# WHOSE DAY IN COURT IS IT ANYWAY?

***Rt Hon Thomas Gault****

In the course of conversation at dinner recently the person next to me, a non-lawyer who had recently been in a trial court for some reason (other than to face prosecution), ventured the opinion that the judicial system is extravagant. I am sure she did not mean that the décor and ambience of our court facilities reflect excessive expenditure by the Department for Courts. She was referring to the overall process – the adversarial system, the rate of progress, the manner in which information is presented through oral examination, and the cross-examination of witnesses. I do not know whether it was a jury trial.

I did not then attempt to justify the system by reference to the great traditions of British law, the fundamental rights of citizens of access to the courts, to a fair and impartial hearing, an independent judiciary, open justice, and the presumption of innocence. That was not just because it would have ruined the meal. It was because I am of the view that those high values would not necessarily be lost with the adoption of more streamlined procedures.

The cost and pace of civil litigation is deterring many people and companies from obtaining due redress. The cost of the criminal justice system strains the State's resources at many levels, but relevantly in the provision of aid to defendants to enable them to be legally represented.

Is there extravagance? Could our system be less elaborate without compromising the fundamental values society should not be prepared to relinquish? Is it appropriate in a small country, with limited resources to seek to emulate the structures, institutions, and processes of large nations without examining whether something less for our situation would be truly inferior?

The recent debate in England on proposals to limit the availability of trial by jury has been interesting. Advocacy for entrenched interests seemed more prominent than research

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* President of the New Zealand Court of Appeal.

into, and evaluation of, the efficiency of the existing system and possible alternatives. One could be forgiven for thinking the institution has been immutable over the centuries. I am not proposing abandonment of trial by jury, although equally I could not support following the United States and constitutionally guaranteeing trial by jury, even in complex civil litigation.[1]

What I do wonder about is the increasing length of criminal jury trials in this country. That is an impression only, though it is supported by such limited statistical material as is available.[2] Trials of five, six, and more weeks, now, are common. We have had a trial on burglary charges lasting six months. When I was a trial Judge, I sat on a case resulting in the conviction of two men for importing a large quantity of heroin by a courier who gave evidence for the Crown. All three were under surveillance from the time they arrived at the airport until the drugs were delivered, yet the trial dragged on for a month. Dr Crippen was tried "on 18 October 1910 and following days".[3] His appeal was heard and determined on 5 November in the same year.[4] Were he to be tried here now, his trial likely would consume the whole of that period.

There is a similar trend evident in civil cases. A single transaction or course of conduct seems increasingly to give rise to multiple causes of action. Often it is apparent that if the claim is unsuccessful on one it will not succeed on the others, yet all are pursued. They are supported with extensive briefs of evidence covering much that must be common ground and extensive repetitive submissions calling for unnecessary treatment in lengthy judgments. All too often in recent times we have seen cases in which costs to the litigants have far exceeded any recovery that might realistically have been expected.

Some might contend that it is because appellate courts create more and more obstacles to be negotiated by trial courts and counsel that trials take so much longer. I say simply that cannot be the complete explanation. An appellate Judge must read the records of hundreds of trials each year. On my observation, I consider there is plenty of room for those involved in the trial process to increase efficiency without prejudice to all of the recognised safeguards. It is my view that many witnesses are called unnecessarily, the art of focused and effective cross-examination is almost lost and pre-trial notification of criminal defences is long overdue. A difficulty, as I see it, is that there are no adequate incentives to confine trials to matters that are reasonably contestable.

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1 US Constitution, VII Amendment.

2 Frances Sutton *Report Prepared for the Department for Courts: A Statistical Model of the Duration of Jury Trials for Calendar Years 1999 and 2000* (Department for Courts, Wellington, 2001).

3 *R v Crippen* [1911] 1 KB 149, 150 (CA).

4 *R v Crippen*, above.

All of that does have relevance to appeals that are more within my recent experience. It affects the context in which we are required to determine whether justice has miscarried. It makes that task more complicated and time consuming.

Because so much has been said recently about a final court for New Zealand, I have concentrated on intermediate appellate courts. That is what I am best equipped to do because that is where I have been gainfully employed for the past 11 years.

Before commenting on efficiency in the handling of appeals, it seems appropriate to examine the rights and legitimate expectations of litigants in respect of appeals. What are the values to be assured and protected in the face of increasing workloads and costs?

A right of appeal generally is taken for granted. Our judicial hierarchical system contemplates the right to challenge and have reviewed first instance decisions. Article 41(1) of the International Covenant on Civil and Political Rights (reflecting Art 10 of the Universal Declaration of Human Rights) provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Art 14(5) states explicitly:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

That is adopted in section 26(h) of the New Zealand Bill of Rights Act 1990:

> The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.

There is also, of course, section 27(2), the true scope of which is, as yet, unclear.[5]

From the premise that from all judicial decisions by which rights and obligations are determined, and from criminal convictions and sentences, there is a right to at least one appeal, there arises the question of the content of that right.

There is little difficulty in carrying forward into the right of appeal the rights to a fair hearing without undue delay before an independent and impartial court and adequate time and facilities to prepare the appeal. But should it be a superior court? Should it be a collegiate court? Should the appeal be by way of rehearing or review on law only? Should

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5 In the view of O'Regan J in *M & J Wetherill Co Ltd v Taxation Review Authority* [2001] 3 NZLR 827 (HC), it does not extend to assuring a right of appeal not otherwise provided.

it involve a public hearing? Should the appellant be entitled to be present? Should it involve a right to counsel at public expense?

When I originally prepared this paper, I ventured as answers to most of these questions "it all depends". Generally appeals are to higher courts, though rehearing and review at the same level are recognised. Certainly, if the appeal court is constituted by more than one Judge, they should act collegially, but not all appeals warrant more than a single Judge. Since then, however, the judgment of the Privy Council in *Taito*[6] has become available. That contains some interesting comments on what is required to accord a sufficient right of appeal. I do not wish to comment upon the decision itself, save perhaps to record my agreement with the judgment in so far as it records that it sets out in broad and necessarily imprecise outline the system under which the appellants' appeals were dismissed by the Court of Appeal.

In addition to the terms in which the judgment is expressed, I regret the timing of its delivery, coming as it does shortly before the retirement of Sir Ivor Richardson the President of the Court of Appeal. No one has worked harder than he has to assure the rights of litigants, and to further the recognition and development of human rights in our courts. It is unfortunate indeed to have had the system for the disposal of criminal appeals in New Zealand so focused upon when the Court has been under his presidency, because the processes involved have operated in New Zealand for at least 60, and probably upwards of 80 years. They certainly were in place long before the commencement even of his lengthy membership of the Court. Over the whole of the time there is no record of challenge to the procedures on the ground that they gave rise in any particular case to a miscarriage of justice.

In 1944 the two divisions of the then Court of Appeal, consisting wholly of trial judges, sat together to consider an appeal advanced on the ground that an earlier appeal had been determined by the Court of Appeal when he was not heard, was not represented by counsel, and was not informed of his right to be so represented. The Court noted that the procedures under challenge had been operating for many years prior to that. The Court dismissed the appeal,[7] and thereby endorsed the procedures employed since then in not materially different statutory settings.

It is to be noted that, though critical of the processes, the Privy Council judgment records:

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6 *Taito and Others v R* (19 March 2002) Judicial Committee of the Privy Council, PC 50 and 59 of 2001.

7 *R v Neiling* [1944] NZLR 426 (CA).

> Except in the case of Johnson, there is no material before the Privy Council about the grounds of appeal of the appellants, let alone material to indicate that their appeals have a realistic prospect of success.

Presumably, it is envisaged that the Legal Services Agency can, if necessary, fund yet another visit to London for each appellant.

On the subject of what constitutes a sufficient right of appeal the Privy Council had no difficulty in carrying into appeals as of right, as a matter of fundamental human rights law, precisely the same rights as are recognised for first instance trial. By way of a "generous interpretation" of section 25(a) and (h) of the New Zealand Bill of Rights Act 1990, the Privy Council said:

> What is required is a collective judicial decision on the merits of the appeal by a division (three members) of the Court of Appeal, sitting together, and arrived at after the hearing in open court: see section 25(a) of the New Zealand Bill of Rights Act 1990. So far as the Solicitor-General felt unable unreservedly to embrace this proposition his doubts are not justified.

It can be commented that the United Kingdom is party to the Universal Declaration, the International Covenant, and the European convention, yet does not provide appellants the same rights on appeal as for first instance trial. In fact, leave to appeal is required for almost all, if not all, appeals to the English Court of Appeal.

Further, their Lordships have since accepted that the absence of a defendant, even from trial, is not inconsistent with his or her fundamental rights under the European Convention. The House of Lords so held (to the extent that they recognised the difficulties with the questionable waiver contention) in the eminently sensible decision in *R v Jones*.[8]

It is perhaps worth also mentioning that my own experience sitting in the Privy Council did not extend to the Judges collegially settling together, in meetings, the text of judgments delivered. Nor did all the Judges sitting on the occasions of delivery of judgments have knowledge of the case in which judgments were delivered. These seem to have been perceived as essential requirements for the New Zealand Court of Appeal, however.

Accordingly, in seeking to offer views on appropriate appellant processes for New Zealand, I find myself in precisely the wrong place at the wrong time. Having commenced by reflecting upon issues of cost and efficiency, one message has become clear enough, that it is no part of the appellant function to be fiscally conscious.

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8 *R v Jones* [2002] UKHL 5, [2002] All ER 113 (HL).

I turn then to the mode and scope of appeals, and the nature of the hearings in New Zealand. These vary. There are appeals by way of case stated, appeals on questions of law only, appeals by way of rehearing (*de novo* or on the lower court record), appeals from the exercise of discretions. Absence of uniformity does not go to the sufficiency of the appeal right, but opportunity to have findings of fact revisited is seen by some as important.

It may not matter too much which forms of appeal are employed in particular cases, but it is not easy to see why there is not greater uniformity. For present purposes, I am not so concerned with the procedure; the sufficiency of the review is what matters. What scope of review is sufficient to properly accord the right of appeal? There are two aspects of that I want to look at more closely when I come to deal with measures to cope with increasing workloads. They are whether an opportunity to seek leave to appeal is sufficient, and whether review on points of law only is enough.

Issues I have mentioned so far are relevant to first appeals at all levels; from Community Magistrates to District Court Judges, from the District Courts to the High Court, from the courts of specialist jurisdictions and from the many tribunals dealing with such matters as competition law, resource management, licensing, and so on. While what I say hereafter may have some application more widely, I will concentrate primarily on the Court of Appeal.

## *I WORKLOAD*

Statistical material presented to the Legal Research Foundation Seminar, in March 2001 by Sir Ivor Richardson, shows that the number of decisions made on appeals in the Court of Appeal rose from 78 in 1960 to 458 in 2000 and that over the same period the number of judgments per Judge increased from 31.2 to 53.[9]

In the 10 years I have been on the Court, there have been fluctuations. In 1991, we determined 513 cases.[10] In 2001, we dealt with 593.[11] In 1991, there were six permanent members of the Court. There are now seven. Over the last three years, a decline in criminal appeals has been welcome although, for a number of reasons, that has not resulted in a correspondingly reduced workload for the Judges.

Statistics, of course, do not reflect complexity of cases nor quality of output. Nevertheless, making all due allowances for those factors, it is not reckless to conclude that the Judges do not have the time for research and reflection that was available to their

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9 Rt Hon Sir Ivor Richardson "Trends in Judgment Writing in the Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001).

10 *Court of Appeal Report 1991* (Department for Courts, Wellington, 1992).

11 *Court of Appeal Report 2001* (Department for Courts, Wellington, 2002).

predecessors. That is not to be overlooked when comparisons are drawn with for example, the Privy Council. Further, it is a matter of some significance bearing in mind that for virtually all criminal cases, and all but about five per cent of civil cases, the Court of Appeal is New Zealand's final court and determines the law in most fields.

The increasing pressures on our Court of Appeal reflect an international trend. These pressures are not as severe as in some countries as is indicated, for example, by the increase in the number of Lord Justices of Appeal in England in the last 10 years from 27 to 54. United States figures are almost mind-blowing. In his March 2001 report of a project undertaken for the Australian Institute of Judicial Administration on Appellate Courts and the Management of Appeals in Australia, Brian Opeskin, now of the Australian Law Reform Commission, reproduces the following table.[12]

***Growth in Volume of Appeals in the United States Federal Courts of Appeals***

| Year | Filings | Judgeships | Filings per Judgeship |
|---|---|---|---|
| 1892 | 841 | 19 | 44 |
| 1930 | 3,532 | 55 | 64 |
| 1950 | 5,443 | 75 | 73 |
| 1964 | 6,736 | 88 | 77 |
| 1978 | 19,657 | 144 | 137 |
| 1984 | 32,616 | 168 | 194 |
| 1990 | 42,364 | 179 | 237 |
| 1997 | 53,688 | 179 | 300 |

**Source:** Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (1998), Table 2.3.

In a paper presented to a recent conference of common law Judges (and perhaps repeated at the Christchurch Law Conferences), Judge Wallace of the Ninth Circuit Court of Appeals gave figures of 9500 appeals filed in the year 2000 to be dealt with by 28

12 Brian Opeskin *Appellate Courts and the Management of Appeals in Australia* (AIJA, Carlton, 2001) 6.

Judges.[13] He also provided a snapshot of the position as at 28 February 2001.[14] There were 455 reserved decisions. Excluding the senior Judges who do not participate on a full time basis, on average, each judge had 11 undelivered dispositions that had been assigned to him or her.

It is not surprising that the development of ways to cope with work pressures has been more aggressive in the United States. The use of Judges' clerks and the severe limits on oral hearings are but examples.

Workloads for intermediate appellate courts present a dilemma. If litigants are to have a right of appeal and that is to be fairly accorded, the availability of courts with the necessary capacity will become increasingly difficult, as demand continues to rise. Lord Oliver, delivering the Fourth Annual Oration to the Australian Institute of Judicial Administration, somewhat discouragingly suggested:[15]

> … that the greater the availability and the greater the efficiency and expedition of appellate procedures, the greater becomes the demand for their deployment. So that, in the end, every improvement tends to become self-defeating and the system chokes on its own success.

In England, efforts to achieve more efficient processes have been almost hectic. First, there was Lord Woolf's report in 1996.[16] Then, in 1997, a review of the Court of Appeal Civil Division was undertaken by a team headed by Sir Jeffrey Bowman (and including Lord Woolf).[17] More recently, the extensive report on the Review of the Criminal Courts undertaken by Lord Justice Auld has been published.[18] That includes a substantial chapter on the handling of appeals in criminal cases.[19]

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13 Hon J Clifford Wallace, Senior Judge United States Court of Appeals for the Ninth Circuit "Managing Delay at the Trial and Appellate Levels" (Paper presented to the Fourth Worldwide Common Law Judiciary Conference, Vancouver, May 2001) 2.

14 Wallace, above, attachment 4.

15 Rt Hon Lord Oliver of Aylmerton "The Appeal Process" (1992-1993) 2 JJA 63, 66.

16 *Final Report to the Lord Chancellor on the Civil Justice System in England & Wales* (Lord Chancellor's Department, London, 1996) [Woolf Report].

17 *Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division)* (Lord Chancellor's Department, London, 1997) [Bowman Report].

18 *Review of the Criminal Courts of England and Wales* Lord Chancellor's Department, London, 1996) [Auld Report].

19 Auld Report, above, ch 12.

Lord Justice Auld records that average waiting times for appeals have been reduced over the last decade.[20] In the 1990's, waiting times of twenty-two months for conviction appeals, and fifteen months for sentence appeals were not uncommon. Those periods now are in the order of eight months and five months respectively. By comparison the performance standards for the New Zealand Court of Appeal call for disposal of 75% of criminal appeals within 90 days of filing, and 90% within 120 days.[21] Fixtures within two months are generally offered after legal aid is granted.

With civil appeals in England almost every appeal has a leave requirement. That reflects a recommendation in the *Bowman* report as one measure to weed out unmeritorious appeals and reduce the number of cases to be heard in full by the Court.[22] This course was adopted against a background of increasing delays with an average time between setting down and final disposal of fourteen months in 1996. For the civil judgments of the New Zealand Court of Appeal delivered in the month of November 2001, the average time elapsed between the filing of a *praecipe* (setting down) and judgment was 156 days.

Appellate courts in Australia, both in the Federal and State jurisdictions, seem to have experienced broadly similar growth patterns to those in New Zealand. Brian Opeskin reports that perhaps with the exception of the Federal Court there have not yet developed crises in volume.[23]

The situation in New Zealand is not critical, though it is generally accepted that the current workload on the Judges is greater than it should be. If it were not for the fall-off in criminal appeals in recent times it would be worse. That the Court does not have a serious backlog can be attributed, at least in part, to various measures employed over the years. These have undoubtedly increased the capacity of the Court to dispose of more cases. The impact on quality is not so easy to measure and I do not want to get into that right now.

There have been increases in the number of permanent Judges. There has also been an increase in the level of assistance in the work of the Court from High Court Judges with the establishment of Divisions of the Court. Some of that assistance has been offset by the greater number of occasions on which the permanent Judges sit in panels of five.

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20 Auld Report, above, 642.

21 *Court of Appeal Report 2001* (Department for Courts, Wellington, 2002) 1.

22 Bowman Report, above, chapter 3.

23 Brian Opeskin *Appellate Courts and the Management of Appeals in Australia* (AIJA, Carlton, 2001) 6.

There has been the welcome innovation of a Judge's clerk for each Judge – though we have not reached the situation they have in the United States where clerks draft most opinions.

There have been statutory and judicial controls on access to the Court. These can give rise to issues of litigant's rights. There are, of course, those (generally second) appeals for which leave is required.[24] There can be no issue with leave as a legitimate filter for second appeals, or for appeals that are not against decisions affecting rights and obligations or against criminal convictions or sentence. Appeals pre-trial in criminal cases and appeals in some interlocutory matters in civil cases fall into that category.

Similar, non-legislative limits have been imposed by judicial decisions. By adopting a less than broad interpretation of section 66 of the Judicature Act 1908, the Court has declined jurisdiction for appeals from incidental rulings made in the course of proceedings on the ground that there are not involved judgments decrees or orders of a kind with which the jurisdiction to appeal is concerned.[25] Rulings and orders affecting rights and obligations may be appealed, however.[26]

Jurisdiction also is declined, though no express statutory prohibition exists, when attempts are made to appeal against refusals of leave to appeal.[27] Similar reasoning has been employed by the Privy Council.[28]

Perhaps not so obviously for filtering purposes, but nevertheless presenting obstacles to appellants, are the long established restrictive approaches to certain kinds of appeals. An example is the burden on litigants seeking review of the exercise of discretions. The approach adopted is to require the appellant to show: "That the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong".[29]

The most common screen is the requirement for leave to appeal. It would be difficult to mount a serious argument that a sufficient right of appeal has not been accorded where leave to appeal is refused after full opportunity to present argument for leave to the

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24 See, for example, Summary Proceedings Act 1957, s 144.

25 *Association of Dispensing Opticians of NZ Inc v Opticians Board* (1999) 13 PRNZ 599 (CA).

26 *Winstone Pulp International Ltd v A-G* (1999) 13 PRNZ 593 (CA).

27 *Seamar Holdings Ltd v Kupe Group Ltd* [1995] 2 NZLR 274 (CA).

28 *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC).

29 *May v May* [1982] 1 NZFLR 165, 170 (CA) Richardson J. Recently affirmed in *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17, 286 (CA).

appellate court. However, the position might not be so clear where, as occurs in some jurisdictions, leave applications are considered by less than the full bench, perhaps on case summaries prepared by clerks. On the same reasoning, it would be difficult to contend that a right of appeal has been denied when the appeal court has proceeded "by way of rehearing" in the sense that expression was used by Somers J in *Sharplin v Broadlands Finance Ltd*,[30] and the court has decided after argument that it is not prepared to substitute its view of the facts for that of the trial Judge. It would be different should appellate courts take the absolutist stance of "we don't do facts" (an expression used in a different context by one of their Lordships in the course of a Privy Council hearing).

The reluctance of appellate courts to review findings of fact is generally explained by reference to the advantages enjoyed by Judges who see and hear the witnesses, rather than by reference to the time involved in such reviews. There is a considerable body of opinion that the claimed advantage is illusory.[31] The reliability of demeanour as a test of credibility, particularly where aspects of culture and language are involved, is increasingly questioned.[32] In any event, the claimed advantage is said to be seldom realised in modern trial processes.[33]

There is thus pressure for the broadening of the limited circumstances in which findings of fact will be reviewed on appeal. As I apprehend, that pressure is not for some fundamentally different approach as a matter of law. There is adequate support in the authorities for appropriate review of findings of fact on first appeals, which are seldom limited to points of law only.[34] The criticism seems to be directed to the manner in which challenges on factual grounds are handled in practice.[35] The suggestion seems to be that, because of workload, the Court is unreceptive to arguments directed to factual findings.[36] If that is valid, which I question because what are appropriate cases depends on your point of view, this is yet another source of pressure upon the capacity of the Court.

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30 *Sharplin v Broadlands Finance Ltd* [1982] 2 NZLR 1, 11 (CA) Somers J.

31 See generally, *State Rail Authority of New South Wales v Earthline Constructions Ltd* (1999) 160 ALR 588 (HCA) Kirby J.

32 *Earthline Constructions*, above, 617.

33 *Earthline Constructions*, above, 619.

34 See, for example, *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (17 July 2001) Court of Appeal, CA 79/00 and *Earthline Constructions*, above.

35 Dr James Farmer QC "The New Zealand Court of Appeal: Maintaining Quality After the Privy Council" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 237, 239.

36 Farmer, above.

In respect of appeals that have found a gateway into the Court, we have looked for ways to streamline their disposal. There has been a degree of case management by the Court staff and Judges. We have adopted the practice of requiring written submissions in advance in order to focus and shorten oral hearings. We have, in recent times, avoided, as far as practicable, multiple judgments giving substantially the same reasons.

Whatever appeal structure we have, a busy intermediate appellate court necessarily will be an important component. Because the final court, wherever situated, will handle only a small number of appeals, duly screened by a realistic leave requirement, an intermediate court or courts will still carry the burden of providing access to those exercising rights to at least one appeal. A court of appeal will always have the dual responsibilities of error correction and development of the law (the latter subject, of course, to a further appeal in some cases). In order that the court can have the time for deliberation and reflection in the difficult cases, it will be necessary to ensure that the less difficult appeals are handled efficiently in ways that will avoid overload as the volume increases. How is this to be done?

The appointment of additional Judges has its limits and is not generally regarded as a measure of first choice. It has resource implications. It generally raises the issue of availability of persons with the appropriate skills and experience who are prepared to do it. It presents problems if the increase in workload proves to be only temporary.

There is the possibility of some appeals being determined by smaller panels of Judges. There is no magic in three. The only difficulty with two is disagreement, but that will not be frequent and re-argument before three in a small number of cases would probably not seriously detract from the savings made overall. Diversion of cases to other courts or to ADR (Alternative Dispute Resolution) might move the problem but would not solve it.

Introducing more extensive leave requirements to screen out unmeritorious appeals, along the lines adopted in England, may need consideration. Apart from the issue of whether this is consistent with litigants' rights of appeal as already mentioned, there are practical questions. Much depends on how this would be done and who by.

We have had experience with leave requirements in criminal appeals. Leave still is needed for pre-trial appeals,[37] and for appeals by the Solicitor-General against sentences.[38] In those cases, and as was the position prior to 1991 when leave was required for all criminal appeals, the practice has been to consider both the leave application and the substantive appeal at the same time. In the result, very little time saving has been

37 Crimes Act 1961, s 397A.

38 Crimes Act 1961, s 383(2).

achieved. The Judges have been required to read the whole file, in case leave should be granted, and in the course of argument, the merits of the appeal have been full canvassed in any event.

On the other hand, where on some second appeals, and more recently with appeals under the Employment Relations Act 2000, leave to appeal has been considered at a preliminary hearing, the two-stage process has proved time consuming and has required Judges to prepare for two hearings.

Those disadvantages can be reduced by having leave applications dealt with on the papers or by fewer than three Judges, but a refusal of leave in that way may leave appellants dissatisfied.

When in the early 1990's, we were subjected to a flood of civil appeals generated by the consequences of the share-market crash, I became interested in two possible ways to dispose of more appeals with the same number of judges. The first is to confine oral hearings and the second is to write less extensive judgments. Both were particularly attractive at that time, because so many appeals were simply hopeless attempts to delay inevitable judgments enforcing financial obligations. The flood subsided but I have maintained my interest.

Full oral argument is part of the British legal tradition. Every citizen is entitled to his day in court, it is said. In the United States, the explosion of litigation has led to abandonment of such extravagant notions. A litigant is entitled to fifteen minutes or thirty minutes of oral argument. Oral argument is regarded not as some therapeutic outlet for the litigant, but as a means for assisting the court to decide the case. It is permitted only to the extent that it does that.

Of course, oral argument is curtailed only because of the move towards the presentation of argument in writing. I have no doubt that any substantial argument is best communicated to the court by written submissions presented prior to the hearing supplemented by oral argument. This gives the court the opportunity to become familiar with the case and the competing arguments and to obtain the maximum assistance from the oral hearing. Necessarily, this means that "the hearing" begins when members of the Court begin considering the written submissions.[39]

That should not mean that it is necessary to impose time limits on oral argument. It will become apparent at an early stage what issues the court considers of importance and competent counsel will focus on those matters or attempt to persuade the court of the

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39 *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA).

importance of others matters. Oral hearings are shorter though, in appropriate cases they can continue where the court is being assisted.

It is an essential part of a system in which counsel are dissuaded from attempting comprehensive coverage of the whole case in oral argument that the members of the court do the necessary reading in advance. This method of handling cases should, in my view, be regarded more as a means of achieving higher quality determinations than as a means of coping with increasing workload. The risk is that achieving shorter hearings will be taken as an invitation to list more cases. That will be self-defeating. Without adequate time to prepare for hearings and with a greater caseload the system will be less efficient, more burdensome for the judges and less satisfactory for counsel and parties.

There are appeals brought by litigants in person. Fortunately there seem to be fewer in New Zealand than in other jurisdictions. Often they are without merit. They call for patience and understanding by Judges and court staff. But there are limits to the time and resources busy courts can give indulging litigants whose perseverance exceeds their ability to appreciate their predicament.

There are good arguments for the imposition of time limits in some matters.[40] But time limits tend to be inflexible and it will usually be more satisfactory for the court to control proceedings, firmly if necessary. We are a long way from having to consider such draconian measures as time limits to the extent employed in America. There are also matters in which it is considered appropriate to dispense with oral hearings in some matters. Often this can be achieved with the consent of the parties.

The Crimes (Criminal Appeal) Amendment Act 2001 provides for the determination of criminal appeals on the papers.[41] In fact, as already mentioned, the Court of Appeal did this for many years in cases in which the appellant was refused legal aid. The procedure now is more formal and incorporates more explicit safeguards that ensure full consideration of the merits of appeals dealt with in this way.

I turn from judicial intake to judicial output. The tradition of preparing full judgments in appeals involving no more than application to the facts of well-established legal principles is of questionable value. Such judgments are of no interest beyond the immediate parties. Frequently they are just re-statements of reasons given in a lower court judgment. They are time-consuming and expensive to produce and end up clogging libraries to be cited in the future in spite of having no precedent value.

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40 Brian Opeskin *Appellate Courts and the Management of Appeals in Australia* (AIJA, Carlton, 2001) 69-74.

41 Crimes Act 1961, s 392B.

I emphasise that the obligation to give reasons for decisions is fundamental in our judicial system. I have no wish to erode that in any way. But when the reasons are the same as those already fully articulated in the judgment under appeal, I see no reason why it should not be sufficient simply to say that.

Abbreviated judgment writing processes are common in the United States. Memorandum decisions and summary dismissals are well used. In some situations, no written reasons are given. I would not go that far. It is an important element in accountability of Judges that reasons are given. But these can be given quite briefly and need not be preceded by a lengthy narrative of the facts of the case and the arguments of counsel. Such judgments have been provided for by statute in New South Wales, since 1912.

I think there could be a considerable increase in efficiency if the community were prepared to accept abbreviated judgments in appropriate cases. So long as reasons are given, I see in that no inroad into the important values our judicial system must retain.