Introduction

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This edition of the Law Review is devoted to litigation issues, and draws on the work of the LLM Litigation class at Victoria University in 1988. This course was led by Mr Glen Luther, formerly a lecturer at the University, and me. Before introducing the papers in this Review, I will give a brief overview of the Litigation course, the subjects studied, and themes discussed.

To most people litigation conjures up pictures of a court room in which battles are fought before a judge (sometimes assisted by a jury). Lord Denning once expressed it in martial terms:[1]

> In litigation as in war. If one side makes a mistake, the other can take advantage of it. No holds are barred.

In recent times however there has been a move away from such a militaristic view, and the intention of litigation is said to be to try to achieve real justice between the parties. See for example Sir John Donaldson's view, in the context of production and inspection of documents:[2]

> In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why," they ask, "should I be expected to provide my opponent with the means of defeating me?" The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the Court does not have all the relevant information, it cannot achieve this object.

In other words, the traditional adversarial approach to litigation is being questioned. This system has been described as "the traditional, cardinal basis for the conduct of civil procedure in England since about the middle of the 13th century, and is well settled and deep rooted"[3], and is contrasted with the inquisitorial procedure introduced to Europe by Pope Innocent III. The adversarial trial system (both civil and criminal) is being viewed increasingly as too battle oriented and, perhaps most important, as too expensive (to both litigant and society), and too time consuming to amount to a realistic way in which to resolve most disputes that arise.

This reassessment of the traditional approach to litigation is echoed in New Zealand. Since the introduction of the High Court Rules in January 1986, lawyers have been required to reassess basic principles of dispute resolution. This discussion is best

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1 *Burmah Oil Co* v *Governor of the Bank of England* [1979] 2 All ER 461, 467.

2 *Davies* v *Eli Lilly & Co and Others* [1987] 1 All ER 801, 804.

3 Jacob *The Fabric of English Civil Justice* (Stevens, London, 1987) 6.

illustrated by reference to the controversy currently raging involving the requirement of exchange of briefs of evidence prior to trial.

Under the High Court Rules, there are several major innovations involving directions prior to setting a case down for hearing and also directions affecting the trial. These rules were not contained in the former Code of Civil Procedure and were intended by the Rules Committee to encourage greater participation by judges at the interlocutory and trial stages of a proceeding. The first rule governs direction before setting down, and enables the party at any time before a proceeding is set down for trial, to file an application for directions regarding the proceeding.[4] The rule gives a very broad discretion to the court to make such orders and give such directions as it thinks fit with a view to facilitating and expediting preparation for trial and overcoming delay by any party, whether or not any such order or direction has been sought by any party. These direction rules have proved to be very useful, and are used by the court to make what are often known as "timetable orders".

The second rule deals with trial directions and enables any party at any time after the pleadings are closed to apply to the court for an order for directions affecting the trial.[5] Again the court may make such orders and give such directions (whether sought or not) as appear best adapted to secure the just, expeditious and economical disposal of the proceeding. One direction often made by the court is the requirement that witnesses' briefs be exchanged prior to trial. The general rule is that evidence at trial is given viva voce, although occasionally parties may agree to file affidavits, or have an agreed statement of facts. The latter tend to be the exception rather than the rule. Since the High Court Rules were introduced however, judges (particularly in the Auckland region) have seized on the new procedure to require parties to exchange briefs of evidence. See for example *Esprit Marketing Limited* v *Dealers Guide Limited*[6] where the evidence in chief of experts was required to be exchanged within the time limits provided by the court. In answer to the opposition to such an approach by counsel for the defendant, Smellie J said:

> In my view ... the philosophy of the new High Court Rules is to move away from ... a technical approach to the disposal of civil litigation. The Rules now favour the Court requiring Counsel to join in the search for the truth in order that justice may be done.

Similar sentiments were expressed in *Hooker Brothers* v *Car Haulaways Limited*[7], and *Cross* v *Aurora Group Limited*[8] where the direction went further and evidence of all witnesses at the trial was ordered to be provided on affidavit, subject to cross examination, even though one of the parties submitted that credibility was an issue. A

4 Rule 437.
5 Rule 438. See also RSC Ord 38, r 2A.
6 Unreported, 4 March 1987, Auckland High Court, A 359/85, Smellie J.
7 Unreported, 27 March 1987, Auckland High Court, A 1082/84, Hillyer J.
8 Unreported, 27 May 1988, Auckland High Court, CL 4/88, Barker J.

more restrictive approach was adopted in *Winters* v *MLC*[9] where Barker J declined to order an exchange of an expert's report where the expert would be giving evidence as a witness to an actual occurrence which was the subject matter of the proceeding - that is primary rather than opinion evidence. See too the more conservative approach adopted by McGechan J in *Modern Freighters* v *Dodson*[10] and in *Commerce Commission* v *Fletcher Challenge and others.*[11]

Notwithstanding the more circumspect approach adopted by McGechan J, the trend in other parts of the country seems to be towards a system of pre-trial exchange of briefs of evidence.[12] The recent practice note adopted by the Auckland and Hamilton judges has been the subject of much discussion within the Auckland District Law Society, and there have been meetings with the Executive Judge in Auckland to make the procedure workable.[13]

These were the kinds of issues discussed in the LLM Litigation Class in 1988, and the papers chosen for inclusion in this edition of the Law Review canvass recent developments and possible further innovations. The articles by Belinda Cheney and Cameron Mander discuss the way in which two recent procedural developments are being used to facilitate resolution of disputes. The mini-trial option, adapted from the United States of America, is becoming increasingly popular in this country.[14] Belinda Cheney examines the nature of a mini-trial and gives illustrations of how it works in practice. Cameron Mander examines the recently introduced pre-trial conference procedure in District Court criminal procedure. The aim of these procedures is to reduce cost and time wasting for the benefit of the parties and the court.

John McLinden's article is slightly different. His paper contains a study of civil depositions in the United States, and to a lesser extent, in Canada. He argues that such a procedure could be adopted in New Zealand. Justin Emerson looks at the class or representative action, based on rule 78 of the High Court Rules, and suggests that it is under-used in New Zealand and could be very advantageous in several types of litigation.

These papers illustrate that litigation is very much a live subject, and that fundamental concepts of dispute resolution are being challenged and re-examined. Perhaps the papers also suggest that at a time when New Zealand is becoming a far more litigious society, it is inappropriate to relegate the study of litigation to a few

9 Unreported, 23 September 1986, Rotorua High Court, A 111/83, Barker J.

10 Unreported, 19 February 1987, Wellington High Court, CP 233/86, McGechan J.

11 Unreported, 29 November 1988, Wellington High Court, CP 335/88, McGechan J.

12 Practice note issued by the Executive Judge in Auckland and Hamilton and approved by all Auckland and Hamilton Judges for pre-trial exchange of briefs of evidence, reported in 287 Law Talk.

13 See for example, W M Wilson "Pre-Trial Exchange of Briefs of Evidence" 296 Law Talk 12, and *Report of High Court Sub-Committee of Auckland District Law Society* on pre-recorded evidence in chief dated 9 June 1988.

14 See Cavanagh "The Mini Trial" - A New Zealand Experiment in pre-trial dispute resolution" [1989] NZLJ 23.

weeks coverage in a professionals course where there is no Civil Procedure course within the University degree. The omission of Civil Procedure from the list of subjects offered by the University is lamentable, and should be rectified in the near future. Civil Procedure is not an aspect of justice but is essential to justice. As Sir Jack Jacob, one of the leading teachers and writers on the subject in England, has said:[15]

> Civil procedural law is perhaps the most pervasive and extensive branch of the law, since it is the indispensable instrument to activate every other branch of the law, except the criminal law. Its essential function is to infuse life into all other areas of the law, to bring into actual being and to give reality and affect to all the legal rights and duties of every person and body in society.

15 Jacob, above n 3, 63.