LEEANZ Symposium 16/9/14: Ivor Richardson

Judging in the Court of Appeal has gone through various changes. To illustrate I cite from 3 papers I wrote – in 1980, 1990 and 2000 ("The Role of an Appellate Judge (1981) 5 Otago Law Review 4; "Changing Needs for Judicial Decision-making" (1991) 1 JJA 61: and "Law, Economics and Judicial Decision-making" in Megan Richardson and Gillian Hadfield (Eds), "The Second Wave of Law and Economics" (Federation Press, Melbourne 1999) 129).

Two quick points. First, in the vast majority of cases at appellate levels, once arguments have been tested at the hearing, the outcome seems obvious for the reasons which are then given in the judgment.

Second, judgments don't have to be lengthy tomes. The 97 New Zealand cases in the New Zealand Privy Council Cases (1932) volume averaged less than 8 pages each. And the data on the length of decisions in the permanent Court of Appeal over the 50 years since its establishment in 1958 (Bigwood (Ed), "The Permanent New Zealand Court of Appeal: Essays on the First 50 Years" (Hart Publishing, Oxford 2009) 308) records that in most years around 70% were no more than 10 pages and the proportion over 30 pages was between 3% and 4 % in the checked years; 1990, 2000 and 2007.

The 1980 paper noted that, though our Court was an intermediate appellate court, there had been only 35 appeals to the Privy Council in the previous 20 years. Thus, for practical purposes the Court was the court of last resort and exercised oversight of the administration of justice in New Zealand, sitting 5 judges instead of the usual 3 in appropriate cases. And in the previous (1979) year the Court had dealt with 227 criminal and 96 civil appeals.

Much of the discussion was on the process for hearing and deciding cases. The Judges usually read the judgment or summing-up under appeal and much of the other material ahead of the hearing and questioned counsel, often extensively, testing the arguments. I noted that we seldom took more than 2 days to hear a case. More often it was a day or less. If we had reached a firm view, we ordinarily disposed of the case orally on the spot, determining a substantial majority of the criminal appeals (80% in the previous year) and about 50% of the civil appeals in that way. Most reserved judgments were determined within a month to 6 weeks and we seldom had more than 12 or 15 judgments on hand at any one time.

Finally, I emphasised that in those rare cases, where society was clearly divided and different sets of values – whether economic, moral, political or social – were held, awareness in weighing those values was just as important as professional competence in judgment writing.

Turning to the 1990 paper, I emphasised there that the previous six or seven years had been extraordinary for all New Zealanders in all kinds of ways.(p.63):

"There have been so many changes: changes in institutions, changes in processes, above all changes in attitudes, in the way of looking at events, at the economy and at society. We are a very different society from what we were 10 years ago. What we have hardly begun to do is to explore the philosophical approaches underpinning various branches of the law to bring legal thinking into line with changed economic, social, political and administrative thought in this country."

That led me to pose a series of questions and to refer to several recent cases: Should the philosophical approach underpinning administrative law and its doctrines now be modified to reflect the less expansive role of government in the more market-oriented State? Did the developing interest in unjust enrichment, the expansion of duties in negligence and tort law generally, and the ready implication of terms and remedies in contractual situations, reflect a paternalistic attitude, increasingly at odds with the new emphasis on individual responsibility? And, in the exercise of discretion and choosing between alternative remedies, what, for example, did experience indicate was the likely effect on the ultimate outcome if decisions of Ministers and officials were quashed?

My conclusion was that we were likely to produce better legal decisions in the 1990s if the courts had available the kinds of arguments and economic and social material I had been mentioning. Policy alternatives could then be considered in an informed manner, rather than resting on instinctive responses supported by generalised reasons.

In the 2000 paper I outlined an economic analysis approach (p.129):

"There are two features of the legal system which, in my view, make economic analysis of the law an important field of study for the courts. The first is that the courts allocate and reallocate resources and their decisions necessarily affect the use of society's limited resources. Justice may be priceless but it is not costless. The acceptable resolution of disputes may involve balancing human rights and other values. But the efficient use of scarce resources and the economic implications of suggested alternatives can never be ignored. Just as in the decisions we make as individuals - how we will spend our energies and money - there are always policy trade-offs between efficiency, fairness and other individual and community values.
The second feature is related to the first. Like economics, the legal system is concerned with behaviour. It seeks to influence behaviour by establishing rules of conduct and imposing sanctions for their breach. Therefore it is only logical to conclude that rules and

sanctions should be designed and decisions made having regard to the incentives they create and the impacts they will have for the allocation of resources for the future."

The paper went on to discuss economic analysis in the two categories: first, the traditional "Economic" area of the law where economic analysis is central to decision-making, such as competition and securities regulation, planning and resource use, valuations for various purposes, assessments of income for tax purposes, international tax questions and transfer pricing.

Second, as the paper went on to explain by discussing a variety of recent appeals in a range of cases in contract, torts, administrative law and constitutional law, the absence of empirical evidence made it difficult to reach balanced reasoned decisions. For example, determining the contractually agreed allocation of risks and responsibilities and the commercial appropriateness of that agreed allocation is a crucial part of the reasoning process in contract cases. On an empirical analysis (p.134) standard form contracts could potentially increase efficiency by permitting a dramatic reduction in transaction costs and so in prices. And judicial interference with contractual arrangements – under statutes such as the Contractual Remedies Act 1979, Credit Contracts Act 1982, Fair Trading Act 1986 or the Illegal Contracts Act 1970 – might also be muted if it were shown that the likely long run effect was to increase costs and prices for the supply of such goods and services, so that it was less likely that disadvantaged sections of the community would have reasonable access to goods and credit.

Similarly the discussion of a range of cases brought out how empirical evidence could utilise the normative economic goals of tort law and administrative law. And, even in the human rights area, extensive empirical evidence might be needed to make a full assessment of individual and community rights, interests and responsibilities.

The paper had begun (p.129) by quoting the great American judge, Justice Holmes of the United States Supreme Court who foresaw the development of modern law and economics over 100 years ago when he said that:

"For the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

Given how the Law Commission and Parliamentarians try to weigh all the relevant economic and social implications in developing legislation in these areas, it is still puzzling why our Law Schools' courses and our Courts, unlike their American and Canadian counterparts, fail to do so.