Access to Justice from the Perspective of the Commercial Community: Judicial Specialisation

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I INTRODUCTION

The issue of specialisation in the courts is a vexed one that has surfaced from time to time over the years. But, despite its proponents, it appears to have gained little traction in New Zealand.[1] The comments that are made in this paper may be regarded as provocative, but they are voiced to express the genuine concerns of the commercial community and their counsel. It is in my opinion a debate that has to be undertaken. It may very well be that there are no or no ready and simple solutions. But unless we entertain the debate, we cannot say to ourselves that we have tried to address the problem, and have addressed the concerns of the commercial community and provided an answer to that community — even if the answer is, with justification, no change.

Many comments have been made on a number of occasions that civil litigation is in crisis. The identification of that crisis, its causes and effects, and how it can be dealt with have been addressed at previous conferences. Few, however, have focused on the issue of specialisation as one of the causes of concern. Let me make it clear at the outset that in New Zealand at least, we are blessed and indeed fortunate to have an outstanding judiciary, which can be regarded as the epitome of everything one hopes for in the concept of separation of powers, evidencing the utmost independence and impartiality. However, concerns do arise in relation to the lack of specialisation on the bench, given the ever-increasing complexity of the types of disputes that can come before our courts.

II THE NEED FOR SPECIALIST KNOWLEDGE

One of the cornerstones of a civilised, democratic society is the rule of law and access to the law for the settlement of disputes — whether between private citizens or citizens and the state. It is the state that provides that service in both instances, in the guise of the courts and the judiciary. For the commercial community, access to an independent, unbiased/impartial arbiter who will provide a speedy and informed ruling (whether by curial or arbitral process) is essential. The vast majority of disputes that do go to trial are resolved at first instance, so my focus is on first instance judging (not

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1 For one particularly informative paper, see Susan Glazebrook "A Specialist Patent or Intellectual Property Court for New Zealand?" (2009) 12 JWIP 524.

appellate judging).

Commercial parties look to the courts as a place of last resort — the refuge for resolution of disputes after other attempts have failed.[2] Thus the court is and must be a decision-making body that will truly engage and issue a determination that is informed and intelligent. This in turn imposes a requirement on the decision-making body to possess the requisite skills to be able to engage in the process. For only by that means will the ultimate outcome be one that is appropriate to the conditions and circumstances. This is much more than just being in possession of good personal skills such as assessing witnesses and their demeanour, understanding process, and being able to communicate and write a decision. It includes, most fundamentally, an ability to understand the particular discipline that is the subject of the argument.

All doctors should understand basic medicine, anatomy and physiology, and have or acquire the necessary interpersonal skills to be able to engage with patients. That is all part of their training, whether at medical school or acquired in their formative years on the job. But no patient with a severe cardiac complaint will go to a neurologist — even though the neurologist will possess the basic or fundamental understandings of cardiac function.

III THE CASE FOR SPECIALISATION

Specialisation at the Bar

When I started practice exactly 40 years ago there were two types of lawyers: common lawyers and conveyancers. The former did litigation (as it became known), the latter attended to the buying and selling of properties, commercial deals, company matters, family matters and the like. That division into two broad parts was about the limit of specialisation in the early 1970s.

By around the late 1970s to early 1980s, those in common law became rebranded as litigators. Specialisation began to emerge, particularly in the large firms. Litigators would specialise in tax, matrimonial (as it was then called), employment, intellectual property and so on. In the general property area specialisation also emerged — corporate financing, tax, mergers and acquisitions and the like.

But importantly, as litigation became even more complex and as the demands of corporate clients became greater, the degree of specialisation at the bar became itself even more refined. The 1986 High Court Rules contributed to this, so that those who did litigate needed a ready knowledge and understanding of the High Court Rules, how they functioned and why they did in a particular way. Moreover there were some bespoke rules for discrete areas of litigation.[3]

2 This is not meant to be pejorative but simply a recognition that litigation has always been seen as the last resort.

3 See, for example, pts VIII (Probate and Administration) and IX (Administrative Division).

Specialisation at the Bar Equals Specialisation on the Bench

As a general (but by no means universal) rule, most members of the senior judiciary are drawn from the ranks of the senior bar. The vast bulk of the members of the senior bar are now specialists. The days of the generalist in civil litigation are long gone.[4] That degree of specialisation can be acute and extreme, often to the exclusion of most other disciplines. If such a person is then appointed to the bench, is it fair or even appropriate to expect him or her to try a case in an area with which he or she has absolutely no familiarity whatever? And is it fair to the parties?

The contrary argument might also be raised. Is it appropriate to appoint such a highly specialised person, who may have no ability to bring to the judging exercise that knowledge and expertise gained from cognate areas of the law? If one considers simply the case of patent law, Lord Hoffmann has made it clear that the construction and interpretation of a patent is the same as that for any other commercial document, including a contract.[5] On the other hand, a generalist may be appointed who has never had to look at arcane areas such as tax — including highly geared or leveraged leasing transactions between associated parties where serious issues of tax avoidance arise.

If there is a high degree of specialisation at the senior bar there can, arguably at least, be a justification for a degree of specialisation on the bench. In all likelihood, the debate reduces to one of the extent of that desirable degree of specialisation on the bench.

The Efficient Determination of Disputes

There is also the even more fundamental issue that, if we are to pay more than just lip service to r 1.2 (the "just, speedy and inexpensive" determination of disputes),[6] this may far more readily be achieved in a proceeding presided over and case managed by a specialist judge who can quickly identify and require the parties to focus on the real (and often depressingly few) truly important points and also cut down significantly wasted time-consuming and expensive interlocutories and discovery procedures.[7]

And again it should not be overlooked that the skill of the specialist advocate can extend to the embellishment of a submission that might muster some credence before a generalist judge, but would readily be seen for what it is by a specialist judge.

We now come to the second decade of the 21st century. We have again new High Court Rules. They repeat the diktat of the 1986 Rules that "the objective of these Rules is to secure the just, speedy and inexpensive

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4 A notable and highly successful exception was the late Richard Craddock QC who whenever asked about his area of specialisation simply said "civil litigation".

5 *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667 at [32]. A proposition that is beyond argument but which may have seemed heretical to some at the time.

6 See below.

7 To a large degree, the enormous expense of discovery will now be reduced by the new discovery rules: High Court Rules, pt 8.

determination of any proceeding or interlocutory application".[8] Let us focus on these words: "just, speedy and inexpensive" determination of a dispute. Can it really be said that to expect large commercial clients to subject their complex patent dispute to a binding and oftentimes unappealable determination by a judge who has never in his or her life read a patent, is consistent with these words?

And what of the other technical complexities? How many judges have had to deal, either in their practising lives or whilst on the bench, with the particulars in pt 22 of the High Court Rules dealing with patents and which in fact find their origin in the extra-statutory rules, the Patents Rules 1956?[9] Yet an understanding of the Rules, and in particular their history,[10] is essential.

How many judges have also encountered in their practising or curial lives phrases such as "the notional skilled addressee" or "the furniture of the mind" and can readily apply them without more?

Personal Observations

As a litigator of some 40 years I deal at the so-called business end of the system, together with my clients. I am a consumer of the service the state provides to my commercial clients for the resolution of these types of disputes. My particular area of specialisation is intellectual property (as is perhaps apparent), although I deal with general commercial litigation as well.

I enjoy the work immensely. It is challenging. Yet I look at other jurisdictions with envy at the type of intellectual property work they enjoy and I wonder why we do not have as much and as complex and as varied IP work in New Zealand.

I subscribe to the Australian published series of reports, the Intellectual Property Reports. There are now almost 100 volumes starting from the early 1980s. The vast bulk of the decisions reported are Australian, although there are decisions from other Commonwealth countries including New Zealand. But I look at the type and quality of the litigation reported from the Australian Courts — generally the Federal Court of Australia. It is quite extraordinary and it is serious stuff of a type we rarely if ever encounter in New Zealand.

Why is that so? It is not, in my view, just a product of our size or population and smaller commercial community. That would explain a disparity of perhaps ten to one but not the disparity in terms of volume of work of about 100 to 1 at the very least. Nor is it a result of a smaller, less specialised bar in New Zealand or a smaller field of expert patent attorneys or independent experts. We have all of these. In any discipline where we may lack patent attorney or independent expert specialisation, we simply look to other jurisdictions such as Australia or further afield. This has never been an

8 High Court Rules, r 1.2.

9 For an interesting discussion as to the origins of the Rules and how they impact on pleading points, see the judgment of the Court of Appeal in *Pfizer Ireland Pharmaceuticals v Eli Lilly* (2005) 68 IPR 207 (CA).

10 Derivative in part from English rules and practice.

impediment for us.

Rather, the cause in my view — in part at least — is that there is no specialisation on the bench. For example, a highly complex application to revoke a pharmaceutical patent may well be heard by a judge who has no experience in patent law at all. Moreover, he or she may have no training in pharmacology, pharmacokinetics, biochemistry, biotechnology, medicinal chemistry and all of the related disciplines that will be the subject of expert evidence at any such revocation trial.

This is not intended as any criticism. It is simply a reflection of the facts and circumstances relating to judicial appointment in New Zealand. It is unfair to the parties to require them to litigate such a dispute as I have outlined before a non-specialist judge. And it is equally unfair to expect a generalist judge to upskill and become fully conversant with complex scientific disciplines that he or she ordinarily would never encounter. The experts involved will regard this as their everyday bread and butter, as will many of the counsel who appear. For the judge, it may well be a minefield.

It may be said in partial answer to this that the judge can be provided with a primer or other educational tools for the purposes of upskilling. It may also be said that the judge can sit with an expert.

I do not consider this to be an answer. A primer is just that: a primer. It is not Pharmaceutical Patent Law 101. An expert or scientific adviser can sit with a judge under subpt 1 of pt 22 of the High Court Rules only with the consent of the judge. This rarely happens in New Zealand.[11] Moreover, the expert in such a case is really an adviser who assists the judge but who does not actively participate in the hearing.[12]

In Commerce Act 1986 matters, judges sit regularly with an expert, but there the expert fully participates and may even issue a separate judgment.[13] Even though the expert who sits in Commerce Act matters with the judge actively participates, it cannot be said that — potentially at least — the issues in a Commerce Act matter are any less complex than in the case of a pharmaceutical patent, or that the potential outcomes for the parties are any less significant.

I know from my own experience that it is necessary to advise clients that litigation in New Zealand over, for example, a pharmaceutical patent is risky and fraught with difficulty due in part to the lack of judicial specialisation. I therefore raise with you the question, does this impact on access to justice for the commercial community? In my view it undeniably does.

To many people, the interests of such commercial clients may not loom large as important considerations. The fundamental problem lying with access to justice is for John and Jane Citizen, for whom litigation is now simply far too costly and a luxury few can afford. That is undeniably a fair observation. However, the commercial community also has its legitimate demands and

11 For an example where one such expert was appointed, see *Smale v North Sails Ltd* [1991] 3 NZLR 19 (HC).

12 See High Court Rules, rr 22.2 and 22.4.

13 Commerce Act 1986, ss 77 and 78.

expectations of the judicial system so that it can have confidence in the system and so that it knows that commercial arrangements are underpinned by proper and adequate recourse to the judicial process, should that be required. We are a member of a number of multinational treaties including TRIPS in the area of intellectual property. Further, we have entered into a social compact with other nations to enforce intellectual property rights.[14] We must recognise that.

At the same time, we are now coming under pressure to enter into fair trade agreements with other countries including the United States. A concomitant of this is likely to be pressure brought to bear on the generic pharmaceutical manufacturers in New Zealand, those who supply into New Zealand, and our own funder of pharmaceuticals, the Pharmaceutical Management Agency (Pharmac). The Pharmac model is much lauded overseas, yet is inimical to the interests of many of the proprietary manufacturers. This brings into sharp focus the very issues articulated above regarding revocation of pharmaceutical patents.

IV THE DANGERS OF SPECIALISATION

There are without doubt legitimate concerns expressed over specialisation on the bench. Some of these have been identified above.

I am not suggesting specialist courts or divisions of the High Court (for which I do think New Zealand is too small). That said, one cannot avoid noting that we already have specialist courts such as the Employment Court, Environment Court and the myriad of Tribunals operating under the umbrella of the Ministry of Justice.[15]

The main objection to specialist courts or divisions is elitism, lack of cross-pollination of ideas with other disciplines, perceptions of bias, cliquism, dogmatism and the clubby nature of practice and procedure before such bodies. Yet none of these appear to beset our specialist courts such as the Employment Court and Environment Court. Embedded or entrenched views are another danger.

In New Zealand, the problem more likely resides in divisions of the High Court, should that be considered. Experiments along these lines have been tried in the past, such as the Administrative Division of the High Court, which fell into desuetude until it was ultimately terminated. Yet, on the other hand, the Commercial List (with specialist judges appointed to it) continues to operate with success. There is also the legitimate concern that divisions

14 See Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 2 January 1995) [TRIPS]; Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 3 (opened for signature 24 July 1971, entered into force 15 December 1972); and Universal Copyright Convention 216 UNTS 132 (opened for signature 6 September 1952, entered into force 16 September 1955).

15 It is worthwhile noting that the Copyright Tribunal (from which there lies an appeal to the High Court, but significantly only on a question of law) has exclusive jurisdiction to hear and determine disputes over licencing agreements which can involve amounts measured in the tens of millions of dollars. See, for example, *Phonographic Performances (NZ) Ltd v RadioWorks Ltd* [2010] NZCOP 1.

within the High Court will create groups of judges — those within the specialist group and those outside of it, leading perhaps to misconceptions about respective qualities of judging. Specialist judges may avoid these issues.

V THE DESIRABILITY OF CROSS-POLLINATION

No commentary or discussion on specialisation would be appropriate without a consideration of the actual workload of the High Court and the manner in which judges deal with, preside over and determine a true smorgasbord of cases.

There are many who are critical, with varying degrees of quality of information relied upon, of the High Court's workload. The perception appears to be that the High Court is inundated with criminal work to the prejudice of civil work and that the criminal is a waste of a fine judicial mind.

I am not at all a subscriber to this point of view. There are a number of responses I make, all of which in my opinion not only answer the criticisms but also highlight the advantages of our present system.

First, the amount of criminal work done as first instance trial work in the High Court has decreased rapidly in recent times. At a recent seminar presented by Miller J, it was shown that High Court judges' sitting time was equally divided up into one third for civil work, one third for criminal and one third for "other" (where "other" included the Criminal Appeal Division of the Court of Appeal (CAD), in which two High Court judges sit).[16] It is quite wrong to focus on number of judgments or rulings or minutes issued. It is sitting hours that matter. These figures were a surprise to me and, I would suggest, to many.

Secondly, a strong, intelligent, protective and independent judiciary at superior level is absolutely essential to deal with any criminal matters that properly demand the attention of a High Court judge (or Court of Appeal judges for that matter). A vigorous criminal bar and bench are an important function of a civilised and democratic society committed to the rule of law.

Thirdly, and on a purely personal observation basis, any competent barrister must have had some experience at the criminal bar, whether as a prosecutor or defence counsel. The invaluable training that criminal work gives spills over very neatly into highly geared commercial litigation.

There is much to be learned from the criminal jurisdiction that is of real benefit in the civil. To take an example, in a civil matter in which I was recently involved, serious issues arose in relation to expert evidence on handwriting. Highly qualified and respected experts from around the world had already given evidence and had prepared new evidence in the event of a retrial being ordered. A concern had arisen with respect to the admissibility of some of the evidence given at trial based on the relevant database, the

16 The Hon Justice Miller "Reforming Civil Litigation" (seminar delivered to LEANZ, Wellington, November 2010).

likelihood ratios, the inherent probabilities and improbabilities, and whether the so-called Bayesian approach to analysis of the data was appropriate. No statistical analysis by a statistician had been carried out.

This type of approach to expert evidence and its limitations (whether in the case of handwriting, facial recognition, walking gait analysis or fingerprints and so on), and whether or not there is an adequate database and statistical analysis, has been severely criticised by the English Court of Criminal Appeal in a number of cases starting with the Sally Clark case[17] and culminating in 2010 in *R v T*.[18] To the best of my knowledge, these issues have never arisen in a civil context. But there is no reason why they should not. There is much to learn from the criminal jurisdiction that is of real benefit to civil litigators, especially in the context of expert evidence.

Fourthly, there is probably little better discipline in understanding the vagaries and frailties of human life, and in assessing the behaviour and demeanour of witnesses, than in a highly charged criminal trial. Such trials provide ongoing training of real benefit in any civil or commercial trial, especially those involving fraud or dishonesty.

This digression to speak of concerns, based upon my own experience particularly in the area of intellectual property and patents, is not unique to me. Others with experience in different areas of specialisation have similar stories to tell.

VI POSSIBLE SOLUTIONS

So far I have expressed my concerns. It would be inappropriate to do so without offering at least a couple of possible solutions.

We all recognise and accept that the judicial resource is a finite one. We also accept that our bench is too small and the volume of work too disparate for specialist judges as a matter of general principle. Moreover, there are fiscal constraints that are beyond the scope of any discussion such as this. So how in that context do we address the problem? I suggest to you two possibilities, although there are undoubtedly others.

One is part-time judges. In England, they have deputy judges of the High Court, who sit as High Court judges from time to time trying the same types of cases as full High Court judges. But they sit for part of the year only and are also able to work in private practice and appear in court — no doubt before the very courts on which they would from time to time also preside. However, population and the catchment from which such judges are drawn may be an important factor. As in England and Wales, New Zealand lawyers form around 0.25% of the population. This is a considerably high proportion. In England and Wales, with a total population of some 56 million

17 *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447.

18 *R v T* [2010] EWCA Crim 2439, [2011] 1 Cr App R 9.

(over 12 times that of New Zealand), there are 121,933 practising solicitors[19] and 15,387 practising barristers.[20] In New Zealand, there are some 11,672 practising lawyers.[21]

Despite the figures and an apparent plethora of lawyers, the common response is that we are simply too small and perhaps too insular to be able to cope with part-time judges. For my part I do not accept this. It works in the context of arbitrators, so why not with judges?

Another, but much more controversial, option is to bring in judges from overseas — again on a part-time basis. That would also carry with it constitutional and statutory difficulties, but these can be overcome.

We provide judges to a number of Pacific Island countries and they clearly have no difficulty in dealing with local customs and different rules of court and procedure. So why should we not borrow from, say, Australia?

This was certainly one of the possibilities suggested during the debate a decade ago over what mechanism we might establish to replace the Privy Council: that is, the makeup of our Supreme Court. One suggestion was to emulate the Hong Kong model.[22] Having been admitted recently on an ad hoc basis in Hong Kong, I have some (very limited) experience and knowledge of that jurisdiction. The Court of Final Appeal in Hong Kong (their equivalent of our Supreme Court) comprises permanent judges and non-permanent judges. The permanent judges are all permanent appointments of the Hong Kong judiciary, drawn locally. The non-permanent judges are drawn from Commonwealth countries, including some retired local Hong Kong judges. Predominantly, however, they are overseas judges. Importantly, they include former Law Lords, Chief Justices of Australia and retired New Zealand Supreme Court and Court of Appeal judges. The Right Honourable Sir Thomas Gault has sat as a non-permanent judge in Hong Kong and delivered the lead judgment on at least three occasions.[23]

The system of sitting with non-permanent judges in Hong Kong was intended to give their Court of Final Appeal gravitas and ensure that the commercial community and the community generally could have confidence in it. That it has achieved both goals is beyond argument. To what degree that is due to the contribution of the non-permanent judges (who it must be noted are only one or two of a five-judge bench) is impossible to tell. But what this does demonstrate is that bringing in judicial horsepower from another jurisdiction is not unknown or unusual.

I emphasise in conclusion once again that nothing that I have said in

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19 The Law Society *Trends in the solicitors' profession: Annual statistical report 2011* (London, 2011) at 5.

20 The Bar Council "Statistics" (2010) <www.barcouncil.org.uk>.

21 New Zealand Law Society *Report on the Exercise of Regulatory Functions and Powers for the year to 30 June 2011* (2011).

22 Hong Kong, by comparison with New Zealand, has a population of seven million and a total number of practising lawyers of approximately 8,500 (based on practising certificates issued): The Law Society of Hong Kong "About the Society" (31 December 2011) <www.hklawsoc.org.hk>; and Hong Kong Bar Association "About Us" (December 2010) <www.hkba.org>.

23 See *Van Weerdenburg v HKSAR* HKCFA CRI 9/2010, 27 July 2011; *Fong Yau Hei v Gammon Construction Ltd* (2008) 11 HKCFAR 212; and *Re Ping An Securities Ltd* (2009) 12 HKCFAR 808.

this paper should be regarded as a criticism of our bench — quite the contrary. It is nothing more than a plea to ensure that in any overall consideration of the issues of access to justice for the commercial community, it includes a consideration of the need for specialisation on the bench.