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THE ASSIGNMENT OF CASES TO JUDGES

Petra Butler*

In this paper Dr Butler explores the principle of "neutral assignment of cases" and presents data on case allocation procedures in Germany, the United States, and New Zealand. She concludes that this topic warrants further consideration in New Zealand.

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.[1]

I INTRODUCTION

Judging is a very human endeavour, reflecting all the variation in experience, perspective, humanity, common sense, and understanding of the law of the judges themselves. It would be unrealistic to expect all judges to approach and resolve a particular case in the same way. Indeed, in his recent article on the New Zealand Court of Appeal, *Realism Reflected in the Court of Appeal: The Value of the Oral Tradition,* Professor Peter Spiller observed that "[l]inked with my insights into the personalities of the judges and their attitudes to judging were my discoveries of key judgments having been dictated by who happened to be on the bench at the time".[2]

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* Lecturer, Victoria University of Wellington, LLM (VUW) PhD (Göttingen). I would like to thank the research assistants who enthusiastically supported the research for this paper: Frances Wedde, Ryan Malone, and John Buick-Constable. I would like to thank Andrew Butler, Geoff McLay, Professor Tony Angelo, and the anonymous referee for their valuable comments on earlier drafts of this paper and Clara, Conor, and Cillian for their patience. I also owe thanks to Professor Ingo von Münch who encouraged me to research this topic and who has been a valued friend and mentor.

1 Canadian Judicial Council *Ethical Principles for Judges* (Ottawa, 1998) 14.

2 Peter Spiller *Realism Reflected in the Court of Appeal: The Value of the Oral Tradition* (1998) 2 Yearbook New Zealand Jurisprudence 31, 37. Examples mentioned, which show how the personalities of the judges influenced particular decisions, include (at 37 and following) *In re Lolita* [1961] NZLR 542 (CA) and *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA) (drink-driving, police powers, and civil liberties).

Judicial systems generally seek to minimise the impact of individual personality on the determination of cases (for example, through the doctrine of precedent and multi-member courts of appeal), but cannot and do not seek to eliminate it entirely. Precisely because the make-up of a court can determine the outcome of a case, it is vital for litigants to have confidence that they have not lost a case because of decisions made to appoint a particular judge or judges to the case in order to produce a particular result. In other words, while litigants can be expected to accept the "luck of the draw", they should not be expected to tolerate a "stacking of the deck". What a judicial system should do, therefore, is ensure, as far as possible, that decisions as to the assignment of judges to cases are made on the basis of objective criteria established in advance.

The purpose of this article is to consider how effectively the New Zealand judicial system guards itself against manipulation of case allocation. Comparative reference is made to German and United States experience in determining whether the New Zealand system could be improved. The conclusion reached is that there are weaknesses in the current system (particularly at Court of Appeal level) that should be addressed lest doubts arise as to its integrity.

At the outset it needs to be emphasised that nothing in this paper is intended to say that the current New Zealand system is being exploited to manipulate case allocation; nor is anything here intended to reflect on the integrity of any individual who is operating or has operated within the system. What this paper does intend to do, however, is to indicate the potential that exists for the manipulation of case allocation and to outline how the system could be improved so as to minimise that potential.

This paper will first explain some relevant basic concepts. Then, in Part III, the paper outlines briefly the constitutional principles in which the idea of "neutral case assignment" is anchored. Examples are given in Part IV to show that the assignment of cases to judges does raise issues that need to be addressed. Part V gives an overview of, and comments on, the assignment practice in the New Zealand High Court and Court of Appeal. This is supplemented in Part VI by an overview of the assignment practice in Germany and the United States.

II SOME BASIC CONCEPTS

In conducting the research for this article, it soon became apparent that very little academic or professional attention has been paid in the Commonwealth to the issue of how cases are allocated to judges (or vice versa), or to how particular panels (especially at appellate level) are selected. While there is a wealth of material on the topic in the United States and Germany, where strong systems of case allocation and panel selection have been put in place, no New Zealand literature on the subject could be located, and there is not much to be found in Canada, Australia, or even the United Kingdom. Accordingly, it is

useful to begin by outlining some basic concepts used in the American and German literature and case law.

"Panel packing" is a key term in the literature on case allocation. It refers to the deliberate allocation of one or more judges to a judicial panel in order to achieve a particular outcome: judicial selection is affected by perceptions as to how a particular judge will vote. Panel packing can be achieved in a number of ways. The most obvious way is for the judge or administrator in charge of allocating judges to panels (in general the president of a court) to select on a case-by-case basis the judges who will sit, in order to achieve a particular outcome. Alternatively, it can be done in a negative way by ensuring that certain judges are not assigned to certain types of cases because of concerns about their likely predisposition for that case-type. Panel packing can also occur when the retirement or appointment of a judge is hastened or delayed so that that particular judge either cannot hear, or still has the chance to hear, a particular case.[3] Panel packing is not something which only judges can bring about. It also refers to conduct by parties to the litigation who seek to manipulate the system in order to secure a hearing before a particular judge. In summary, "panel packing" refers to any deliberate act that affects who gets to decide a case, with the intention of interfering with how the case will be decided.

The establishment of specialised panels (in bankruptcy or company law, for example) is not, per se, panel packing. Judges' specialist experience and understanding of the particular field can cut down hearing time and costs for litigants. They can also produce a better quality decision through the right questions being asked, thus reducing the likelihood of a further appeal.[4] But any specialised panel has to be constituted according to sound criteria that cannot be changed arbitrarily and must sit for a fixed amount of time so that packing cannot occur.

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3 In 1996, a debate developed in Germany around the election of two new Constitutional Court judges (see BVerfGE 40, 356). The German Constitutional Court Act states that after the judges' term of office of 12 years ends they conduct business until their successor is elected. The idea is to ensure that the *Bundesverfassungsgericht* (German Constitutional Court) can work even if the election cannot be conducted in time. At the end of 1995, the Second Senate of the *Bundesverfassungsgericht* (the *Bundesverfassungsgericht* has two senates, each with eight judges) asked the *Bundesrat* (the Federal Council or Second Chamber of Parliament, responsible for the election of the Constitutional Court judges) to postpone the election of two new judges for a couple of months until 1996 to give the Second Senate time to finish a number of complicated cases in regard to the right to asylum. The election was delayed and the decisions rendered in May 1996. The non-election of the new members to the Second Senate has been criticised by a number of commentators as an infringement of the neutral assignment of judges principle (see Bernd Rüthers "Nicht wiederholbar!" 1996 NJW 1867; Bernd Sangmeister "Manipulierte Richterbank des Bundesverfassungsgerichts in den Asylverfahren?" 1996 NJW 2561).

4 See Alan Galbraith "Facilitating and Regulating Commerce: The Court Process" (2002) 33 VUWLR 841, 845.

"Neutral" assignment of cases refers to systems designed to counter the risk of panel packing and, indeed, to counter the risks associated with a perception that panel packing may have occurred, or may occur in the future.

A final point is that panel packing is something that needs to be guarded against at both trial and appellate level. Most trial courts are more vulnerable to panel packing than appeal courts since they are usually made up of a single judge. The effort required to panel pack a trial court is therefore less. Second, in the common law system the trial court is the finder of facts; and facts, as lawyers know, often dictate the law. Third, for many litigants the cost of an appeal is prohibitive. The trial is the only step in the judicial process that they can afford. A perfectly functioning neutral assignment system at appellate level is cold comfort if a party cannot access it. This paper focuses mainly on appellate courts since the data and information about assignment procedures available to the author related principally to appellate courts. However, the basic observations in this paper are equally applicable to trial courts.

III WHY A NON-NEUTRAL SYSTEM OF CASE ASSIGNMENT IS OBJECTIONABLE

This paper does not consider the extent to which a non-neutral system of assigning judges and allocating cases is or may be contrary to, say, the New Zealand Bill of Rights Act 1990, or the International Covenant on Civil and Political Rights 1966.[5] That task must await another day. The purpose here is to set out the legal policy reasons that support the proposition that a non-neutral system of allocating cases and selecting panels (whether appellate or trial) is objectionable.

In essence, the neutral assignment of cases to judges is part of the rule of law. In this regard neutral assignment serves four instrumental functions. First, it protects the courts from intervention when searching for truth and justice. The specific judicial result is not to be manipulated by anyone (whether it be one of the parties to the litigation or another state agency) being able to choose a particular judge.[6] This means that the courts can perform their function of delivering justice "without fear or favour".[7] Second, neutral assignment of judges is conducive to public confidence in the impartiality and independence of the judiciary.[8] Third, the neutral assignment of cases guarantees that everyone has the same

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5 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

6 Compare: BVerfGE 4, 416; 17, 299; 22, 258; 48, 254; 82, 159, 194; 95, 322, 328; 1997 NJW 1497, 1498.

7 See in New Zealand, for example, the judicial oath in the Oaths and Declarations Act 1957, s 18.

8 Ernst Traeger "Der gesetzliche Richter" in *Festschrift für Wolfgang Zeidler* (Berlin, 1987) vol I 123, 124; compare also the awareness about the importance of public confidence at the Herrenchiemsee Conference (10–24 August 1948) in regard to special courts: Commentary, art 131–93.

chance of getting a judge favourable to his or her cause. In this sense it is a reflection of a very basic notion of equality and fairness: because judicial personality can make a difference to the outcome, every litigant should have the same chance of getting a panel favourable (or unfavourable) to him or her. Fourth, since the judiciary performs a very important task in upholding basic rights and freedoms it is vital that panel selection processes be robust to ensure that those rights are not compromised.

IV SHOULD THERE BE A CONCERN?

Before considering the specifics of the systems of case allocation and panel selection used in New Zealand and overseas, it is worth asking whether there is any real reason for New Zealanders to be concerned about the issue. This question can be profitably analysed by considering it on two levels: First, is there any evidence that manipulation of case allocation actually occurs? Second, even if there is not, should systems be put in place to avoid it in the future?

A Evidence of Case Allocation/Panel Selection Manipulation

Experience overseas indicates that case manipulation can occur through the case allocation system. Further, commentators in New Zealand have suggested that case manipulation has occurred in particular cases, and a review of some case allocation statistics in New Zealand indicates at least that there is not an even spread of work among Court of Appeal judges. These points are explored in more detail below.

1 The fight for civil rights in the United States

(a) The Houston Conference—who can get an education?

In the United States during the civil rights era it was alleged that the panels of the Court of Appeals for the Fifth Circuit were constituted by the Chief Judge in order to secure liberal majorities.[9] This matter was fully explored in a major research project undertaken by J Robert Brown and Allison Herren Lee[10] in 2000. The following account of the events has been taken from the report on that research.

In the late 1950s and early 1960s the Fifth Circuit found itself charged with primary responsibility for enforcing the mandate of *Brown v Board of Education*[11] and was, therefore, in the eye of the civil rights storm. By 1963, nine judges sat on the Fifth Circuit. They

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9 J Robert Brown and Allison Herren Lee "Neutral Assignment of Judges at the Court of Appeals" (2000) 78 Texas L Rev 1037, 1044 and following; Jonathan Entin "The Sign of 'the Four': Judicial Assignment and the Rule of Law" (1998) 68 Miss LJ 369.

10 Brown and Herren Lee, above.

11 *Brown v Board of Education* (1954) 347 US 483.

included one Hoover appointee, one Truman appointee, five judges appointed by Eisenhower, and two Kennedy appointees. The Circuit was divided in regard to civil rights cases. Four of the judges, including the Chief Judge (an Eisenhower appointee), consistently favoured plaintiffs in civil rights cases and were willing to explore novel remedies where necessary to promote desegregation. A fifth judge was an ally to these four but ill health prevented him from undertaking a full caseload. The remaining judges probably did not oppose the civil rights cause but certainly had concerns about the way the other four went about reaching desired outcomes. In 1963 things came to a head. One of the judges of the Fifth Circuit accused Chief Judge Tuttle of having secured liberal majorities on panels hearing civil rights cases. The Chief Judge was accused of having violated the "universal practice" of appointing a circuit judge and a district court judge from the state in which the case originated, and of having packed the Fifth Circuit panels with a pro-civil rights majority. The allegation was supported by the fact that in the 25 race cases decided between 1961 and 1963, at least two of the four pro-civil rights judges were present in 22 of them.[12]

The Chief Judge convened an extraordinary meeting of the entire Circuit in Houston. Because of the venue this meeting has come to be called the "Houston Conference". The discussion, and whether panel packing actually did occur, has never been revealed. (Brown and Lee's conclusion is that the evidence is overwhelming that panel packing did occur.)[13] However, after the Houston Conference the judges of the Fifth Circuit established procedural safeguards to avoid even the hint of panel packing. When assigning cases, the court clerk was no longer to know the identity of the judges sitting on a particular panel. And, in addition, the clerk was specifically instructed not to accept unilateral assignments or reassignments of cases, but instead to obtain the consent of the Chief Judge.[14]

(b) Affirmative action at Michigan Law School

In the 2002 case of *Grutter v Bollinger* the members of the Court of Appeals for the Sixth Circuit discussed openly in their judgments whether the panel had been packed.[15] The case concerned the selection process for the University of Michigan Law School. It was alleged that the selection for admission to the Law School was based, inter alia, on race and was therefore discriminatory. Students belonging to ethnic minorities (such as Afro-American or Hispanic) were favoured. Sitting en banc, the Sixth Circuit held, by a five to

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12 Brown and Herren Lee, above, 1047–1050.

13 Compare Jonathan Entin "The Sign of 'the Four': Judicial Assignment and the Rule of Law" (1998) 68 Miss LJ 369.

14 Brown and Herren Lee, above, 1064, 1065.

15 *Grutter v Bollinger* (2002) 288 F 3d 732 (6th Cir).

four majority, that the Law School's selection process did not violate the equality provision in the Fourteenth Amendment to the United States Constitution. In his dissent Boggs J alleged that the panel hearing the case was not chosen according to the Sixth Circuit rules.[16] Batchelder J in her dissent stated:[17]

> Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate.

The judges concurring with the (majority) judgment of the Chief Justice discussed Boggs J's allegation in quite frank language. Clay J observed:[18]

> It is ludicrous to think that with our circuit operating with only one-half of the active judges' positions filled, and with over 4000 cases reaching our Court each year, the Chief Judge or any member of this Court would single out any one particular case and manoeuvre the system for a particular outcome.

What is noteworthy in *Grutter v Bollinger* is that the procedure as to how the panel was chosen was openly discussed in the various judgments. As noted in Part VI B of this paper, the Sixth Circuit's allocation procedure is one of those which conform best to the idea of neutral case assignment.

2 Lord Denning

Why did Lord Denning stop sitting on House of Lords appeals and accept the position of Master of the Rolls? Lord Denning himself indicated that the motivation for his move was that his influence on the law would be greater as Master of the Rolls than as a single Law Lord since, as Master of the Rolls, he could choose who sat on particular panels and which cases were assigned to those panels.[19] He was, for example, accused of sending all industrial relations cases to his own court.[20] If true, this use of position by Lord Denning to allocate cases to himself raises legitimate concerns about fairness of process, at least for those on the receiving end of his judgments!

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16 *Grutter v Bollinger*, above, 793–797 Boggs J.

17 *Grutter v Bollinger*, above, 797 Batchelder J.

18 *Grutter v Bollinger*, above, 762 Clay J.

19 See Lord Denning *The Family Story* (Butterworths, London, 1981) 204.

20 Robert Stevens *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Clarendon Press, Oxford, 1993) 606.

3 Brighouse

In a speech at the 1995 New Zealand Bar Association Conference, Roger Kerr, Executive Director of the Business Roundtable, when discussing the controversial *Brighouse*[21] decision of the Court of Appeal asked "Given that it was a decision by the slenderest of majorities, where was Justice McKay? And why was Justice Bisson roped in from retirement?"[22] Kerr did not answer these rhetorical questions in his speech. But there was an indirect answer by Jack Hodder in a recent article for the *Independent*. The article was, like Kerr's speech, concerned with the abolition of the Privy Council. Hodder uses the "roping in" of Sir Gordon Bisson in *Brighouse* as an example ("fairly or otherwise") of "stacking" the Court of Appeal.[23]

4 Some empirical observations on work load spread in the Court of Appeal

Research undertaken for this paper looked at the judgments of the Court of Appeal in the areas of Bill of Rights, family law, employment law, company law, tax law, and intellectual property between January 1999 and July 2001, to see whether a pattern of case assignment could be found and to determine whether certain judges were assigned more cases in a certain area of law than others.[24] If the Court followed a completely random assignment process the expectation would be that each of the permanent members of the Court of Appeal would sit on a roughly comparable number of cases in each area.

In regard to Bill of Rights cases Sir Ivor Richardson (the then President of the Court), Sir Kenneth Keith, and Justice Blanchard sat the most. Justices Robertson and Anderson[25] were the two High Court judges who sat most on Bill of Rights cases.

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21 *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 (CA) (an employment law case).

22 Roger Kerr "Appeals to the Privy Council" (Speech to New Zealand Bar Association Conference, Queenstown, 22 July 1995). The majority was 3:2. Justice McKay was a permanent member of the Court at the time. Sir Gordon Bisson, a former Court of Appeal judge, voted with the majority.

23 Jack Hodder "Law Lords' growing activism bodes ill for NZ" (11 June 2003) *The Independent* Auckland 9.

24 The results of this research are tabulated in the Appendix below. The areas chosen are either highly specialised (tax law and intellectual property, for example) or are areas in which personal convictions might be expected to have a greater role to play in the outcome (like Bill of Rights and family law). The judgments have been drawn from a relatively stable period in the Court of Appeal. Cases were sourced from the Briefcase and LINX databases: 373 Bill of Rights cases, 62 family law, 155 employment law, 84 company law, 94 tax law, and 17 intellectual property.

25 Justice Anderson was appointed a member of the Court of Appeal in September 2001.

Family law cases were most often heard by Justice Blanchard, Sir Kenneth Keith, and Justice Gault. The two High Court judges who most often sat on family law cases were Justices McGechan and Paterson.

In regard to employment law cases the distribution was nearly even across all permanent members of the Court (with the exception of Justices McGrath and Henry, due to the fact that both were not members of the Court for the entire time of the survey).[26] Justices Doogue and Salmon are the High Court judges who show up most prominently in the employment law case statistics.

Justice Blanchard seems to have been the specialist in company law cases as he sat on considerably more of them than any other permanent member of the Court. Sir Kenneth Keith sat the least on such cases. Justice McGechan was the High Court judge whose expertise was sought most for company law cases.

Sir Ivor Richardson, Justice Blanchard, Justice Gault, and the High Court judges Justices McGechan, Robertson, and Salmon heard more tax law cases than their colleagues.

Justices Thomas and Gault heard most of the intellectual property cases; none of the other permanent members of the Court of Appeal feature dominantly in the statistics for intellectual property cases; nor do any of the High Court judges except for Justices Doogue and Salmon.

These statistics indicate that there is, at least in some areas, an allocation pattern for the years 1999 to 2001. Since the case allocation process of the Court of Appeal is not wholly transparent it is not clear whether these patterns were planned or purely coincidental. However, the material suggests that panels, even though they may not have been chosen to secure a specific outcome, were selected on the basis of a preference being given to particular judges to hear specific types of case.

This in itself does not necessarily violate the concept of neutral case assignment. As is discussed later, even the relatively strict German case allocation management plans often allow for specialised chambers, such as for white-collar crime or commercial law. So the fact that Justice Blanchard sat on most company law cases,[27] Justice Gault on most intellectual property cases,[28] Sir Ivor Richardson on many tax cases,[29] and Sir Kenneth

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26 In July 2000 Justice Henry retired from the Court of Appeal and Justice McGrath joined the Court.

27 Justice Blanchard is co-author (with Michael Geyde) of *The Law of Company Receiverships in New Zealand and Australia* (2 ed, Butterworths, Wellington, 1994).

28 Justice Gault was a leading intellectual property practitioner prior to his appointment to the Bench.

29 Sir Ivor specialised in tax law as an academic and practitioner.

Keith on many Bill of Rights cases[30] is not necessarily troubling, since each is an acknowledged expert in the particular field. Their presence on the Bench doubtlessly ensured that all the right issues were considered and debated in those cases. However, what is questionable is that under the current Court of Appeal procedures it is for the President alone to determine who is an expert in the field. It would, therefore, be possible to establish, in respect of one case, a panel with judges who were all experts in the particular area and in the next case concerning the same area of law to establish a panel in which none of the judges had particular expertise in that area. Moreover, since the Court is a multi-member court, the question of who sits alongside an expert judge can be significant in determining the outcome in a particular case.

Neutral assignment of cases is about "system integrity" and perceptions of what could possibly occur. The point of the statistics, and their only point, is to indicate that it seems likely that random case allocation did not take place during the relevant period and that it seems likely that the President of the Court of Appeal used his power to allocate cases in a non-random way.

B Protecting System Integrity in Advance

Even if there is no evidence in New Zealand that manipulation of results has occurred through the case allocation and judicial assignment processes, that does not mean that the issue ought not to be addressed.

The contemporary attitude to figures of authority such as judges is very different from that which prevailed even a few years ago. Public institutions and the people who operate within them can no longer rely on the inherent authority which public office bestows in order to quell public anxiety about their integrity. The public wants assurances that the systems operated by public institutions are sound and transparent and beyond the illegitimate manipulation of those in charge.

The judiciary has not been immune from public probing of this type.[31] Indeed, concern over the lack of a transparent system around the appointment of judges to the proposed

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30 Sir Kenneth was a professor of public law and had significant involvement as an adviser on the proposed supreme law bill of rights in 1985, and more generally was an adviser to Government on public law issues.

31 Examples additional to those referred to in the text include: the surprise resignation of Judge Christiansen (see Rachel Grunwell and Nick Maling "Judge Quits after Motel Incident" (17 June 2001) *Sunday Star Times* Wellington A1); the briefing of Nandor Tanczos, MP by three Court of Appeal judges to persuade him to drop his objection to a particular Bill (see Steven Price "Dangers in Judges Briefing Tanczos" (19 June 2001) *The Evening Post* Wellington 6); the use of a Department of Courts computer by a High Court judge and five District Court judges to view pornography on the internet (see Bruce Logan "Double-Think and Internet Porn" Maxim Institute <http://www.maxim.org.nz/main_pages/news_page/news_judge.html> (last accessed 25

new Supreme Court has been raised during the consideration of the Supreme Court Bill.[32] And while this article was being finalised, a prominent lawyer and Member of Parliament (Stephen Franks, of the ACT party) broke with parliamentary convention and attacked the decision of the Chief Justice to sit on the Court of Appeal panel that decided whether the Maori Land Court had jurisdiction to hear claims of iwi and hapu to the foreshore and seabed.[33] The attack was based on the fact that having been a prominent lawyer on behalf of Maori groups prior to her appointment to the bench, the Chief Justice should have declined to sit as her impartiality was in question (even if the decision reached was correct).[34] It would have been helpful on this issue for the Chief Justice or some spokesperson on behalf of the judiciary to have been able to point to a system for panel selection that indicated that the Chief Justice's appointment to that appeal was based on objective criteria that applied to all appeals. That would have taken much of the force out of Mr Franks' attack.[35] In a good number of these instances, public disquiet has centred on the lack of transparency, a lack of effective accountability measures, and the large measure of unsupervised trust that is vested in judges. Therefore, it is imperative that the New Zealand judiciary operate sound and transparent processes in respect of case allocation to ensure that the integrity of the judicial system is maintained beyond reproach.

V ASSIGNMENT OF CASES IN NEW ZEALAND

This section considers the systems adopted by the New Zealand High Court and Court of Appeal to govern the assignment of cases to judges. On the information available, the High Court operates a relatively transparent case management system which fulfils the criteria for neutral case allocation quite well. Case allocation in the Court of Appeal is,

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September 2003)); and the trial of two District Court judges on charges related to expenses and allowances (one judge pleaded guilty to certain charges, while the other pleaded not guilty and was acquitted) (see White Collar Crime <http://www.crime.co.nz/c-f-cat.asp?cat=461> (last accessed 25 September 2003)).

32 Business Roundtable "Submission on the Supreme Court Bill" (April 2003) 3.1.

33 G J Thompson "Lawyers Critical of MP's Attack on Chief Justice" (12 September 2003) *Dominion Post* Wellington A2. The Court of Appeal's decision in *Ngati Apa v Attorney-General* (19 June 2003) Court of Appeal CA 173/01 (that the Maori Land Court did have jurisdiction) has proven to be controversial and has generated heated political debate about rights in and over the seabed and foreshore.

34 Thompson, above, A2.

35 Indeed, in a comment on Mr Franks's criticism of the Chief Justice, Rodney Harrison QC pointed out that the decision of the Chief Justice to sit was entirely appropriate because, first, she has great expertise in the field of Maori land rights and the Treaty of Waitangi and, second, is unlikely to have been biased by having acted for Maori interests as a practitioner (Rodney Harrison "Specialist Insights of Judges Valuable" (16 September 2003) *New Zealand Herald* Auckland A13).

effectively, in the hands of the President of the Court and, therefore, open to at least the assertion that panel packing can occur.

A Assignment Procedure in the High Court

1 Introduction

There are three main High Court registries, namely Auckland, Christchurch, and Wellington,[36] and the practice of case allocation varies slightly among them.[37] However, the essential features of case allocation in all registries are to identify the issues in dispute, to encourage settlement by alternative dispute resolution, and, if that is not possible, to plan together with the parties the course of the proceedings, including setting a firm date for the final hearing within a reasonable time after the commencement of the proceedings.[38] That is what the case management system introduced in the High Court in 2000 envisages,[39] driven as it is by concerns of efficiency and equal workload distribution and by the wish to encourage alternative dispute resolution. This case management system states that the first objective of case management is to "[e]nsure the just treatment of all litigants by the Court".[40]

The management plan operates on either an "individual list" or a "master calendar" basis.[41] All civil cases, apart from admiralty proceedings in rem, will on filing be assigned by the registrar to one of the management tracks. The registry operates three tracks: the Immediate Track, the Swift Track, and the Standard Track, and, where the registry operates a master calendar, the Assigned Track.[42] The Immediate Track gives cases of considerable urgency a hearing date on filing and includes, for example, creditors'

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36 In addition to the three "big" registries there are High Court registries at Blenheim, Nelson, Greymouth, Timaru, Dunedin, Invercargill, Palmerston North, Wanganui, Napier, Rotorua, Tauranga, New Plymouth, Hamilton, and Whangarei. These registries are serviced by judges from the three big registries.

37 Information in regard to case allocation in the High Court was obtained through an Official Information Act 1982 request to the Chief Justice and interviews conducted with the three registry offices. See also, in regard to case management, John Hansen "Case Management in New Zealand Courts" (1998) 9 Otago LR 319.

38 Practice Note "Civil Case Management in the High Court" (8 December 1999) PN 33 6–49–3.

39 "Case Management" [2000] NZLJ 19. In regard to District Courts the registrar at each District Court allocates the cases to sitting times. There will be a re-allocating of cases from time to time if the court lists become uneven (interview with the Deputy Registrar, Lower Hutt District Court).

40 Practice Note "Civil Case Management in the High Court" (8 December 1999) PN 33 6–49–2.

41 "Case Management" [2000] NZLJ 19.

42 Practice Note "Civil Case Management in the High Court" (8 December 1999) PN 33 6–50–5.1.1.

petitions in bankruptcy, company liquidation proceedings, and summary judgment applications. The Swift Track is for cases that need to come to a hearing quickly, including, for example, civil appeals, applications for judicial review, and applications for writs of habeas corpus. The Standard Track is for all other generally non-urgent cases, and the Assigned Track is for cases that require judicial management greater than that required for cases on the Standard Track—for example, if the trial is likely to take more than five days or there are three or more separately represented parties.[43]

2 *The three main High Court registries*

(a) Christchurch

The Christchurch High Court (with four permanent judges)[44] operates an individual list system as a pilot. The registry assigns the cases in strict rotation. Therefore, a judge's particular expertise does not seem to play a role in case allocation.[45] Once a file has been allocated to a judge, it stays with that judge until it is closed. For short cause and other brief matters, the duty judge takes the file and allocates it to the judge to which the file was initially allocated when that judge is scheduled to be the duty judge. The idea is that over time each judge should have approximately the same volume of work. If the caseload becomes uneven, because for example a judge has to recuse himself or herself, judges reassign the work among themselves. In regard to criminal cases each judge has a set number of criminal weeks per year. The registry schedules cases on the basis of which judges are available. However, the registrar generally accommodates the Crown's preferred date of a hearing and a case is assigned to the judge whose "crime week" it is. If a criminal trial impinges on time scheduled for civil matters, there is provision for rescheduling of the civil work by the executive judge, again in consultation with the other judges of the court.

(b) Wellington

At the Wellington High Court (with seven permanent judges)[46] the allocation of cases is made by the Court's registry. The executive judge of the Court in consultation with the other judges draws up a timetable as to the availability of each judge. Judges' time is allocated to circuit work, to a period as the duty judge, to the criminal appeal division or civil appeal division of the Court of Appeal, and to jury duty. The remaining time is allocated to civil litigation. This timetable is given to the registry. The registry staff allocate

43 Practice Note "Civil Case Management in the High Court" (8 December 1999) PN 33 6–50–5.2–5.5.

44 As at September 2003.

45 Compare below in regard to the use of High Court judges in the Court of Appeal.

46 As at September 2003.

cases to judges as appropriate taking into account the availability of counsel. The allocation is based purely on availability.

(c) Auckland

In Auckland, civil and criminal cases that require fixture dates are put onto general lists that are called at "call-over" hearings before a civil list judge or a criminal list judge.[47] In the call-over hearing the executive judge always presides. The hearing determines the availability of counsel, the length of the trial, and the readiness of the case before allocating the case to a judge. Similarly, in criminal cases the date is negotiated with counsel and the Crown and a judge is then found for the case.

Judges are rostered to hear either civil or criminal cases in certain weeks. It is the task of the list judge to allocate cases to the individual judges who are available in the week in question. This is done on a random basis, taking into account the commitments and workload of the individual judges. However, complex civil cases are assigned to judges by the executive judge on a basis that preserves a balance of work between all judges. At present only the five specialised judges hear complex commercial cases. "Complex" cases are those where the litigants appear in person, complex legal issues are involved, the confidentiality of the issue is important, or special expertise is required.

Urgent matters and criminal appeals are dealt with by the Duty Judge List. Judges are rostered on to the Duty Judge List and hear cases as allocated by the court staff. Availability as determined by the rostering process determines which judge hears a particular case.

(d) Common procedure in all three registries

At all three registries it is uncommon for cases to be reassigned, for example because of sickness. Cases are reassigned only because of urgent court business or because other cases run overtime. In Auckland the possibility exists that at call-over the list judge can make changes at up to 10 am on the day to allow judges to step down in cases of conflict of interest. In Christchurch judges manage their own diaries and would reschedule a case which had to be postponed. If a judge in Christchurch cannot sit, the executive judge, in consultation with the other judges, allocates the case to a new judge. In Wellington it is unclear who reassigns the case. However, it is most likely that it is done by the registry. In Auckland it is either the registry office, the list judge, or the executive judge on the basis of the length of the case and timetabling.

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47 There are 17 permanent judges at the Auckland High Court (September 2003).

When High Court (and District Court) judges go on circuit they are allocated sitting times and the local registrars allocate cases to these times. Cases can be reassigned by the circuit judge if, on the day, counsel or parties are prevented from attending. Judges in some small circuits sit only once every six months. It would not, therefore, be in the interests of timely delivery of justice for cases allocated to a judge to stay with that judge until closed if an adjournment occurs.

(e) Acting and temporary judges, and "out of registry" judges

Finally, it should be noted that the Judicature Act 1908 allows for the appointment of "acting judges" and "temporary judges" to the High Court. Any person can be appointed a temporary judge by the Governor-General for a term not exceeding two years.[48] A former judge can be appointed as an acting judge for up to two years.[49] Appointments can only be made if the Chief Justice and not fewer than three other permanent judges sign a certificate that, in their opinion, an appointment is necessary for the due conduct of the business of the Court.[50]

This paper does not deal specifically with how such judges are allocated to particular cases. Furthermore, from time to time judges from one registry will be assigned to undertake work in another registry due to caseload pressures in the latter. Again it is beyond the scope of this paper to address issues as to how cases are allocated to such "out of registry" judges.

B Assignment Procedure in the Court of Appeal

1 Court of Appeal structure

The New Zealand Court of Appeal currently consists of seven permanent members plus the Chief Justice as an ex officio member.[51] Most cases in the Court of Appeal, whether criminal or civil, are decided by three judges sitting in a "division" of the Court.[52]

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48 Judicature Act 1908, s 11.

49 Judicature Act 1908, s 11A.

50 Judicature Act 1908, s 11B.

51 Judicature Act 1908, s 57(2)(a).

52 Judicature Act 1908, s 58(1). The exceptions to three judge divisions are:

(1) delivery of judgment/determination of applications for leave to appeal to the Privy Council (two judges constitute a Court (s 58(2)));

(2) the making of incidental orders and directions (one judge can exercise the Court's powers (s 61A));

Divisions must contain at least one permanent member of the Court.[53] In a large number of cases, the panel contains only one permanent member of the Court, the other judges being High Court judges either appointed for the particular appeal or for a period during which a particular appeal happens to be heard.[54] The most important cases determined by the Court are heard by a "Full Court" which consists of five permanent members of the Court or, on exceptional occasions, seven members.[55] Because under the current system there are usually more members available to hear an appeal than required,[56] there is obvious potential for perceptions of panel packing. This potential ought to lead to the adoption of mechanisms to dispel any possible concerns.

2 *Legislation governing case allocation and judicial assignments*

Sections 58C, 58E, and 58F of the Judicature Act 1908 are of great interest. All three sections are recent innovations; they were inserted by the Judicature Amendment Act 1998.

Section 58C requires the adoption of "a procedure" by the permanent judges of the Court of Appeal to determine the assignment of judges as members of a criminal or civil division of the Court. [57] The "procedure" adopted under section 58C[58] is that the President,

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(3) where a Full Court is required to sit (where the case is considered to be sufficiently significant to warrant a Full Court in accordance with a procedure adopted under s 58E of the 1908 Act or where the case has been referred by a division for determination by a Full Court or where the Court is determining an appeal from the Courts Martial Appeal Court (s 58D(4))).

53 Judicature Act 1908, ss 58A(1)(c), 58B(1)(c).

54 Judicature Act 1908, ss s 58A(3), 58B(3).

55 Judicature Act 1908, s 58D.

56 "Usually", since when a permanent member of the Court is on leave, a seven member bench would "use up" all available judges.

57 Judicature Act 1908, s 58C reads:

> Assignment of Judges to divisions—
>
> (1) Judges are assigned to act as members of a criminal or civil division of the Court of Appeal in accordance with a procedure adopted from time to time by Judges of the Court of Appeal holding office under section 57(2).
>
> (2) The President of the Court of Appeal must publish in the *Gazette* any procedure adopted under subsection (1).
>
> (3) A Judge of the High Court who is eligible to act as a Judge of a division of the Court of Appeal because of a nomination made under section 58A(2) or section 58B(2) may not be assigned to a division without the concurrence of the Chief Justice.

Section 58C came into force on 1 August 1998.

acting President, or nominee, with the concurrence of the Chief Justice determines which appeals are appropriate for hearing by a division comprising three members of the Court and who will be assigned to hear the case.[59] Further, under the "procedure" the Court prepares a forward planning programme covering the anticipated sittings of the divisions.[60]

Section 58D(4) provides that the Court of Appeal "must sit as a Full Court" to hear and determine: (1) any appeal from a decision of the Courts Martial Appeal Court under section 10 of the Courts Martial Appeals Act 1953; (2) any case referred, by the majority of the judges in a division of the Court, for hearing and determination by a Full Court; and (3) cases that are "considered, in accordance with the procedure adopted under section 58E, to be of sufficient significance to warrant the consideration of a Full Court".

Section 58E requires the adoption of "a procedure" by the permanent judges of the Court of Appeal in order to determine whether a case is of sufficient significance to warrant its consideration by a Full Court.[61] The "procedure" adopted under section 58E[62] is that the President (or his or her nominee) will assess the significance of the appeal—if the parties have notified the Court that a Full Court is sought—taking into account, among other factors, the importance of the issue and the availability of judges.[63] The President (or

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58 The procedure was adopted on 1 August 1998 and notified in the *Gazette* on 24 September 1998: [1998] *New Zealand Gazette* 3790.

59 [1998] *New Zealand Gazette* 3790:

> Assignment to particular appeals or a particular appeal will be by the President, the acting President, or nominee, who where appropriate will consult with other members of the Court. Assignment will be with the concurrence of the Chief Justice and on a time period or case by case basis, taking into account the forward planning programme and the availability of Judges.

60 [1998] *New Zealand Gazette* 3790.

61 Judicature Act 1908, s 58E reads:

> Cases of sufficient significance for Full Court—
>
> (1) The question whether a case is of sufficient significance to warrant the consideration of a Full Court must be determined in accordance with the procedure which those Judges of the Court of Appeal holding office under section 57(2) from time to time adopt.
>
> (2) The President of the Court of Appeal must publish in the *Gazette* any procedure adopted by the Judges of the Court of Appeal under subsection (1).

62 [1998] *New Zealand Gazette* 3790.

63 [1998] *New Zealand Gazette* 3790:

> The Judges of the Court of Appeal have adopted the following procedure for determining whether a case is of sufficient significance to warrant the consideration of a Full Court:

his nominee) assesses whether the appeal is "suitable" for Full Court determination. If it is assessed as being "unsuitable" for such determination it will not be determined by a Full Court. Appeals assessed as "possibly suitable" for a Full Court are referred to at least to two other members of the Court and, following consultation, those members will decide by majority whether the appeal is of sufficient significance to warrant determination by a Full Court. Curiously, panel selection for a Full Court is not by the 1908 Act required to be governed by any procedure such as that adopted in respect of hearings by divisions of the Court.[64] Accordingly, selection for a Full Court lies in the discretion of the President, and there is no need for the Chief Justice or any of the permanent members of the Court to concur in its exercise.

Section 58F allows for the assignment of one High Court judge to sit as a member of a Full Court if it is necessary in the circumstances. To be eligible for such an assignment, the High Court judge must have been assigned to a division of the Court of Appeal under section 58C.[65] Assignment under section 58F requires the President of the Court of Appeal

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> • Practice notes will require parties to notify the Court … if a Full Court is sought.
>
> • Before final confirmation of a fixture the President or his nominee will assess the significance of the appeal taking into account:
>
> (a) the importance of the issues, including any legal, social and general economic implications;
>
> (b) whether it is appropriate to reconsider a previous decision of the Court;
>
> (c) the desirability of resolving any conflicting decisions of the High Court;
>
> (d) the request (if any) by a party for a Full Court hearing;
>
> (e) any other relevant matter, including the availability of Judges ...

64 The "procedure" adopted on 1 August 1998 (and outlined above) is adopted in pursuance of s 58C of the Judicature Act 1908 which is specifically limited to the assignment of judges to divisions (three-judge panels) of the Court of Appeal. Further, the "procedure" adopted pursuant to s 58E is only concerned with identifying whether a full court should hear a matter, not with determining who should sit on the panel if a Full Court is appropriate.

65 Section 58F of the Judicature Act 1908 reads:

> High Court Judges sitting on Full Court—
>
> (1) Whenever the President of the Court of Appeal certifies in writing that due to—
>
> (a) The illness or absence on leave of any of the Judges holding office under section 57(2); or
>
> (b) The need for the expertise of a specific Judge of the High Court in a particular case; or
>
> (c) Any other exceptional circumstances,—

to certify in writing that, in the circumstances, "it is necessary" for a specific High Court judge to sit. One of the permissible grounds for co-opting a High Court judge onto the Full Court is the need for his or her specific "expertise".[66] The decision as to whether that expertise is needed rests with the President alone. Neither the other permanent judges of the Court, nor the Chief Justice, have to concur.

To round out the picture of case allocation and judicial assignment in the Court of Appeal, it should be recalled that the Court comprises not only permanent Court of Appeal judges, but that on a regular basis, judges of the High Court sit on appeals. Under sections 58A and 58B of the Judicature Act 1908 the Chief Justice "must" from time to time nominate judges of the High Court to sit on each of the Court of Appeal's criminal or civil divisions. There is no maximum number of nominees stipulated in sections 58A or 58B. The nomination of a particular judge:[67]

> must be made either—
>
> (a) In respect of a specified case or specified cases; or
>
> (b) In respect of every case to be heard by the Court of Appeal during a specified period not exceeding 3 months.

Nomination under section 58A or section 58B does not guarantee selection; it simply makes a High Court judge "eligible" to sit in the Court of Appeal. Selection and assignment depend on decisions made by the Court of Appeal President under the 1998 assignment "procedure" and on the concurrence of the Chief Justice.[68]

C Assessment

1 High Court

The assignment systems in the High Court allow for discretionary decisions which render the assignment process open to potential abuse.[69] For example, the Christchurch

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> it is necessary for a specified Judge who has been assigned to a division of the Court under section 58C to sit as a member of the Full Court, that Judge may sit as a member of the Full Court.
>
> (2) No more than 1 Judge of the High Court may sit as a member of the Full Court at any one time.

66 Judicature Act 1908, s 58F(1)(b).

67 Judicature Act 1908, ss 58A(3), 58B(3).

68 [1998] *New Zealand Gazette* 3790.

69 Compare criticism of the case allocation systems for the United States circuit courts, Part VI B below.

registry runs a strict rotation system, but if the caseload becomes uneven or a judge has to recuse himself or herself the judges reallocate the case among themselves. There is potential for violating neutral case assignment if a judge who challenges himself or herself has the capacity to choose his or her replacement. Another potential for abuse at the Christchurch registry is that the registry accommodates the Crown's preferred date. This may make it easier for the Crown to get its preferred judge. However, overall a strict rotation system achieves a good level of neutrality to the allocation of cases to judges.

In the Auckland registry case allocation depends on the availability of judges, their work commitments, and the availability of counsel—all determinants that are potentially susceptible to manipulation.

The system with the greatest distance to go in terms of removing the potential for manipulation of case allocation is that of the Wellington registry. The registry staff allocate cases to judges taking into account their availability and the availability of counsel. There is the opportunity for counsel to be available or unavailable depending on the judge who is likely to be assigned.

When the High Court goes on circuit, there is probably the greatest potential for the parties to affect who sits on the bench. Since lists on circuit are always full, judges can often be readily persuaded to postpone a fixture. It is possible, therefore, for the parties to postpone a fixture by seeking and obtaining adjournments, in order to avoid having the case determined by a judge they perceive to be bad for their cause.

Overall, and notwithstanding some of the weaknesses identified above, the High Court case management system—even though probably more driven by efficiency and work load issues—serves generally to allocate cases randomly and not to give either party an advantage. However, it would be desirable to minimise the occasions where discretion can be used to allocate cases. The High Court registries should aim for a system which maximises system integrity. Instead of allocating cases to judges according to their availability (as at the Wellington registry) a strict rotation system as in Christchurch is more desirable. The issue in regard to Christchurch registry is that if judges cannot hear an assigned case (either because they have to recuse themselves or because of their workload) they arrange reassignment among themselves. A more objective mechanism should be adopted. For example, a case needing reassignment could be "re-rotated" so that the case would be reassigned to the next judge on the rotation list. Maximum integrity would be achieved if the judges had no access to the rotation list.

Specialised lists are not in conflict with the neutral assignment of cases. On the contrary, the establishment of a special list, like the commercial list in Auckland,[70] is

70 The commercial list is established pursuant to s 24A of the Judicature Act 1908.

probably desirable to take into account the special knowledge and skills of certain judges. A judge's special expertise can only be to the advantage of the litigant.[71] However, there have to be clear criteria in place as to what cases are suitable for the special list or a specialised chamber,[72] and which judges will hear them and according to which criteria.[73]

Particular thought needs to be given to case allocation for the High Court on circuit. It is probable that a system of case allocation will not on its own achieve the objectives of neutrality. In order to avoid manipulation by the parties any case allocation system will need to be supplemented by a strict approach to the granting of adjournments.

2 *Court of Appeal*

The case allocation process in the Court of Appeal is unsatisfactory. The dissatisfaction arises at two levels: first, compliance with the 1908 Act; second, with first principles. Turning to the statutory scheme first, under the "procedures" notified in the *Gazette* in September 1998,[74] case allocation to divisions is put in the hands of the President of the Court. The "procedure" does not give any indication as to what criteria the President must use either to form the panels or to allocate cases to them. That level of discretion violates the neutrality principle that is central to case allocation, and creates at least the potential for panel packing. Case assignment does have to be done with the concurrence of the Chief Justice. But charging an already overworked Chief Justice with a supervisory role in respect of case allocation seems unfair. Furthermore, there does not seem to be any "procedure" for determining a Full Court. Who sits on a Full Court is in the hands of the President alone. Bearing in mind that the Full Court determines the most important appeals, the breadth of discretion available to the President is surprising, especially since in comparison, allocation to divisions is more closely regulated.

The concerns expressed in relation to the procedures adopted under sections 58C and 58E need to be tempered by acknowledging that they were adopted by all of the Court's permanent members. If panel packing were occurring in the Court of Appeal one would expect that enough of the judges would be sufficiently concerned to change the current

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71 Alan Galbraith "Facilitating and Regulating Commerce: The Court Process" (2002) 33 VUWLR 841, 845; Rodney Harrison "Specialist Insights of Judges Valuable" (16 September 2003) *New Zealand Herald* Auckland A13.

72 Section 24B of the Judicature Act 1908 specifies the classes of proceeding eligible for inclusion on the commercial list.

73 The Judicature Act 1908 specifies no criteria for the nomination (by the Chief Justice) of a judge to the commercial list; nor does it specify any criteria for determining which commercial list judge gets to hear a particular case.

74 [1998] *New Zealand Gazette* 3790.

procedures and adopt new ones to eliminate such a practice. That said, as the Houston Conference example shows, it can take time for judges to realise that there is a problem; and it also takes a bold personality to raise the issue.

Of further concern is the way in which High Court judges can be nominated to sit on the Court of Appeal. The principal concern is with the ability of the President to nominate High Court judges for specific cases under sections 58A and 58B of the Judicature Act 1908. This power leaves open the possibility of panel packing and, although specifically granted by Parliament, is precisely the sort of power that is expected to be circumscribed by objective criteria set in advance. Further, since the Court of Appeal establishes a forward-looking case programme, even the nomination of High Court judges for a particular period has the potential of being used to panel pack. The allocation of a case to a particular period could allow the assignment of a favoured High Court judge to that case during his or her three-month stint on the Court. Finally, the effectively uncontrolled power of the President to co-opt one High Court judge onto the Full Court under section 58F(1) of the 1908 Act also does not conform with the neutral assignment of cases since it is the President's decision as to when expertise is needed.

The second level of concern is that case allocation does not appear to comply with the spirit, and perhaps with the letter, of the law. Section 58C requires the permanent judges of the Court of Appeal to adopt "a procedure" for assigning judges to a criminal or civil division of the Court. Reposing full discretion in the Court's President to determine who shall sit when and where is not "a procedure". Interestingly, in a memorandum to the Minister of Justice concerning the coming into force of sections 58C and 58E a Ministry of Justice official raised a concern in relation to the proposed allocation "system"[75] since it would repose significant discretion in the Court's President:[76]

> However, the procedure adopted in respect of the assignment of Judges may be open to criticism on the part of the profession and others because it adopts a "minimalist" approach. … While there may well be good reasons for preserving the greatest degree of flexibility possible in assignment of Judges to different divisions (which is consistent with this procedure), it is possible that members of the profession may be concerned that the procedure adopted does not contain some substantive indication of the factors or particular qualifications which would render a Judge more suitable for assignment to the criminal division on the one hand, or the civil division on the other or to both. An elaboration of such considerations may assist counsel

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75 Subsequently adopted and notified in [1998] *New Zealand Gazette* 3790.

76 W A Moore "The Judicature Amendment Act 1998 Commencement Order (No 2) 1998" (24 June 1998) (Letter to the Minister of Justice obtained under the Official Information Act 1982, on file with the author).

> and enhance overall confidence in the justice system through increased transparency in the procedures adopted by the Court.

Indeed, it is hard to understand why Parliament would require the Court's judges to agree on "a procedure" for panel selection, if it intended that the judges could agree to leave it all to the President.[77] By stipulating "a procedure" the adoption of objective criteria that would secure public and professional confidence in the manner of panel selection is warranted. That aim is not achieved nor even pursued by the current system. So while the Ministry of Justice official refers to the current system as "minimalist," others might not unfairly regard it as no procedure at all.

VI THE NEUTRAL ASSIGNMENT OF CASES IN GERMANY AND THE UNITED STATES

For the purpose of comparison this section considers the systems that have been put in place in Germany and the United States to secure the neutral assignment of cases to judges.

A Germany

1 Overview

Article 101 I 2 of the German Constitution (Art 101 I 2 GG) states: "No one shall be deprived of his/her lawful Judge". The constitutional concept of a "lawful" or "statutory"[78] judge raises eyebrows among common law judges. Is it not inherent in the position of being a judge to be lawful, to adhere to the laws of a country, and to serve the country by implementing them? In fact, the concept described in Art 101 I 2 GG relates to what the academic writing in the United States has referred to as the "neutral assignment of cases to judges".[79] To comply with Art 101 I 2 GG the system has to ensure that judges cannot be allocated ad hoc or ad personam.[80] It requires the German courts to develop objective criteria, specified in advance, that automatically allocate a claim to a judge when it arrives at the court. In other words, in Germany—incredible though it may sound to common law ears—a litigant has been allocated his or her judge before committing the crime, or before the proceedings have been launched.

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77 Unfortunately, neither the parliamentary debates nor the explanatory note to these provisions throws light on their purposes.

78 See Harald Koch "Rechtsvergleichende Fragen zum 'Gesetzlichen Richter'" in *Festschrift für Hideo Nakamura* (Seibundo, Tokyo, 1996) 281, 283.

79 See J Robert Brown and Allison Herren Lee "Neutral Assignment of Judges at the Court of Appeals" (2000) 78 Texas L Rev 1037.

80 BVerfGE 82, 159, 194.

In Germany the "lawful judge" is determined by a mix of statutory provisions (usually in procedural statutes) and administrative processes determined by the judges themselves. Case allocation starts right at the point of deciding which court geographically (which court district or *Bezirk*), hierarchically (District Court, High Court, Court of Appeal, and so forth), and topically (Labour Court, Administrative Court, Social Welfare Court, Tax Revenue Court, or the court of general civil and criminal jurisdiction) should hear the case. Germany does not know the doctrine of forum conveniens/forum non conveniens.[81] Judges in Germany have no discretion whether or not to accept a case;[82] nor can they accept jurisdiction in respect of a case that is properly to be determined by another type of court or by a court in another district.[83]

Turning to statute first, the various procedural codes (civil, criminal, administrative) determine broad jurisdictional issues. For example, § 25 ZPO (Civil Procedure Code) states that the jurisdiction for immovable property lies with the court where the immovable is located. § 9 StPO (Criminal Procedure Code) provides that jurisdiction lies with a court where the accused has been apprehended. The Judicature Act (GVG) determines which level of court is appropriate (District or High Court).[84] This is similar to the broad jurisdictional allocation statutes common to most modern legal systems.[85]

Once the appropriate court has been determined by reference to the relevant statutory procedural code, the question arises as to which judicial officer in that court will be assigned to determine a particular case. §§ 21–21i GVG are the key. This part of the GVG requires every court to form a *Präsidium* which is to be the court's management group. It consists of the president of the Court as chairperson and a certain number of judges elected by their colleagues (the number depends on the overall number of judges at the court). According to § 21e GVG it is the task of the *Präsidium* to develop the management plan (*Geschäftsverteilungsplan*) for the court for the financial year ahead. This management plan must state the criteria according to which cases are allocated to individual judges. The Federal Constitutional Court has held that the management plans have to be sufficiently detailed that the possibility of manipulating the allocation of cases is excluded. The plans must also exclude the possibility that judges are chosen according to subjective criteria

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81 Mathias Reimann *Conflict of Laws in Western Europe* (Transnational, New York, 1995) 82–85.

82 See Othmar Jauernig *Zivilprozessrecht* (22 ed, Beck, München, 1988) 6.

83 Compare in New Zealand the High Court Rules, rr 219, 220 and the forum conveniens/forum non conveniens principles that allow a proceeding to be heard by a court other than that where it ought to have been commenced.

84 See, for example, Judicature Act (GVG) § 23.

85 See in New Zealand, for example, Judicature Act 1908, High Court Rules, and District Court Rules.

rather than general objective criteria. The Constitutional Court has held that even the mere possibility of manipulation infringes Art 101 I 2 GG.[86]

2 A typical assignment system

A typical management plan for the year 2002 is that of the *Landgericht* (High Court) in Braunschweig, a city of approximately 270,000 people. The High Court deals with serious criminal matters, civil matters with a case value above €5,000, and appeals from the *Amtsgericht* (District Court) in criminal and civil matters. In the 2002 financial year, the *Landgericht Braunschweig* had 55 judges available to it. The *Präsidium* decided to form 12 chambers (each comprised of three judges) for civil trials and 11 chambers (also comprising three judges each) for criminal trials. It then decided, in regard to civil matters, to allocate certain subject areas to certain chambers. If a civil matter does not fall into one of the subject areas then it is to be allocated to the next free chamber, which is determined by a points system. In regard to criminal matters, each chamber is allocated a certain geographical district. The plan also deals, for example, with substitution during illness and holidays, and determines who is responsible in the case of a retrial.[87] The 2002 management plan for the *Landgericht Braunschweig* is 24 pages long, and the management plan is renewed every year to take account, for example, of shifting workloads or retirements. The management plan can be accessed through the court's registry. Because management plans are driven by the requirement of Art 101 I 2 GG that everyone has a right to a lawful judge, they have a different focus from that of management plans that are driven, for instance, by monetary viability, the efficient use of staff, or fair workload distribution, which is the usual pattern of judicial management in New Zealand.[88]

3 Conclusion

No system is foolproof, and aspects of the German system of case assignment have been the subject of legal challenge.[89] However, overall the assignment system has worked well. There is no room for the parties to use the system to get the judge they want. Moreover, there is hardly any room for the judiciary itself, and especially the president of the particular court, to manipulate the system to secure a certain outcome. The case

86 BVerfGE (24.03.1964) in 1964 DRIZ, 175.

87 Generally, in Germany retrials are decided by a different chamber at the same court.

88 See above Part V A 1.

89 For example: whether a judge who was not a member of the chamber responsible for the trial could set a trial date which impacted on the composition of the chamber because, on the set trial date, two of the judges who would normally have been members of the chamber were on holiday (BVerfGE 4, 412). In another decision, the complaint arose from a jurisdictional dispute between two District Courts where the second District Court was chosen by error (BVerfGE 29, 45).

assignment follows a plan which leaves little room for human intervention since most discretion is removed. Because of the constitutional guarantee of the "lawful judge" and the fact that management plans and management practices have been regularly scrutinised by the superior courts, there is also an awareness, among the management groups of the courts as well as among lawyers and the public, about the right to a lawful judge—which is in itself a protection against any form of abuse of the assignment process.

B United States

1 Overview

The case allocation systems of the Federal Court of Appeals were chosen for the purpose of this article to illustrate a neutral assignment process in the United States.[90] The information about the assignment process used in this paper has been gathered by J Robert Brown and Allison Herren Lee in conjunction with their research project.[91]

All 12 Court of Appeals circuits have a system in place which, each asserts, enables it to constitute neutral judicial panels.[92] Even though the extent of random assignment and its methods vary considerably among the circuits there are some common parameters.

As a first step, in most circuits the initial panel schedule is determined at least one year in advance.[93] The clerk's office or the circuit executive is generally responsible for determining the panels. A number of circuits use computer programmes for determining the panels. Circuits generally have some rules in regard to the composition of the panels. For example, in the District of Columbia circuit judges must sit with each other at least three times and have 32 days of regular sittings, with about half before and half after 1 January. The Fifth Circuit also has a policy to have judges sit with every other judge before

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90 See the extensive study by J Robert Brown and Allison Herren Lee "Neutral Assignment of Judges at the Court of Appeals" (2000) 78 Texas L Rev 1037, 1069 and following.

91 Brown and Herren Lee, above; see also, for an overview of the assignment processes for each circuit, the further information supplied by the authors at Circuit Practices <http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm> (last accessed 25 September 2003).

92 Brown and Herren Lee, above, 1069 and following; Circuit Practices <http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm> (last accessed 25 September 2003).

93 Except for the Fourth, Seventh, and Tenth Circuits, which only determine their panels six to eight weeks before each term.

repeating the panels. Also an effort is made to make certain that judges do not sit for more than three consecutive months and to include at least two active judges on every panel.[94]

The Ninth Circuit is noteworthy because of its geographical spread (Hawaii to Anchorage) and its considerable number of judges (28). Like other circuits an effort is made to ensure that each judge sits with all colleagues on a regular basis. Furthermore, an attempt is made to schedule new District Court judges to sit in the Circuit Court sometime during their first year on the bench. Due to the Ninth Circuit's geographical boundaries a further effort is made to ensure that every judge sits in all significant locations within the Circuit and does so in roughly equal amounts.[95] Judges are asked beforehand about their availability. Senior and visiting judges[96] designate the weeks and number of days they are willing to sit. At this stage no case allocation takes place.

Each panel and each judge is scheduled to sit on certain dates in the year. Each judge, therefore, knows when he or she has study and holiday periods. All circuits allow, however, for some system for judges to swap panels after the initial plan is circulated.

Not all panels are created as just described. Specialist panels are established outside the normal panel determination process. Death penalty panels are a good example. They are determined differently as is the case generally for cases on remand from the Supreme Court. In the Fifth Circuit, for example, only active judges may sit on the death penalty panel. In the Sixth Circuit the circuit executive maintains a separate roster for death penalty panels, consisting of active judges and senior judges who agree to hear the cases, and then the panels are drawn randomly.[97]

The issue of how to allocate the cases to the pre-determined panels is the one which varies most between the circuits. The Fifth, Sixth, Tenth, and Eleventh Circuits have strong policies and practices in place which separate the panel determination process from the case allocation process.[98] In case of the Fifth Circuit especially, this is a result of the 1963 Houston Conference. In all other circuits the office which determines the judicial panels

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94 See Circuit Practices <http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm> (last accessed 25 September 2003).

95 See Circuit Practices <http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm> (last accessed 25 September 2003).

96 The District of Columbia Circuit is the only circuit which does not rely on visiting judges or District Court judges to hear cases.

97 See Circuit Practices <http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm> (last accessed 25 September 2003).

98 In the Sixth Circuit the circuit executive's office assists in the scheduling of panels; the clerk's office assigns cases.

also allocates the cases to them, or the officer who allocates cases knows the panel composition before allocating the cases. A considerable number of circuits assign cases on a "first-in, first-out" basis after having allocated cases which have some type of priority. Another assignment method is that of assigning criminal cases first. Some circuits give cases a certain weighting and in their case allocation have regard to the fact that each panel should have the same workload. The Tenth Circuit has probably the most transparent method of assigning cases to judges.[99] Cases are manually divided into criminal, civil, and mixed clusters and randomly assigned to panels by a computer programme. At the time the clusters are formed the clerk's office does not know the identity of the panels. A tentative calendar is then sent to all judges, including a list of parties and attorneys, to determine conflicts of interest. If a conflict occurs the change in the panel position will be audited and the reason noted. The audit trail is circulated among the other judges.

Circuits also differ in determining how to deal with post-allocation vacancies brought about, for example, by illness or other inability to sit on the panel. The Tenth Circuit, for instance, has a series of protocols in place to fill vacancies. Some circuits leave it to the officer who undertook the case allocation to fill the vacancy. In others it is left to the chief judge or the judges themselves to find a replacement. In regard to recusal all circuits have a mechanism in place whereby the judges are notified of the cases before a final case allocation takes place so that they can notify the officer in charge of case allocation of any ground for recusal. The final case allocation takes this into account.

2 *Conclusion*

Even though all circuits assert that they use a "random assignment" process, all of them leave some room for human intervention in the form of discretionary decision-making powers, which renders the assignment process open to potential abuse. And the opinion of Boggs J in *Grutter v Bollinger*[100] indicates that even in the most recent past panel packing has been alleged. Consideration of the assignment process of the panels shows that it is mostly the clerks who put together the panels. Even in circuits where computers are used, or as in the Seventh Circuit where a matrix is used, judges can swap and change and thereby make the panel assignment a far less random exercise. The systems do not prevent the deliberate formation of liberal or conservative panels; however, they do make it far harder than it was in the past.

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99 J Robert Brown and Allison Herren Lee "Neutral Assignment of Judges at the Court of Appeals" (2000) 78 Texas L Rev 1037, 1074. The Tenth Circuit also uses a panel determination process which is the least prone to human intervention of all circuits. Furthermore, where changes are made the change and the reason for it are documented.

100 *Grutter v Bollinger* (2002) 288 F 3d 732, 793–797 (6th Cir) Boggs J.

Liberal exchange policies erode any policy of random assignment and the policy that all judges should sit with each other for a certain amount of time. Furthermore, most circuits have no prearranged, objective system in place for replacing judges when an unexpected vacancy opens on a panel after cases have been assigned. The replacement duty rests normally either with the clerk, the head of the panel (in the Third Circuit), or the chief or assignment judge with or without the clerk. Furthermore, some circuits do not separate the panel and case assignment process. Others, however, like the Fifth Circuit after the Houston Conference, completely separate the two processes. Of concern are also the special panels for hearing, for example, death penalty cases. It seems that these panels do not follow any real assignment process, but rather are formed on the basis of who is available or who wants to do them. Even though there has been a significant amount of case law in the lower courts, the lack of analysis of the constitutional principles involved, especially at Supreme Court level, means that litigants' ability to be tried in front of a randomly chosen court is very much dependent on the good faith of judges and the adherence of court officers to objective systems.

VII CONCLUSION

Neutral case assignment is about protecting the integrity of the judicial system by preventing either the parties or the judges and officials from determining who sits on a case with a view to producing a particular outcome. Incidents overseas and in New Zealand suggest that without special measures in place, case allocation can be manipulated to the detriment of the rule of law, public perceptions of justice, and observance of the principles of equality.

Consideration of the case allocation systems in the New Zealand High Court and the Court of Appeal discloses a number of concerns from the standpoint of neutral case assignment.

At the High Court level, a number of very different systems are used to allocate cases to judges. Neither the Wellington nor Auckland registry operates a case allocation system which guards to any particular degree against the potential manipulation of case allocation. In contrast the Christchurch registry's rotation system could, with a few improvements, be an adequate model for the other registries to adopt. As a method of case allocation, rotation is very easily operated by court administrators and embodies the "luck of the draw" principle. Aspects of the Christchurch rotation model which could be improved include re-allocation where the initially assigned judge has to recuse himself or herself or is absent for any other reason.

The big challenge at the High Court level, in terms of observance of neutral case assignment, is posed by the circuit system. Because the circuits are served by judges from the main registries, and because individual judges only go on circuit to a particular

provincial centre a few times a year, manipulation of the case allocation system by the parties is a substantial risk. Because of the tension between system efficiency, workload distribution, and personal living arrangements (many of the provincial centres are a good distance from the circuit judge's home base) on the one hand and neutral case assignment on the other, it may be well be that neutrality in the case assignment system is not sufficient on its own to secure the goals which neutrality is designed to meet. Other mechanisms, such as stringent practices in relation to the granting of adjournments, may have to be used to prevent potential manipulation.

In the Court of Appeal there is a lack of transparency about how judges are allocated to divisions of the Court and which divisions of the Court get to hear which cases. While the criteria for the allocation of a case to a Full Court are relatively clear, there are no transparent criteria or procedures in place to determine the selection of judges to sit on a Full Court. Overall the Court of Appeal system appears to give substantial discretion to the President to control the allocation of cases and the selection of particular panels. In addition, there is cause for doubt as to whether some of the processes which have been put in place by the Court actually meet the requirements of transparency and objectivity which, properly interpreted, the Judicature Act 1908 requires. Bearing in mind the wide range of important public law, private law, and criminal matters which the Court of Appeal handles, the perception of transparency in its process is vital to the Court's standing and legitimacy. Indeed, the recent criticism of the Chief Justice's presence on the panel which decided the foreshore and seabed appeal shows that the administration of justice might be easier to defend if cases are assigned to judges of the Court of Appeal pursuant to objective criteria.

The case allocation systems used in Germany and the United States are examples of how neutral case assignment can be achieved. While not offered as prescriptive models, both the German and United States systems indicate that certain minimum elements need to be present if a case allocation system is to achieve the objective of neutrality. There need to be objective initial allocation criteria (for example, rotation on a first-in, first-out basis, allocation by reference to geography), rules for the reallocation of cases where the initially assigned panel (or members of the panel) are absent or need to recuse themselves, and rules which prevent (or at least greatly hinder) the ability of the parties to pick judges.

The systems for case allocation can be quite elaborate, as the *Landgericht Braunschweig* model shows.[101] However, the attraction of such a scheme is that it delivers substantial

101 It should be noted, though, that what any court management plan in New Zealand, certainly at High Court level, would need to take into account is the smaller number of judges operating out of the three main registries than is the case in Germany (compare 55 High Court judges in Braunschweig, a city of approximately the size of the greater Wellington region, with 29 for the whole of New Zealand).

reassurance about the integrity of the system and, once established, is relatively easily revised from year to year to take account of such things as workload distribution.

For a comparative lawyer, one of the most fascinating aspects of this research project is the difference of "problem awareness" from one legal culture to another. The persistent question stimulated by this research (not one this paper specifically addresses) is why, on the one hand, neutral case assignment is such a widely debated topic in Germany and has generated such a vast amount of jurisprudence and literature, yet on the other hand there is silence on this topic in New Zealand, despite the fact that in the last couple of years the New Zealand judiciary has come under increased scrutiny.[102] The matter cannot be lightly dismissed as something which turns on the civil law–common law divide. The detailed case allocation systems utilised in the United States Court of Appeals illustrates that the concern is one which is relevant to a common law system too.

Public confidence in the judiciary is an essential aspect of every functioning state. This paper suggests that reviewing the current case allocation systems in New Zealand courts would be a valuable thing to do to avoid problems arising in the future that could call into question the hard-earned heritage of respect for the judicial system. If this paper raises awareness and stimulates debate on the issue of neutral case allocation, an issue not much discussed to date, it will have achieved its purpose. Furthermore, since it seems likely that a new Supreme Court for New Zealand will be established in the near future, this paper may assist in dealing with any case assignment issues in that Court.

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102 Possible explanations may lie in the different histories of the judiciary in each of the three jurisdictions. The experience of executive and internal manipulation of the judiciary during the Nazi period in Germany doubtless contributed to a strong "lawful judge" jurisprudence (though the concept first emerged in Germany in the 19th century). Equally, the relatively blatant political judicial appointment process in the United States may explain the need for courts to adopt neutral case assignment systems in order to defuse public concern about judicial impartiality. New Zealand has had no such experiences.

APPENDIX

COURT OF APPEAL JUDGMENTS JANUARY 1999–JULY 2001[103]

Judge	*Bill of Rights*	*Family Law*	*Employment Law*	*Company Law*	*Tax Law*	*Intellectual Property*
Anderson	18		1		1	
Baragwanath	4		1	1	1	
Blanchard	**40**	**9**	**17**	**14**	**16**	**2**
Cartwright	2		1			
Doogue	6	3	4	3	1	1
Eichelbaum CJ	**2**					
Elias CJ	**11**		**1**	**2**	**1**	
Ellis	5			2		
Fisher	2		2	2		
Gallen	4	2	1	2		
Gault	**35**	**7**	**21**	**9**	**15**	**3**
Goddard	10	1		1		
Hammond	1					
Henry	**18**	**3**	**11**	**2**	**6**	**1**
Heron	6					
Keith	**42**	**9**	**22**	**6**	**7**	**2**
McGechan	3	4	1	6	2	
McGrath	**16**	**4**	**7**	**6**	**4**	
Panckhurst	6					
Paterson		4	1	1	1	
Penlington	1					
Potter	2					
Randerson	1					
Richardson P	**47**	**4**	**22**	**5**	**16**	**2**
Robertson	19		1	3	2	
Salmon	6	2	4	3	2	1
Thomas	**30**	**2**	**20**	**7**	**8**	**3**
Tipping	**36**	**6**	**16**	**7**	**11**	**2**
William Young			1			
Young		2		2		

103 The seven permanent members of the Court of Appeal are indicated in bold. The Chief Justice is also a member of the Court by virtue of that office and sits periodically.