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The Role of Appeals in New Zealand's Court Structure

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INTRODUCTION

In March 1989 the Law Commission submitted its seventh report to the Minister of Justice. Entitled The Structure of the Courts, one of its stated primary purposes was

> to determine the most desirable structure of the judicial system of New Zealand in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand.[1]

Obviously such a comprehensive review of New Zealand's court structure entailed an examination of the appeal business of the courts. Appropriately the Law Commission took the opportunity to ask fundamental questions about the nature of appeals. They looked at the history of appeals in the English common law tradition, largely inherited by New Zealand, and traced changes in appellate litigation to the present day.

This paper critically examines the observations of the Law Commission. The role of appellate tribunals generally will be discussed. In particular the apparant tension that now exists between their role as forums for dispute resolution in the adversarial tradition and their undisputed wider role as overseers, interpreters and indeed makers of the law will be explored. That discussion will set the scene for a look at the specific issue of the number of appeals that should be available in our court structure and the future character of the Court of Appeal should it become our highest court. Finally, difficulties in the recommendations of the Law Commission on these matters will be highlighted, particularly in relation to appeals from first instance decisions in the High Court.

HISTORY OF APPEALS

The right of appeal is a creature of statute and as such is to be distinguished from the common law power of review.[2] The common law was no lover of appeals. Indeed it had, in the words of the Law Commission, "an aversion to appeals."[3] Thus the relatively simple and coherent appeal system we know today did not exist in England as late as the second half

of last century. There was an appeal process of sorts, but it "was archaic, disordered and bordering on the chaotic."[4] One reason was that there had developed over the centuries several judicial heirarchies and the emergence of a separate equitable jurisdiction in the Courts of Chancery further complicated the process.[5]

The appellate procedure that existed was limited in scope. Indeed, given that the merits of the case were not even considered it seems difficult to describe the process as an 'appeal'. It was based upon the writ of error and depended "upon the existence of an error on the record of proceedings in the lower court."[6] If such an error was found the superior court reviewed the decision and quashed it, no matter how small or incidental the mistake and despite the overall justice of such a result.[7]

This rather embryonic procedure bore no resemblance to European practice. Continental appeal courts always played a significant role in their legal systems. One reason, it has been suggested, is that their trial courts were scattered and local judicial officers required supervision by centralised appeal courts. A continental appeal was a true rehearing, or trial de novo, and took that form to enable

> continental regimes to impose a uniform and centralised Roman law on local courts in place of the localised, customary law they had been employing in the medieval period.[8]

Why was English appellate procedure, by contrast, so limited? Firstly, England's trial courts were themselves quite centralised and their judges a great deal more powerful. Secondly, the strong oral tradition in English courts made appeals less feasible. The written record of an English trial was scanty, outlining only the legal claims of the parties and the court's findings. Lengthy written judgments were the exception rather than the rule. These features of English procedure sprung from a concern for efficiency; a desire to keep the judicial process quick and cheap.[9]

By the late nineteenth century major reforms of England's courts were embarked upon. The Judicature Acts 1873 - 75 completely restructured the system. A single Court of Appeal

was created and the appeal was founded not upon the writ of error but was to be by way of 'rehearing'. That, indeed is the position in New Zealand today. Rule 37 of the Court of Appeal Rules states that "all appeals shall be by way of rehearing."[10] The term 'rehearing' is, it should be noted, something of a misnomer. The vast majority of appeals simply examine the proceedings of the trial court and apply the law as it stands at the time of the appeal to the facts found by the lower court. The New Zealand Court of Appeal has the power to admit further evidence[11] but will only usually do so where it is important and has come to light since the trial. In fact it is exceptional for fresh evidence to be heard on appeal or for witnesses to be examined or re-examined. In the vast majority of circumstances the appeal will be conducted on the record of the evidence of the court below.[12]

Appeal courts are empowered to make findings of primary fact themselves and to draw inferences from facts.[13] In practice, however, they are very reluctant to interfere with findings of primary fact by trial judges, particularly those based upon assessments of credibility. Another area in which appeal courts are reluctant to tread is a review of a lower court judge's exercise of discretion. Overturning such an exercise of discretion will only be countenanced where the court "proceeded on a wrong principle, gave undue weight to some factor or insufficient weight to another factor, or is plainly wrong."[14]

THE ROLE OF APPEALS TODAY

Competing Principles

Appellate litigation as we know it has, in its relatively short existence, assumed considerable importance in our judicial system. An examination of its development during this century involves, as the Law Commission point out, an assessment of competing principles.[15] Tension between different bases for appeal, particularly during recent decades, has become more marked as the role of appeal courts has grown and developed.

Traditionally, as previously alluded to, the common law stressed the importance of the trial. Acting as a crucial buttress to this emphasis is the principle of finality - that litigation is an orderly means of dispute resolution. That is, the trial verdict represents the resolution of the dispute, the end of the matter. That litigation end somewhere, and preferably sooner rather than later, serves the best interests of both the litigants (arguably) and the wider public. Endless litigation wastes human and financial resources and actually becomes increasingly irrelevant. By the time protracted litigation does end the original dispute may have been subsumed by later issues and indeed by the litigation process itself, while for the eventual 'winner' the campaign's spoils may not come near compensating him for the cost of the battle.

With a litigation process that after centuries of development has become highly formalised and around which a substantial culture has developed, it is easy to lose sight of its raison d'etre and indeed first priority: "the proper resolution of particularised disputes."[16] In an age of wide rights of general appeal, when the system seems all too often to be used cynically and tactically by those with money, such fundamentals are easily lost sight of. The Law Commission have done well to remind us of those first principles and of the possible negative effects of appeals.[17]

Yet it would be inappropriate to focus nostalgically on the halcyon days of former centuries. Trial courts as a forum for dispute resolution between individual litigants are still important and most litigation still begins and ends in them. However the appeal courts, placed as they are at the top of a rigid heirarchy, today exercise many more functions than simple dispute resolution. These other functions, which relate as much to the constitutional fabric of the nation as to arguments between individual citizens, must be considered in an analysis of the role of appeals. The Law Commission discuss these "competing principles" under two main heads: justice for the individual litigant and clarification and development of the law.

Justice for the Individual Litigant

This reason for appeals focuses on the primary importance of the individual in the process. Its importance is particularly evident in the criminal arena. Indeed an appeal against a criminal conviction has gained the status of a civil right. New Zealand has ratified, and is thus bound to give effect to, the International Covenant on Civil and Political Rights. Article 14(5) of the international agreement states that

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed in a higher tribunal according to law.[19]

Where the liberty of the individual is involved (and in some nations the elimination of the individual) as it is following many criminal convictions, a just legal system should provide an appeal. The appeal right serves to reduce the "danger ... of an incorrect conviction of a crime or an unjustified sentence."[20]

It is also important that individual civil litigants have an opportunity to appeal erroneous decisions. While the consequences are not as severe as for the criminal convict, they are still significant. An appeal provides "a powerful corrective to any sense of grievance which the losing party may feel"[21] following an erroneous decision.

Provision for correction of judicial decisions by way of appeal is also in the State's interest. The judicial system must be seen as just, fair and possessed of integrity. It needs to have, if not the approval of the populace, then at least their tacit acceptance. If genuine individual grievances are not in some way assuaged a wider lack of confidence in the system itself will result.

This notion of the appeal as a means of correcting or varying first instance decisions is the most basic not to mention the original reason for allowing appeals. It is clearly undesirable for patently wrong decisions to be unchallengeable. It is in the interests of both the litigant and the state to provide a remedy for that injustice. Judges are fallible and mistakes are made. The appeal attempts to overcome those

weaknesses in the system. Furthermore, the very nature of appellate litigation, with its focus on specific narrow legal issues and its oversight by a number of experienced and supposedly learned judges, means that the decision on appeal is likely to be more acceptable and correct.[22]

But litigants who lose are very likely to be aggrieved despite the lack of merit in their case. Martin Shapiro suggests that one reason for appeals could be "to provide a psychological outlet and a social cover for the loser at the trial."[23] It may be that appeals are pursued for that reason, but it is surely no justification for them. One reason for allowing appeals where there is genuine grievance about an arguably incorrect decision is that wider public confidence in the system is maintained. Truly unjust decisions are a concern not only for the actual litigants but also for interested observers. Litigants, however, whose grievances have more to do with wounded pride than with unfair treatment are unlikely to receive any public sympathy. Denying such peopie an appeal will not, therefore, result in any wider disenchantment with the judicial system.

Indeed use of the right of appeal by bad losers as a means of saving face is undesirable. The credibility of the legal system could be undermined if appeals were used consistently by litigants as a means of reducing "the psychic shock"[24] of their loss at the trial.

Thus Shapiro's observation that one reason why appeals have developed is to allow downhearted litigants an outlet for their annoyance at losing is, it is submitted, wrong. This is borne out by the common law's traditional emphasis on the trial and its aversion to appeals discussed above. The whole point of the procedure that developed was that the trial was the occasion during which the disputants could 'let off steam.' The trial courtroom was the place in which litigants' differences would be resolved once and for all and that fundamental emphasis remains today.

Shapiro's point does however serve as a reminder that appeals are undoubtedly used for the reason he suggests. Such a use has never been intended but has developed incidentally. The

Law Commission's comments on both the role of appeals generally and on the number of appeals that should be available seem to implicitly acknowledge this misuse of the system. Their concern that litigation should be quick, that the principle of finality should be observed and that available resources should not be squandered serves, in the context of the discussion on appeals, as a reminder that appellate litigation can be both unnecessary and wasteful.

Unfortunately the Law Commission did not make the logical leap from there into an investigation of the extent to which such wasteful litigation is presently tying up the judicial system. Could there be grounds, in the civil context, for limiting the availability of first appeals? If second and third appeals can be wasteful presumably a proportion of first appeals can be equally pointless. It is a little disappointing that having asked such fundamental questions the Law Commission have not pursued them into a more critical examination of the court structure; for example by looking at whether some first appeals only by leave might be justified.

Clarification and Development of the Law

In asking the question "why appeals?" attention thus far has centred on the just resolution of particular disputes. Appeals, as a mechanism for correcting erroneous first instance decisions, are one means of ensuring that the individual litigant is treated fairly. This, it has been noted, also serves the interests of the judicial system itself.

In addition, however, appeals enable the courts at the top of the heirarchy to perform functions which have increased in importance relatively recently and which often have very little to do with the particular dispute in question. The Law Commission referred to this wider role as the clarification and development of the law.[25]

As our heirarchical court system evolved appeal courts also took on the nature of superior courts. As one progressed up the heirarchy the judges supposedly became more learned and their decisions more authoratative. Many appeals raised important legal issues and appellate litigation became the

means by which superior appeal courts resolved those issues. Interpretation of statutes and development of the Common Law ultimately fell to appellate tribunals. The New Zealand Secretary of Justice commented, in his submission to the Royal Commission on the Courts, on the unique role of the Court of Appeal "as a custodian of the common law." Its function, he said, was to "develop that law in a harmonious, consistent and rational way."[26]

Many myths surrounded this creative function of the courts and judges became masters of euphemism. The Common Law was not 'developed' by judges, rather it was 'declared'. Stare decisis, the doctrine of precedent, was paid lip service but by distinguishing the instant case from the apparantly binding precedent judges could avoid it. In the area of statutory interpretation also judges proved adept at creativity. When faced with a statutory provision which on its face seemed clear and unambiguous but with which the judges disagreed, various contorted means of avoidance were devised. The phrase 'Parliament cannot have intended' took on a familiar ring as courts ignored the plain meaning of the words and read in their own priniciples.

Before long some judges freely acknowledged their law-making function. Lord Denning has perhaps been the most well known senior member of the judiciary "to admit to an innovative role."[27] Indeed he not only admitted to it but at times positively flaunted it. This led him into conflict with the House of Lords on many occasions. While Master of the Rolls he wrote:

> Many proposals have been made by us in the Court of Appeal. Time and again we have ventured out on a new line: only to be rebuffed by the House of Lords.[28]

Some law lords were harsh in their criticism of Lord Denning. His attempts to 'fill in the gaps' in legislation were described by Lord Simon as "a naked usurpation of the legislative function under the thin disguise of interpretation."[29] Ironically these clashes between a 'liberal' Court of Appeal and a 'reactionary' House of Lords

only served to underscore the fact that judges were not independent arbiters as had always been supposed. Indeed some writers have argued that their politics, education and social backgrounds all bear on the way they decide cases, particularly those involving social or moral issues such as race relations, homosexuality or the role of trade unions.[30] The divergence of opinion that emerged in England's top courts, sometimes culminating in a three two split in the House of Lords,[31] demonstrated just how much power superior court judges had and the extent to which policy considerations bore upon their decision making.

The reality of the law-making function of the judiciary has also recently been acknowledged by senior New Zealand judges.[32] Sir Robin Cooke, President of the Court of Appeal, has commented on the many policy cases surfacing "creating a constantly strengthening awareness that our responsibility must be to aim at solutions best fitting the particular national way of life and ethos."[33] Today the innovative role of judges is largely accepted, although the extent of innovation acceptable is not agreed upon. Lord Devlin is probably representative of those judges who attempt to walk a middle road. He has distinguished

> activist judicial law-making - 'keeping pace with change in the consensus' - which is acceptable, with dynamic or creative, law-making - judges generating change in the consensus - of which he disapproves.[34]

Such rationalisations tend, however, to become pointless semantic exercises. Lord Devlin's comments beg the question: what is "the consensus?" Individual judges' perception of 'the consensus' will, of course, vary. 'The consensus', like that mysterious creature 'public opinion', is something most judges would find difficult enough to objectively identify let alone follow or lead.

It is no coincidence that concomitant with this growing awareness that the courts are developers of the law there have been significant changes in the nature and amount of appellate litigation. Since World War II society has become more complex. The state, particularly through comprehensive social welfare schemes, has become much more involved in the lives of individual citizens and in the economy. The world

of commerce has changed radically. The output of our legislature has increased dramatically. Not surprisingly legal issues have also become more complex. Judges in recent decades have been faced with problems for which there could not possibly have been precedents.

In addition society has become more litigious. Sir Ivor Richardson reported in 1985 that in the Court of Appeal "the volume of business has increased four-fold in twenty five years."[35] All this demonstrates that the law-making function of appeal courts, both in development of the Common Law and in the interpretation of statutes, has become increasingly important. It is not clear whether this change has been judge-led or if judges have merely responded to the expectations placed upon them by a rapidly changing society. In truth these changes have probably been both led by and demanded of judges.

As a footnote to this discussion on the role of appeal courts as law-makers it is important to note that bound up with that function is the top court's role as supervisor and overseer of the entire court system. Judges in courts of first instance look to the superior appellate courts for leadership in the resolution of difficult questions of law. The provision of appeals and the work of appellate tribunals serves

> to compel judges and other judicial officers to be more careful whem making decisions at first instance and to be judicial and reasonable and to apply the law and not to be arbitrary.[36]

Discussion, thus far, has briefly traced the role of appeals historically and their development since nineteenth century reforms. While today appeals are still brought by individual litigants whose aim is a final resolution of their dispute, appellate litigation is also the context in which judges perform other wider functions. In particular the role of judges as law-makers, to a greater or lesser degree, has been more readily acknowledged in recent decades. This creative role has fallen more noticeably to appellate judges as they sit towards the top of the judicial heirarchy and have a supervisory and error correcting role.

This creative function will be explored more fully and the tension between this role of the courts and their raison d'etre

as resolvers of litigants' disputes will be examined. Later the implications of this creative role for the court structure itself will be looked at in the context of a discussion about the number of appeals that should ideally be available and the nature of the top court.

TENSION IN THE SYSTEM

The framework laid down by the Law Commission has been used as a basis for discussion on the role of appeals today. The Commission's heading "competing principles" is, it can be seen, quite apt. Appeals had their origin in a desire to see that the individual litigant was treated fairly by being given a chance to have an erroneous trial decision reversed or varied. A mechanism by which incorrect decisions could be altered also served the interests of the state. The focus, it should be remembered, was still on the individuals involved; on the just resolution of particular disputes.

Appeal courts also had the job of developing the Common Law, although this was played down and even denied. This law-making function has, however, assumed much greater significance in our court system over the last fifty years and the result has been an emerging tension between the various functions of appellate litigation.

Often, on appeal, the rarefied legal questions thrashed out between bar and bench have little to do with the dispute that originally brought the matter to trial. Indeed usually all questions of fact have been well and truly resolved, the appeal court merely deciding what the law is or should be on a particular point. By this stage the litigation arguably has less to do with ensuring justice between the individual litigants (who remain, of course, integral in the process) than it has with the coherent development of the law generally. The Law Commission pointed this out in the context of a commentary on the practice of granting leave to appeal. They noted that the test for granting leave often asks whether the question of law at issue is one of general importance or "a matter of significant public interest."[37]

The resolution of a particular dispute thus becomes not so much the end in itself but a means to a greater end - the clarification and development of the law. Appeal courts will use the litigation in this way either because the trial court has deviated from the law and needs to be brought back into line or because there was no law applicable and the appeal has assumed the task of 'developing' it.[38] In the words of Lord Elwyn-Jones:

> ... an appeal court's ruling upon a question of law goes beyond the functions of doing justice between the parties and acquires public importance as a binding declaration of what the law is.[39]

Thus, despite Lord Devlin's protestations that the first priority of appeal courts is the "proper resolution of particularised disputes between individuals", the reality is that often dispute resolution is incidental to the court's wider public role of developing and interpreting the law. The Law Commission acknowledged this by observing that on occasion "the parties to the original proceedings might no longer have any real interest in the matter when it gets to its final examination in the courts ... ."[40] The court is, certainly, performing its development role in the context of resolution of a particular dispute. Yet in reality the litigants (from the court's point of view) may have become quite incidental, their specific concerns now subsumed by matters of importance for the wider public interest. In the words of Martin Shapiro:

> ... the study of appellate courts makes it clear that courts always exist in a state of tension between their basic source of legitimacy as ... resolvers of conflict and their position of government agencies imposing law upon the citizenry.[41]

One does not have to agree with Shapiro's proposition that courts are instruments of the political regime to acknowledge the tension between the two primary roles of appeal courts, conflict resolving and law-making. That tension, this writer will later contend, has important implications for the structure of our courts and for the number of appeals that ideally should be available.

Characterising Appeals

There is a danger, of course, that a recognition of the different functions of appellate litigation will lead to an overly-rigid categorisation of cases; that is, between cases involving clarification or development and cases in which the appeal (legally speaking) appears relatively routine and dispute resolution is the focus. In both the United States and Canada it appears that commentators on and architects of the judicial system occasionally fall into this trap. In both jurisdictions there have been numerous examinations of the judicial system because of the problem of overcrowding. In many states this has resulted in the creation of an intermediate Court of Appeal, the intention being that some pressure is taken off the top court in the state heirarchy. Even that, however, has not always proved sufficient and the suggestion has been made that cases be allocated quite strictly, according to their "type", between the two appeal courts or between different divisions of the one court.[42]

An example is to be found in Canada. In 1977 the special Committee on the Appellate Jurisdiction of the Supreme Court released their findings. Having examined the overcrowding problem in the Supreme Court they concluded that the only solution was an increase in the number of justices both immediately and in the future as the need arose. They were mindful, however, of what this would do to the nature of the Supreme Court. "Collegiality, consistency and disciplined creativity",[43] hallmarks of a top appellate court, would be compromised in an amorphous court sitting in several panels. "A small, unified court is a prerequisite to effective law development."[44] They decided therefore, because of these problems, to recommend a bifurcation of the Court of Appeal.

The bifurcation proposed would divide the court into two sections: Juristic and General. The General Section would speedily dispose of "ordinary" appeals while the Juristic section "would devote its time to the resolution of causes implying some 'law-developing' element."[45] The Committee's proposals demonstrate the extent to which the dual role of appeals has emerged in some jurisdictions. It highlights the

fact that many appeals have an importance for the legal system that extends far beyond the immediate concerns of the individual litigants.

Yet while an acknowledgement of this dual role is important, the distinction can be taken too far. MacDonald, in his commentary on the Ontario proposals, makes this point. It is his contention that the expeditious resolution of actual disputes and the development of a sound provincial jurisprudence as the two main functions of appellate review "cannot be separated."[46] To talk of cases as being either ordinary or general on one hand or law-developing and juristic on the other will often be artificial and unrealistic. While it is true that some cases might be so readily categorised, the great majority will not. Such an assessment is really a matter of degree. Unless the case has been appealed for the wrong reasons it will, of necessity, involve some legal issue about which there is room for argument. Given that, it is difficult to see how some of these appeals can be meaningfully siphoned off, labelled "ordinary" or "precedent-bound" and dealt with by a separate division of the court.

Undoubtedly it is true that some cases stand out for the important legal issues they raise. On occasion it may be clear from the outset that the case is one which can only sensibly be dealt with by the top court. Perhaps the case casts the present law into doubt and the top court is required to clarify it. Or perhaps the law simply does not adequately meet the problem and the top court need to extend or develop the law. It could be also that the present law is clearly archaic and inadequate and the top court must adapt or banish it.

The distinction then can be drawn. Indeed the importance of doing so has been highlighted in this paper and will be noted again in a later discussion on second and leapfrog appeals. But to take it too far lends a sense of unreality to the appellate process. The two purposes of appellate review, decisive resolution of disputes and development and clarification of the law, are so intertwined that to divide one appeal court on the basis of a 'neat' distinction between the two would be well nigh impossible.

As MacDonald points out, and as this paper will later suggest, a two-tiered appellate structure essentially deals with cases on the basis of the above distinction (very loosely) but does so in a more natural and satisfactory way.

The Aliakmon

Having focused on the two main functions of appeal courts and suggested that the appellate process is characterised by a tension between these roles, it will be instructive to focus on how this tension manifests itself in practice. The Aliakmon[47] is a case which progressed through the English courts and serves the purpose well.

In July 1976 the plaintiff buyers contracted to buy steel coils to be shipped from Korea to Immingham. The price was payable by a 180-day bill of exchange to be endorsed by the buyer's bank in exchange for the bill of lading. The buyers intended to resell the steel before the bill of lading was tendered but were unable to find a buyer. As a result their bank refused to back the bill of exchange. The buyers and sellers met to resolve the problem. The bill of lading was subsequently sent to the buyers by the sellers and it was agreed in correspondence that the goods would be at the disposal of the sellers. The steel coils had been improperly stowed and damage resulted during the voyage. The buyers brought an action against the shipowners claiming damages for breach of contract and/or duty in respect of the loss suffered as a result of the damage to the goods.

Staughton J, at first instance, upheld the plaintiff's claim in contract and thus made no observations as to the carrier's possible liability to the buyer in tort. The Court of Appeal unanimously overruled the lower court's finding on contract and thus the alternative claim in tort took centre stage. On that issue all three judges found that the carrier was not liable in negligence but for very different reasons. At the heart of the issue was the principle laid down (after a lengthy analysis of the authorities) in The Wear Breeze.[48] That principle, put simply, is that only the owner of goods at the time the damage is done can sue in tort. The

court held that the result of the meetings and correspondence between the parties after the bank refused endorsement of the buyer's bill of exchange was a variation in the contract of carriage. That variation was to the effect that property in the goods would not pass upon consignment and delivery of the bill of lading as originally intended but at a later time, namely when the price was paid. Property eventually passed after the goods were landed, and thus the rule in The Wear Breeze operated to deny the buyer a remedy in tort - the buyer was not the owner of the goods at the time the damage was done. The shipper would have an action in tort, by contrast, although would have no interest in pursuing it; risk having passed to the buyer in accordance with the contract of carriage at the commencement of shipment.

The 1970's saw significant developments in the law of negligence, particularly in the so-called building cases. At the apex of that development was the case of Anns v Merton London Borough[49] in which Lord Wilberforce (in the House of Lords) laid down a simple two-fold test by which the courts would establish proximity between the parties and thus liability.

Many judges saw the Anns test as a significant change in the law. It was literally applied in both England and New Zealand. One such judge was Lloyd J, who in The Irene's Success was [50] confronted with a similar problem as presented itself in The Wear Breeze and later in The Aliakmon. He held that Anns had effectively changed the law and that were "The Wear Breeze being decided today, it would be decided differently."[51] His approach was affirmed a few months later in a clear dictum by Sheen J in The Nea Tyhi.[52]

In The Aliakmon two of the Court of Appeal judges accepted Lloyd J's finding that the Anns test was appropriate and that The Wear Breeze was no longer good law. Sir John Donaldson MR found, however, that there were policy reasons under the second stage of Lord Wilberforce's test to deny the plaintiff a remedy. Robert Goff LJ held that the carrier owed the buyer plaintiff a prima facie duty of care and that there were insufficient policy reasons at stage two to negative that duty. Yet because of the nature of a time charter in

operation the shipowner had not breached that duty. The plaintiff should have been suing the time charterer.

The third judge, Oliver LJ, held that the Anns test had been misinterpreted and that The Wear Breeze was not only still good law, but was in accordance with a long line of substantial authority and with the policy of the law today. The House of Lords granted the plaintiffs leave to appeal. They did so on the tort issue only.

Surprisingly, in light of the divergence of opinion in the Court of Appeal, the House of Lords unanimously dismissed the appeal. One speech was delivered by Lord Brandon of Oakbrook with which the other four lords concurred. It is clear that the House of Lords' broader agenda motivated their decision. The case was an opportunity, although not an ideal one, to complete the retreat from the Anns test which had begun in Peabody Donation Fund (Governors of) v Sir Lindsay Parkinson and Co Ltd.[53] Had the House of Lords thought that allowing the buyer an action in tort on the facts of The Aliakmon was undesirable they could have affirmed the decision of the Master of the Rolls in the Court of Appeal. That is, found that there were policy considerations which on the facts of the particular case led them to conclude that the buyer should not have an action in tort. The House of Lords' primary concern, however, was not with the details of the facts in The Aliakmon but with the direction of the law of negligence itself. They took the opportunity to reaffirm The Wear Breeze, overrule The Irene's Success and to put significant checks upon the operation of the Anns test.

The Aliakmon is a good example of the way in which appellate courts at the top of the heirarchy use specific litigation to supervise the development of the law generally. This is especially so as the case was not really entirely appropriate "as the medium to bring some order to the post Junior Books chaos in the area of pure economic loss."[54] Markesinis goes on to note that

> the choice could have hardly been more unfortunate since the facts were atypical and one of the central themes of economic loss litigation - the floodgates argument - is absent from the case.[55]

It would have been relatively easy for the House of Lords to find for the plaintiff in this case. There were few legal or practical barriers in their way. The plaintiff clearly deserved some relief and allowing it would not, as the courts say, 'open the floodgates'. Yet the House of Lords had other wider considerations in mind. They wished to clear up the law of negligence in the area of pure economic loss and this case presented them with the ideal opportunity. Perhaps they thought it impracticable or inconvenient to wait for a more 'suitable' case, especially as judges in the Court of Appeal (such as Robert Goff LJ) were obviously going in a direction of which they disapproved.

Whatever their motives, the case illustrates the dual function of appellate review well. It demonstrates also that the top court's law-making role often completely overshadows the details of the particular litigation. It is also helpful in the context of discussion below on the ideal number of appeals. Legal issues, The Aliakmon makes clear, frequently emerge or attain importance in the course of the litigation process itself and not always in the comparative vacuum of the solicitor's office.

HOW MANY APPEALS?

The Proposal

Having considered the role of appeals in our judicial system generally, the Law Commission went on to look at the specific issue of how many appeals should be available. The focus of the discussion is particularly upon the desirability of second appeals in light of the important principles of finality and prompt litigation and the desire to ensure the most efficient use of available resources.[56]

As already mentioned, the Law Commission were required to work on the asuumption that the Government would abolish appeals to the Judicial Committee of the Privy Council. Their final recommendations, in brief, are that the Court of Appeal become New Zealand's highest court and be re-named the Supreme

Court. The original jurisdiction of the District Courts will be enlarged, though not correspondingly removed from the High Court. Rather, both courts will have an overlapping original civil and criminal jurisdiction. Most of the civil jurisdiction will be concurrent although applications for judicial review would still always be to the High Court. In both the civil and criminal jurisdictions either of the parties would have the right to apply to a High Court judge for a transfer of the case to that court on the grounds of its complexity or general importance. In practice then the High Court will continue to deal with the most important civil and criminal cases at first instance.

The High Court would see its appeal business increase, appeals from the District Court being to panels of three judges. Larger panels will sit more frequently in the new Supreme Court, although first appeals from the High Court will normally still be to a panel of three judges. The Law Commission point out that

> it is not common in systems like ours for an appeal to go from a court of 1 judge to a court of 5 or more.[57]

All first appeals will be by right. Second appeals on questions of law, where available, will be by leave of the Supreme Court only.[58]

The Debate

There is some debate about just how necessary a second appeal is. It is of particular importance in the Law Commission report because with the abolition of Privy Council appeals second appeals from cases begun in the High Court will no longer be available.

The loss of this second appeal is not intentional but rather incidental to the removal of Privy Council appeals. Second appeals will still be available on most occasions, but not from cases begun in the High Court. The question is whether this loss will matter.

In 1978 the Royal Commission on the Courts took the opportunity

to present the issues surrounding the abolition of Privy Council appeals. Of necessity that involved a look at the need for a two-tier appellate system. The Royal Commission's conclusion was "that a two-tier appellate system is a desirable ideal."[59] However it accepted that if Privy Council appeals were removed "...it will be so difficult as to be impractical to create a completely new final court... ." The reasons are obvious. New Zealand and its legal profession are small and would not be able to absorb such a significant addition to the court structure. It would also, of course, be very expensive. At least until New Zealand's population increases "a single appeal would have to be accepted in many circumstances."[60]

One solution, suggested by the District Court judges in their submission to the Law Commission, is that the District Courts become the only court of first instance. This would involve a dramatic change in the court structure as we know it, the High Court becoming an intermediate Court of Appeal. It is fair to say that such a radical restructuring could not be justified simply on the basis of maintaining a second right of appeal in all cases.

What, then, are the arguments for and against second appeals; or rather are the arguments for them so compelling that their loss should cause concern? The difficulty with debate in New Zealand on this issue is that inevitably it becomes bound up with the question of Privy Council appeals about which people can be surprisingly emotive. Whether the Privy Council should continue to be our final appellate court is quite a different issue to the desirability of second appeals generally.

The Case against two Appeals

As mentioned above, it is widely accepted that one appeal is sufficient to ensure justice between litigants. In England the House of Lords hears very few appeals - on average between 60 and 80 each year - while there are some 4200 judgments in the Queen's Bench Division. In New Zealand between 1 and 5 appeals may go to the Privy Council in any one year while

there have been some 500 or 600 final civil judgments in the High Court.[61] Undoubtedly the New Zealand figure is affected by the distance and expense involved in having to travel to London, but still it seems clear that only a very small number of cases ever get as far as a second appeal. Many smaller states in the United States have only one appellate tier,[62] although the federal Supreme Court exists to hear appeals on important constitutional questions. Their experience does not indicate that a lack of a second appeal causes any obvious injustice. Those states in the United States which have created intermediate appeal courts have usually done so because of overcrowding in the top court and not to provide litigants with a second appeal. Indeed Overton notes in his assessment of Florida's three tier court structure that "providing a second appeal was clearly not the purpose for creating Florida's District Courts."[63]

Those who doubt the value of second appeals point out that litigation is not about achieving perfect solutions to legal problems. It is not some academic exercise. If, in the vast majority of cases, justice is done with only one appeal what is the point of a second? While acknowledging that second appeals do have their uses, doubters argue that the advantages derived by the legal system and society from second appeals are not sufficient to justify the resources that have to be devoted to them. Besides, where does one stop? If two appeals are necessary why not more?

The reality is that with many questions of law there are no 'right' answers. Decisions handed down by the top court are 'right' simply by virtue of the fact that it is the top court giving them. Indeed judges at the top of the court heirarchy, with equal intelligence, experience and knowledge of the law, can reach quite different conclusions on the same points of law. One United States Supreme Court judge had no doubt that were there a right to appeal beyond the Supreme Court a proportion of such appeals would succeed.[64]

Two or more appeals are then, according to their detractors, wasteful. There is very little merit in second appeals per se, it is argued. The merit rather is in the fact that often

on the second appeal the matter has finally reached the highest court and can be conclusively dealt with. The Law Commission noted this view, which regards the number of prior hearings or appeals as largely insignificant.

> In the end the most critical matter is that appeals in important matters should be able to be taken to the final court in our legal system and be given a full and fair hearing there.[65]

This view is lent support by the provision for leapfrog appeals by leave from the District Court to the Supreme Court; a feature of the Law Commission's proposed court structure.[66] However leapfrog appeals have been relatively rare to date and the Law Commission envisage this continuing. They truly are the exception, occuring in cases where "major issues of principle" have emerged at first instance.[67] Proponents of second appeals would in no way see the leapfrog provision as inconsistent with a two-tier appellate structure. Rather, as a means by which unnecessary duplication can be eliminated, it complements and enhances the system.

The Case for two Appeals

What of arguments in favour of second appeals? The Report of the Royal Commission noted the view "that a second right of appeal is necessary to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined."[68] Lawyers do not have the luxury of days and days to prepare for litigation; to ponder the issues and ensure that all fine legal points relevant to the problem are cavassed. Nor, it is pertinent to note, could the parties afford it. Constraints of time both on the courts and on advocates mean that important points are not perhaps dealt with as thoroughly as they would be in the ideal world. Indeed raising such points may be irrelevant at the time of the trial. The argument is that many issues surface or become more important during the course of the litigation itself. The litigation process, which still to a large extent centres on the oral presentation of argument, will highlight some issues while others fall by the wayside.

The Aliakmon litigation, discussed above, demonstrates this

process. At first instance the plaintiff's claim was alternatively based upon contract and tort. The plaintiffs won on contract and the tort issue was thus not judicially considered. In the Court of Appeal the first instance decision on contract was reversed and the tort issue considered. While the claim in tort was unanimously dismissed by the Court of Appeal, their reasons were so disparate that the decision begged to be appealed. In the House of Lords only the narrow tort issue was argued in detail before five of England's top judges and was firmly resolved.

The issues were refined as the litigation proceeded. By the time the case reached the House of Lords one important legal issue remained outstanding. The highest court could devote all their attention to that one issue and consequently their decision would, on that issue, be better than that given by the court below.

The Aliakmon litigation also demonstrates the way in which a heirarchical court structure, with two appeals, naturally allocates different types of work to the different courts. The first appeal is general, the court largely going through all the arguments heard at the trial. They cannot devote much time to the potentially important legal issues in the case but deal with them along with all other facets of the appeal. A second appeal by contrast, usually only by leave, concentrates clearly on only one or two important points of law which have emerged in the courts below and remain unresolved. By virtue of that fact alone the court handling the second appeal will be able to resolve those issues in a more satisfactory way than a busier court handling a general appeal. The top court, then, is dealing with litigation in which there is a strong public-interest component. The individual litigants are of course important, the case would not be there without them. But nor would the case be there unless the issues it raised required the top court to exercise its role of clarification and development. The two-tiered appellate process in England has been described in this way:

The lower courts

> deal with an infinite variety and a huge bulk of litigation, necessarily in a somewhat summary and

> perfunctory way. Thus ... [the] ... intermediate courts of appeals have relatively large case-loads and perform an invaluable function in correcting judicial fallibility and bringing an element of consistency to the grass-roots of the judicial process. The House of Lords is at the centre of the system: its small case-load ... includes only the creme de la creme of legal conundra ... which require the most weighty consideration and which have the widest implications in raising issues of general public importance.[69]

This view of the court structure and of the second appeal within it has been described as the "stepping stone" approach.[70] The first appeal both sharpens legal issues and determines factual issues.[71] In the vast majority of cases that appeal will be sufficient. However in a few, important legal issues may remain unresolved or inadequately resolved. Those cases are the diet of the top court. Critics of this so-called stepping stone approach decry the reproduction of effort and the cost to both the litigants and state that such duplication involves. Many such critics prefer an allocation procedure, such as that proposed in Ontario and as found in some American states, Wisconsin being a useful example.[72] Such procedures allocate cases to different courts or different divisions within the one court according to their 'type'. Humdrum appeals go to one court while public interest "law-making" appeals go to the top court. In Wisconsin cases are divided into three broad categories for this purpose.

Problems with this approach have been outlined to some extent above. In addition to those points two others need to be made. Firstly, the process of allocation may itself be faulty or at least questionable, especially where young and inexperienced judges' clerks exercise the allocation responsibility. This difficulty is surmounted in some states by the use of other procedures, for example certification of cases by the lower court.[73]

The second problem is more pertinent to this present discussion. That is that such a system implies that the law-making role of the courts is confined to one super-tribunal at the top of the heirarchy. In a two-tier appellate structure the reality is quite different. The first appeal is not just a stepping stone for the litigation as it proceeds inexorably towards a hearing in the highest court. A second appeal is very much the exception and not the rule. The intermediate

appellate court itself performs an important law-making function and thereby exercises considerable influence over the development of the law. Both the English and New Zealand Courts of Appeal are good examples of that.

The fact that there are so few second appeals also answers the charge that they are wasteful. Delay, lack of finality and increased costs are not really serious concerns given the few second appeals that proceed. Furthermore the duplication argument implies that the issues at the end of the first appeal are exactly as they were at the end of the first instance hearing. Allocation, it is argued, would have spotted the important issues and sent the case straight to the top court obviating the need for an intermediate appeal. This fails to take account, however, of the crystallisation effect of the litigation process. It may well be, as in The Aliakmon, that issues worthy of the top court do not emerge until the first appeal. And in those cases in which important issues have emerged during the trial the leapfrog facility is a safeguard against unnecssary duplication.

In any event some sort of allocation procedure does not necessarily purge all duplication from the system. The Ontario Committee, for example, envisaged appeals (with leave) from the General Section of the provincial Supreme Court to the Juristic Section.[74] That would presumably be necessary in situations where the case had been wrongly allocated initially or where issues requiring the 'law-making' expertise of the Juristic Section arose in the course of or as a result of the general appeal. In addition, of course, there would be the possibility of a further appeal to the Supreme Court of Canada. MacDonald's conclusion is that

> ... although the narrow issue of time and cost saving impelled the Committee to recommend a bifurcation of the Court of Appeal rather than the creation of another appellate court, this restructuring, in fact, does not promise a cheaper or more expeditious appellate procedure.[75]

A final point in favour of a two-tier appellate structure has to do with the nature of the top court itself. The Law

Commission recognised that the top court in a system such as New Zealand's is a body of great significance. It has the "final reponsibility ... for clarifying and devloping the law... ," a responsibility described by the Commission as "major and critical ... in our system of constitutional government.[76] It is a court unlike any other in the judicial system. It hears the 'creme de la creme' of cases. Its judges are ideally held in high regard because of their seniority, expertise and experience. Furthermore the court should be small; "a permanent group of appellate judges meeting in a collegiate way the responsibilities of the final court of our system of justice."[77] In many jurisdictions the unique character of the top court is achieved in large measure because of the type of cases heard. The litigation will have traversed at least one appeal, the top court thus being presented with one or two specific legal issues upon which they can bring their unparalleled legal prowess to bear.

The House of Lords, the Supreme Courts of the United States and Canada and the High Court of Australia are all examples of top courts, in jurisdictions similar to our own, which hear almost only second appeals. Retaining a two-tier appellate structure helps to preserve these unique top courts. The quality of their decisions must surely be enhanced as they have longer to ponder fewer rarefied legal issues.

A top court of this nature is all the more important today because of the great expectations placed upon our judicial system. Society has become more complex and as a result more litigious. Concomitantly the courts have, as discussed above, been increasingly called upon to 'develop' and 'clarify' the law. A two-tier appellate structure naturally sifts litigation until the top court, if and when it is confronted with an issue, is primarily required to exercise its law-making or clarifying function. This narrow focus by a small court consisting of judges of the highest calibre ensures that their decisions are not only coherent and consistent but of a very high standard - to the benefit of the whole legal system.

It is submitted, therefore, that second appeals are possibly more necessary now than they have ever been. Availability

of a second appeal will, to a large extent, ensure that the courts do not fall down on their increasingly important law-making responsibilities.

THE LAW COMMISSION'S FINDINGS

In one sense the Law Commission have asked more questions than they have answered. Those questions, in relation to appeals, were appropriate and important. An examination of the Commission's Report reveals their conclusions on some of the issues raised.

Firstly, the Law Commission is not averse to second appeals. Indeed they emphasise that their recommendations, if adopted, will result in more second appeals.[78] In particular, "a larger number of criminal matters would be the subject of two appeals than is currently the case."[79]

It could be that this increase in second appeals is simply incidental to the widening of the District Courts' original jurisdiction. The second appeal is not necessarily meritorious in itself but simply necessary in a heirarchical court structure to get some matters to the top court. This approach is evident to some extent in the Law Commission's report. The Commission certainly view the proposed Supreme Court's supervisory role as of paramount importance. They state that "it should be possible for matters originating in any court or tribunal to come before the Supreme Court if the issue is one of major public importance."[80] Further, the Supreme Court's exercise of overall control over major areas of law and legal policy can be achieved "through second appeals as well as through first appeals."[81]

It could be argued therefore that second appeals will exist only as the means by which the Supreme Court supervises lower courts. Thus second appeals from District Court decisions can be justified on the basis that with first appeals being decided by different panels in the High Court one unified tribunal is still required over them to ensure consistency and correct errors. The Law Commission in fact point out that

where appeals cannot at present be taken beyond the High Court inconsistency has resulted.[82] This indeed has been used as one of the justifications for the continued existence of the House of Lords as England's top judicial body. With the English Court of Appeal now sitting in various divisions one final superior body over them is required to ensure consistency and coherence in the law.[83]

There are indications in the Law Commission's report however that they view second appeals as more than simply a necessary if not altogether desirable means of getting cases to the top court. Like the Royal Commission before them, although perhaps less explicitly, the Law Commission appear to accept the view that a two-tier appellate structure is desirable in itself.

Firstly, for the reason that in complicated and important litigation the three tier structure refines and crystallises issues. They are quick to point out that "law-making" is not confined to second appeals and reject the notion that a rigid distinction can be drawn between first appeals (concerned with the correction of error) and second appeals (concerned with clarification and development of the law).[84] However they refer on more than one occasion to the "special character" of second appeals in which "the emphasis is on the court's role of reviewing, clarifying and, if appropriate, developing the law and less on the particular case."[85] Elsewhere the Commission ackowledge that a second appeal "is less concerned, in the overall order of things, with correcting error in the particular case and more with the clarification and development of the law."[86] The Commission appear, then, to accept the view that one appeal will, in the vast majority of cases, be sufficient to ensure justice for the individual litigant. But in addition that second appeals are important, in this litigious age, as the means by which the top court can exercise their role of clarification and development of the law most effectively.

This approach raises further questions, particularly about whether this is fair to litigants who ultimately bear the cost[87] and whether it is desirable that the development

of the Common Law be dependent upon the whims and tactics of litigants.[88] An examination of those issues is beyond the purview of this paper.

A second reason for the Law Commission's apparant acceptance of the desirability of a two-tier appellate structure is that it helps preserve the unique character of the top court. For example, the Commission consider it desirable that routine criminal appeal business be handled by the High Court with only those cases involving important "issues of principle" making it to the Supreme Court.[89] This view accords with the practice of other jurisdictions, discussed above, in which the top court hears only second appeals involving issues which have emerged in or arisen as a result of litigation in the courts below. The two-tier appellate structure thus ensures that the top court avoids getting bogged down in routine appellate business. The result is, hopefully, better quality decisions in the most important of cases.

The requirement for leave to appeal a second time, as proposed by the Law Commission, and the requirement that such appeals be limited to questions of law complements this view of the role of the second appeal.

Finally, the Commission's whole proposed structure, with two appeals from the District Court, suggests approval of the refinement of issues approach. Indeed the Commission rejected suggested alternatives to a simple progression up the court heirarchy.[90] A principal consideration, for example in not allowing appeals from the District Court to the proposed Supreme Court as a matter of course in any circumstances, is the workload of the top court. A two-tier appellate structure safeguards the top court from overcrowding and the two earlier hearings ensure that the Supreme Court has only to deal with a few well-defined, not to mention important, legal issues. In the words of the Commission, there are real

> advantages, in terms of the deliberate review, clarification and ,as appropriate, development of the law, of having a careful assessment of the issues by counsel and a court <u>at least</u> once before a case gets to the Supreme Court.[91] (Emphasis added)

PROBLEMS WITH THE PROPOSED STRUCTURE

There are, it is submitted, problems with the Law Commission's proposed structure to do with both second appeals and the nature of the Supreme Court. The first issue concerns the loss of second appeals from actions begun in the High Court. This possible loss concerned the Royal Commission in 1978[92] although they recognised that abolition of Privy Council appeals would make it inevitable.[93] The Law Commission, by contrast, do not mourn the loss of this second appeal. In response to the suggestion that the situation will be anomalous, in that actions begun in the District Courts will have two appeals available, the Law Commission merely noted that "such a difference may of course occur whenever there are two first instance courts.[94]

Concern about the loss of second appeals from High Court litigation centres upon the apparant inconsistency in the system. Two appeals will be possible from actions begun in the District Court: firstly to three High Court judges and secondly (subject to the granting of leave) to (probably) five or more Supreme Court judges.[95] However only one appeal, normally to a panel of three, will be available from decisions of first instance in the High Court. The irony is, of course, that the latter cases will be the most important and complex in the civil and criminal arenas. They are the very cases, it can be argued, from which second appeals would potentially be the most useful.

The anomaly can of course be rationalised. Of most significance, it is argued, is that important cases be heard in the final court. Whether it be on first or second appeal is of no consequence. The second appeal from first instance hearings in the District Court is justifiable firstly as a means of getting matters before the Supreme Court and secondly as the way in which the Supreme Court can ultimately supervise the development of the law. That is, to ensure that no inconsistency occurs as a result of first appeals being heard by disparate panels in the High Court. In a three tier court structure the second appeal is a mere device, or a necessary mechanism, by which important cases from the District Court

can be laid before the Supreme Court.

Yet that, it is submitted, is itself an acknowledgment that a two-tier appellate structure is inherently worthwhile as a means of refining and crystallising issues. It is an acknowledgment that after a first instance hearing and one appeal unresolved legal issues may remain outstanding. The Supreme Court will then, on the second appeal, be called upon to exercise its law development or clarification function. That, as the Law Commission point out, is the nature of second appeals.

No doubt it could be argued that second appeals to the Supreme Court will exist only so that the court may exercise its supervisory and error-correction functions over High Court appeals. That will, in part, be the case. However there will also be cases in which, after a hearing and one appeal, the law is still unclear. The High Court panel may not necessarily have misapplied the law but, as in The Aliakmon, they may have reached different conclusions as to what the law is. The Bench might be split or their reasoning so varied that a second appeal is required to clarify or develop the law. That view of a two-tier appellate structure is, it seems, implicitly accepted by the Law Commission.[97]

If that refinement model of double appeals is appropriate for litigation begun in the District Court, why not for that begun in the High Court? The distinction could be that the hearing and first appeal are in courts further up the heirarchy, and that as a result issues will be seized upon and dealt with in a more satisfactory way than in the District and High Courts. The view of double appeals, however, as a means by which complex issues can be refined and crystallised is applicable to all courts in the heirarchy. Besides, any difference there might be as a result of the litigation beginning in the 'superior' High Court would in part be neutralised by the more difficult nature of that litigation.

The whole argument about second appeals is that regardless of what court the matter is first heard in there may be issues that emerge in the course of the litigation, as a result

of (amongst other things) oral interaction between bar and bench, which could not have been anticipated by counsel. That this happens does not reflect badly on the parties or the court. It is, quite simply, the nature of the 'beast'. The Aliakmon litigation again serves as a useful case in point. Imagine that action, under the Law Commission's proposed structure, was begun in the High Court. The High Court decide the matter in favour of the plaintiff on the basis of contract. On appeal the case would in all probability go to a panel of three [97] in the Supreme Court. The tort issue suddenly becomes crucial and those three judges reach quite different conclusions on that issue. The resulting uncertainty in the law could only be remedied in a later case. A possible solution, that the matter go to a full bench of the Supreme Court (or to at least five), is not desirable in the Law Commission's view; it involves judges "of one court sitting on appeals from their colleagues."[98]

A further problem with the loss of the second appeal has to do with the nature of the proposed Supreme Court itself. The Law Commission see the court as being ultimately responsible for the development of New Zealand's Common Law. And they have also observed that in our heirarchical structure this function is most obviously exercised in the context of a second appeal. The second appeal does have a "special character" and it is no coincidence that in other like jurisdictions the top court's work consists almost entirely of second appeals heard by leave of that court. This ensures that the highest court is dealing only with the most important legal issues. They can devote all their time to those issues without the distraction of more routine litigation.

Our new Supreme Court will be in quite a different position. They will be dealing not only with important second appeals and with the occasional special public interest case originally[99] but with routine general appeals by right from the High Court. If parties often choose to begin important litigation in the High Court,[100] even though the option to begin in the District Court will exist, the new Supreme Court's work will differ little from that of the Court of Appeal at present.

The fear is that a mix of routine first appeals by right from the High Court and second appeals by leave will distract the Supreme Court from their "major and critical responsibility in our system of constitutional government" for clarifying and developing the law.[101] No doubt the court will cope with this dual function. Yet if the Supreme Court's primary role is to finally resolve important rarefied legal issues one cannot help wondering if the expected high quality of decision making will be compromised because they are also being asked to dispose of unexceptional routine appellate business.

CONCLUSION

The report of the Law Commisssion on the Structure of the Courts is in many respects an admirable document. Their proposals are sympathetic to New Zealand's traditional court structure and their research thorough. This paper has been concerned principally with their observations and proposals on appeals.

The Law Commission raise important issues in their report about the role of first and second appeals in our judicial system. In only a few respects is their commentary disappointing. Firstly, having noted the Common Law's traditional antipathy towards appeals, and having correctly highlighted the potential for appeals to be unnecessary and wasteful, the Commission fail to explore the extent of present 'abuse' of the system. In particular, the possibility of first appeals in civil litigation being by leave only might profitably have been examined.

Secondly, their comments on double appeals do not adequately deal with the issues they themselves raise on this matter. The value or necessity of second appeals takes on prominence as an issue because, with the abolition of appeals to the Privy Council, a second appeal from first instance High Court litigation will be lost in the proposed new structure. In 1978 the Royal Commission on the Courts made it clear that they looked forward to this loss with some trepidation.

The Law Commission's view however is not, in the end, clear. Some of their comments suggest that second appeals themselves are of little inherent value. Of real significance is that important matters reach the top court. Whether that be on first or second appeal or even originally is of little consequence. If that is the Law Commission's view the existence of two appeals from first instance hearings in the District Court but only one from first instance High Court litigation is in no way inconsistent. They exist in the first case simply as a convenient mechanism by which deserving District Court cases can reach the Supreme Court rather than because second appeals are desirable per se. They also serve, in that context, as a means of keeping the workload of the top court at manageable levels.

On another view, however, a two-tier appellate structure is itself considered desirable because it serves to refine and crystallise issues thereby enhancing the court's role as overseer, clarifier and developer of the law. It is this writer's observation that this view is lent greater credibility by development of the law-making function of appellate courts since the 1950's. By the time litigation makes a second appeal the outstanding legal issues are ususally well-defined and the top court, whose expertise is theoretically unparalleled, can spend time on those specific issues and emerge with a satisfactory resolution. Second appeals appear naturally then to have more to do with the judiciary's law-making function than with its dispute resolution or error correction functions. Thus to remove second appeals at a time when the judiciary's law-making role, by their own admission, is more important than ever before seems a little absurd.

Some comments in the Law Commission's report suggest endorsement of this latter view of the two-tier appellate process - that it is generally desirable in itself (though not <u>always</u> necessary) no matter what court the first instance hearing is before. If this is the view of the Law Commission (as it was of the Royal Commission in 1978) then New Zealand's future court structure could well harbour a significant anomaly. That they make little of it probably reflects the fact that there is no realistic alternative. While second

appeals are themselves desirable, the benefits to be gained from them would not be sufficient to justify the radical restructuring of the court system required to retain them in all cases.

The Law Commission's proposed court structure will then have weaknesses. The loss of second appeals in some cases will be one. Another will, as discussed above, be the rather eclectic nature of the Supreme Court's workload to the possible detriment of their law-making function. However given New Zealand's small population and the limits on available resources these compromises will simply, in the words of the Royal Commission, "have to be accepted."[102]

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FOOTNOTES

!. Rt Hon Sir Owen Woodhouse The Structure of the Courts New Zealand Law Commission Report No 7, xi

2. Above n1, 78

3. Above n1, 79

4. Sir Jack Jacob QC The Fabric Of English Civil Justice, 213

5. L Blom-Cooper & G Drewry The Final Appeal: A Study of the House of Lords in its Judicial Capacity, 46

6. Above n5, 47

7. Above n5, 46

8. M Shapiro Courts. A Comparative and Political Analysis, 39 referring to J Dawson History of Lay Judges

9. Above n8, see generally 38 - 39

10. Court of Appeal Rules SR 1955/30

11. Above n10, Rule 36

12. See McGechan on Procedure 4 - 48 (1/11/85)

13. Above n10, Rule 41

14. Above n12, CA37.04 (4)

15. Above n1, 78 - 82

16. Roshier and Teff Law and Society in England, 64 (quoting Lord Devlin)

17. Above n1, esp 82 (para 236)

18. Above n1, 80 (para 229)

19. Above n1, 79 (para 226)

20. Above n1, 80 (para 227)

21. Above n4, 211

22. Above n1, 80 (para 228)

23. Above n8, 49

24. Above n8, 52

25. Above n1, 80 - 82 (paras 231 - 234)

26. Mr Justice Beattie (Chairman) The Report of the Royal Commission on the Courts 1978, para 282

27. Above n16, 62

28. Lord Denning The Due Process of Law, v - vi

29. Magor & St Mellons RDC v Newport Corp [1952] AC 189

30. For example see the landmark work:
J A G Griffith The Politics of the Judiciary
NB: Not all have accepted Griffith's analysis. See for example:
Simon Lee Judging Judges
Lord Devlin "Judges, Government and Politics" (1978) 41 Modern Law Review 501

31. Above n16, 67

32. For example:
Rt Hon Mr Justice Richardson "Judges as Law Makers in the 1990's" The Wilfred Fullagar Memorial Lecture, 23 Sept 1985

33. Sir Robin Cooke (1983) NZLJ 297, quoted Above n1, 81 (para 232)

34. Above n16, 64

35. Above n32, 5

36. Above n4, 212

37. Above n1, 81 (para 231)

38. Above n8, 56

39. Lord Elwyn-Jones "The Role and Functions of a final Appellate Court" (1976) 7 Cambrian LR 31, 33

40. Above n1, 81 (para 234)

41. Above n8, 56

42. See for example:
R S Brown "Allocation of cases in a two-tiered Appellate Structure: The Wisconsin experience and beyond." (1985) 68(2) Marquette LR 189 - 236
R A MacDonald "Speedy Justice for the litigant: Sound Jurisprudence for the Province." (1978) 16(3) Osgoode Hall LJ, 601
B F Overton "District Courts of Appeal: Courts of Final Jurisdiction with two new responsibilities - an expanded power to certify questions and authority to sit en banc" (1983) 35 Univ of Florida LR 80

43. R A MacDonald "Speedy Justice for the Litigant: Sound Jurisprudence for the Province." (1978) 16(3) Osgoode Hall LJ 601, 604

44. Above n43, 604

45. Above n43, 605

46. Above n43, 606

47. Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd
First instance - [1983] 1 LLoyds Rep 203
Court of Appeal - [1985] 1 QB 350
House of Lords - [1986] 2 WLR 902

48. [1969] 1 QB 219

49. [1978] AC 728

50. [1981] 2 Lloyds Rep 636

51. Above n 50, 639

BL BLOOMFIELD, C. The role of appeals in New Zealand's court structure.

52. [1982] 1 Lloyds Rep 608

53. [1984] 3 All ER 529, HL(E)

54. B S Markesinis "The Imaginative versus the faint-hearted: economic loss in a state of chaos." 45 Cambridge LJ 384

55. Above n50

56. Above n1, 82 (para 237)

57. Above n1, 166 (para 494)

58. Above n1, 161 (para 481)

59. Above n26, para 304

60. Above n26, para 300

61. Above n1, 85 (para 247)

62. B F Overton "Florida DCA's new responsibilities." (1983) 35 University of Florida LR 80, 83

63. Above n62

64. Above n1, 84 (para 243)

65. Above n1, 87 (para 252)

66. Above n1, paras 436, 440

67. Above n1, para 440

68. Above n 26, para 267

69. Above n5

70. R S Brown "Allocation of cases in a two-tiered appellate structure: the Wisconsin experience and beyond." (1985) 68(2) Marquette LR 189, 205-206

71. Above n70, 205

72. Above n70

73. Above n70, 209

74. Above n43, 611

75. Above n43, 611

76. Above n1, 160 (para 479)

77. Above n1, 164 (para 489)

78. Above n1, 86 (para 248), 164 (para 488)

79. Above n1, 164 (para 488)

80. Above n1, 161 (para 482)

81. Above n1, 148 (para 436)

82. Above n1, 161 (para 482)

83. N D Vandyk "An End to the House of Lords as Appeal Court?" 124 The Solicitors Journal 175

84. Above n1, 84 (para 245)

85. Above n1, 162 (para 484)

86. Above n1, 132 (para 384)

87. Above n39, 34

88. Above n43, 618

89. Above n1, 149 (para 440)

90. Above n1, 149 (paras 441 & 442), 150-151 (paras 447-452)

91. Above n1, 124 (para 361)

92. Above n26, para 304

93. Above n26, para 300

94. Above n1, 86 (para 248)

95. Above n1, 166 (para 494)

96. Above n1, 162 (para 484)

97. Above n1, 166 (para 494)

98. Above n1, 149 (para 443)

99. Above n1, 123 (para 359)
eg: New Zealand Maori Council v Attorney General [1978] 1 NZLR 641

100. Above n1, 93 (para 270)

101. Above n1, 160 (para 479)

102. Above n26, para 300

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BL BLOOMFIELD, C. The role of appeals in New Zealand's court structure.

BIBLIOGRAPHY

Books

Abraham H J The Judicial Process. An Introductory Analysis of the Courts of the United States, England and France (1986 New York, Oxford University Press)

Atiyah P S Law and Modern Society (Oxford University Press, Oxford, New York, 1983)

Blom-Cooper L & Drewry G The Final Appeal. A Study of the House of Lords in its Judicial Capacity (Oxford University 1972)

Griffith J A G The Politics of the Judiciary (2 ed, Fontana, London, 1981)

Jacob Sir Jack The Fabric of English Civil Justice (Stevens, London, 1987)

Llewellyn K N The Common Law Tradition. Deciding Appeals (Little, Brown & Company, Boston & Toronto, 1960)

Morrison F L Courts and the Political Process in England (Sage Publications, Beverly Hills, 1973)

Roshier B & Teff H Law and Society in England (Tavistock Publications, London & New York, 1980)

Shapiro M Courts. A Comparative and Political Analysis (University of Chicago Press, Chicago, 1981)

Street H & Brazier R (eds) De Smith's Constitutional and Administrative Law (5 ed, Pelican Books, England, 1985)

Journals

Aldisert R J "English Appellate Judges from an American Perspective" (1978) 66 Geo LJ 1349 - 1404

Black T "The Role of an Appellate Judge" [1980] NZLJ 377 - 379

Blom-Cooper L "The Changing Nature of the Appellate Process" (1984) 3 Civ Just Q 295 - 310

Brown R S "Allocation of cases in a two-tiered appellate structure: the Wisconsin experience and beyond." (1985) 68 Marquette LR 189

Clarke M "Buyer fails to recover economic loss from the negligent carrier" (1986) 45 Cambridge LJ 382

Devlin (Lord) "Judges, Government and Politics" (1978) 41 Modern LR 501

Elwyn-Jones (Lord) "Role and Functions of a final appellate court" (1976) 7 Cambrian LR 31

Leonard D P "The Correctness Function of Appellate decision-making, judicial obligation in an era of fragmentation" (1984) 17 Loy LAL Rev 299 - 352

MacDonald R A "Speedy Justice for the Litigant: Sound Jurisprudence for the Province" (1978) 16 Osgoode Hall LJ 601 - 624

Markesinis B S "The Imaginative versus the faint-hearted: Economic Loss still in a state of chaos" (1986) 45 Cambridge LJ 384

Overton B F "District Courts of Appeal. Courts of final jurisdiction with two new responsibilities - an expanded power to certify questions and authority to sit en banc" (1983) 35 University of Florida LR 80

Richardson (Mr Justice) "Judges as Lawmakers in the 1990's" The Wilfred Fullagar Memorial Lecture, Melbourne, 23 September 1985

Shapiro M "Appeals" (1980) 14 Law and Society Rev 201

Vandyk N D "An end to the House of Lords as Appeal Court" (1980) 124 Solicitors Journal 175 - 176

Wasby S L "Functions and Importance of appellate oral argument" (1982) 65 Judicature 340 - 353

Watson G D "Finality and Civil Appeals - a Canadian perspective" (1984) 47 Law & Contemp Problems 1

Reports

Mr Justice Beattie (Chairman) The Report of the Royal Commission on the Courts 1978

Rt Hon Sir Owen Woodhouse (President) The Structure of the Courts Preliminary Paper No 4 (Wellington, 1987)

Rt Hon Sir Owen Woodhouse (President) The Structure of the Courts Law Commission Report No 7 (Wellington, 1989)

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