

JUDGING THE JUDICIARY

In 1995, speaking at the Bar Association Conference, I posed the question concerning the Court of Appeal decision in *Brighouse v Bilderbeck*: "Would anyone here bet against the proposition that, had the matter gone before the Privy Council, the majority *Brighouse* decision would have been reversed (and by 5-0)?" Well, here we are less than three years later and it has been overturned by our own Court of Appeal by 7-0 instead.

The saga of redundancy payments illustrates much that is wrong with our legal system. In 1992 Chief Judge Goddard said "redundancy compensation is payable only pursuant to an individual or collective contract or redundancy agreement to that effect." In *Brighouse v Bilderbeck* he changed his mind and imposed, as Justice Gault said, a legal requirement for employers to pay such redundancy as the Employment Tribunal subsequently decided was fair. He was backed up by a Court of Appeal composed (quite unnecessarily) of five judges, the majority being Lord Cooke and two well known loyal supporters, one of whom had the grace to acknowledge that the case constituted a "radical departure" and was the product of conscious judicial activism. Because of the anomaly that there is no appeal to the Privy Council from cases appealed from the Employment Court, there the matter rested until this year. Aoraki Corporation is to be congratulated for pressing on with a case that in conventional terms ought to have been regarded as hopeless.

But where does this saga leave us? Can such 180° u-turns be limited to cases that everyone knew were wrongly decided in the first place, like *Brighouse* and now the *Carter Holt Harvey* decision on company amalgamations which looks very much like a pre-emptive strike by the Court of Appeal to clean up a mess of its own making before its decision was ignominiously overturned by the Privy Council? Or should the large number of five-judge sittings of the Court of Appeal make us nervous that any and every aspect of the law is up for grabs?

We have seen other attempts at conscious legislation by the Court of Appeal, such as *Andrews v Parceline Express*. Even sensible decisions such as *DHL Couriers* are stated not to apply to all circumstances. Under these conditions, how can lawyers advise clients, and how can businesses assess risks?

Indeed we have reached the point in New Zealand where senior judges seem perfectly comfortable with arbitrariness and unpredictability: Chief District Court Judge Ron Young has openly mocked "Roger Kerr's and the Business Roundtable's treasured certainty". We might contrast the Chief Judge's view with that of Chief Justice Murray Gleeson, recently appointed as head of Australia's highest court:

... there is an abiding need for predictability and certainty in any system of law. The willingness of people to engage in commercial transactions, for example, depends upon confidence in their ability to know the way in which the law will assign rights and obligations to their conduct and relationships. ... The value of reasonable certainty, and the demoralising consequences of unpredictability in the law, should not be underestimated.¹

It will not surprise you to learn that I happen to prefer Chief Justice Gleeson's view.

Perhaps the most astonishing thing about the legal system is that there seems to be no consensus about what it is for. Indeed there is not just lack of agreement but two radically opposed views. One is that the role of the courts is to decide disputes brought before them by the parties in accordance with principle and precedent drawn from the pre-existing body of law. The other view is that the role of the courts is to make social policy decisions which create fair outcomes and balance competing interests.

These two goals involve different understandings about the role of the courts, different requirements of judges, different procedures, different information and different enforcement systems. So it might be thought that deciding which of these two purposes the legal system is supposed to serve would be a precondition for any sensible discussion about judicial appointment and supervision. This debate seems to have gone by default. A goodly number of judges appear to have decided for themselves that their job is to pursue some chimerical 'fairness' while the users of the judicial system resort to law expecting just that – law.

¹ Gleeson, A M, 'Individualised Justice – The Holy Grail', *Australian Law Journal*, Vol 69, June 1995.

In the rest of the public sector, organisations have clear goals laid down for them and the chief executives are intended to be held to account for failure to achieve them. In the context of the legal system, the natural response is that any such move would endanger judicial independence.

But judicial independence is a requirement only of the traditional model of the judicial role. It is not an end in itself. It serves a purpose. That purpose is to ensure that the law is applied equally by the judges without thought for current government policy, popular opinion or the views of their senior colleagues.

Judicial independence is not supposed to give judges a licence to pursue their own enthusiasms and social goals untrammelled by the need to account to any democratic electorate. Yet this is the model of judicial independence now put forward by some judges. It was publicly espoused by Justice Thomas in a lengthy personal manifesto which he published prior to being appointed to the Court of Appeal.

A relevant comparison is between the position of the Governor of the Reserve Bank and some legal bodies like the Human Rights Commission. The Governor of the Reserve Bank is made independent in the sense that he or she can only be given formal and open instructions by the government. This is precisely so that we can be confident that the Bank will pursue the goals set down in the legislation and not be deflected by current political pressures or fashions. The Human Rights Commission on the other hand has no clear goals and seems to regard its independence as a licence to make the law up as it goes along.

Judges still claim their traditional protections and privileges, including that their remuneration should not be decreased. But if they are to claim these traditional privileges they must perform their traditional role. If judges are to widen their role and pursue social goals by essentially political means then we need to consider completely different mechanisms for appointment and supervision. At present it looks very much as though some of our senior judiciary want the excitement and public profile of the judiciary in the United States without being subject to the controls that apply in that jurisdiction.

Chief Justice Gleeson has put the matter in the following way:

... it is expected of judges that they will apply neutral and general principles to the resolution of individual disputes: they have no mandate to act as ad hoc legislators who, by decree, determine an appropriate outcome on a case-by-case basis. The legitimacy of judges depends upon the nature of the function that is assigned to them and upon the manner in which they perform that function. No judge has, and no wise judge aspires to, political legitimacy. Judges are un-elected and, from most points of view, relatively unaccountable. Their independence and unaccountability are appropriate to the judicial role, but they are inappropriate to a quasi-legislative role. The procedures by which judges are selected, their tenure of office, the fact that they may only be removed from office by an extraordinary and rarely invoked procedure, and the mechanisms that are established to ensure that they are free from political influence or pressure, all assume that their duty is to act as impartial adjudicators who administer general rules of law in a disinterested fashion. This is not to assert that there is no room for principled development of the law by appropriate judicial law-making. Of course there is. But, as a rule, acceptable judicial law-making is incremental, and involves development of established principle. There is a limit to the extent to which a democratic community will accept law-making by people who are not obliged to submit to the accountability of the political process.²

That many disagree with Chief Justice Gleeson and see an essentially political role for the courts is shown by the assumptions underlying the arguments over appeals to the Privy Council. At base the whole sovereignty argument assumes that courts are engaged in political activity. In that case of course we would not want overseas judges making policy decisions for New Zealand. But as with the Hong Kong Court of Final Appeal, the whole point of going overseas for judges is to emphasise that legal decisions are not simply exercises in coming to the desirable political solution. They are to be made according to stipulated procedures and to be derived from pre-existing principles, and this can be done just as well by judges brought up elsewhere in the common law world.

If, on the other hand, legislation is to be interpreted only after an assessment of the likely economic and social consequences of the various options, then the job may as well be done by a parliament through select committee hearings.

² *Ibid.*

Indeed, it would be better done by a select committee, given the range of information open to it and the greater transparency of the lobbying process.

This divergence of views makes any discussion of judicial appointment and supervision difficult. Presumably, judicial appointees should be selected for their acceptance of the values of the legal system. But no one seems to know what those values are any more.

So to propose a Judicial Appointments Board is surely to put the cart before the horse. The purposes of the Board are presumably to increase transparency and to put a screen between the government and judicial appointments. But if the Board is not simply to become yet another body with a licence to pursue its own political goals, then some meaningful criteria for appointment must be put forward. This means deciding between the two basic views of the legal system and pursuing one model consistently.

At present the only attempt to instruct judges in their role seems to be in the judicial oath. The oath is framed in words which would once have been regarded as having a clear and consensual meaning: to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will." Today, however, these words seem to mean all things to all people. Once we have decided what we require of judges, the oath should be rewritten to make clear what is expected.

Background of judges

The current system is criticised for being in the nature of a 'closed shop'. The result, it is said, is that judges come from too narrow a range of backgrounds. So now we have wider consultation processes including groups other than the leaders of the legal profession.

The strange thing about these processes is that although by far the biggest users of the civil jurisdiction of the High Court are business interests, so far as I know no group representing businesses has been consulted on appointments to the High Court. Nor will this be corrected by Diane Yates's draft Bill. Revealingly, the minister of maori affairs, the minister for consumer affairs and the minister for women's affairs would all get to nominate people for the Board, but the minister for commerce would not.

So let me say now what I would say to the Attorney-General were he to consult our organisation as a representative of business.

First, I would reject completely the notion that the Bench should in some way be 'representative' of the community as a whole. This again is a view which stems from the modern radical view of the role of the judiciary. But its proponents do not seem to realise that it also requires a radical change to the composition of courts.

Since in a District Court or High Court case there is usually only one judge, it is hard to see how one can legitimately talk about 'representativeness'. It is vital that litigants believe that each judge represents the entire community. Do those who use the language of representativeness really want to see a situation in which parties feel aggrieved because the judge was the same sex or race as an opponent? That seems to be the natural outcome of such thinking.

A better question to raise would be whether we are getting the best choice of judges out of the present selection system.

Asking that question may reveal aspects of the judicial system which prevent perfectly suitable people from being appointed to the Bench. One such would be the current opposition to part-time judges. The arguments against having active practitioners serving part time as judges seem pretty spurious. And if, for example, their effect is to deny to the Bench experienced women who choose not to work full time, then the effect on the quality of our Bench may well be serious.

There is a second potential source of judicial talent that is under-used because the system is clearly loaded against this group. A procedure of consulting senior judges inevitably favours the litigators who appear before them. Left largely out of account are the transactional or commercial lawyers who arguably undertake the real development of our law by devising original solutions to new problems. When Justice Blanchard was appointed, the Attorney-General went out of his way to comment on the rareness of such appointments.

But commercial lawyers have some significant advantages over litigators as judges, especially at appellate level. Commercial lawyers are forward thinkers, while litigators are criers over spilt milk. Commercial lawyers, or at least the

best of them, think in terms of the dynamic effects a change in the law will have. Too many judges view cases entirely with the advantage of hindsight and with the desire to help someone for whom things have turned out badly, without regard for the way their rulings will affect future business decisions.

Obviously, commercial lawyers lack experience of managing litigation. But this should prompt consideration of whether promotion from the High Court to the Court of Appeal should always be the natural order of things.

There used to be a strong prejudice against promotion in the legal system, but its increasingly hierarchical nature is breaking that down. Nonetheless, the jobs of judges at different levels are different. The task of a District Court judge is mainly to run criminal trials. A prime task of a High Court judge is to manage civil litigation. Judges of the Court of Appeal do not have to do either of those things. They have to produce considered legal judgments which, in the vast majority of cases, will finally state the law.

In recent times, however, only Justices McKay and Keith have been appointed straight to the Court of Appeal, although Justice Blanchard was moved up pretty quickly.

So a rational review of the appointments process should not be concerning itself with asking which groups in the 'community' should be consulted, but with asking questions like:

- how can we identify the commercial lawyers who might be suitable for judicial appointment; and
- what are the skills required of High Court judges and Court of Appeal judges, and should we be making more appointments directly to the Court of Appeal?

For the moment, rather than recommend any formal changes to the appointment process, I would like to hope that we can get the genie back into the bottle and improve a system based on a collegial assessment of the limited range of skills appropriate to a closely defined task.

There is a further analogy here with the Governor of the Reserve Bank. No one worries overly about the process by which a new Governor is chosen because

the role of the Governor is clear. If roles are ill-defined and open-ended, then of course the method by which people are appointed becomes a key question.

But it has to be said that if the current generation of judges, particularly the most senior, continue on their present course, the case for an open and politically supervised appointment process will become unanswerable. In that event we are talking about parliamentary hearings rather than decisions by an inscrutable Judicial Appointments Board. The tawdry spectacle of the Bork and Thomas hearings before the US Congress will not be far away. I suggest the next generation of judges may not thank their predecessors for that.

Specialisation

Two particular issues impact on the appointment process and on any proposals for the supervision of judges. These are specialisation and training.

The initial reaction of many business people, and probably most litigants, would probably be to favour greater specialisation. There are obvious short-term advantages to litigants if the judge concerned has some background in the subject matter of the dispute.

But many of us in business do not want to see the creation of more specialist courts like the Employment Court, the Environment Court or the Maori Land Court. The creation of such courts is a way in which the government can decide in advance which judges will deal with which cases. They also tend to lose their character as real courts and become machinery for social interventions. I believe there are good arguments for abolishing most of them.

This objection does not apply to less formal specialisation within the High Court, so long as it is controlled by the Chief Justice and not by the government, and so long as there is no room for legal argument that a case has been commenced in the wrong Division.

As a practical matter, such increased specialisation can only come about if there is greater centralisation of the High Court. If the judges sat only in Auckland, Wellington and Christchurch there would be groups of judges who could start to divide the work between themselves in a sensible fashion.

This already happens to a limited extent in Auckland. But the area that concerns business people is, of course, commercial cases. The Commercial List judges deal only with preliminary matters, and the suggestion that they should deal with the substantive hearings has met with great resistance. Most High Court judges would claim competence to deal with commercial cases and would resent losing them. Unfortunately, not all those judges are accurate in their self-assessment.

There is also, of course, the problem that every High Court judge is a potential Court of Appeal judge. In the interests of sound adjudication of commercial law, it is not helpful to have judges arriving in the Court of Appeal after a long period dealing only with criminal cases.

So the question of specialisation is a fine one. There are clearly short-term benefits to litigants in particular areas in having their cases go before judges who are familiar with the background. The long-term effects on the legal system as a whole are more equivocal.

Training

Again, most business people's initial reaction would probably be that training for judges would be a good thing. But as with specialisation, the issues may be more complex than appears at first sight. Let us tackle this by considering the potential subject matter of judicial training.

First, the procedure and tactics of trial. Currently, it seems to be assumed that lawyers experienced in litigation will be well versed in how to run a court, but no doubt a short period of induction with some advice from older hands would not go amiss. This would be particularly the case if the idea that more commercial lawyers should be appointed were taken up.

Next there is the law. This presumably is included in the phrase 'professional competence' in the member's bill drafted by Lianne Dalziel. But there is a problem. Judges are there to decide marginal cases in Court on the basis of argument from counsel. They should indeed be exposed to all the views expressed in legal journals, material to which counsel also have access. But we must avoid the impression that judges in their officially sponsored training are being given some received view. Most current judges are doubtless robust enough to resist this kind of thing, but the signs are that new appointees will

be required to signify their willingness to undergo what currently passes for judicial training and this may mean a more malleable Bench in future. 'Re-education' is not a term with happy connotations.

Thereafter we proceed to what Lianne Dalziel calls 'social awareness'. This phrase is so broad as to be meaningless as an expressed goal, especially when coupled with the goal of 'personal growth'. Almost anything could be justified under these headings, although I am left wondering whether commercial expertise falls under either or has been specifically excluded.

As there is almost no limit to the subject matter of court cases, there is no limit to the knowledge that judges might find useful. The Chief District Court Judge has told us that the purpose of training is to ensure that judges are 'up' on social and economic issues. But we have surely learned the folly – indeed the conceit – of believing that omniscient or expert planners can competently micro-manage the economy and society – even planners in governments with all the resources they have at their command. Given that, what chance have judges?

I suggest there is no special body of knowledge under this heading that is required by judges and no one else. There is therefore little reason for special judicial training. Of course judges should keep up with relevant literature and be encouraged to attend courses and seminars open to others. But training specifically for judges will attract barrow-pushers who wish to influence them. We have already had experience with overseas so-called experts in child sexual abuse conducting judicial training and putting forward highly controversial views as being scientific consensus. The same sort of thing has happened over environmental issues. Counsel have then found these views put forward by judges as matters that 'everyone knows'. Effectively counsel are arguing against another counsel whose arguments they have not heard.

So, if judicial training is to take place, it is not enough that the programme be made public. The detailed content of that training needs to be made public and in appropriate cases counsel need to be able to call expert evidence to rebut it.

Complaints and supervision

I hear many complaints about judges, although I am not in a position to know how many of them are well founded. These complaints include:

- refusal to allow parties and counsel to argue the issues they wish to argue;
- paying no attention to legal arguments if the other side is producing social policy arguments;
- issuing judgments that bear no relation to the arguments made by counsel but dealing with matters of the judge's choosing;
- bullying parties into alternative procedures that they do not want to use, sometimes, especially in the Court of Appeal, because the judges appear to find the case boring; and
- particular judges having idiosyncratic tendencies, so that counsel reverse their assessment of the chances of success on hearing who a case is set down before.

Occasionally cases are so egregious as to arouse public comment, as in *Z v Z* where the conduct of the case was hijacked by the Court of Appeal. But for the most part these complaints are made privately by counsel unwilling to endanger clients' interests or frighten other members of their firms.

So it is unlikely that these are the kinds of complaint that will be made to Lianne Dalziel's proposed Judicial Commission. More likely, complaints will be from litigants in person and from groups such as women and Maori that believe that they have been insensitively dealt with. Given the proposed power, effectively in the hands of the Chief Justice and the Chief District Court Judge, to suspend judges while a complaint is being dealt with, and given the public comments of the current holders of those offices on the need for the legal system to change its ways to accommodate the needs of women in particular, it will be a brave judge who does not feel the need constantly to look over his or her shoulder. It must also be remembered that if judges engage in 'defensive judging' this will not only be at the cost of the taxpayer but also of the other party whose counsel will have to be paid to listen to lengthy irrelevant arguments or even ceremonies. This sort of thing would appear to be happening already in England where a complaints mechanism has been introduced.

But how can one be against greater accountability? Well, that takes us back to the beginning of my paper. If judges are to stick to their traditional role then we are willing to accept adverse decisions and occasional irascibility or idiosyncrasy. But if judges are to carve out for themselves a broader role, making economic and social policy decisions, then they will have the demands of political accountability inflicted upon them. That seems to be the logical choice judges, legal practitioners and the wider community face.

Conclusion

So I conclude that much of the debate in recent years on issues like the Privy Council, the appointment of judges, complaints and supervision has been wrongly focused. In my view these are not aspects of the judicial system that are fundamentally flawed and need fixing, although there may be scope for refinements. The much more basic requirement, in my opinion, is to clarify the issue of whether the role of the courts is essentially to administer law or to make social policy, and, if it is the former, to focus on ways of minimising future fiascos such as *Brighouse*. Ideas such as a reformulation of the judicial oath and the avoidance of legislation giving wide discretion to courts are relevant here. And the resolution of the basic issue of the scope of judicial activism is one that affects us all – it is not a debate on which the legal establishment should have a monopoly.

For my part, I would opt for the concept of a judiciary advocated by Richard Epstein of the University of Chicago Law School in the lecture he gave in Auckland two and a half years ago. There is no finer law and economics scholar working in the field today, yet the whole thrust of Professor Epstein's argument was against importing such sophisticated tools into the courtroom. We simply do not know enough to operate as detailed social planners, and courts encounter the aberrational cases not the mundane transactions of ordinary life. To regulate the mass of everyday transactions on which the community's well-being depends, Epstein argues for simple rules in fields such as property, contract and tort – rules that do not risk ungluing the system as a whole. As he put it:

If we understand how this system works in the routine cases, we will avoid excessive mischief in the sophisticated and idiosyncratic cases that end up before a judge. By aiming for subtlety and economic refinement, we risk falling flat on our faces by making the errors that simpler techniques could have

avoided. The most sophisticated economic theory leads us back, in fact, to simple and powerful rules. If we understood that, it would probably make judging a more boring profession. But in the end, society, lawyers and even we academics would be better off for having more boring courts.³

³ Epstein, Richard A, *Economics and the Judges: The Case for Simple Rules and Boring Courts*, New Zealand Business Roundtable, 1996.