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KEY ISSUES IN JUDICIAL ADMINISTRATION

JOINT PRESENTATION WITH THE RT HON SIR THOMAS EICHELBAUM, GBE, CHIEF JUSTICE OF NEW ZEALAND

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KEY ISSUES IN JUDICIAL ADMINISTRATION

It was your President who suggested that this Session should be forward looking. Crystal ball gazing is safe enough on the day, but if the forecasts of the future are to be recorded for reference, it is a hazardous venture. However, as the Chief Justice of New Zealand observes, he and I will have departed at least the judicial scene before errors are manifest and we shall gaze, from near or far, with interest at the continuing efforts of the next generation of judicial administrators as they strive for the unattainable goal of the perfect system. Forecasts of issues in judicial administration are particularly hazardous at a time when the very objectives of the system of justice are matters of debate and, sometimes, of high controversy.

Take, for example, the debate in Australia about a constitutionally entrenched Bill of Rights. If a Bill of Rights were constitutionally entrenched, there would be a massive shift of power from the Executive Government to the Courts. The Courts would have to devise machinery for the consideration of issues much broader than the issues in controversy in the ordinary run of litigation. Case loads would increase as the Bill of Rights would affect controversies that might not otherwise have led to litigation. Judicial machinery - perhaps in the form of Brandeis briefs - would

have to be devised to assist in the determination of what have hitherto been treated as political issues. Judgments of importance and nicety would have to be written and more judicial time would have to be expended thereon. The New Zealand experience with a statutory Bill of Rights has shown some of the consequences that would ensue in Australia if the Constitution were amended to include a Bill of Rights. The proponents of a Bill of Rights submit that the Courts should be involved in order to counterbalance the growth of executive power. The opponents would leave the balance where it is. Which contention is right? That is a political question, the answer to which is of great significance to judicial administration.

The future of judicial administration depends, naturally enough, on the state of the law under which the jurisdiction of the courts is exercised. As the law is, and will always be, changing to accommodate what is seen as the needs of the contemporary community, the demands of sound judicial administration will change too. That said, judicial administration must be concerned with two primary objectives, reflecting the two primary objectives of the curial system of justice. They are the just settlement of particular disputes and the definition of the law by which social conduct and relationships are governed. Judicial administration is therefore concerned with the efficient and timely resolution of particular

disputes and the informed and sound definition of the law. In both fields of activity, the future presents great challenges.

The Settlement of Particular Disputes

The overwhelming problem is access to justice - the perennial difficulties of cost and complexity. There is every indication that these difficulties will intensify. In both countries, we have a culture of rights, expressed in litigation. No social issue seems to arise but that it must be solved by the creation of rights. No controversy breaks out without an expectation that, if need be, litigation will solve it. Perhaps this is the inevitable consequence of the loss of a moral consensus which, in earlier and simpler times, either stilled many controversies or referred them for resolution according to the advice of parliamentarian or priest, doctor, lawyer or sergeant of police. Moreover, laws are of increasing complexity, reflecting the increasing complexity of modern society. So, if no new methods of dispensing justice are devised, the number of cases requiring resolution by trial will increase, trials will become more difficult and more time consuming and, in consequence, the cost of litigation and the amount of public funds that will have to be spent on litigation will escalate. How can this come to be? Consider the present position. The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the

corporate or the legally aided litigant; Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis. Ordinary people cannot afford to enforce their rights or litigate to protect their immunities. To that extent, the coercive force of the law is undermined. If the burden of litigation will increase, some solutions must be found and practical solutions are likely to be radical.

As a starting point, the full scale trial can no longer be regarded as the paradigm method of dispute resolution, even for complex disputes involving subjects of high value. On the other hand, a trial concluded by judgment and reviewed, if need be, on appeal is essential when other means of dispute resolution fail. Moreover, a trial is the only means by which, under our system of jurisprudence, the law is authoritatively defined. The trial must therefore be retained, but only as the long-stop in litigation. This is the conclusion reached by Lord Woolf in his *Report on Access to Justice* in the United Kingdom and by the recent Canadian Task Force on *Systems of Civil Justice*. Both studies go on to propose differential case management systems in the cases that must go to trial. That requires judges to assume a greater responsibility for the progress of litigation. That involves a heavier judicial workload and, if case management is effected through directions hearings, it will involve

the incurring of costs for every appearance. This consideration simply emphasises that the judicial trial must be reserved as a long-stop measure. Cheaper and more expeditious methods must be devised for the mass of dispute resolutions.

Of course, private mediation or arbitration is to be commended to parties who freely choose it and are able to pay for it. These alternative means of dispute resolution, conducted pursuant to the private agreement of the parties, can be expeditious, flexible and tailored to particular needs. And, of course, they relieve the courts of the burden of determining any dispute settled by private mediation or arbitration. As an encouragement to private arbitration, it may be desirable to ensure that, if applications are made to the court in aid of arbitration or for the review of awards, expedition will be assured.

Special contract apart, parties are not, and should not be, bound to submit their disputes to private mediation or arbitration. The settlement of disputes by legal process is a fundamental function of government in a society under the rule of law. If the function is not performed, the law is not applied and the festering sore of injustice spreads the infection of self-help. Power is then unrestrained by law. Peace and order are at risk and, sometimes, tragedy may be the consequence. Laws that are put on the statute book mock the integrity of the political process unless the

beneficiaries of those laws can enforce them. Hitherto, the courts have been charged with the duty to hear and determine disputes that have not been resolved by the parties, but access to the courts has been unsatisfactorily limited by cost and complexity. Although the courts must continue to hear and determine disputes, the public interest in the administration of justice does not require the expenditure of resources, both of personnel and material, on litigation that can be settled or on litigation that is disproportionate to the importance of the subject matter. Alternative methods of settling such litigation or of resolving such disputes must be encouraged.

Mediation and arbitration are two familiar methods of achieving the resolution of disputes without trial. But should the court have power to compel the parties at their own expense to seek mediation or to submit their dispute to an arbitrator? In my opinion, the answer must be: No. If the payment of substantial fees to a mediator or arbitrator were the price that a party were required to pay for the resolution of a dispute, the resolution of disputes would be reserved to those who have the ability to pay. But dispute resolution is not simply a service to disputants; it is the means by which the rule of law is made effective and peace and order is assured. Moreover, if judges were to be vested with a discretionary power to send matters to private mediators or arbitrators, their office

would be diminished by the function of procuring business for those to whom the matters are sent. The administration of justice by the courts should not be compromised by the intrusion, however unintended, of the commercial interests of third parties. That said, mediation and arbitration will continue to be familiar and prominent features of the system of dispute resolution in the future. There is no reason why, in the vast majority of cases, mediation should not be compulsory in the sense of being a condition of the right of any party to have the dispute brought on for trial. But let it be court-attached mediation. Either the mediator should be a court officer or a private mediator selected by the parties, by lot or by rotation. In either case, the fees should be a charge on public revenue.

In aid of mediation, the court could offer to make at an early stage and on the papers an impartial indicative assessment of the relief that might be granted at trial. Such an assessment, without prejudice to the interests of either party, might assist in procuring a settlement or, if the parties so agreed beforehand, might be accepted as resolving their dispute. Or, if the parties so agreed, their dispute might be determined in an informal or abbreviated procedure that would diminish costs and lead to a speedy and final determination. These procedures could be carried out by a court officer or by a private mediator, assessor or arbitrator selected by the parties, by lot or by rotation whose fees are fixed by regulation and are paid out of

public funds. Resort to mediation, preliminary assessment or to arbitration, whether privately or publicly funded, ought to carry with it a guarantee of integrity and competence. To that end, it would be appropriate for the courts to certify the ability and integrity of individuals available for appointment as mediators or arbitrators.

Offers to settle disputes could be encouraged by providing penalties for non-acceptances that prove to be unjustified at trial. Penalty interest on damages awarded has been suggested by Lord Woolf. Or provision could be made for court certification of the reasonableness of an offer at the time it is made or at a time limited for acceptance of the offer, which puts the non-accepting party at risk as to costs.

I do not suggest that these non-trial procedures should be directed or even directly monitored by judges. The emergence of highly-qualified judicial administrators in the last decade demonstrates that the power to direct the channelling of disputes to methods of resolution other than trial can be safely left in their hands. The exercise of such a power would be open to judicial review. But the integrity of the process would be better assured by publicity. It might therefore be desirable to require the publication in open court of periodic reports by the administrators as to the manner in which their powers have been exercised and, though briefly, the

reasons for the orders that have been made. Such a report, open to public inspection, would be an invitation to judicial scrutiny which, even though cursory and sporadic, would give a guarantee of transparent integrity.

The techniques of diversion from trial will be many and, as judicial administration experiments with them, no doubt pitfalls and advantages will be discovered. But I suggest that there should be an approach which allows for such experiments, conducted under court authority, designed to meet the needs of the parties and the exigencies of the particular piece of litigation. However, in the enthusiasm for diversionary techniques, there should be no misunderstanding of the sea-change in attitudes and outcomes involved. Lawyers brought up in the adversary system would be expected to temper adversarial zeal with the sweetness of compromise; litigants claiming an entitlement to their rights will be sent on a detour on arrival at the courthouse; solutions reached by diversionary procedures may deliver cheaper but also a less satisfying form of justice. If the right of immediate access to the courts is to be qualified, the appropriate forum in which the so-called reforms should be considered is the Parliament - not the Rules Committee of a court.

Subject to statute, ultimate responsibility for the system of administering justice must remain in the hands of the judges. The public generally accepts judicial authority, in part because of the unique judicial characteristics - security of tenure and complete independence from the Executive. But judicial time and energy should be reserved for the functions which judges alone must perform - that is, the conduct of trials and appeals according to law. The day to day administration of methods of resolving disputes otherwise than by trials ought to be entrusted to the court's staff recruited, if need be, from practitioners who have had practical experience in litigation. Nor should there be a need for judges to be concerned with differential case management leading to the preparation of a case for trial in those - hopefully few - instances where trial proves to be necessary. Provided, of course, that Ch III of the Australian Constitution offers no impediment to that distribution of function.

Of course, access to justice is impeded by more than the absence of adequate schemes for alternative dispute resolution. The mystery which, in the minds of many, surrounds the legal process and the costs which are involved in undertaking full-scale litigation are factors which even the most flexible schemes of ADR may not eradicate. General educational programmes about the legal process will assist, but there is much to be said for courts providing the same

kind of assistance to litigants as a department store provides for shoppers: an information desk and an interactive computer screen that will answer basic questions. A Canadian suggestion is that such a computer should be programmed to print out pro forma documents for use by litigants in person. That may be a false form of charity for the litigant and an unnecessary burden for the court.

Costs are an intractable problem. Court costs are themselves an impediment to access to justice, at least to the extent that they exceed what is reasonably necessary to inhibit the launching of unnecessary proceedings. One view seems to be that the litigants, as users of the justice system, should pay for it. With respect, that profoundly mistakes the constitutional function of the judicial power of the State which, as I have said, is to apply the rule of law in resolving disputes and thereby preserving the peace, order and good government of society.

Legal professional costs present, and will continue to present, an insoluble problem. On the one hand, a legal profession whose members were all on the government payroll would not long maintain its independence. On the other, in the absence of legal aid, how can the ordinary person afford even the most reasonable cost of the professional services needed to prepare for and to conduct a simple trial? Legal services are labour intensive, time consuming

and commanding rates of remuneration commensurate with professional skill. The gap between legal professional costs and what a litigant can afford to pay can be made up only by the pro bono work of the legal profession and the provision of legal aid. Both of these resources are finite. But Lord Woolf has suggested fixed or capped fees for particular kinds of litigation involving prescribed amounts of money. This is a suggestion that is worth consideration by judicial administrators and representatives of the professional associations. It may provide a solution in some instances, but the problem of professional costs will not be fully solved. It is unnecessary to pursue the problem here. But the problem highlights the necessity for court procedures to be simple and for methods of dispute resolution that reduce the costs that would otherwise be incurred by going to trial.

If a case must go to trial, there is much to be said for a more interventionist role to be played by the trial judge. I do not suggest that, risking blindness from the dust of conflict, the trial judge should take the conduct of the case out of the hands of counsel, but a firm control of the time taken and the points pursued in advocacy might justifiably warrant a greater degree of intervention than in earlier times. In the making of orders in interlocutory proceedings designed to bring the necessary issues to trial efficiently and in good time, the masters or registrars must have adequate, perhaps

draconian, powers to enforce time limits, prescribe the range of discovery and settle the issues for trial. These are important functions calling for a high level of professional experience. I will not canvass the many worthwhile suggestions that have been made about control of court dockets, the listing of cases and time limits on the delivery of judgments by trial judges. Others have a closer and more up-to-date experience of them than I. But I would make a few observations about advocacy on appeal.

Appeal books often contain a full record of the pleadings, sometimes supplemented by interlocutory orders, a transcript of the evidence and addresses at the trial, a copy of the judgment of the trial judge, the formal judgment and a notice of appeal. In the High Court of Australia, some effort is made by the Registrars to eliminate unnecessary material but, despite their best efforts, there have been occasions when multiple appeal books lie unread simply because the issue to be decided on appeal is fully and adequately raised by the judgments delivered in the intermediate appellate court. The diffuseness of material is matched on occasions by diffuseness in oral argument. Efficiency requires that both these problems be addressed.

First, technology should allay any practitioner's concern that relevant material is being omitted from an appeal book. There is no reason why appeal books should not shrink to the barest essentials in hard copy and the balance provided on floppy disk or by access to the originating court's data base. A criminal appeal book might consist of the indictment and the summing up, to which rulings on evidence or excerpts from the transcript can be added according to the exigencies of the case. A civil appeal might consist of the pleadings and the judgment of the trial judge in appropriate cases. Of course, this assumes that Governments will provide the funding to allow the appeal court to have immediate access to the material omitted from the hard copy but available in electronic form. And it assumes that the Courts will agree on compatible software that will allow the exchange of information between the trial court and the appellate courts. The Council of Chief Justices has sponsored a study by an officers' committee to settle recommendations that will facilitate this development. Technology also offers the prospect of recapturing and analysing evidence simply and speedily. These facilities are of great utility during a trial as well as on appeal. Indeed, information technology has proved to be useful from the stage of filing of originating process to the stage of final appellate judgment. We have barely begun to discover the benefits which information technology can provide in litigation: filing documents, preparing and transmitting proofs of evidence, plans, photographs

and videos, cross-referencing of subject matter, searching for authorities, citations, principles and annotations and even the statistical analysis of prospects of success or failure. But technology cannot, in the foreseeable future, take the place of advocacy. Hopefully, it will never do so.

Nor will it cure some of the defects in advocacy that appear from time to time. The tradition of unlimited oral advocacy has not been an unqualified success, especially when the advocate is pressured by the volume of work or, for other reasons, fails to present a clear, concise argument. In recent times, a practice has developed in the High Court of handing up to the Bench in the course of hearing quantities of supplementary argumentative material that might have been avoided if there had been a sufficient analysis of the real issue before the appeal commenced. At the appellate stage, we come to grips most closely with the problem of ensuring that the law is defined soundly and in the light of relevant information.

The informed and sound definition of the law

There are two main groups of players in this scenario: the advocates and the judges. Judicial administration cannot add to or subtract from the natural talents of either group, but it is concerned

with techniques of advocacy and the recruitment of judges. Written material is often the most effective way of communicating information in a form which leads cogently to the conclusion advanced, predisposing the judicial mind to acceptance of that conclusion. Staccato propositions seldom achieve that objective. On the other hand, oral argument is essential both to the dialectic which refines the issues and points to the solution and to the persuasion of the judicial mind to the submitted conclusion. Written material and oral argument are not alternative means of advocacy - at least in our tradition. They are complementary, and both call for an application of the advocate's art and skill. Written argument should not be regarded as a formality to be observed before the real task of oral advocacy begins: that could be a tactical error and its fruits might be manifested in the reserved judgment. Written argument can provide the intellectual building blocks for the conclusion advanced. But written argument does not exhaust the advocate's function. In oral argument, the advocate is to display the issue for determination in an attractive way, to respond thoughtfully to judicial questioning, to rebut firmly adverse judicial pre-conceptions, to captivate the judicial mind by reasoned argument concisely and courteously expressed and to lead it on the true path of judgment. This is a high and satisfying technique which cannot be attained without experience and industry. The use of written and oral argument to complement each other can shorten the time of hearing and enhance

the impact of essential points. The High Court of Australia is presently engaged in revising its special leave rules and its practice direction on appeals to provide the framework in which effective advocacy can be practised by use of both forms of argument.

The assistance provided by good appellate advocates to the definition of the law is hard to over-estimate. But, of course, the ears to which their submissions are addressed must be attuned to the reception of submissions pitched at a level that assumes a background of legal knowledge and practical experience.

It would be as unseemly for me to extol the standard of the Australian judiciary as it would be wrong to ignore the problem of recruiting their successors. This is one of the major problems of judicial administration: how to attract and retain judges of the required experience and proven integrity. Once upon a time, a judge's professional life consisted of 15 years as a junior counsel, 10 as a silk and 15 or more as a judge. Whatever might be said about the judges who were recruited under this method, they came to the Bench with practical experience having revealed their strength and integrity in public advocacy for a long time. Judicial status was high and remuneration was correspondingly assessed. The number who were elevated to the chill and distant heights were relatively few. Much has changed. The attractions of judicial office

have diminished and the number of judges required to preside in the courts has escalated. Judges are sought at an earlier stage of their career, perhaps when they are at the height of both their earning power and their financial commitments. Refusals of appointment, once a rarity, are now commonplace.

Governments will be forced to seek appointees who have not had practical experience, who are not out of the top drawer, whose expertise is not in litigation though it may be in other fields of legal activity. Some of these appointees will prove to be sound appointments; some may not. As a judge who is not up to the job can, over a judicial lifetime, do much damage to the administration of justice according to law - perhaps to the discomfiture of the Government that appoints him or her - it is of the utmost importance that the number of persons required to serve as judges be kept to a minimum and the conditions of judicial service be such as to ensure acceptance of appointment by candidates who possess the necessary qualifications. This would occur if only the community were fully aware - for then Parliaments and Executive Governments would be aware - of the extent to which the rule of law and the resultant peace and order of society depend upon the competent and independent exercise of judicial power.

The diversion of dispute resolution away from trials, the case management of the preparation and presentation of issues for trial, the sharpening of advocacy skills and the use of technology can combine to increase the efficiency of the system of administering justice. Increasing the efficiency of the system can improve public access to justice and can contain, if not reduce, the demand for more judges and ensure the appointment of judges possessing the necessary qualifications.

There is an urgency about improving the efficiency of the system of administering justice, for the case load of trials and appeals seems to be increasing at a rate that places unacceptable burdens on both public and litigants' resources. Yet the work of the courts according to the traditional judicial standards is the means by which we maintain the rule of law. The manner in which the efficiency of the system can be enhanced is the agenda which this Conference has set itself. It has the advantage of bringing together New Zealanders and Australians who share a common interest and largely a common legal heritage. The cross-fertilisation of ideas will be matched by a mutual learning from experiments on either side of the Tasman. In this context, I take the opportunity to acknowledge the contribution which Sir Thomas Eichelbaum, the Chief Justice of New Zealand, has made to the Council of Chief Justices in Australia, providing a line of communication across the Tasman that is of mutual benefit in

appreciating common problems and assessing possible solutions. The differences in the constitutional arrangements and, to some extent, the social conditions in the two countries focus innovative proposals precisely on problems of procedure and curial organisation. Hence the utility of this Conference. We or, more accurately, our children will benefit in the 21st Century from your efforts to craft the means by which our priceless freedom under the law can be preserved.