.

10. Overseas commentators increasingly complain that under an adversary system, civil litigation is beyond the reach of all but the rich and the legally-aided; that of those cases which do come to court they are won or lost by the quality of the representation which a party can afford;[3] that even the rich often choose to by-pass the courts on the ground that the cost in time and money is disproportionate to the sum or issue at stake; that this is due at least in part to the mercantilisation of the legal profession;[4] that the fees charged by at least some members of the bar are astronomical;[5] and that those who embark upon adversarial litigation pay an unacceptably high price in time, stress, and financial uncertainty.[6]

11. New Zealand has not escaped these criticisms. Here too it has been said that the sandwich class between the wealthy and the legally aided are unlikely to afford anything but the simplest and shortest of civil litigation,[7]that permitting non-lawyer shareholders of incorporated legal firms can only exacerbate the mercantilisation of the legal profession,[8] that few standard civil proceedings are heard within a year of filing or within the timing aspirations set by the National Case Management Committee,[9] that for some time there has been a progressive increase in both the interlocutory period and the duration of trials themselves[10] and that New Zealands court system appears to be doing less work and doing it less efficiently.[11]

12. Not all of these criticisms seem justified. An increasingly complex society produces increasingly complex disputes. A tribal dispute over the ownership of a spear was (I assume) quick to resolve because it did not involve a debenture trust deed. The more complex the dispute, the more elaborate the investigation, preparation, crystallisation of issues, and trial.

13. For me, that is the explanation for both the trend in court statistics and the rise in legal costs. With all due respect to the Law Commission, the fact that many small trials have been replaced by a smaller number of long trials does not indicate that New Zealand courts are doing less work and doing it less efficiently. [12] What it indicates is that modern courts are routinely faced with processing issues at a level of complexity that would have baffled the courts of an earlier era.

14. So I am not sure that criticism of courts and lawyers always takes into account the extra demands that an increasingly complex society places upon them. That said, however, there is no denying the problem of cost, whatever its cause. There is a triple whammy here the direct cost to the parties of paying lawyers, experts and court fees, the indirect cost to the parties in prolonged personal time, stress and financial uncertainty, and the revenue cost to the taxpayer in providing courts and legal aid. Of these, the direct cost to the parties is probably the greatest problem. As Justice John Hansen has pointed out, the cost to the parties of litigating a major dispute is now beyond the means of those who are neither wealthy nor eligible for legal aid.[13]

15. There are ways in which the parties might receive more help over costs. One could be the new provisions for contingency fees in ss 333 and 334 of the Lawyers and Conveyancers Act 2006. This reform will permit conditional fee agreements which provide for both a normal fee (in the sense of remuneration that would be payable in a non-contingent case) and a premium to compensate for the contingency nature of the fee (i.e. the risk that payment could be denied or delayed). Another source of assistance could be the growing field of litigation costs insurance. A third could be the creation of a civil equivalent to the new, but already well received, criminal Public Defenders Scheme.

16. However assisting parties in those ways simply redistributes the cost within the community. It does not strike at the heart of the problem which is the creation of a disproportionately high cost in the first place. Nor could it be an answer to complaints about the time it takes to dispose of proceedings, the level of court fees, the cost of legal aid, or inadequacies in the remuneration paid by way of legal aid. In most cases the transactional cost of processing litigation is simply too high.

17. Anything we can do to reduce the absolute cost of litigation should be done. Any cost will always be too much from the parties point of view. But the exercise is at least economically rational if the amount expended represents a reasonable proportion of the sum at stake. What of the growing number of cases in which the total cost paid by the parties approaches, and in some cases even exceeds, the sum for which the plaintiff would have settled? Leaky building litigation is the archetype. The sheer number of parties, the complexity of the issues, and the antiquity of the facts to be investigated, frequently means that taking the case to trial would be uneconomic compared with the sum which might be recovered. To my mind the real problem is not so much absolute cost ($500,000 to run a $10 million claim may well be acceptable) as proportionate cost ($500,000 will certainly be unacceptable to run a claim for $100,000 even though the same professional time may have been required).

18. I do not see this as a criticism of the legal profession. It is a criticism of a system which assumes that the full gamut of civil procedure appropriate to a multi-million dollar commercial dispute is equally appropriate when dealing with the leaky walls of a suburban house. The need to create the Weathertight Homes Tribunal was an admission that our general courts could no longer economically process complex disputes involving several hundred thousand dollars. Nor is the problem confined to leaky buildings. It applies across the board.

19. How has this problem of proportionality come about? The trouble is that the adversarial system is extraordinarily labour-intensive. To have the facts and the law independently investigated by professional lawyers and experts on behalf of each of the parties, presented in court in an open-ended oral setting, independently assessed by a judge, and then further reviewed in multiple levels of appeal, adds up to a lot of hours by lawyers, experts and judges. Even more professional hours are required if the civil proceedings are duplicated by a similar exercise conducted by the police, prosecution and defence lawyers, jury and/or judge, in a criminal setting. And it is that fundamental process, invented to deal with the robust disputes of mediaeval England, that we are still trying to apply to a claim for breach of copyright in

computer software progressively designed by seven programmers in three countries over eight years. Not surprisingly, the cost of a typical civil case under the adversarial system in theUnited Kingdom is likely to be more than twice that required under the inquisitorial system in continental Europe.[14]

20. What we have to do, therefore, is find a way of matching the transactional cost to the sum or issue at stake. Our approach is relatively satisfactory at the extremes. Disputes of up to $7,500 ($12,000 by agreement) are handled in the Disputes Tribunal in a summary way without legal representation, with an emphasis on a mediated outcome, and with broad discretions as to procedure and result in the absence of agreement.[15] At the other extreme, civil disputes involving a million dollars or more are usually handled with reasonable cost efficiency. Between those extremes, however, lie the majority of cases in which the legal costs are disproportionate to the sums or issues at stake. As the Chief Justice of New South Wales, James Spigelman, said:

> In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings. The principal focus of improvement, now that delays are well on the way to being acceptable, must be the creation of a proportionate relationship between costs and what is at stake
> If the legal profession and the courts cannot deliver a more cost efficient service, then we will be bypassed in commercial dispute resolution as, to some degree, we have been bypassed in other areas of dispute resolution. This process requires a collaborative approach by the courts and the profession.[16]

21. No-one involved in commercial mediation could help but be aware of the harm that is currently caused by costs which are disproportionate to the sums or issues at stake. By the time the case comes to mediation, the stakes have often been raised by sunk legal costs which represent a substantial proportion of the claim itself. In extreme cases they can exceed the sum claimed. The parties can be reluctant to forego what they see (however irrationally) as an investment in the recovery or defence of the original claim by settling at a figure based solely on the likely recovery at trial.

22. On a leaky building claim, for example, plaintiffs may be reluctant to accept a sum which, after payment of legal and expert costs, would leave little over for the required remedial work. For their part, defendants find it hard to assess their exposure at trial without regard to the heavy investment they have already made in their own defence, especially when they know that their costs exposure to the plaintiff could be no greater than the prescribed scale. So the unwelcome third party at the mediation is sunk costs. These situations arise because there had been no-one with the authority and expertise to take charge of the dispute at the outset. What is required in the parties own interests is a set of directions designed to ensure that procedural elaborateness, and hence time and cost, will not exceed a level commensurate with the amount at stake.

False hopes

23. I do not think that the answer lies in exhortations to the legal profession to reduce their fees. Although I have not seen any studies on the point, I would be surprised if the average income of legal practitioners has risen relative to the rest of the community for a very long time. It is the rising complexity of disputes that has led to more time-consuming and elaborate procedures. That in turn has led to more professional time. It takes lawyers much longer to process a dispute over a voidable preference than a dispute over a cow. It is unreasonable to expect practitioners to absorb the extra cost.

24. Nor do I think that the answer lies in increasing legal aid. At $1.6 billion per annum, taxpayer expenditure on legal aid is already four times the annual expenditure on the courts themselves.[17] Increasing legal aid funds redistributes the burden within the community but does not reduce the cost itself. The way to achieve that is to give the parties a process which limits the creation of cost in the first place.

25. Could the answer lie in switching to an inquisitorial process? Some commentators think so. The adversarial process is said to be based upon the two false assumptions that proceedings will be resolved by trial and judgment (when in fact the vast majority are resolved by agreement) and that the best way of resolving a dispute is by a contest between competing adversaries (when in fact adversarialism distorts the truth, is unduly labour-intensive, and overlooks frequent inequality in bargaining power between the parties).[18] The call to consider an inquisitorial system has also been made in New Zealand.[19]

26. It is far from clear, however, that our problems would be solved by simply switching to the inquisitorial. For every criticism of the adversarial system, an equal and corresponding one can be found in relation to the inquisitorial. It is true that the adversarial system is labour-intensive, expensive, time-consuming and subject to distortions caused by inequality of arms. But the inquisitorial system is paternalistic (the responsibility for investigating and resolving disputes is placed upon the state), is subject to the inefficiencies of all bureaucracies, and is more vulnerable to influence, coercion and corruption. It is questionable whether investigation by a special kind of civil servant will, in the end, be as effective in ascertaining the truth as powerful statements on both sides of the question.[20] In an age of transparency, there is much to be said for a dispute resolution process which is open and participatory. The lack of any finite trial date to which all procedures are directed can cause European proceedings to drift.[21] Participation by private individuals working with an independent judiciary in an open forum may provide a more suitable setting for controlling the executive and for complementing the broadness of generalised legislation with fact specific precedents.

27. The true position is that neither the adversarial nor the inquisitorial has a monopoly on desirable features. The smart thing to do would be to borrow the best of both worlds. But before we could do that we would have to accept that to gain some of the benefits of the inquisitorial process we would have to compromise the thoroughness and purity of our common law system. CouldNew Zealand citizens, lawyers and judges stomach this?

The ideal justice fallacy

28. At the heart of our present dilemma is the ideal justice fallacy. The fallacy is the touching assumption that ideal justice is both attainable and every persons right. It tends to be assumed that justice is an absolute which justifies the full panoply of court procedures regardless of the magnitude and nature of the dispute. Greeted with indignation are suggestions that certain disputes do not warrant legal representation, formal pleadings, full discovery, the right to join third parties, the right to cross-examine, more time to prepare, endless amendments to pleadings, another adjournment, unlimited witnesses, and submissions unlimited by page or time.[22] Appellate courts, too, can sometimes be guilty of prolonging an endless search for substantive justice without overt balancing against the competing values of expedition, economy and finality.

29. There are in fact two bitter pills to swallow. One is that ideal justice is unattainable by any system run by humans. The notion that by devoting sufficient resources to the task we could achieve ideal justice is, like Father Christmas, a myth. Who is to say whether the resources devoted to investigating the Kennedy assassination or the death of Princess Diana produced the ultimate answer. Even dedicating the entire New Zealand police force to the investigation of one testamentary promises claim for a decade would give us only an approximation of the true facts. And even if the facts could be ascertained, and the top one hundred jurists in the country sat on the case for another decade, the justice of the resultant decision would lie in the eye of the beholder. The best we can hope for in any system of litigation is that it will produce results which most people would say is right most of the time.

30. The other pill is that even if ideal justice were attainable through adequate resources, we could not afford it. We can no more afford optimum justice than we can afford optimum medical care or optimum education. Like doctors and teachers, we have to use a finite resource to best advantage. Selections must be made. A heart operation warrants much time and money. A common cold does not. In the legal world we have to devote to each dispute a sum of money, and an amount of time, that is reasonable having regard to the magnitude of the sums or issues at stake. Some cases warrant a procedural Rolls Royce. Others will have to make do with a Lada, and still others a bicycle.

31. There is nothing new in this. The classic procedural bicycle is the Disputes Tribunal referred to earlier. In the interests of economy it excludes legal representation, pleadings, interlocutory procedures, traditional trial procedures and painstaking research into the law. In varying degrees, this acceptance of a relatively humble level of procedure is repeated in most statutory tribunals and specialist courts. The problem is that there is little or no provision for it when a civil dispute comes before our courts of general jurisdiction. When they go there, everyone rides in a Rolls Royce whether they asked for one or not. And if they can not afford a Rolls Royce, they are left on the roadside. The state offers no alternatives.

32. Nor is legal expense the only thing which must be kept proportionate to the sum or issue at stake. Equally important is expedition. The importance that parties place upon expedition is illustrated by the permanent reliance often placed upon interim decisions. A substantial proportion of intellectual property and commercial disputes go no further an interim

injunction. The losing party elects to accept the provisional decision and move on. To an even greater extent the same is true of provisional adjudications under the Construction Contracts Act 2002. What this tells us is that in a surprisingly high proportion of cases a relatively cursory examination of the merits will be sufficient for the parties purposes.

33. Many will object that curtailing procedures and truncating trials would be contrary to natural justice. Natural justice is a core element in common law systems. We would never want to turn our back on it. But the full bells and whistles of traditional court procedure are not a dictate of natural justice. The fundamentals of natural justice are absence of bias, opportunity to present ones case, and opportunity to respond to adverse material. So long as these are observed, the form which natural justice takes in any particular case is responsive to the context and requirements of that case.[23] Natural justice does not demand the Rolls Royce we presently provide in our courts of general jurisdiction.

34. Everything comes at a price. Where cost and speed is not an issue, full civil litigation in the High Court, with its unqualified access to interlocutory procedures, an open-ended trial, and rights of appeal, will continue to provide the most thorough and skilled examination of a dispute. But in many cases probably the vast majority it would be in the interests of the parties to accept a less thorough means of resolving their dispute.

35. So in making changes the most pressing need is for supervised proportionality. We need a process for ensuring that the nature and sophistication of the procedures to be applied to any given dispute will be commensurate with the issues and sums at stake. We need cost/stake proportionality.

36. How is this to be achieved? In my view by two means: (1) more convergence with inquisitorial systems and (2) more diversity in the available forms of dispute resolution. I will address each in turn.

(1) More convergence with inquisitorial systems

37. Recent years have already seen considerable convergence between adversarial and inquisitorial systems.[24] Civil law countries are adopting more adversarial characteristics.[25] An example is improved access to precedents.[26] For their part, common law regimes have become increasingly dissatisfied with the passive role assigned to judges. So in England the Lord Woolf reforms were designed to move away from a party-controlled adversarial culture towards judicial case management.[27] In Australia it has been pointed out that the civil litigation system is increasingly a blend of adversarial and non-adversarial elements with judges becoming more active in defining the issues in dispute and moving cases forward to a hearing.[28]

38. In New Zealand, too, case management is the most tangible example of convergence with inquisitorial systems. Although the more immediate influence in that respect has been the USA, case management has its philosophical origins in continental Europe.

39. As one of the architects of case management in New Zealand, Hansen J has expressed disappointment at the lack of commitment on the part of judges and administrators (perhaps generously omitting reference to the legal profession).[29] He has lugubriously described case management here as at best, a partial success.[30]

40. In this I think he is too modest. I doubt whether case management is much loved by either judges or lawyers, but it is not there for our benefit. It is easy to forget that before it was introduced the courts were replete with ancient files which had stalled not through any desire for delay on the part of the parties but through inertia on the part of their lawyers.[31] Certainly there are up-front costs in the memoranda, conferences and accelerated processes associated with case management, but my own experience is that these are more than outweighed by the reduction in defended interlocutory applications, inordinate delays, last minute settlements, and aborted trials, of yesteryear.

41. As well as case management, New Zealand has seen other modest steps towards the inquisitorial. Examples are the assignment of particular files to individual judges (albeit occasional), innovative directions for the joint resolution of technical matters by expert witnesses, and a more interventionist judicial role during the trial itself. Equally applicable to this country are the remarks of Kirby P, then President of the New South Wales Court of Appeal:

> It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court listsIn part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements.[32]

42. So as the years go by, common law judges begin to look a little more like their continental counterparts. My prediction is that this trend will continue, albeit within a fundamentally adversarial framework. Particular forms it is likely to take are (i) strategic case management, (ii) supervised proportionality, (iii) judicial interventions during trial where injustice might otherwise result, (iv) combined criminal and civil proceedings, and (v) overarching judicial responsibility for ensuring that a dispute is resolved. I will explain what I mean about each.

(i) Strategic case management

43. Case management is currently designed to provide the parties with a procedural setting in which to make their own strategic decisions. In most cases this works. The parties and their lawyers can usually be relied upon to file pleadings which adequately identify the issues and to select the procedures which will best resolve their dispute. Unfortunately this is not always the

case. Sometimes there are marked disparities in the skill or experience of counsel and in some cases a party is not represented at all. A likely development is that judges will come to recognise a duty to intervene in the strategy of pre-trial procedures where the outcome would otherwise be unjust. So it might become unacceptable for a judge to remain silent where the plaintiff should be applying for summary judgment based on an unpleaded cause of action or where the defendant does not realise that there is an unanswerable limitation defence.

44. Whether such interventions would be a welcome development is part of a larger debate over the competing attractions of adversarial and inquisitorial systems. Some would regard more proactive judging as unfair to those parties who can and do pay for adequate representation. A judge also risks loss of objectivity by entering more actively into the way in which the case is conducted. However those considerations must be weighed against the delays, confusion, cost and injustice which can result from incompetent choices made in the early stages of litigation. Medicine and education serve as precedents for a service provided by the state to a certain level while reserving to the individual the right to pay for more. For those parties who can afford competent counsel, there will be no call for judges to intervene.

(ii) Supervised proportionality

45. It seems unrealistic to expect the parties to initiate choices as to the form and level at which their dispute will be resolved once court proceedings have been issued. If they had been able to agree on something it would not have been necessary for them to come to the court in the first place. It is common experience, therefore, to find that the parties and their lawyers are unable to agree on the question whether discovery, cross-examination or submissions should be limited or that the dispute should be referred to a judicial settlement conference or external mediation. Nor do they always have the expertise to make those choices. If cost/stake proportionality is accepted as a valid objective, it may need to be the responsibility of judges to guide the parties towards it.

(iii) Judicial intervention during trial where injustice might otherwise result

46. As with strategic case management, it may become necessary for judges to take a more active part in a trial where leaving it to the parties might otherwise produce a clearly unjust result. Again, in the majority of cases this would be unnecessary given the responsibilities normally discharged by counsel. It may become necessary to intervene more actively, however, where parties are unrepresented or are inadequately represented.

(iv) Combined criminal and civil proceedings

47. Criminal and civil proceedings are commonly combined under inquisitorial systems. In New Zealand there is little overlap between the two. On a criminal sentencing there can be orders for reparation or compensation, and in some cases an order that all or part of a fine be paid to a victim, but the victim is not separately represented. In civil proceedings for defamation, criminal convictions in relation to the same factual issues are irrebuttable. But for

the most part distinct investigators, lawyers, and judges, are involved. The duplication of police/investigator and professional time before and during criminal and civil proceedings is obvious. In at least some cases it should be possible to combine criminal and civil proceedings without prejudicing the defendants right to a fair trial.

(v) Overarching judicial responsibility for ensuring that the dispute is resolved

48. Case management currently places upon one or more judges the responsibility for moving a case forward to trial with all appropriate opportunities for settlement along the way. If the case comes to trial, the trial judge (usually different from the case management and interlocutory judge or judges) must give a decision on it. In that sequence each judge is normally responsible only for the particular phase of the proceeding that happens to come before that judge. Further, a judge is responsible only for ensuring that there is an outcome in a task over which he or she has direct jurisdiction. There is no individual with overarching authority and responsibility for ensuring that, by whatever means, the overall dispute is resolved.

49. That situation is partly due to lingering perceptions as to the role of common law judges. It is also a result of the master list approach to the allocation of cases among High Court judges. Under a master list system the judiciary has a joint responsibility for ensuring that all cases filed are decided using the particular judges who happen to be on hand when a particular phase of the case is ready for hearing. In recent years the High Court master list system has been softened by the assignment of particular cases to particular judges but only where particular magnitude or complexity is thought to justify departure from the norm.

50. Master lists are to be contrasted with the individual list systems found in some courts overseas. Under an individual list system, each proceeding is assigned by rotation to a particular judge at the time of filing. It is that judges responsibility to usher the case through its various procedural stages and, if necessary, preside over the trial. The judges workload at any given time turns on the state of that judges docket. The docket is the current list of those cases that had been assigned to that judge.

51. The distinction between master and individual lists may sound a minor administrative matter but in practice the psychological impact upon the judges involved is far-reaching. In New Zealand individual listing has been discussed but so far rejected (other than for Associate Judges) due to perceived difficulties in devising an equitable method of allocating files to individual judges and the high turnover of judges in circuit towns.

52. This is not the place to rehearse the many arguments for and against individual listing but in my view one point stands out. Under the current New Zealand system there is no individual judicial officer with responsibility for resolving the overall dispute. Associate Judges attend to most of the pre-trial procedures. Judges hear the trials themselves and often become involved in the procedural steps immediately preceding the trial. But if the focus is to shift from preparation for a forthcoming trial to resolving the dispute by the best and most economical method possible, it may well require a single judicial officer who has an overview of the case as

a whole, an ongoing supervisory role, and a personal incentive to see his or her workload satisfactorily managed by the just disposal of each dispute on that judges docket by the method that best suits it.

(2) More diversity in the available forms of dispute resolution

53. The five most common procedures for resolving substantive disputes in the High Court are currently summary judgment, strike-out application, interim injunction, judicial settlement conference and trial. Of these, the first four will normally occur only if either or both of the parties initiate them.[33] They are optional extras. The default mechanism is that the case will go to trial. Trials are normally preceded by formal pleadings, general discovery and an exchange of written briefs. At trial the normal sequence is an opening address, examination, cross-examination and re-examination of each witness followed by closing submissions. It is unusual to see any limit placed upon the length of any document, the nature or number of the witnesses, or the time which may be spent on any phase of the trial.

54. If the cost/stake proportionality discussed earlier is to be achieved, the court must be given the power, and the duty, to step outside the models described in the last paragraph. At the very least the court will need to consider limiting the length of documents, limiting or dispensing with discovery, written briefs, cross-examination and/or an oral hearing, limiting the nature and number of witnesses and exhibits, and limiting the time which may be devoted to specified phases of the trial.

55. In addition the court will need to consider other ways in which the dispute might be economically resolved. The parties could be directed to use any one of the formal procedures currently available (summary judgment, strike-out etc) but the choices do not end there. In appropriate cases the court might direct the parties to participate in a mini-trial conducted by a judge, an expert determination conducted by an independent expert, a case appraisal,[34]and inquisitorial process, or one of the many other processes discussed in the large body of dispute resolution literature now available. Judges should be trained in the wide range of processes now available and the way in which disputes should be channelled into the process most suitable for that kind of dispute.

56. Of course the standout alternative to trial is now mediation, whether privately or judicially conducted. It has been said in the United Kingdom that by 2020 mediation will be the first and preferred option for settling disputes.[35] Elsewhere, mediation has been elevated to a central and mandatory role in codes of civil procedure.[36] Typical is the legislation inQueensland making mediation or case appraisal at the expense of the parties virtually compulsory through court referral orders.[37]

57. New Zealand has not yet gone that far. In the High Court the parties or their representative must attend a case management conference at which a mandatory consideration is whether it is appropriate to schedule a judicial settlement conference or to allow time for negotiation or a form of alternative dispute resolution.[38] Present limitations, however, are that

there is no similar mandatory consideration at pre-trial conferences[39] and that the only opportunity to require mediation against the wishes of a party is the opportunity to require a judicial settlement conference prior to trial.[40] There does not appear to be any power to order a party to participate in any other form of mediation without that partys consent, and once the trial has begun, consent is required before the matter can be referred to a judicial settlement conference.[41] The court may direct the parties to attempt to settle by mediation or undertake some other form of alternative dispute resolution but it is neither mandatory that the court considers this possibility (other than at the initial case management conference) nor must a party submit to such an order without consent.[42]

58. Although the wisdom of imposing mediation upon an unwilling party used to be controversial, it now appears to be generally accepted that it has a high rate of success. In New Zealand mandatory mediation in the absence of judicial direction to the contrary is already the approach in employment and certain aspects of weathertight homes disputes. A Bill currently before Parliament will extend into legislation a pilot scheme for parenting matters in the Family Court. It seems only a matter of time before it is extended to civil litigation in general.[43] Less important is who conducts the mediations. However the best model may well be a three-pronged approach based on court referral orders referring the dispute to (i) judge-led judicial settlement conferences, (ii) state-provided professionally trained mediators, or, at the election of litigants, (iii) private mediators engaged at the cost of the parties.

59. In all this the courts must resume their role at the heart of dispute resolution. They alone have the authority to co-ordinate the resolution of disputes, whether the actual process of resolving the dispute is publicly or privately conducted. Determination by judicial decision should be only one of the services offered by the state. The over-riding duty should be to ensure that each dispute is handled in a way which is appropriate to the nature of that dispute and at a cost in time and money which is proportionate to the sums or issues at stake. In some cases services will be provided in-house. In others the courts will refer the dispute to other dispute resolution agencies and practitioners, whether state-provided or private.

Conclusion

60. For all but major disputes with competent counsel, the adversarial process in its current manifestation takes too long and costs too much. Too often the cost in time and money is disproportionate to the sum or issue at stake. The game is not worth the candle.

61. The cure is not to throw away the adversarial process. Instead we need to modify it and supplement it with aspects borrowed from inquisitorial systems. Judges should be called upon to undertake tasks which might be described as strategic case management, supervised proportionality, judicial intervention during trial where injustice might otherwise result, and overarching judicial responsibility for ensuring that a dispute is resolved, by whatever means. In suitable cases it should also be possible to adopt the continental practice of combining criminal and civil proceedings.

62. We also need to provide litigants with a greater range of dispute resolution processes. At its simplest this would involve curtailing the elaborate and open-ended nature of the adversarial process whenever the sophistication of the process would otherwise be out of proportion to the sums or issues at stake. Faced with a relatively modest claim, the court should have a power and responsibility to limit the permissible length of party-generated documents, limit or dispense with discovery, written briefs, cross-examination and/or an oral hearing, limit the nature or number of witnesses and/or limit the time which each party could devote to presenting evidence, cross-examining, or making submissions. The courts should also refer disputes to other state or private dispute resolution processes such as mini-trials, case appraisals, and mandatory mediations where indicated by the nature of the dispute. Judges should be given a pivotal role in ensuring that disputes are resolved, by whatever means.

63. The adversarial process is fundamentally sound but we do not need a Rolls Royce to visit the local dairy. Most of the time a Lada or bicycle would do. So long as we recognise that we should also be using many other ways of resolving civil disputes, the adversarial process will continue to be the default mechanism for the foreseeable future.

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[1] ALRC IP 20 supra at p18

[2] For other formulations see the then Mr Justice Lightman Litigation in the 21st Century address to Chancery Bar Association June 1998 cited by Justice John Hansen Courts administration, the judiciary and the efficient delivery of justice: A Personal View (2007) Otago Law Review Vol 11 No 3, 351 at 353 and see also 373; Australian Law Reform Commission Issues Paper 20 Review of the Adversarial System of Litigation ALRC IP 20 at pp 17 and 26.

[3] Sir Gavin Lightman, lecture at Sheffield University quoted in *The Guardian* 8 April 2003.

[4] Gleeson CJ in a speech of 5 October 2007 cited by The Hon C F Finlayson in an address of 26 October 2007 to the Credit and Finance Institute conference, Wellington, NZ; and similar views expressed by Sir Gavin Lightman in the 2003 Edward Bramley Memorial Lecture, University of Sheffield, 4 April 2003 The civil justice system and legal profession the challenges ahead.

[5] For example Lord Grabiner QC has apparently been charging 1,000 per hour since 2003 see Marcel Berlins column, *The Guardian* 8 April 2003.

[6] See, for example, National Consumer Council Report *Seeking civil justice* London 1995; the Then Mr Justice Lightman The civil justice system and legal profession the challenges ahead the 6th Edward Bramley Memorial Lecture, University of Sheffield 4 April 2003; and The Hon G Davies Civil justice reform: Why we need to question some basic assumptions (2006) 25 CJQ 32 and Court appointed experts (2004) 23 CJQ 367 and Civil justice reform (2006) 16, JJ 19 N1, 5 all cited by Hansen J supra (fn 2) at pp 354, 373 and 375.

[7] Hansen J supra at p 354.

[8] Hansen J supra at p 375. Note that under the Lawyers and Conveyancers Act 2006 the definition of incorporated law firm under s 6 and persons qualified to provide legal services under s 21 are also combined with limited liability under s 17.

[9] Hansen J supra at 354.

[10] Law Commission Supra at p 329; Hansen J supra at pp 358 and 359: Over the last 10 years hearing time has increased by approximately a third (3.7 to 5 days for a defended civil hearing) while the number of filings has dropped over the same period to produce a broadly stable number of defended civil cases on hand at any given time. Although the commencement of civil proceedings in the High Court have modestly declined in the last ten years the numbers increased from about 2000 in 1957 to 6800 in 1988: *Legal method in New Zealand*, Butterworths 2001 at p 40 n 53 citing statistics provided by the Department for Courts 14 February 2001 subject to limitations in earlier record-keeping.

[11] overall findings for the three jurisdictions are that demand and throughput are generally falling, cases are taking longer on average to come to court and the courts are typically spending longer on deciding them. In civil cases in particular, users appear to be moving elsewhere for justice or simply not pursuing a legally-based

outcome. In other words, New Zealands court system appears to be doing less work and doing it less efficiently. - Law Commission, supra, at p 329

[12] overall findings for the three jurisdictions are that demand and throughput are generally falling, cases are taking longer on average to come to court and the courts are typically spending longer on deciding them. In civil cases in particular, users appear to be moving elsewhere for justice or simply not pursuing a legally-based outcome. In other words, New Zealands court system appears to be doing less work and doing it less efficiently. - Law Commission, supra, at p 329

[13] Hansen J supra at p 354.
[14] See 1998 report of The Lord Chancellors Office in the United Kingdom considering the proposed Woolf Reforms and Sir Gavin Lightman, cited Hansen J supra at p 375.
[15] Disputes Tribunals Act 1988 ss 10, 13 and 18
[16] Sydney Morning Herald February 2004 cited by the Law Commission *Delivering Justice for All* supra at p 330.
[17] i.e. judicial and staff salaries, court servicing costs, depreciation of buildings, related services such as counselling etc see Law Commission *Delivering Justice for All* supra at p 330.
[18] Hon G Davies, supra; A former Judge of the Queensland Court of Appeal, The Hon G Davies, has suggested that
[19] In *Seeking Solutions: Options for change to the New Zealand court system: Have your say* (2002) Part 2 NZLC PP52 at p18 the Law Commission records the views of certain submitters to that effect although the Law Commission itself does not appear to address those arguments in its subsequent report *Delivering justice for all: a vision for New Zealand courts and tribunals* supra. Hansen J supra at 373 375 also appears sympathetic to inquisitorial proponents.
[20] Per Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63, citing Eldon LC in *Ex parte Lloyd* [1822] Mont 70,72.
[21] The comparative advantages and disadvantages are helpfully summarized by the Australian Law Reform Commission in *Review of the adversarial system of litigation* supra at pp 10, 11 and 26.
[22] See, for example, submissions of the Auckland District Law Society Courts Committee on the Draft District Courts Rules 2007. Criticising proposals to place time limits on examination and re-examination of witnesses and the making of submissions the Committee considered that the overarching objective of any set of rules must be to try and achieve a just outcome and it would be wrong to over-emphasise objectives of trying to achieve a prompt and cheap outcome: *Law News*Issue No 01 25 January 2008 p 4.
[23] *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452.
[24] See B Markesinis Learning from Europe and learning in Europe in B S Markesinis (ed) *The Gradual Convergence* Clarendon Press Oxford 1994, 30-21l; but for contrary view which focuses upon the inherent power adjudication under common law alone see P Legrand European legal systems are not converging (1996) 45 *International and Comparative Law Quarterly*52,74; and for similar constitutional limitations upon convergence also based upon the constitutional role of the judiciary see Sir Anthony Mason A new perspective on separation of powers (1996) 82*Canberra Bulletin of Public Administration* 1,7.
[25] See J Hunter and K Cronin *Evidence Advocacy and Ethical Practice* Butterworths Sydney 1995, 37. In France, a report of the *Commission justice pnale et droits de lhomme* proposed to abolish the classic inquisitorial position of the *judge dinstruction*. See M Delmas-Marty The judge dinstruction: do the English really need him? in B Markensinis (ed) *The Gradual Convergence* Clarendon Press Oxford 1994, 46.
[26] M A Glendon, C Osakwe, and M W Gordon *Comparative Legal Traditions*, 1994, pp 198, 208-210.
[27] Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* Lord Chancellors Department London 1995; Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* HMSO London 1996.
[28] Australian Law Reform Commission supra at p 39.
[29] Hansen J supra at 353, 372 and 373.
[30] Hansen J supra at 372.%