

## **Book Review, Sanchirico Ed., Economics of Evidence, Procedure and Litigation: Volume One**

Our system of civil justice is again in a state of revolution. There could be no more radical response to any review of the rules of civil procedure, than to abandon the trial as their primary focus. That, however, is the approach taken in the new District Court Rules:

*“The core philosophy of the new rules puts access to justice ahead of competing considerations. The defended witness action is no longer the focal point of the process, and has been relegated from its position of primacy to become simply one of several possible outcomes. ... The new Rules take settlement as the basic objective, the process being designed to enhance the prospects of settlement at an early stage.”* NZLS CLE program, “The New District Court Process – a radical change”, p 1.

At the same time, the High Court (in Auckland at least), is trialling a system of Court ordered and state funded mediations, which no doubt will soon be compulsory for all.

The reasons for these changes are the usual concerns of cost and delay, and a belief that much of the current workload of the Courts is a waste of the judicial resource. Of course, many of the processes that now trouble the Courts are the result of earlier attempts at reform, driven mainly by the judiciary. The clearest and most recent example of this was the introduction of the case management system. It is easily forgotten that the basic premise underlying case management is that lawyers have failed to ensure that their clients have proper “access to justice”, and the Courts and the State can do a better job if they have control of the litigation process.

While the sentiment behind these reforms is understandable, there has been a general failure in most of the reform proposals to address more foundational issues of what our system of civil justice is designed to achieve, and how particular reforms further that underlying purpose. The purpose of our civil justice system is usually described by the reformer as being to promote “access to justice”. What that means is anyone’s guess. However, the “justice” the reformer has in mind appears not to be justice as dispensed by judges. Most of the reform initiatives are directed at promoting increased rates of settlement not trials.

The reservations that many of us have over the level of justice that is meted out in many mediations or settlement conferences have long been recognised; see Fiss, *“Against Settlement”*, (1984) 93 Yale LJ 1073. This form of justice is certainly a long way from Jeremy Bentham’s famous statement that:

*“Of the adjective branch of the law, the only defensible object ... is maximisation of the execution and effect given to the substantive branch of the law.”* The Principles of Judicial Procedure”, in Browning ed., *2 Works of Jeremy Bentham* (1838 – 1843) 6.

I have commented in the past on how civil justice reform in New Zealand has often lacked a clear understanding of the basic purpose (or “justice”) of our system of civil procedure (see Barker, “Ideas on the Purpose of Civil Procedure” [2002] *New Zealand Law Review* 437). In that article, I attempted to summarise the principle theories that have been suggested for the purpose of our system of civil procedure, in the hope of giving some direction to future reform initiatives. In a similar vein is the recently released text, *“Economics of Evidence, Procedure and Litigation”*, which should be of interest to all practitioners concerned with reform in this area.

The text looks at the structure of a system of civil justice, using the discipline of law and economics. It does not contain any new writing, but is rather a collection of the leading articles in the area grouped under broad topic headings. There is a basic division in the articles between those that treat litigation spending as exogenous (ie unrelated) to the settlement decisions made by the parties, and those that treat litigation spending as endogenous to those settlement decision. Within this basic division, there are further subdivisions, dealing with such topics as the importance of informational symmetry to settlement decisions, discovery, cost allocation rules and so forth. Each part starts with one of the leading papers in the area, followed by the important criticisms and developments of that theory.

The strength of the book, and where I suspect most practitioners would find it of interest, is in the analytical approach it brings to commonly perceived problems in civil justice. This can be seen in the sorts of questions that lie behind the work of various authors in the collection. For example:

- (a) What is the impact of Court delay and litigation cost on the overall cost of resolving legal disputes? (Complex and costly trial processes tend to

increase settlement rates, as they make the alternative of trial less attractive. However, “[m]easures to reduce litigation costs might actually increase the total costs of legal dispute resolution, by making trials, which are usually costlier than settlements, more attractive than before the measures were introduced.” Posner, “An Economic Approach to Legal Procedure and Judicial Administration”, p 8.)

- (b) Does discovery encourage settlement? (Possibly not, at least in terms of the number of settlements achieved, because a lack of discovery creates false pessimism by one party as to their prospects of success at trial, meaning they are more likely to settle. From a broader social perspective, however, settlement before discovery is not a good thing, as optimal settlements take place when the parties have full knowledge of their opponent’s case. See, for example, Cooter and Rubinfeld, “An Economic Model of Legal Discovery”, p 435.)
- (c) Do “Calderbank” offers work? (Not as well as you might think, because they tend to increase the likelihood of a settlement that favours the defendant. See Miller, “An Economic Analysis of Rule 68”, p 206).

There are also other points of interest throughout the papers collected in the text. It may interest a reader to know, for example, that you can prove by use of a mathematical formula, that a plaintiff will win in 50% of cases that go to trial (Priest and Klein, “The selection of disputes for litigation”, p 105). Likewise, those readers wanting to combine their passion for legal analysis with their love of Russell Crowe, will be pleased to know that the question of when parties will be prepared to settle a case, can be “solved” by reference to John Nash’s development of the “bargaining solution”. (This solution runs through a number of the papers).

In terms of who this book will appeal to, some of it is very dense. You would need to have a particular interest in the area, and be prepared to accept that there are large parts of many of the articles that only a mathematician will understand. It is also fair to say that most of the articles are analytical, in the sense of describing why things are, rather than being more normative. That said, it is an interesting text, and a valuable collection of material that many of us practising in the area might otherwise not come across.