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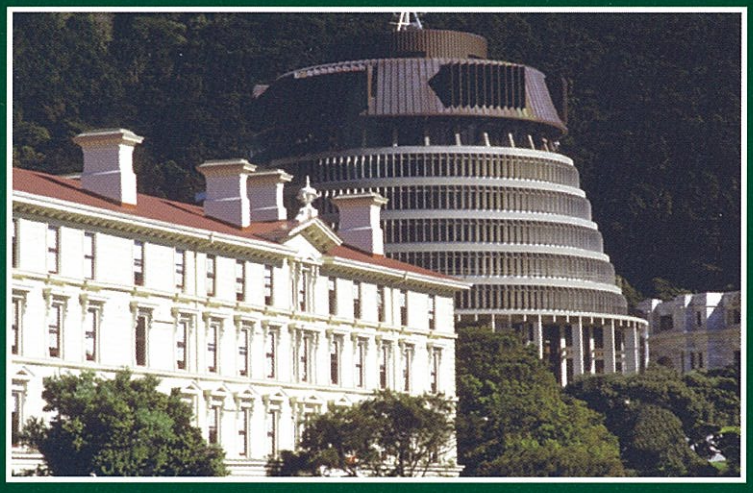

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CLOSING REMARKS

Sir Ivor Richardson*

In this short comment, delivered at the closing session of the conference, Sir Ivor considers three topical issues: expectations of the new Supreme Court of New Zealand, the functioning of the Court of Appeal post-2003, and judges and judging. Added as a postscript is his response to an article by Petra Butler, published in the first issue of this journal, on the allocation of cases to judges.

I EXPECTATIONS OF THE NEW SUPREME COURT

Four points:

(1) We should look to the future—and with confidence—and without having to conduct an inquest into the processes that resulted in the abolition of appeals to the Privy Council and the establishment of the Supreme Court. The Supreme Court Act 2003 has passed, and orthodox first appointments to the new court have been made. I do not share the view expressed by some lawyers that the reform process has seriously damaged the judiciary and its public standing. Much of the debate was poor quality and ad hominem but the tumult and the shouting has died. It never really engaged the public and the institution remains strong.

(2) I do not share the view that section 3(2) of the Supreme Court Act, providing that "[n]othing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament", sends a clear and inhibiting political message to the Court as to who is in charge. The interpretation and application of section 3(2) are for the Court to determine. It is the meaning of the expression in today's world that matters. Section 3(2) does not mandate any particular 19th-century or other theory. It recognises the right of Parliament to legislate in today's landscape, in the democracy and society which we are in today's world, which includes the network of international treaties and norms and the limitations on absolute power all that entails.

(3) We should expect the Supreme Court to allow a significant minority of the appeals it hears. The primary purpose of having a second (or third) appeal is to settle and clarify

* Distinguished Fellow, Faculty of Law, Victoria University of Wellington. Sir Ivor sat on the Court of Appeal from 1977 until his retirement in 2002, for the last six years as President.

the law by providing principled answers where there is truly room for competing arguments. It is not surprising that a proportion of second (and third) appeals succeed, here and elsewhere. Over a long period, around 30 per cent of New Zealand appeals have succeeded. Coming to the recent past, I checked the annual statistics posted on the Privy Council website[1] before appearing before the select committee considering the Supreme Court Bill (at its invitation). The website provided data for the six years 1996–2001, which happened to be the six years I was President of the Court of Appeal, and recorded that in total 30 per cent of the substantive appeals determined following argument had been allowed. When reflecting on that percentage it is important to keep in mind that only a tiny fraction of the judgments are appealed, and that ordinarily (and except for perceived tactical advantage) they are cases in which the litigants are advised that there is a real chance of success and an appeal is worth the cost.

A ratio of 30 per cent or more is common in other jurisdictions and simply reflects the nature of a second appeal. Interestingly, an obituary in *The Times* for Lord Wilberforce noted that Lord Denning, a towering figure as Master of the Rolls, had 30 per cent of his judgments reversed by the House of Lords. *Pinochet*, which has been referred to at earlier sessions of this conference, is a good example of the room for differing views in second appeals. There were in that case two substantive hearings within four months before differently constituted panels.[2] The results and the reasoning (and the arguments) in the judgments were very different.

(4) I predict that the new Supreme Court will be seen as an outstanding court. The judges come from a range of backgrounds and have a blend of expertise. They are very experienced in appellate work and in working together.[3] They are well set to determine finally all issues that a final court for New Zealand should determine—as they have done (and often in five-judge courts) for all except the handful of cases that have gone to the Privy Council. In that regard it is worth noting that the 1998 Judicature Amendment Act recognised and mandated the splitting of appeals into the three-judge and five-judge streams which the Court of Appeal had developed.[4] With a substantially reduced total

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1 Privy Council Office <http://www.pco.gov.uk/output/Page34.asp> (last accessed 20 February 2004).

2 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61; *(No 3)* [2000] 1 AC 147 (HL).

3 The initial appointees to the Court are Chief Justice Dame Sian Elias and Justices Thomas Gault, Sir Kenneth Keith, Peter Blanchard, and Andrew Tipping—all former members of the Court of Appeal.

4 See the Judicature Act 1908, ss 58–58C, as substituted and inserted by the Judicature Amendment Act 1998, s 5.

workload, and with the advantage of having before them a first appeal judgment, the judges will have more time to reflect on the real issues in what experience indicates are likely to be the 15 or 20 really hard cases each year.

II FUNCTIONING OF THE COURT OF APPEAL POST-2003

Again four points; and noting, first, that Justice Robertson drew our attention to how limited a discussion there has been about the functioning of the Court of Appeal in the future, and second, that the legislation now provides for seven permanent judges plus High Court judges seconded to divisional courts.[5]

(1) For planning purposes, the President and Court of Appeal judges are likely to continue forecasting civil and criminal volumes, hearing times, and the demand for permanent Court of Appeal and seconded High Court judges. Over recent years, volumes have tended to plateau at 400 to 500 criminal and 150 to 200 civil cases each year, rather than evidencing distinct upward trends.

(2) Two new factors may substantially affect workloads from 2004 onwards. First, there will be few five-judge cases, whereas previously there were 40 to 50 per year. Second, the Law Commission is recommending that criminal jury appeals from the District Court go to the High Court rather than stay in the Court of Appeal—and historically over 50 per cent of the appeals heard by the Court of Appeal are from the District Court. In combination, these two factors may reduce the workload of the Court of Appeal by 30 per cent or more.

(3) Administrative decisions as to the proportion of panels to include High Court judges and as to the membership of the High Court judge pool (whether it be restricted (and on what bases), or universal) will affect the performance of the Court of Appeal. Over the years, about 80 per cent of criminal appeal divisional courts and around 45 per cent of civil appeal divisional courts have included High Court judges, and while in the 1990s there was a small High Court judge pool, latterly it has been much larger.

(4) The workload of the Court of Appeal is high-volume, but significant cases often end there (and thus Lords Denning, Lane, Woolf, and Phillips elected to leave the House of Lords and to focus on first appeal work). There is some tension between the two categories of cases at the first appeal level, the great majority of cases being dominated by the correction-of-error function (where predictability and certainty are particularly important values), and the balance being cases in which there is truly room for argument, and so, often under great time pressures, the Court is settling the law for the time being.

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5 Judicature Act 1908, ss 57(2), 58A(2), 58B(2).

III JUDGES AND JUDGING

Three points:

(1) I draw some observations from my paper "Trends in Judgment Writing in the New Zealand Court of Appeal",[6] delivered at the 2001 Legal Research Foundation Conference.

First, the courts can be expected to draw on a range of authority while recognising that there have been substantial changes in citations over the years. For example, there was a sharp fall in the percentage of English cases cited by the Court of Appeal between 1960 and 2000, a very significant increase in the percentage of New Zealand cases, and some increase in the citation of cases from other jurisdictions and of international, law reform, and academic materials.[7]

Second, the age of New Zealand cases cited changed markedly between 1960 and 2000, with 71 per cent in 2000 being less than 10 years old, compared with 43 per cent in 1960.[8] Factors explaining these changes include the decline of judge-made common law and the increasing prominence of statutory law, the pace of change, the increase in the volumes of New Zealand appellate decisions, local conditions, the sense that the United Kingdom centre of gravity is moving inexorably towards Europe and European law, and increasing confidence in New Zealand decisions and in our ability independently to shape our own law.

Third, the incidence of multiple judgments reduced from 22 per cent of cases in 1960 to nine per cent in 1990 and four per cent in 2000.[9] In 1960, six per cent carried dissents. In 2000 it was two per cent. The incidence in the Supreme Court in both categories is likely to be considerably higher, not because more time will be available, but because the legal questions at the second appeal level are more complex, with true room for different views and analyses.

(2) As Justice Robertson emphasised, courts can decide only those cases which litigants put before them. They are not roving ambassadors for the rule of law. Clearly, judges need to be cautious in going beyond what the determination of their case requires. Some of the reasons for this constraint are as follows: (i) Ordinarily the litigants should be entitled to decide what issues to focus on and how much time and money to spend. Their cases

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6 Rt Hon Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 261. Statistical data for the period 1960–2000 is appended at 269–282.

7 Richardson, above n 6, 264–265.

8 Richardson, above n 6, 265.

9 Richardson, above n 6, 263.

should not, against their wishes, be submerged in and become a vehicle for a wide-ranging public inquiry. (ii) There are risks to the process and to the reliability of the ultimate decision, the further the court goes beyond deciding the litigants' case. An obvious concern is how the court ensures it is adequately informed on wider questions and that those opinions are tested. Adversarial court processes are a poor substitute for the extensive research and consultation, impact analyses, discussion papers, reports, and draft bills produced by the Law Commission, for example, or for the systematic way, including select committee processes, in which policy is developed elsewhere in government. (iii) An expansive approach misses the possibility of better arguments from committed litigants in later cases which may have affected the original expanded decision and reasoning, and which may unfairly affect the certainty and predictability that should follow. A related feature of collegial appellate decision-making is that in some cases there may be perceived advantages, both in precedential terms in sending a clearer message and as regards the effective use of judicial time, in building a coalition for unanimity or for seeking a majority judgment. That may involve stopping at the point at which agreement can be reached, if taking a further step may unravel the joint approach.

(3) Judges are professionals. They should not be concerned about their image or making their mark. It is a mistake to try to further a great vision of an ideal legal world. Lawyers who want to change the world should go into politics. The healthy reality is that the sands of time quickly wash over the great majority of appellate judgments—and that is how it should be.

IV POSTSCRIPT

By way of supplement to the information on the functioning of the Court of Appeal provided above and to the information on its functioning contained in a valuable article by Dr Petra Butler in the previous issue of this journal,[10] it is worth noting that there has been relatively little scope for judicial participation in the allocation of particular judges in the vast majority of cases.

As stated at the panel session, the President and other Court of Appeal judges have forecasted likely civil and criminal volumes (for the next calendar year), hearing days required for those cases, and the Court of Appeal and High Court judges needed for the projected workload. About 80 per cent of three-judge criminal panels and 45 per cent of civil panels have included High Court judges. The Court of Appeal judges (including the Chief Justice) have regular monthly meetings. They agree, at least six months in advance, the particular weeks in which each permanent judge will sit in those divisional courts over that period. In addition, because of the need for forward planning for the High Court

10 Petra Butler "The Assignment of Cases to Judges" (2003) 1 NZJPIL 83.

judges, the Chief Justice agrees with judges in the High Court which weeks they will sit in the divisional courts. It is then the court office's responsibility to allocate cases to divisional courts as the fixtures are sought and to try to fill up earlier weeks before allocating cases to later weeks. Adjustments may have to be made close to the scheduled hearings for reasons personal to the particular judge, such as High Court trials running overtime, illness, or perceived conflict. Otherwise, for the great bulk of the cases, the allocated judges (permanent Court of Appeal and seconded High Court) hear the cases for which fixtures have been made by the Court of Appeal office.

Five-judge cases are determined by permanent judges, as well as those three-judge criminal appeals which, usually for reasons of urgency or because divisional court lists are full, cannot be heard by the divisional courts. The greater proportion of civil appeals heard by three permanent judges has reflected the reality that divisional courts assembling for a week and then dispersing cannot reasonably be expected to hear two- or three-day civil cases; that the High Court judges should not ordinarily be expected to deal with fields outside their experience as trial judges, such as employment; and that as well as the five-judge cases there is a relatively small number of three-judge civil appeals which should reasonably be heard by permanent Court of Appeal judges.

Leave arrangements planned in advance, the limited availability of the Chief Justice, and occasionally other commitments or conflicts affect the pool of permanent judges available when the programme is finalised each month. The President does the draft, which is discussed with the next senior judge. Their agreed draft is circulated to the other permanent Court of Appeal judges for any adjustments which may be suggested and agreed to.

The obvious need is to provide each judge with a fair share of the range of work reaching the Court, recognising some specialisation. While there is some limited scope for selective case allocation, the allocation of cases to judges is essentially driven by the resources available at the time, and is immediately monitored through the collegial participation of the judges.