COMMENT

NEW ZEALAND'S PERMANENT COURT OF APPEAL

I. *Creation and Constitution of the Court*

Until January 1, 1958, the New Zealand Court of Appeal was of the "Full Court" type. It was formed, that is to say, by the judges of the Supreme Court who withdrew, from time to time, from their duties in that Court to constitute the Court of Appeal and to engage in what one of them once ironically described as the "melancholy pleasure" of reversing each other's judgments. On January 1, 1958, the Judicature Amendment Act, 1957 came into force. By that Act the familiar Full Court system of dealing with appeals was abolished and a permanent Court of Appeal established. It commenced hearings on 17th February, 1958.

The new Court consists of the Chief Justice of New Zealand who is a member of the Court by virtue of his office as head of the judiciary,[1] one judge of the Supreme Court appointed as President of the Court of Appeal, and two other Supreme Court judges appointed as judges of the Court of Appeal.[2] A judge may be appointed to the Court of Appeal at any time after his appointment to the Supreme Court, but it is possible for the appointment to be made to the Supreme Court and Court of Appeal simultaneously, i.e. a member of the Bar may be appointed to the Court of Appeal without serving first as a judge of the Supreme Court.[3] Judges of the Court of Appeal have seniority over all judges of the Supreme Court except the Chief Justice, or acting Chief Justice, but receive the same salary as the puisne Judges.[4] They hold office as long as they remain judges of the Supreme Court, that is normally until the statutory retiring age of seventy-two.[5] It is possible for a judge of the Court of Appeal to resign (with the consent of the Governor-General) as a judge of that Court without resigning office as a Supreme Court judge.

II. *The Demand for a Permanent Appeal Court*

The decision to set up a permanent court was the culmination of at least

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[1] Judicature Amendment Act 1957, s.2(2)(a). For some discussion of Appellate Court problems in Australia see the leading article by Mr. Justice McClemens, *supra* p. 221.

[2] *Id.*, s.2(4). There is provision for the appointment of additional judges in certain circumstances.

[3] One member of the Court, Mr. Justice Cleary, was appointed from the Bar. The other initial members of the Court, the President, Mr. Justice Gresson and Mr. Justice North, were appointed from the Supreme Court Bench.

[4] The President receives a higher salary than the judges, and the Chief Justice a higher salary than the President.

[5] Judicature Act, 1908, s.13.

fifty years of discussion.[6] Measures of law reform tend, in democratic States, to be enacted only when there is a sufficiently vociferous demand from a majority of the public or when an interested group is strong enough in public or private influence to achieve the passage of the measure through the legislature. The question of establishing a permanent court was not one with which the public at large was greatly concerned. The setting up of that court was therefore principally, if not solely, the result of the aspirations and efforts, over a period of some fifty years, of the practising legal profession.[7] Opposition to the establishment of the court came mainly, though not entirely,[8] from the judges of the Supreme Court who took part in the appellate work of the old Court of Appeal.[9]

It is unnecessary now to traverse in detail the development of the demand for a permanent court and the reasons by which the demand was supported and opposed. The history of the debate may be read in a paper by Mr. L. P. Leary, Q.C. presented at the Ninth Dominion Legal Conference in 1954.[10] It is worth recording, however, in summary form, the bases of the principal arguments used by the supporters of a permanent court.

1. *Speed and Convenience.* It was argued that a permanent Court would provide both convenience and speed in the disposal of appellate work. The judges themselves were increasingly overburdened by the difficulties of disposing of their appellate work in such time as remained after satisfying the demands of their work in the Supreme Court.[11] This led, of course, to the matter which caused most complaint among the legal profession, the delay in the dispatch of appellate business. Under the circumstances this was no fault of the Judges. The profession, though dissatisfied by the serious delays, was persistently sympathetic to the judges' difficulties.[12]

2. *Specialisation.* It was urged that trial work and appellate work are different in kind and that each requires a degree of specialisation in the judges dealing with them. As Mr. L. P. Leary, Q.C., put it:

> Some men are primarily trial judges and some are primarily banco men; and, of course, there are men combining both qualities. Appeal work is mainly banco work. If all judges are required to dispense all branches of the law and do appeal work as well, then the reading of every one of them must be encyclopaedic in its range. This is asking a great deal. If

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[6] The first serious attempt to secure a separate Court of Appeal was made half a century ago by Sir John Findlay, the Attorney-General of the day: see *Report of the Department of Justice* (N.Z.) (1958) 3.

[7] See unsigned editorial article in (1957) 33 *N.Z.L.J.* 261.

[8] For instance, Sir John Salmond, when Solicitor-General, viewed the prospect of a permanent Court with disfavour: see L. P. Leary, "A Permanent Court of Appeal" (1954) 30 *N.Z.L.J.* 109 at 111.

[9] The opposition of the judges and their reasons for it are referred to by L. P. Leary, *op. cit.* at 110-111.

[10] See *op. cit. supra* n. 8. The arguments for and against a permanent court are also discussed by T. P. Cleary (now Mr. Justice Cleary) commenting on L. P. Leary, *op. cit. supra*, in *id.* 114. And see editorial articles in (1947) 23 *N.Z.L.J.* 29 and (1957) 33 *N.Z.L.J.* 261.

[11] In the Supreme Court four sessions are held each year, not only in the four main centres in which the judges live but in other centres also. The necessity of going on circuit to these other centres made the judges' task even more burdensome. The extent of the burden cast on the judges is referred to in a memorandum prepared by Sir David Smith after his retirement from the Bench, which is recorded in *N.Z.L.J.* 114-115.

[12] L. P. Leary, *op. cit. supra* n. 8, at 112.

some, however, are permitted to specialize in appellate work, they become expert and expeditious.[13]

3. *Judicial Co-operation.* There was a widely held view, expressed by Sir Raymond Evershed, M.R. (as he then was), that a small number of Judges, working together as a permanent court, acquire a faculty for co-operative work which is beneficial to the efficiency of the court. As the Master of the Rolls expressed it, in the course of an address given at the University of Melbourne:

> If, therefore, the real purpose of an appellate court is to be achieved, it is essential so to do by getting what I may call a combined judicial operation. Two heads it is said are better than one, but only if they work truly together. Otherwise the individual opinion of each of three appellate judges may have no obvious primacy over the view of the trial judge. If, therefore, the members of the appellate court are constantly having to change (and I leave aside the mechanical difficulties which would clearly arise if constant change of personnel were necessary), then those judges constituting the Court would not sit often enough together to acquire the faculty of working not individually but in co-operation with their brethren.[14]

There is, undoubtedly, in the view of the present writer, substance in each of these three main arguments. The arguments of those who preferred the retention of the Full Court system seemed much less compelling and, indeed, now that the permanent court has been functioning for some sixteen months, they seem to have taken on (if this may be said with respect) something of an air of unreality. The main reasons advanced in support of the Full Court system were, first, that the judges of the Supreme Court, deprived of the opportunity of meeting and working with their judicial brethren during sessions of the Court of Appeal, would suffer from the effects of isolation and loss of the stimulus of direct meetings of judicial minds; second, that Court of Appeal judges might come to work in a rarefied atmosphere and so lose touch with the public and with public sentiment; third, that a permanent court consisting of a small number of judges might at times be dominated by one single member. Each of these arguments has been effectively answered,[15] and they do not call for discussion here.

It is safe to say that nothing in New Zealand's (admittedly still brief) experience has led its lawyers to regret the change or think of reversion to the former system. The only qualms which appear to have been felt relate to the fact that the new Court deals with criminal as well as civil appeals.[16] The special problems of the conduct of criminal trials may warrant, it has been suggested, a special Court of Criminal Appeal composed of trial Judges. This of course is the situation in England, where the Court of Criminal Appeal is made up of Judges of the King's Bench Division. But the fact that, in New Zealand, the Chief Justice is a member of the New Zealand Court of Appeal, and that that Court at any time would be almost certain to contain members with considerable experience of the conduct of criminal trials (this is certainly the case at present) is, in the view of most New Zealand lawyers, sufficient warrant that the Court will not lose touch with the realities of the day-to-day administration of the criminal law.

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[13] *Id.* at 109.

[14] *The History of the Court of Appeal* (1951) 25 *A.L.J.* 386 at 388, quoted by T. P. Cleary in (1954) 30 *N.Z.L.J.* 116.

[15] See L. P. Leary, *op. cit. supra* n. 8.

[16] See editorial, (1957) 33 *N.Z.L.J.* 261.

III. *The Functioning of the Court*

In the first fifteen months of its existence the new Court disposed of some ninety-three cases, civil and criminal.[17] These include appeals against sentence only. About a third of this number of decisions has been reported.[18] Perhaps it is not too early to attempt to compare the functioning of the new Court with the expectations of those who supported its formation. These expectations of the superior efficiency of a permanent court, summarized earlier in this note, centred mainly on three things: (1) increased speed and convenience; (2) specialisation; (3) judicial co-operation.

1. *Speed and Convenience.* The new Court has undoubtedly been able to dispose of appeals with a degree of dispatch which was impossible under the former system. The delays of three, four or even six months between hearing and judgment, which had become an unavoidable feature of the former system, no longer occur. The decisions of the new Court which have so far been reported show that such delays are a thing of the past: three or four weeks might be a usual length of time between hearing and delivery of a reserved judgment in a complicated case, but many cases, particularly criminal appeals, are disposed of in a matter of days.

Far greater expedition is possible also in bringing cases on for hearing. Fixtures are now made each month, and this has led to a considerable increase in the speed with which parties can have their appeals heard. In these respects the improvement in the administration of justice brought about by the setting up of the new Court is self-evident.

2. *Specialisation.* It seems obvious that, from the point of view of the Judges themselves, the difficult task of deciding appeals is one more easily carried out by Judges who are free from all trial work, and who are therefore able to devote all their time and energies to their specialist duties.[18a] And it would not be too rash a speculation to suggest that Judges of the Supreme Court must, under the new system, find their duties as trial Judges less burdensome now that they are freed from the necessity of sitting in the Court of Appeal.

The suggestion that the appointment of specialist appellate Judges would lead to greater efficiency in appellate work is, perhaps, one with which not all jurists would unequivocally agree. Although this argument was an important one used in support of the establishment of a permanent court, its intangibility makes difficult any assessment of its validity. Mr. R. F. V. Heuston has recently paid an eloquent tribute to the qualities of the High Court of Australia.[19] He singles out for special notice two main features of the judgments of that Court. The first is the predominance of the notion of justice according to law.

The litigant is entitled to have his case decided, not *ex aequo et bono*, or

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[17] See R. B. Cooke, ". . . Court of Appeal Decisions" (1959) 35 *N.Z.L.J.* 117.

[18] Up to and including the July 1959 issue of the New Zealand Law Reports.

[18a] See the brief account of the working of the Court of Appeal given by the President, Sir Kenneth Gresson in (1959) 33 *A.L.J.* 121-22.

[19] See R. F. V. Heuston, *The Law of Torts in Australia* (1959) 2 *Melbourne Univ. L.R.* 35.

> according to some feeling of what is required by the political and social fashions of the day, but, in the words of Roscoe Pound, according to authoritative precepts applied by an authoritative technique.[20]

The second quality noted by Mr. Heuston is the apparent belief of the Court that its exposition of doctrine in a given case should be as complete as possible.

> Secondly, it is apparent that the Court believes that its exposition of this body of doctrine in any given case should be as full as possible. It is truly remarkable how many recent decisions provide a full historical investigation of the origin of any particular rule or set of rules together with a critical survey of their present scope. One gains the impression that the Court has both the time and the will to travel beyond the points raised by counsel in their arguments in an effort to provide a complete restatement of the branch of law under review.[21]

Mr. Heuston's description of these qualities may perhaps be taken as providing not only a description of one particular court but also as a statement of the ideal of attainment which might serve as a guide for any appellate court. The attainment of judgments shaped in this way depends, of course, on the abilities of the individual Judges, on the adoption by the members of the court of such ideals as guides, and the necessary time for research and reflection to produce them. It would be invidious and perhaps impertinent to attempt to assess the work of New Zealand's new Court by such a yardstick. But it may be perhaps said, with respect, that some of the judgments of the new Court, in fields where a complete historical and critical approach is desirable and helpful, have already been noteworthy. The Court's discussion of automatism as a defence in criminal cases, for example,[22] is a wide-ranging analysis of the concept, and its relation to insanity as a defence, marked by care and completeness of exposition, a remarkably wide range of citation, and great breadth of learning. Such judgments one cannot help feeling seem to carry the stamp of specialist judicial skill upon them.

3. *Judicial Co-operation.* The third main argument for a permanent court was that a small number of judges, working together as a permanent court, would acquire a faculty of working together with beneficial results to the effectiveness and authority of the court.[23] The new Court has indeed had a record of harmony agreement in its judgments which one learned writer has described as remarkable and perhaps unique.[24] In the first fifteen months of its life, "in every case the result reached was unanimous, while in only one or two was there even any difference in the reasoning of the members of the Court."[25] It was not until the decision on *Percival* v. *Hope Gibbons Ltd.*,[26] a decision on the liability of occupiers for dangerous premises, that a dissent was recorded. (It should be said that many of the ninety-odd decisions given in this period were appeals in criminal matters, including appeals against sentence, in which by custom, a single judgment only is almost invariably given).[27] Whether or not a facility for working together acquired by members of a permanent court is the explanation for this degree of unanimity, it does indeed suggest an assurance and certainty which, as it seems to the present writer, lend additional weight and authority to the pronouncements of the court.

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[20] *Id.* 36.
[21] *Ibid.*
[22] *R.* v. *Cottle* (1958) N.Z.L.R. 999.
[23] See the remarks of Sir Raymond Evershed, M.R. quoted above.
[24] R. B. Cooke, *op. cit. supra* n. 17. [25] *Ibid.*
[26] (1959) *N.Z.L.R.* 642.
[27] See letter by G. S. Orr in (1959) 35 *N.Z.L.J.* 192.

Mr. L. P. Leary, Q.C. has shown, in the paper above quoted, that the trend in British countries in recent years has been towards the substitution of permanent appellate courts for Courts of Appeal made up *ad hoc* from trial judges of the superior Courts.[28] The learned author cites the apparent fact that the Colonial Office, with its long experience of the problems of administration of justice in colonial territories, clearly seems to favour permanent appellate courts in all territories where there is sufficient judicial business to warrant them. Nor, as far as the present writer knows, has there been any instance of a reversion to a "Full Court" system after experience of a permanent court. The possibility has indeed been considered and rejected in England in recent years.[29] The new permanent court in New Zealand seems to have fully justified the hopes of the legal profession, and its constitution marks, it is believed, a major improvement in the administration of justice in this country.
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[28] (1954) 30 *N.Z.L.J.* 109.
[29] See Lord Evershed, M.R., *The History of the Court of Appeal* (1951) 25 *A.L.J.* 386, 388.
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