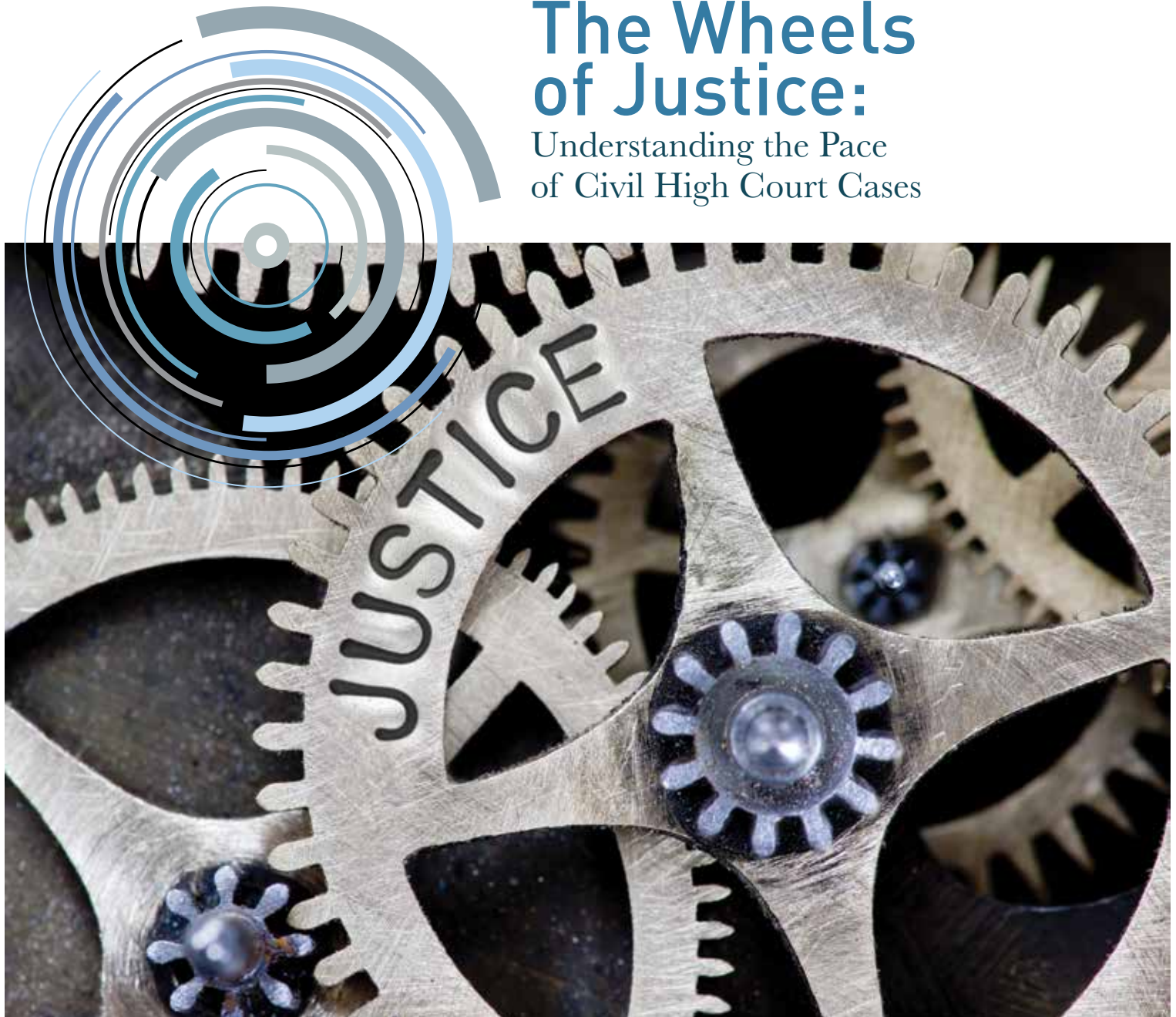


The Wheels of Justice:

Understanding the Pace of Civil High Court Cases



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Executive Summary

Delays in the court process are a key obstacle in accessing justice. Delay creates costs; not only in the loss of time but also financial and psychological costs. These costs are borne by the litigants, the economy, and the public purse. This is the first major New Zealand study to investigate the pace of High Court civil cases and to examine if, and where, delays might occur.

In this report, we look at both the overall length of cases, and we focus on various points in the life of a case where delay might occur. We have used mixed methods to study these issues: a quantitative analysis of data provided by the Ministry of Justice, an analysis of physical court files, and interviews with lawyers, judges, court staff, and litigants.

Determining the overall length of a case is a more complex task than it appears on its face, particularly as there are limitations to the data recorded by the Ministry of Justice. Where possible, we have used our analysis of the physical court files to overcome these limitations and evaluate case length. On average, a case filed in the High Court will conclude within 191.5 days. General proceedings, one of the types of civil proceedings heard by the High Court, frequently exceeded the average case length, taking an average of 381 days to conclude. As general proceedings were the longest class of cases and account for 29 per cent of the High Court's total caseload, the report focuses on this case type. Study participants agreed that most general proceedings should not exceed two years; only 18 per cent of general proceedings exceeded this limit.

Analysing case length alone, however, cannot answer all questions about delay. Delay can occur in extremely short cases; conversely, for some very long cases the passage of time could not be conceived as delay. In fact, we précised several long cases that had no evidence of delay. These included cases that were 'parked' for various reasons: waiting for a related case to be resolved, an appeal to be heard, remedial work to be undertaken, or a settlement negotiated. Some cases just needed more time to be ready for trial, especially cases involving multiple parties, or with complex evidentiary issues. While lengthy, these cases were not necessarily delayed.

Other cases – long and short – exhibited evidence of delay. Interviews with the participants helped to tease out the nature of this delay. The lack of judicial time to promptly hear fixtures (interlocutory and substantive) and deliver judgments was of particular concern. The unavailability of litigation participants, especially experts, also slows the pace of a case. Errors by registry were also evident; while rare, these errors can delay case progression. Finally, litigation involves a range of participants: litigants, lawyers, witnesses, court staff, and judges. The behaviours of any of these participants in the process can affect pace. For example, litigants, whether represented or unrepresented, can create delay for strategic reasons; lawyers preparing court documents late or to a poor standard can create delay. We canvas the interplay between these litigation participants and consider how these relationships can affect pace.

When considering solutions to the causes of delay the fundamental purposes of the court must be kept to the fore: to secure just outcomes between parties, publicly state the law, reinforce norms, and limit executive power. The court is a complex organisation. There are many participants who each respond to their own pressures and incentives. Any solutions must take into account this complexity. Proposed reforms should be carefully considered and approached cautiously.

Before firm recommendations can be made, further analysis of this data is required. A number of possibilities, however, have emerged at this preliminary stage. Many of these reforms centre on the case management process, including: earlier identification of issues in dispute, greater inclusion of litigants earlier in the process, improving the timing and methods of eliciting witness evidence, considering judicial specialisation, and setting firm timetables. Another key area for further research is initiatives to lower or better plan the cost of legal representation, which has a close but complex relationship with the pace of litigation. Other possible reforms focus on the court's broader operations, including: protecting judgment writing time, and maximising the advantages that can be harnessed from modern technology. There is an urgent need to improve data about who uses our courts, whether or not they are represented, and how their cases proceed. Without this information, we are unable to design a civil justice system that responds to the needs of those using the court and that protects its important public function.

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Glossary

CMS	Case management system
CEQL	Christchurch Earthquake List
LiPs	Litigants in person
Phase I	Analysis of Ministry of Justice generated data from CMS
Phase II	Analysis of data from physical review of court files
Phase III	Interviews and focus groups

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This is the Court... which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give – who does not often give – the warning, “Suffer any wrong that can be done you rather than come here!”

Bleak House by Charles Dicken (1853)

Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

The Causes of Popular Dissatisfaction with the Administration of Justice
by Roscoe Pound (1906)

1. Introduction

More than 160 years since Charles Dickens made his biting criticism of the civil litigation process in *Bleak House*,¹ we return once more to the question of delay in our courts. The topic has been the subject of much consideration, experimentation, and innovation in the intervening years but discussion of “crisis” in civil litigation – due to delay and unaffordability – has persisted.² Even without the language of crisis, the issue of delay continues to be identified as one of the key obstacles to access to justice.³ This report is the first major New Zealand study on the issue and adds to a body of research looking at delay in the civil courts throughout the common-law world.⁴

A. Research Questions

This study set out to answer the following questions:

1. How long does a civil case take to be resolved?
2. How many files take longer than average to resolve?
3. How long should a civil case take to be resolved, depending on the nature of the proceeding?
4. If cases “stall”, at what point(s) do this occur?

¹ Charles Dickens *Bleak House* (Public Domain Publishers, ebook, originally published as a book in 1853).

² Malcolm Feeley *Court Reform on Trial: Why Simple Solutions Fail* (1983) (Quid Pro Books, New Orleans, Louisiana, 2013) at xi-xiii (noting that the language of crisis is often invoked when criticising the courts); Judith Resnik (ed) *Civil Processes* (Oxford, Oxford, 2003) at 767 (noting dissatisfaction with civil process is common and the language of “crisis” is used frequently). In New Zealand the language of crisis was invoked for the 2008 conference *Civil Litigation in Crisis – What Crisis?* and a follow up seminar in 2009, *Civil Litigation in Crisis – Beyond the Crisis?*, sponsored by the New Zealand Bar Association and the New Zealand Legal Research Foundation. Justice Forrest Miller “Managing the High Court’s Civil Caseload: a Forum for Judges and the Profession” (Paper presented at the Members of the Legal Profession, Dunedin, New Zealand, 24 August 2011) at [4] rejects the language of crisis stating “The system is imperfect, and operates under considerable stress, but the problems have been overstated”.

³ For a recent example see Justice Stephen Kós “Civil Justice: Haves, Have-nots and What to Do About Them” (Paper presented at the Arbitrators’ & Mediators’ Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

⁴ For a survey of this literature see Chapter 2.

5. Why do certain civil cases take longer to resolve than other cases? For example: (a) nature of claim; (b) case complexity; (c) legal culture; (d) finite court resources; (e) lawyer and litigant behaviour; and (f) delays in judgment delivery.
6. Does civil case progression in the High Court differ for different types of litigants: corporate, individual, self-represented?

To investigate these questions, we have used mixed methods: a quantitative analysis of data provided by the Ministry of Justice, an analysis of physical court files, and interviews with lawyers, judges, court staff and litigants.

The questions are considered only in the context of the High Court civil jurisdiction. For the period of study, 2014-2015, the High Court had jurisdiction to hear claims where more than \$200,000 was at stake.⁵ The study does not, therefore, address delay in all civil cases. There are a great many civil disputes that fall within the jurisdictions of the District Court and New Zealand's many tribunals (e.g. the Disputes Tribunal and the Tenancy Tribunal),⁶ but the High Court serves an important function in our constitutional order, which makes it worthy of study. This is the public good function, to which we now turn.

B. *Our Position on Civil Justice*

Our starting point is that cases determined in the High Court have a public good function that goes beyond the need for dispute resolution between two parties. The public good of dispute resolution is an important issue but not always readily apparent. The study of delay in a court looks, at first glance, to be a quantitative exercise asking:

does actual length of case = appropriate length of case

This quantitative exercise is, of course, an aspect of this study. Lying not far beneath the surface of this seemingly simple calculation, however, are deep and important questions about the role of judicial adjudication in our constitutional arrangements, and the role of the state in dispute resolution. The solution to the problem of "appropriate length of case" can only be answered by attending to the two competing views of civil litigation that are at work beneath the surface.

The first view can be briefly summarised. Civil justice is primarily a form of dispute resolution between the parties. Its aim is to provide accurate determination of disputes to avoid citizens resorting to violence.⁷ Civil justice is therefore "a matter of placing a service of adjudication at the disposal of citizens who wish to assert their legitimate interests and enforce their legal rights".⁸ This conception arose as part of laissez faire ideology where disputes were seen as being "between two competent and autonomous parties, each of who had their own selfish motivations for

⁵ District Courts Act 1947 (No16), s29. The District Courts Act 2016, s74 increased the monetary threshold of the District Court, and the District Court has jurisdiction to hear claims where the amount claimed does not exceed \$350,000.

⁶ These forums receive considerably less attention as the legal profession, the judiciary as those with the financial resources to use the courts, are concentrated in the higher courts: Resnik, above n 2 at 751.

⁷ Duncan Webb "The Right Not to Have a Lawyer" (2007) 16 Journal of Judicial Administration 165 at 168; Alan Uzelac "Global Developments - Towards Harmonisation (and Back)" in Alan Uzelac (ed) *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer, Switzerland, 2014) at 6-7; Richard Moorhead "Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation" (2003) 22 Civil Justice Quarterly 133 at 134.

⁸ Rabeea Assy *Injustice in Person: The Right to Self-Representation* (OUP, Oxford, 2015) at 38-39.

presenting the most persuasive case”.⁹ Dispute resolution therefore can take many forms and the most preferable form is private, fast, and inexpensive.

The second view agrees that civil justice has a dispute resolution function but sees its purpose as going beyond this. Its further, important function is the creation and public statement of rules (i.e. the rules of the common law). There is a public good in this form of “rule creation” as it specifies “standards of socially desired behaviour in order to promote compliance with them”.¹⁰ This is important in a capitalist economy and democracy, as civil justice “provides the legal structure for the economy to operate effectively and for the power of government to be scrutinised and limited”.¹¹ Litigants are not, therefore, mere consumers of a service provided by the state. There is a public good in the enforcement and refinement of legal standards, and in upholding the rule of law.¹² Together, these functions of private dispute resolution, rule creation, ordering of the capitalist economy, and providing a check on government, are a public good that goes beyond the interests of the individual who calls upon the system. As Genn says:¹³

In determining the merits in individual disputes, the judiciary are publicly stating the law, reinforcing norms of social and economic behaviour, identifying the limits of executive power and publicising the values of the society.

These two views, as Resnik points out, show deep conflict about civil processes. The first view sees civil litigation as failure of private ordering, less used the better, and to be kept in private between the disputants. The second view sees civil litigation as a beacon of justice and embodies society’s ideals about equal opportunities.¹⁴

This report takes the second view as its starting point: that civil litigation both resolves private disputes and serves a public good function. In considering whether or not there is delay, and how to resolve any delay, both these functions must be preserved. As the dispute resolution function is a key purpose of civil litigation, considering how the litigant views the process must remain a central focus. We encountered significant difficulties accessing litigant views and consequently only a small sample is included in this report.¹⁵ Nevertheless, where possible, we have consciously oriented ourselves to the litigant perspective in analysing the data. For example, when considering our first research question, “how long does a civil case take to be resolved?”, we have analysed case length from the litigant perspective: the time of filing (our first measureable date) to the last

⁹ Linda Mulcahy *Legal Architecture: Justice, Due Process and the Place of Law* (Taylor and Francis, Hoboken, Online, 2010) at 63.

¹⁰ William Landes and Richard Posner “Adjudication as a Private Good” (1979) 8 *Legal Studies* 235 at 236.

¹¹ Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, UK; New York, 2010) at 16.

¹² Richard Stewart “The self-represented litigant: A challenge to justice” (2011) 20 *Journal of Judicial Administration* 146 at 149.

¹³ Genn, above n 11 at 18. Chief High Court Judge Justice Helen Winkelmann “ADR and the Civil Justice System” (Paper presented at the AMINZ Conference, Auckland, New Zealand, 6 August 2011) adopted Genn’s conception of civil justice citing supporting the economy, peaceful dispute resolution, and production of precedent, as the functions of civil justice.

¹⁴ Resnik, above n 2 at 757.

¹⁵ Litigants’ perceptions of the pace of civil litigation remains an important issue, however, which is worthy of separate and further study. Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Australian Centre for Justice Innovation, Monash University, 2015) at 38 noting that “It is imperative that a balance is struck between timeliness and quality of the justice experience, and this can only be measured qualitatively by engaging with, and hearing the voices of, disputants and participants”. As discussed further in Chapter 3, we had difficulty accessing this perspective and this study therefore is incomplete on this point.

date on the court file. This approach differs from other studies,¹⁶ where case length is measured from the time the case is deemed ready for trial, until the handing down of the judgment. We consider that bringing the litigant perspective to the fore should not be the sole lens of analysing the research questions but it should play an important role.

C. *A Brief History of Civil Justice Reform*

This research forms part of many years of critical review of New Zealand's civil justice system. The late 1970s saw the beginning of a sustained period of change in the civil justice system. As Sir Thomas Eichelbaum observed:¹⁷

In 1970 Judges still widely held the view that the judicial function was limited to deciding case put before them by the Registrar. The critics labelled this the era of the cuckoo clock Judge; the Judge came out when the clock struck ten, heard the case and on its conclusion retired to chambers until next required. In an era of up-to-date lists and an absence of competition for Court time, this was a tenable concept.

Improving the efficiency of New Zealand's courts was a major focus of the 1978 Royal Commission on the Courts. Its report – known as the Beattie Report – recommended major structural reforms of New Zealand's court administration system, advocating the introduction of “modern management methods”.¹⁸ The Beattie Report found that “problems of court administration” lay at the heart of its terms of reference, and cited with approval the following United States Supreme Court Judge:¹⁹

The challenges to our system of justice are colossal and immediate and we must assign priorities... I would begin, by giving priority to methods and machinery, to procedures and technique, to management and administration of judicial resources even over the much-needed re-examination of substantive legal institutions.

Under the chief justiceship of Sir Ronald Davison, the Beattie Report's recommendations in this area were implemented from the 1980s onwards. Chief Justice Davison established the appointment of the office of the ‘Executive Judge’, appointed first in the High Court and later in the District Court. The establishment of this role, as Sir Thomas Eichelbaum later observed, heralded the introduction of judicial case management in New Zealand, as Executive Judges carried out delegated functions on behalf of the Chief Justice or Chief Judge, and in particular, were in charge of court lists in their area:²⁰

Under the influence of energetic and proactive Executive Judges such as Robertson in Auckland, Doogue in Wellington, and Holland in Christchurch, it became clear that delays and adjournments, features of an earlier era, were out of favour with the judiciary.

¹⁶ Miller, above n 2 at [8] stating “By delay, then, we mean time spent on a waiting list between entry to the ready list and trial that exceeds the time reasonably necessary to get the case ready for trial”.

¹⁷ Ian Barker and Graham Wear (eds) *Law stories: essays on the New Zealand legal profession 1969-2003* (LexisNexis NZ, Wellington, New Zealand, 2003) at 16.

¹⁸ David Beattie and Royal Commission on the Courts *Report of Royal Commission on the Courts* (Government Printer, 1978) (the Beattie Report).

¹⁹ At 230 (citing Chief Justice Burger).

²⁰ Barker and Wear, above n 17 at 16.

International case management expert Maureen Solomon²¹ helped implement civil caseflow management in New Zealand, visiting the country several times to conduct seminars.²² Eichelbaum, who in 1989 succeeded Davison as Chief Justice, continued to attempt to modernise the court system. In 1994 he supported the introduction of a case management system designed (according to legal historian Peter Spiller) to “promote the economic disposal of civil cases and to encourage the settlement of cases by negotiation or the use of alternative resolution techniques.”²³

Formal case management systems were first trialled under three pilot schemes in the 1990s, in the High Courts in Auckland, Napier, and Christchurch, and in five District Courts in the Auckland area. Case management was then implemented nationally, in 2000 in the High Court and in 2001 in the District Court.²⁴

Since case management was introduced, there have been a number of amendments to the procedures aimed at minimising costs and delay. These changes include the centralisation of case management,²⁵ changes to the discovery rules,²⁶ and presumption in favour of electronic exchange of documents.²⁷ The most recent amendments²⁸ were partly in response to Justice Miller’s research, which illustrated the ‘case management conundrum’:²⁹ case management might efficiently prepare a case for trial, but it is expensive. Given that most cases eventually settle (as opposed to proceeding to trial), the efficiencies gained by close judicial management must be balanced against the front-loaded costs imposed on litigants.³⁰ Justice Miller revealed that many cases³¹ settle in the pre-trial window,³² so acknowledged that the proximity to trial remains as the main driver towards settlement. Justice Miller made a number of recommendations, with the intention that the Rules will still drive settle-able cases towards settlement, while promoting efficient preparation for cases that should proceed to trial.³³ Justice Miller remained of the view that:³⁴

Although it will always be true that most cases settle, we think the dominant object of the judicial system must be to ensure that trial is viable for as many as possible. To adopt a different objective is to risk having the state place unreasonable pressure on litigants to compromise their rights. So as a general proposition courts should facilitate

²¹ Maureen Solomon *Caseflow management in the trial court* (American Bar Association, Chicago, 1973).

²² Barker and Wear, above n 17 at 16.

²³ Peter Spiller "The Courts and the Judiciary" in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, New Zealand, 2001) at 219-220.

²⁴ Law Commission *Seeking Solutions: Options for Change to the New Zealand Justice System - Have Your Say (Part II)* (NZLC PP52, 2002) at 133.

²⁵ Justice Geoffrey Venning "Access to Justice - A Constant Quest" (Paper presented at the New Zealand Bar Association Annual Conference 2015, Napier, 2015) at 11-12.

²⁶ High Court Amendment Rules (No 2) 2011.

²⁷ High Court Rules 2016, r 7.1.

²⁸ High Court Amendment Rules (No 2) 2012 (SR 2012/409), which came into force 4 February 2013.

²⁹ Justice Forrest Miller "Civil Case Management (Powerpoint Slides)" (Paper presented at the Law and Economics Association of New Zealand, on file with the authors, 2010); Miller, above n 2.

³⁰ Front-loading of costs means requiring steps to be taken at the outset of the litigation (e.g. briefing witnesses, conducting discovery). These steps would need to be taken at some point in the litigation, if it proceeded to trial. Most cases settle, however, so requiring steps to be taken at the outset can be considered wasted costs. These steps might however increase the chance that the case will settle. These tensions underlie the decisions about the timing of steps in the litigation.

³¹ Justice Miller and colleagues sample was confined to general civil proceeding cases entered on the ready list (i.e., deemed ready for trial), disposed between 2008 and 2010 in Auckland ($n = 140$) and Wellington ($n = 190$).

³² This period was defined as the 60 days between the setting down date and trial.

³³ For all recommendations see Miller, above n 29; Miller, above n 2.

³⁴ Miller, above n 2 at [6].

trial by clarifying the trial issues first and then setting an early and definite trial date. By doing so they facilitate fair settlements for the majority of cases that will eventually be resolved by agreement as trial approaches.

The High Court Rules have incorporated these recommendations in three ways. Judges now classify cases as either complex or ordinary, with only complex cases requiring close case management.³⁵ Therefore, the greatest front-loaded costs are imposed on cases most likely to proceed to trial. The first case management conference is now scheduled later than under the previous rules: at least 25 working days after the filing of the first statement of defence.³⁶ This therefore provides parties with time to focus on the substantive issues at the earliest opportunity³⁷ (and discuss settlement if relevant), rather than just discussing practical issues (e.g. timetabling). The close of pleadings date (previously setting down date) is now at the discretion of the Judge, as opposed to the default 60 working days.³⁸ The pre-trial window is acknowledged as the optimum time to discuss settlement because parties (and legal counsel) will have a better understanding of the weaknesses of their case; the courts should expand this window to exploit parties' desires to settle.

All of these recent amendments are centred on the High Court Rules overriding objective: "to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application".³⁹ This aim also appears in the recently enacted Senior Courts Act 2016, which states that one of the purposes of rules of practice and procedure is to facilitate the just, speedy, and inexpensive dispatch of the business of the High Court.⁴⁰

D. Context

Litigation takes place within a broader social, political, and economic context. Legislation that generates new legal rights or responsibilities can also create a new stream of litigation. The imposition of statutory limitation periods creates deadlines for claims, which can also cause fluctuations in civil filings. Fluctuations can also be caused by natural disasters or financial shocks. As a Judge explained in an interview for this project:

The economic cycles – and it's only happened twice in the last few decades – post '87, post GFC, the court gets out of control for a period. And, and you've got to be very careful when you look at cycles, because that period from 2010 to I'd say about 2014, was so – the court would have struggled, any court would have struggled with workload.

The statistical data in this study is drawn from mid-2014 to the present. While there were no major economic shocks during this period, there were two other events contributed in a significant way to the High Court's civil case load: the Canterbury earthquakes and the continuing leaky building crisis.

³⁵ High Court Rules 2016, r 7.1(4).

³⁶ High Court Rules 2016, r 7.3(2).

³⁷ High Court Rules 2016, Schedule 5.

³⁸ High Court Rules 2016, r 7.6(4).

³⁹ High Court Rules 2016, r 1.2.

⁴⁰ Senior Courts Act 2016, s 145.

1. *These Shaky Isles*⁴¹

In 2010 and 2011 there were two major earthquakes in Canterbury that caused significant loss of life and property. Those earthquakes were part of a sequence of approximately 14,000 which continued into 2016. The earthquakes generated hundreds of thousands of insurance claims, which in turn generated a large number of civil disputes “for reasons ranging from differences in interpretation of insurance policy coverage to failures in communication and delays caused by the overwhelming number of claims”.⁴² In response, the High Court, led by then Chief Judge Winkelmann, created a specific Canterbury Earthquake List (CEQL). Cases placed on this list were subject to a distinct procedural process, which differs from proceedings following the normal tracks. This litigation was ongoing during the period that this report covers.

2. *Leaky Buildings*

New Zealand’s leaky building crisis, also referred to as weathertightness, has been a less visible but significant part of the context of this research. From the mid 1990s, it began emerging that some builders were using defective building materials and poor design methods in the construction of thousands of homes, schools, apartments, and office blocks around the country.⁴³ These defects have resulted in major and ongoing building damage, with cost estimates for fixing these homes ranging from \$11 to \$33 billion.⁴⁴ In 2007, the Government established the Weathertight Homes Tribunal, which is run through the Ministry of Justice, and enables home owners to pursue a claim where the actual repair cost or estimate is more than \$20,000.⁴⁵ Many other claims have been brought in the High Court, including, for example, several class action claims against cladding manufacturers for alleged building products defects filed within the past couple of years.⁴⁶ The leaky buildings crisis is an ongoing one, as many leaky buildings remain unrepaired (and continue to be bought and sold) or have been the subject of inadequate or faulty remedial work.⁴⁷ These cases continued to be filed and litigated throughout the period of this research.

E. *Conclusion*

This research project examines the pace of civil High Court cases, while taking into account this particular New Zealand context. In the next chapter, we attempt to conceptualise the concept of delay and briefly canvass the previous literature on delays, both nationally and internationally, before turning to the study itself.

⁴¹ Ironically, this research was delayed by the Kaikoura Earthquake of November 2016, which closed the Ministry of Justice building and temporarily prevented access to some of the data analysed in this report.

⁴² Nina Khouiri "Civil justice responses to natural disaster: New Zealand's Christchurch High Court earthquake list" (2017) 36(3) Civil Justice Quarterly 316 at 318.

⁴³ For further information and inter-disciplinary discussions about New Zealand’s leaky buildings crisis, see: Steve Alexander *The Leaky Buildings Crisis: Understanding the Issues* (Brookers, Wellington, 2011).

⁴⁴ At 4 and 38.

⁴⁵ Pursuant to the Weathertight Homes Resolutions Services Act (2006) Act. The Tribunal’s resolution services include negotiation mediation and adjudication. For an overview of options available to home owners, see: <https://www.building.govt.nz/resolving-problems/resolution-options/weathertight-services/> [accessed 30 August 2017]; Dan Parker and James Wollerman *Leaky Buildings – Current Issues and Recovery Options* (New Zealand Law Society CLE, Wellington, 2017).

⁴⁶ At 1.

⁴⁷ At 1.

2. Previous Research on Delay

Empirical research investigating court delays dates back to the 1950s in the United States but has a much more recent genesis in New Zealand. In this chapter, we survey the history of this research, including attempts to conceptualise and measure delay. Court delay is a notoriously difficult area of study. As Resnik commented in 1984, the literature at that point had developed no consensus about the causes and cures of delay but had revealed the difficulties of analysing court data.⁴⁸ Identifying the causes of delay has posed an ongoing challenge to researchers, as we will discuss in the New Zealand context.

A. History of Delays Research

Empirical research on the pace of litigation has a relatively long history internationally. Beginning in 1959 with the United States study on *Delay in the Court*,⁴⁹ there was then a surge of research in the 1960s and into the early 1970s that had a both a normative and practical focus. Legal commentators had, by the 1960s, recognised the need for researchers to undertake “systematic fact-finding” in the “field” rather than “arm-chair cerebrating” in the law library, as a new way of examining problems of judicial administration.⁵⁰ “It will no longer do”, as one scholar noted in 1965, to merely “assume or argue about what the situation may be if evidence can be obtained to show what it is.”⁵¹

What Church calls the “old wisdom”, coming from this first line of research, was that delay was a problem that could be fixed by “matching more resources to workload”.⁵² These studies also suggested that more formal procedural control of the pace of litigation would ameliorate the “problem” of delay.⁵³

This wisdom was then challenged by a series of studies conducted by the United States National Centre for State Courts and other bodies in the late 1970s and the 1980s. These studies:⁵⁴

... demonstrated that the link between formal procedural rules and lawyer behaviour is weak and drew attention to the importance of studying the informal relationships between all characters involved in the processing of cases...

Attention therefore shifted towards investigating the more nuanced contributors of delay (e.g. legal culture). To achieve this, researchers conducted empirical investigations, using qualitative and quantitative research methodology, of both user and system perspectives of delay.

⁴⁸ Judith Resnik “Managerial Judges and Court Delay” (1984) 23 Judges Journal 8 at 11.

⁴⁹ Hans Zeisel, Harry Kalven and Bernard Buchholz *Delay in the Court: An Analysis of the Remedies for Relayed Justice* (Little, Brown and Company, Boston, 1959).

⁵⁰ Maurice Rosenberg “The Literature on Court Delay” (1965) 114 University of Pennsylvania Law Review 323.

⁵¹ At 324.

⁵² Thomas Church “The “Old and the New” Conventional Wisdom of Court Delay” (1982) 7(3) Justice Systems Journal 395 at 396.

⁵³ Scott “Case Flow Management in the Trial” in Adrian Zuckerman and Ross Cranston (eds) *Reform of civil procedure: Essays on ‘Access to justice’* (Clarendon Press, Oxford New York, 1995) at 4.

⁵⁴ At 4.

1. *International Empirical Investigations of Delay*

Divergent empirical research methods have been used to investigate how cases progress in the civil justice system. Predominantly, researchers have employed quantitative methods to analyse existing datasets,⁵⁵ or contemporaneously record ongoing trial data.⁵⁶ These datasets can then be compared across time periods⁵⁷ or jurisdictions.⁵⁸ This methodology, while convenient, is often insufficient to achieve the prescribed aim of quantifying delay. There are real concerns about the accuracy of official data. It is collected by officials, not for research but for internal purposes, and researchers have no control over what is collected or how it is collected.

To overcome the difficulties of analysing existing datasets, some researchers have built their own datasets by analysing a subset of cases.⁵⁹ This methodology requires researchers to physically review existing court files and make their own record of case progression. This detailed analysis is costly and time consuming, however, so often only a small sample is précised, which of course raises legitimate questions about the generalisability of any findings. In some jurisdictions, the need for undertaking this painstaking work is being overcome by digitising court documents. As the authors in a recent United States study note:⁶⁰

The days of visiting the courthouse to pore over paper dockets and files are becoming fewer and fewer. This study would not have been possible, or certainly would have been more circumscribed, had the research team been limited to paper dockets and files.

Some commentators have argued it is ineffective to attempt to answer complex questions about delay with quantitative analyses alone and qualitative insights are also necessary.⁶¹ As sociologist William Cameron famously stated: “Not everything that can be counted counts, and not everything that counts can be counted”.⁶²

Various researchers have included a qualitative component in their studies. For example, Church’s study included court observations and interviews,⁶³ the RAND study included interviews and

⁵⁵ See for example Church, above n 52; Michael Heise "Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time" (2000) 50 Cornell Law Faculty Publications 813; Don Weatherburn and Joanne Baker *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (New South Wales Bureau of Crime Statistics and Research, 2000).

⁵⁶ See for example Dale Anne Sipes and others *On Trial: The Length of Civil and Criminal Trials* (National Center for State Courts, 1988).

⁵⁷ See for example Molly Selvin and Patricia Ebener *Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court* (RAND Institute for Civil Justice, 1984); Joel Garner "Delay Reduction in the Federal Courts: Rule 50(b) and the Federal Speedy Trial Act of 1974" (1987) 3(3) Journal of Quantitative Criminology 229.

⁵⁸ For example, see Giuliana Palumbo and others "The Economics of Civil Justice: New Cross-country Data and Empirics" (2013) (1060) OECD Economics Department Working Papers .

⁵⁹ See for example Janet Chan and Lynne Barnes *The Price of Justice? Lengthy Criminal Trials in Australia* (Hawkins Press, Sydney, 1995); Chris Corns *Anatomy of Long Criminal Trials* (Australian Institute of Judicial Administration, 1997); Miller, above n 2.

⁶⁰ Institute for the Advancement of the American Legal System (IAALS) *Civil Case Processing the the Federal District Courts: A 21st Century Analysis* (IAALS, 2009) at 19.

⁶¹ See for example Australian Centre for Justice Innovation, above n 15; Hon Chief Justice Martin "Timeliness in the Justice System: Because Delay is a Kind of Denial" (Paper presented at the Australian Centre for Justice Innovation Timeliness Project, Monash Law Chambers, Melbourne, 17 May 2014).

⁶² WB Cameron *Informal Sociology: A Casual Introduction to Sociological Thinking* (Random House, Michigan, 1963).

⁶³ Thomas Church *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Centre for State Courts, 1978).

postal surveys,⁶⁴ and Chan and Barnes surveyed court participants about factors they considered might be causing delay.⁶⁵ These methods can supplement and provide explanation for delay that are not available using quantitative methods alone. This was the approach used in a recent United States study where the authors considered qualitative data might supplement their investigation of “four non-quantifiable (or at least less quantifiable) factors that may contribute to the variation in time to disposition of like cases across courts: (1) the local legal culture; (2) the culture of the district court; (3) transparency; and (4) judicial leadership”.⁶⁶

2. *New Zealand Empirical Investigations of Delay*

In 2010-2011, the New Zealand High Court conducted its own investigation of civil case progression in 2010-2011 using a review of physical case files, as we discussed in the previous chapter.⁶⁷ Contemporaneously, Righarts and Henaghan investigated case progression in the High Court by analysing Ministry of Justice provided data.⁶⁸ Righarts and Henaghan found that most cases do not proceed to the point of being allocated hearing dates and are resolved relatively quickly: median time being 210 days in 2005, and 136 days in 2010. The average time it took for cases to be resolved after an allocation of a hearing date, however, was of course longer, and kept relatively constant across the five years, with a median time of 483 and 504 days respectively. These authors concluded that public perception on delay was not supported empirically, with only a small subset of cases being slow to resolve. This paper, however, takes a very high-level view of case progression; examining changes in median time to disposition across a number of years. As discussed later in this report, we have reason to question the reliability of the Ministry of Justice’s reported data that this research relies on.⁶⁹

The only other New Zealand contribution to delays research has been a proposed “comprehensive methodology” to “explain behavioural and structural determinants of civil case disposition time”.⁷⁰ Led by Economides, this project attempted to set about the very difficult task of developing a framework of *all* possible contributors that might cause – or at the very least influence – delay, to enable comparison across jurisdictions. Drawing on the previous literature the authors summarise the possible factors as follows:⁷¹

- 1) Judicial Structures and Resourcing. Relevant factors include:
 - a. Number of Judges
 - b. Availability of Courtrooms
 - c. Allocation of Judicial Resources
 - d. General Court Infrastructure
- 2) Institutional Practices of the Court. Relevant factors include:
 - a. Case Management Methodology

⁶⁴ James Kakalik and others *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* (RAND Institute for Civil Justice, 1996).

⁶⁵ Chan and Barnes, above n 59.

⁶⁶ Institute for the Advancement of the American Legal System (IAALS), above n 60.

⁶⁷ See p. 4 of this report.

⁶⁸ Saskia Righarts and Mark Henaghan "Delays in the New Zealand Civil Justice System? Opinion v Fact" (2011) 12(3) Otago Law Review 455. See also Rachel Laing, Saskia Righarts and Mark Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Legal Issues Centre, 2011).

⁶⁹ See Chapter 5, and Appendices A and B, for further discussion on this point.

⁷⁰ Kim Economides, Alfred A Haug and J McIntyre "Towards Timeliness in Civil Justice" (2015) 41 Monash University Law Review 414.

⁷¹ At 440-444.

- b. Alternative Resolution Methods
 - c. Decision-making Requirements
 - d. Judicial Experience and Specialisation
 - e. Judicial Training and Competence
 - f. Extra-Curial Judicial Activities
- 3) Behavioural and Cultural factors. Relevant factors include:
 - a. Judicial Behaviour
 - b. Lawyer Behaviour
 - c. Parties' Behaviour
- 4) Dispute Complexity and Legal Factors. Relevant factors include:
 - a. Legal Complexity
 - b. Factual Complexity
 - c. Technical Complexity
 - d. Litigation funding
- 5) Environmental Factors (which are outside the control of the courts). Relevant factors include:
 - a. Human factors (e.g. illness)
 - b. Natural factors (e.g. earthquakes)
 - c. Economic factors (e.g. GFC)

Economides and colleagues critiqued the limited statistical analyses conducted in previous empirical studies and attempted to devise a new method that would enable a comprehensive quantitative analysis of delay: echronometrics. In theory, echronometrics builds upon standard regression analyses by allowing researchers to control for endogeneity,⁷² and to include in one statistical model the full spectrum of variables that may – or may not – contribute to delay. These authors proposed that this statistical model would allow quantitative analysis not only in New Zealand but would be standardised so it could produce internationally comparable results. This was very ambitious given the large number of variables at play in any one system and the differences between each system. The feasibility of this model remains untested, but we have several concerns. Namely, the model presupposes that all the variables are measurable (either directly or through proxy variables) but little guidance is given as to how. Our experience in conducting this research is that proxies are simply unavailable to measure many of these factors. Further, the model fails to take into account that some variables can be measured in more than one way, which might deliver very different outcomes.⁷³ For these reasons, we have not attempted to implement this methodology.

B. Conceptualising Delay

A very real conceptual problem of arriving at an objective measure of delay underlies the methodological difficulties in studying court delay. A civil justice system deals with dynamic and variable human disputes, with many players, who often have competing goals. It is naïve, therefore, to assume that delay can be easily defined. Delay cannot simply be equated with time passing. Some lapse of time is required for the “proper administration of justice”.⁷⁴ Even simple matters

⁷² Endogeneity is where there is a loop of causality between the independent and dependent variables.

⁷³ Considering lawyer behaviour illustrates this conundrum. An experienced lawyer will likely progress a case efficiently, which will reduce delay. Lawyer seniority as a proxy variable could capture this effect. Conversely, senior lawyers are more likely to be busy and have timetable clashes with the court calendar, and increase delay. Lawyer caseload as a proxy variable could capture this effect. We question whether the model can include both of these proxy variables.

⁷⁴ Martin, above n 61 at 22.

need to give the opposing party the time to consider and respond to the claims of the initiating party, and for the judge to consider those positions and come to a decision. Furthermore, “delay operates as a form of rationing. It imposes cost on court users and deters prospective litigants from coming to court”.⁷⁵ Legal need is elastic and therefore the court system can never hear all the potential claims that exist and distributive choices must be made:⁷⁶

[I]n a world of expanding capabilities and rising expectations, where claims of injustice proliferate, we cannot avoid the necessity of rationing justice. Justice is not free. It uses up resources – money, organization, and not least, the limited supply of attention. Every expenditure of these involves corresponding opportunity costs. And justice is not the only thing we want.

There may, therefore be, an optimal level of delay that both meets genuine need and rations the availability of court resource.⁷⁷

The concept of delay is subjective – both within a particular group (e.g. what one litigant may perceive to be a timely resolution might be far too long for another litigant) and across groups (e.g. the judiciary might consider x amount of time reasonable but litigants might consider it too long). As Feeley summarises, “... one of the problems facing the courts is that they are held accountable to a bewildering array of standards by people with quite distinct views”.⁷⁸ There is no escaping from the fact that delay is a subjective concept.

International public perception surveys, of both users and non-users of the system, have garnered interesting insights on delay. These types of studies have consistently shown, for example in the United States of America,⁷⁹ Australia,⁸⁰ and the United Kingdom,⁸¹ that the public perceive civil justice to be cumbersome, expensive, and slow.

Public perception surveys have also been conducted in New Zealand. For example, between 1999 and 2006, the Ministry of Justice annually commissioned an annual survey of 1,000 New Zealanders. In 2006, 59 per cent of participants believed that courts could not provide services without unnecessary delay.⁸² Participants who had actually been in a court building had stronger concerns about delay: 65 per cent believed that courts could not provide services in a timely way.⁸³ Righarts and Henaghan more recently surveyed 1,875 New Zealanders.⁸⁴ Only 23 per cent of

⁷⁵ Miller, above n 2 at [11].

⁷⁶ Marc Galanter "Access to Justice in a World of Expanding Social Capability" (2010) 37(1) Fordham Urban Law Journal 115 at 128.

⁷⁷ Giovanni Ramello and Stefan Voigt "The economics of efficiency and the judicial system" (2012) 32 International Review of Law and Economics 1, noting that scant scholarly attention has been paid to the question of whether there exists an optimal level of court delay.

⁷⁸ Feeley, above n 2 at 7.

⁷⁹ For example, see M/A/R/C Research *Perceptions of the US Justice System* (report commissioned by the American Bar Association, 1999).

⁸⁰ For example, see Victorian Law Reform Commission *Civil Justice Review: Report* (Victorian Law Reform Commission, 2008) at 10.

⁸¹ For example, see Hazel Genn and Sarah Beinart *Paths to Justice: What People Do and Think about Going to Law* (Hart, Oxford, England; Portland, Oregon, 1999).

⁸² Ministry of Justice *Public Perceptions of the New Zealand Court System and Processes* (March 2006). Unfortunately, the Ministry of Justice no longer conducts this survey.

⁸³ At 24.

⁸⁴ Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12(2) Otago Law Review 329. Respondents were asked to rate on a 5-point Likert scale how

participants believed that a case would be completed within a reasonable timeframe if it went to court. Given a legal system is designed to serve the citizens it governs, it is critical that the public perceive the civil justice system to be just and fair.⁸⁵ Public perception of delay might not, however, reflect the actual reality of how cases progress in court.

1. *Time Standards*

Due to the subjective nature of delay, more recent efforts to consider court delay have rejected the delay terminology and adopted “timeliness”.⁸⁶ This is the terminology used in the International Framework of Court Excellence which provides benchmarks for the progression of civil cases.⁸⁷ These benchmarks are called “time standards” and are a method for objectively measuring timeliness in case progression.

Time standards are “intended to establish a reasonable set of expectations for the courts, for lawyers, and for the public”.⁸⁸ They may be used in different ways by these different stakeholders:⁸⁹

Courts use time standards to set achievable benchmarks; lawyers and other practitioners can use them as milestone guides; and the public can use them to inform their expectations. Governments use time standards to gauge the impact of legislative reforms and as a platform in supporting justice initiatives.

The New Zealand High Court has implemented time standards. The Court expects 80 per cent of short cases (i.e. estimated hearing \leq 5 days) to be scheduled within 12 months of being readied for a hearing and within 18 months for 80 per cent of long cases (i.e. estimated hearing \geq 5 days).⁹⁰ “The judges of the High Court expect that 90 per cent of decisions will be delivered within three (3) months of the last day of hearing or receipt of the last submission” (excluding court holidays).⁹¹ Achievements against these benchmarks are publicly reported.⁹²

2. *Defining Timeliness or Delay*

The Australian Centre for Justice Innovation ‘The Timeliness Project’, established in 2013, warned against conflating timeliness with time standards.⁹³ They acknowledged the temptation of conflating the concepts:⁹⁴

much they agreed with the statement: “I believe my case would be completed within a reasonable amount of time if I went to court”.

⁸⁵ There is a substantial body of literature on the importance of the perceptions of fairness to legitimacy. See for example Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006).

⁸⁶ Australian Centre for Justice Innovation *The Timeliness Project: Background Report* (Australian Centre for Justice Innovation, Monash University, 2013); Economides, Haug and McIntyre, above n 70 at 418.

⁸⁷ International Consortium for Court *The International Framework for Court Excellence* (March 2013); International Consortium for Court *Global Measures of Court Performance* (June 2017).

⁸⁸ Richard Van Duizend, David Steelman and Lee Suskin *Model Time Standards for State Trial Courts* (2011) at 1.

⁸⁹ Australian Centre for Justice Innovation, above n 86 at [2.42].

⁹⁰ Justice Geoffrey Venning “Report from the High Court 2015: The Year in Review” (17 May 2016).

⁹¹ Courts of New Zealand “Judgment delivery expectations: Reserved Judgments” (2017) <<https://www.courtsofnz.govt.nz/>>.

⁹² Venning, above n 90 at 1-20; Courts of New Zealand “Annual statistics for the High Court - year ended 30 June 2015” (2015) <www.courtsofnz.govt.nz>; Courts of New Zealand, above n 91. See also p. 13 and p. 37 of this report.

⁹³ Australian Centre for Justice Innovation, above n 86.

⁹⁴ At 86 at [2.4].

Time standards... provide the main context for how timeliness is measured and defined... . They are also a means by which to measure delay, usually determined by examining the time taken for a dispute to progress to resolution.

However, these scholars consider that time standards are limited to a court perspective rather than a broader justice system or litigant perspective. Time standards measure from the date the dispute enters the formal justice system (i.e. filing statement of claim) until the dispute is resolved (i.e. delivery of judgment).⁹⁵ They argue that reducing timeliness to the marking off of time in the court calendar leaves little room to consider litigants' experiences.⁹⁶

The Timeliness Project advocated for the development of a broader, objective, theoretical framework from which the courts and policy makers could evaluate timeliness.⁹⁷ In doing so they considered the International Consortium for Court Excellence's definition of timeliness.⁹⁸ Timeliness is one of the core values of courts expressed in the Consortium's International Framework for Court Excellence and is defined as follows:⁹⁹

Timeliness reflects a balance between the time required to properly obtain, present, and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.

They rejected this definition as too narrow and argued that any definition needs to place timeliness in the broader context of the justice system. They proposed the following alternative definition of timeliness:¹⁰⁰

The extent to which;

- a) Those involved in the dispute and within the justice system consider that every opportunity has been taken to resolve the matter prior to commencing or continuing with court proceedings;
- b) Processes are efficient and avoidable delay has been minimised or eliminated throughout the process on the basis of what is appropriate for that particular category or type of dispute; and
- c) The dispute resolution process that has been used is perceived as fair and just and where adjudication within courts and tribunals has taken place, the outcome supports the rule of law.

This definition is broader in that it takes into account time from the perspective of the litigant, including the time before court action commences. It also considers perceptions of fairness, and contextualises timeliness in relation to the "particular category or type of dispute". As a working definition to guide empirical investigation of timeliness, however, this definition still contains the subjective elements open to competing interpretations by different actors. Whether a process is "efficient", whether a delay is "avoidable", whose perception of fairness and justice counts, and

⁹⁵ Van Duizend, Steelman and Suskin, above n 88.

⁹⁶ Australian Centre for Justice Innovation, above n 86 at Chapter 2.

⁹⁷ At 86 at v.

⁹⁸ New Zealand and Australia are signatories to this Framework (via the Australasian Institute of Judicial Administration).

⁹⁹ National Centre for State Courts, above n 87 at 4.

¹⁰⁰ Australian Centre for Justice Innovation, above n 86 at [2.13].

whether or not an outcome supports the rule of law, are all factors open to argument. Indeed, the Timeliness Project itself never implemented any empirical research. Instead it gathered a forum of experts to discuss the initial report and then published a briefer Innovation Paper.¹⁰¹ The Innovation Paper discussed the need for more data to be able to carry out this type of research, including both quantitative and qualitative data.¹⁰²

Perhaps the underlying problem is that timeliness, or its negative mirror, delay, is not a single concept. As Feeley pointed out, more than 30 years ago:¹⁰³

Delay is a blanket term covering a host of different problems caused by various factors, all requiring different responses. Delay is not one problem; it is a variety of problems... In short, the word delay signals frustration over a variety of apparent inefficiencies in the court.

Attempting a global definition, therefore, will ultimately founder as too specific or too broad to be useful.

C. Our Approach

Internationally, there is a long and difficult history of delays research, as our review demonstrates. This research project is the first major New Zealand contribution to this body of literature. In drawing lessons from the past, and in trying to find a workable approach to the research questions, we have taken two approaches to the definition of delay:

1. We look at overall time to disposition. Time to disposition is one type of delay and a measureable one. It is closely associated with time standards and provides a useful measure of one aspect of delay.
2. We look at a more specific level, focusing on points where delay may, or is suspected to, occur. In these points we query what functions these delays serve (are they avoidable or purposeful, and for who) and whether there is evidence of inefficient process or insufficient resource.

To carry out this investigation we have drawn on the strengths of both quantitative and qualitative techniques, in a three-phase, mixed methods study. The phases involved analysis of data from the Ministry of Justice; our own review of case files; and interviews with lawyers, judges, court staff, and litigants. In the next chapter, we discuss how we carried out and integrated these three phases, and the strengths and limitations of the resulting data.

¹⁰¹ The forum of experts included members of the New Zealand judiciary: the Chief Judges of the High Court and District Court and the National Executive Judge: Australian Centre for Justice Innovation, above n 15 at 43-45; Australian Centre for Justice Innovation, above n 77.

¹⁰² At 9.

¹⁰³ Feeley, above n 2 at 182.

3. Methods

A. Overview of Research Design

This research used a mixed methods design, integrating an analysis of quantitative and qualitative data. Mixed methods designs first emerged in the late 1980s and are becoming increasingly entrenched in social science research.¹⁰⁴ They enable researchers to use both quantitative and qualitative data in answering research questions.

The mixed methods design selected was explanatory sequential multi-staged.¹⁰⁵ This framework requires the researchers to first gather and analyse quantitative data and then use these findings to inform qualitative data collection and analysis. The quantitative and qualitative data is integrated during collection, and analysis, within a single inquiry. There were three phases of data collection:

Phase	Source	Data
I	Ministry of Justice Data	Quantitative data provided by the Ministry of Justice extracted from the Ministry of Justice's case management system (CMS).
II	Court files	Review of a sample of physical court files (paper files held in the courts).
III	Interviews/ Focus groups	Qualitative interviews with judges, court staff, and litigants; focus group interviews with lawyers who practiced in the High Court in 2014/15.

The rationale for using this design was twofold. First, the research questions were complex, and a quantitative or qualitative method on its own would have been insufficient. Quantitative methods are useful for investigating the magnitude of an effect at a population level – that is, *what* is the pace of civil cases in New Zealand. Qualitative methods are useful for investigating why an effect might exist in a community – that is, *why* do litigation participants perceive the pace of civil cases in New Zealand to be fast or slow. We were able to explore the research questions in more detail, by using a combination of the two methods. Second, the mixed methods design promotes the integration of the quantitative and qualitative data during both the collection and the analyses of the phases. A mixed methods design required us to integrate the quantitative and qualitative findings by connecting, building, and merging the data.¹⁰⁶ A summary of the data analysed in this report appears in Table 3-1.

¹⁰⁴ For example, Robert Blake "Integrating Quantitative and Qualitative Methods in Family Research" (1989) 7 Family Systems Medicine 411.

¹⁰⁵ See Michael Fetters, Leslie Curry and John Creswell "Achieving Integration in Mixed Methods Designs – Principles and Practices" (2013) 48 Health Services Research 2134; John Creswell *A Concise Introduction to Mixed Methods Research* (SAGE Publications Ltd, Thousand Oaks, California, 2015) for further information on the three basic designs and four advanced mixed methods frameworks.

¹⁰⁶ Fetters, Curry and Creswell, above n 105 at 2139.

Table 3-1. Summary of data sources and participant sample

Phase	Data Collection Method	Number of files	Number of participants
I	Data from CMS of cases recorded as disposed between 1 July 2014 and 30 June 2015	5,666	
II	Review of general proceeding court files from the Auckland High Court	90	
III	Focus groups with lawyers (10 groups)		35
	Individual semi-structured interview with court staff		19
	Individual semi-structured interviews with judges		8
	Individual semi-structured interviews with litigants		3
Total			65

B. Approvals, Consultation, and Access

1. University of Otago Human Ethics Committee

The University of Otago Human Ethics Committee (UOHEC) approved the proposed research on 18 September 2015, with the proviso that the interview protocol for Phase III (then called Phase II) be provided once formalised. The amended ethics application was approved on 19 September 2016.

2. Māori Consultation

In addition to UOHEC approval, in September 2015 we consulted with the Ngāi Tahu Research Consultation Committee that considers potential research of interest or importance to Māori. The Committee suggested that ethnicity data be collected as part of the research project. Unfortunately, this data was not available for Phase I and II (the Ministry of Justice collected this data), and was not collected in Phase III. We are unable to make any comment on the findings as a function of ethnicity.

3. Judiciary and Ministry of Justice

To review the spreadsheet (Phase I) and access court files (Phase II) we needed the agreement of both the Ministry of Justice and the Chief High Court Judge. Agreement was reached on 27 August 2015. Conditions were put in place for how the data would be accessed, which were updated as the research progressed.

To invite court staff (Phase III) to be interviewed, we required the permission of the Ministry of Justice. This was granted on 3 November 2016 and then interviewees were invited via the court manager in each of the High Courts where we interviewed: Auckland, Wellington, and Christchurch.

Interviewing judges required an application to the Judicial Research Committee. Permission to invite judicial participation was confirmed on 22 November 2016. The Chief High Court Judge then circulated an invitation to the judges asking them to contact the research team if they were interested in participating.

C. Ethical Issues

To preserve confidentiality of the lawyers, judges, and court staff, we have used direct quotes in the text, but with no pseudonyms attached. This is so the quotes cannot be aggregated, by reference to such pseudonyms, to construct a composite picture that might be used to identify particular participants. The litigants are given pseudonyms but details of their case studies have been altered to protect confidentiality, identifying details removed or altered.

The participating lawyers, judges, and court staff were drawn from the three main centres, Auckland, Wellington, and Christchurch. We have attributed quotes only to the participant's role (e.g. "Court staff") and have omitted their location (e.g. "Court staff, Wellington" is not used) to further protect confidentiality. We have also deleted or amended references to parts of a quote that might identify the location of an individual. Gender has sometimes been changed if we considered it may identify the individual.

D. Data Set Construction

The data for each phase was collected and constructed in different ways, which are outlined briefly here.

1. Phase I

We encountered difficulties with the initial Phase I data set, which are outlined in Appendix A. These were resolved and the final Phase I sample comprised 5,666 civil cases that were disposed (i.e. final determination or interim substantive determination) between 1 July 2014 and 30 June 2015 in a New Zealand High Court.¹⁰⁷

2. Phase II

In this phase, two researchers (Drs Toy-Cronin and Irvine) physically reviewed the information held on file for High Court civil cases in the Auckland, Hamilton, Wellington and Christchurch High Court registries (April – June 2016). The data analysed for Phase II in this report is the physical review of a random sample of 90 general proceedings cases¹⁰⁸ at the Auckland High Court (January – March 2017). There were 732 general proceedings cases disposed in the Auckland High Court between 1 July 2014 and 30 June 2015. The random sample of 90 cases generated for review was therefore 12.3 per cent of the full sample.

The review of the physical case file involved reading the file and creating a précis of each case was recorded. In the précis, the following factors were recorded:

1. The case type (e.g., relationship property matter)

¹⁰⁷ See Chapter 5 and Appendix A for discussion on when cases are considered 'disposed' in the Phase I sample.

¹⁰⁸ General proceeding cases are described by the Ministry of Justice as cases where the plaintiff wants to recover money or settle a dispute with another person or an organisation.

2. Appearance by Litigant in Person (LiP)
3. Court events (e.g., statement of claim, memorandums, fixture allocations, notice of discontinuance)
4. Date of all court events
5. Filing party of all court events (e.g., plaintiff, registry)
6. A detailed description of the purpose of each document.

Across the 90 cases, 2,418 individual court events (i.e., lines of data) were recorded, with an average of 27 court events occurring per case ($SE = 2.78$; Range = 1 – 147). See Figure 1 for an example of the précis from a portion of a case.

Figure 1. An example of the précis in Phase II¹⁰⁹

1	Case Type	Document	Date	Filing Party	Purpose
2	...				
3	Intellectual Property	Joint Memo	13/05/13	All Parties	Discovery has not been completed because settlement discussion began after first CMC. There is a settlement proposal being considered; resolution likely. Request 15/5/13 CMC be adjourned.
4		Minute	13/05/13		CMC adjourned until 10/7/13
5		Joint Memo	7/07/13	All Parties	Substantial progress towards settlement. Request adjournment of CMC.
6		Minute	9/07/13		CMC adjourned until 13/10/13 for settlement discussion to continue.
7		Fixture Allocation	9/09/13	Registry	Presiding Judge no longer sitting in Auckland Registry, and file reassigned. New CMC date of 23/10/13 assigned.

3. Phase III

This phase involved interviews with those who are involved in High Court cases: Justices and Associate Judges of the High Court, lawyers, court registry staff, and litigants. Lawyers were interviewed as part of focus groups and all other participants were interviewed individually. The focus groups were one hour in duration and the interviews were between 30 and 90 minutes.

a) Lawyer focus groups

From the Phase I data, we generated a random sample of 204 general proceeding cases that had been filed in the Auckland, Wellington, or Christchurch High Courts. Next, we ascertained whether the parties in the random sample were represented, and, if so, the name of their legal counsel. Where multiple lawyers were on record, we prioritised the lawyer we approached according to seniority and involvement in the case. We obtained the contact details for as many lawyers as possible from the New Zealand Law Society website, and then approached 352 senior

¹⁰⁹ Any identifying information and dates have been changed to ensure anonymity.

lawyers, by email, inviting them to participate in focus groups held in Auckland, Wellington, and Christchurch.

We conducted five focus groups in Auckland, three in Wellington and two in Christchurch (November – December 2016). A total of 35 lawyers took part (10% of lawyers approached).¹¹⁰ They all practiced in the High Court during 2014-15 and their years of experience are shown in Table 3-2 below. The majority of the lawyers were male ($n = 30$), the remainder were female ($n = 5$).¹¹¹ Four of the lawyers who participated were Queen's Counsel.

Table 3-2. Lawyers' years of practice experience

Years of Practice Experience	Number of lawyers
5-10 years	2
11-20 years	7
More than 20 years	26
	35

b) Judges

An invitation was circulated by the Chief High Court Judge inviting High Court Judges and Associate Judges, appointed before 30 June 2015, to participate in an interview. Four High Court Judges and four High Court Associate Judges participated in telephone interviews of between 40 minutes and one hour (December 2016 – March 2017). Of these Judges, four had 11-20 years' experience in their position, three had 5-10 years' experience, and one had less than five years' experience on the bench. These were semi-structured interviews that canvassed the Judges' views on factors that speed up or slow down cases, pressures placed on judicial performance, and control of the pace of litigation, High Court Rules regarding case management, the High Court's role in promoting settlement and ideas for reform related to pace. The questions were designed to closely parallel the questions asked in the lawyer focus groups to provide some comparability. Some questions also sought the Judges' opinions on issues raised by the lawyers in the focus groups.

c) Court staff

The Court Managers of each home court (Auckland, Wellington, and Christchurch) circulated an email to registry staff in their court, inviting staff who were employed before 30 June 2015, to participate in an interview. Court staff were interviewed in person at the Auckland, Wellington and Christchurch High Courts (January – February 2017). Interviews varied in length between 30 minutes and 90 minutes. This reflected the different staff members' level of engagement and knowledge of case progression. Nineteen court staff participated in interviews. The participants occupied a range of positions within the registry offices from managers to front desk staff. These

¹¹⁰ A further 16 lawyers indicated their willingness to participate but were unable to attend the focus groups due to unforeseen circumstances (e.g., illness, scheduling conflicts, and the Christchurch Earthquake on 13 November 2016).

¹¹¹ Gender identification was as read.

were semi-structured interviews which asked participants for their reflections on issues including: case file progression, scheduling and monitoring, judge allocation, the High Court Rules regarding case management, High Court centralisation, communication with litigation participants, ideal case length, and ideas for reforms related to pace.

d) Litigant interviews

We encountered significant difficulty recruiting litigants to participate in the study. The originally proposed method of recruitment was that the Ministry of Justice would send letters to litigants on our behalf inviting litigants to participate. This was because the Ministry of Justice was concerned that if we approached the litigants directly, the litigant might believe that the Ministry of Justice had compromised their privacy by revealing their contact details. This method was not possible, however, as when we reviewed the Phase I and Phase II data it became apparent that the Ministry of Justice does not hold contact details for most litigants. In almost all cases, only the lawyers' contact details are on record.

We instead developed an electronic survey that we would email to lawyers and ask them to forward it to their client. This would create only a small amount of additional work for lawyers who would need to forward the email invitation. We published an article in the legal press magazine *LawTalk* explaining the project and alerting lawyers to the possibility they would receive an email.

Using the same random sample of 204 cases that we had previously generated to contact the lawyers, we extracted, where possible, the name of the first plaintiff, first respondent, and the corresponding lawyer's contact details. We then invited 165 litigants – via an invitation email to their lawyers – to participate in the electronic survey. We have no way of knowing how many lawyers did forward the email, although we received some responses from lawyers (approximately 10) saying they had forwarded the survey. The response rate to the survey was exceptionally low however: four completed surveys were returned from the 165 invitations that were sent.

The final question on the survey asked if the litigant would be willing to participate in an interview about their experience of their case: three litigants agreed and were interviewed by telephone (March – April 2017). These three interviews (along with the three litigants' survey response) were analysed as case studies. We had reviewed the physical file for the case that two of these litigants were involved in.¹¹² We were therefore able to analyse their recounting of the experience of the case alongside the data from the court file.

E. Data Limitations

1. CMS Extracted Data

A number of limitations in the CMS extracted data were identified and had to be addressed prior to conducting the analyses.¹¹³ These limitations necessarily reduced the scope of the analyses that were initially envisaged for Phase I.

¹¹² The other litigant's case was heard in the Christchurch High Court, so we had not précised the physical file.

¹¹³ See Appendix A for further discussion.

2. *Reviewing Court Files*

The physical court files provide the best available, most complete source of data about the steps taken in a case. The court file provides useful detail that is not available in CMS and a means to cross-check the accuracy of CMS data (for example the date stamped on the statement of claim and the date entered in CMS); but the court file also has limitations for our research purposes.

We have used these documents to seek explanations for why steps in a case took the time they did. For example, an email from a lawyer to the registry explaining that a witness brief has been delayed because the witness is unavailable is a representation we have to take at face value. To an extent this is a safe assumption because lawyers, as officers of the court, have an obligation not to mislead the court in any way. Nevertheless, this could of course be a partial truth or not quite the whole story. The documents on the court file were produced for a specific purpose: for counsel, registry and judges to communicate. The witness brief may be delayed both because the witness is unavailable and because the client has encountered cash flow difficulties. The court file does not allow us to get to this level of detail. Judges' documents (e.g. minutes and judgments) are also potentially for other audiences including the appellate court and the general public. Judges' documents record information that the Judge considers relevant to these audiences but might leave out other details, for example misgivings the Judge might have about why an adjournment is being requested.

There are also inevitably some inaccuracies on the court file. We encountered some date stamps that were clearly wrong (e.g. an incorrect year on the stamp in a sequence of documents; the documents were in the correct order but the year was wrong). Documents can go missing from the file and we would not necessarily be able to identify this.

We have, therefore, interpreted the data from the court files with these limitations in mind. As a result, our claims based on this data are couched in tentative terms. They are the strongest evidence available but they are not infallible.

3. *Interviews*

The interviews with Judges, court staff and lawyers captured a range of views and experiences and has provided rich information for interpreting the Phase I and II data. A limitation of this study is our inability to include a wide range of litigant views. This is due to problems encountered accessing this group (see discussion above). Further research about litigant expectations about the pace of litigation, and the closely related questions about the costs of litigation (financial and otherwise), would be very valuable.

F. *Quantitative Data Analysis*

We used IBM SPSS Statistics 24 (SPSS) to conduct all of the quantitative data analyses. SPSS is widely used by social scientists for statistical analyses. SPSS was used to calculate the descriptive statistics (e.g., frequencies, means), and to conduct bivariate statistics (e.g., *t*-tests, ANOVAs, correlations).

1. *Phase I: Analysis of CMS Spreadsheet*

The 5,666 civil High Court cases that were disposed of in some way between 1 July 2014 and 30 June 2015, were inputted into SPSS for analysis. The Ministry of Justice spreadsheet contained 59 variables; we excluded 44 variables for the following reasons:

1. The variables were not required to address our research questions.
2. There were large counts of missing data that could not be overcome statistically.
3. The variable was not able to be manually merged¹¹⁴ for the 346 cases that had multiple lines of data in the Ministry of Justice spreadsheet.¹¹⁵

We retained 15 variables for analysis from the Ministry of Justice spreadsheet, and calculated three of our own variables (i.e. Variable 1; 8; 13). The following variables were inputted into SPSS for analysis (asterisk indicates the variables that were primarily used in the analyses):

1. Total number of lines of data in Ministry of Justice spreadsheet
2. Court (e.g., Auckland)*
3. Case Types (e.g., General proceedings)*
4. Total number of substantive applications disposed
5. List of substantive applications disposed
6. Date case disposed
7. Date first substantive application filed
8. Case length (calculated using the date differentials of variable 6 and 7)*
9. Ministry of Justice case length (calculated by summing the intervals between substantive filing and disposal for each case)
10. Date case exited hearing phase (i.e., trial concluded)
11. Date case exited judgment phase (i.e., judgment entered)
12. Ministry of Justice case judgment phase duration (provided by Ministry of Justice)
13. Judgment duration (calculated using date differentials of variable 10 and 11)*
14. Scheduled defended hearing duration
15. Number of scheduled trial dates
16. Actual defended hearing duration
17. Nature of claim type
18. Number of interlocutory applications disposed

¹¹⁴ See Appendix A for further discussion on how we carried out the merging of data.

¹¹⁵ For example, discrete variables (e.g., case disposal type: non-judicial, non-trial adjudication, trial adjudication) were not able to be merged when they differed across lines of data for the same CIV number. We decided to prioritise accuracy (and not make assumptions), and accept that we could only conduct limited analyses on the Phase I data. See Appendix A for further discussion.

2. *Phase II: Review of General Proceeding Civil Case Files*

A researcher coded the précis for each of the 90 general proceeding cases reviewed in Phase II. First, each court event was coded as having occurred in one of the following phases:

1. Pre-pleading: date from when a document is filed (e.g., urgent document), up until date when pleadings are filed.
2. Pleading: date from when the statement of claim is filed, up until the date the judge engages in first act of case management (e.g., a minute, or the first CMC).
3. Case Management: date from first act of case management (e.g., a minute, or the first CMC), up until the date that the judge says the case is ready to be set down for trial (e.g., minute allocating a trial date).
4. Pre-trial: date that the judge says the case is ready to be set down for trial (e.g., minute allocating a trial date), up until date trial starts.
5. Trial: date that the trial starts, up until either: 1) date of the last day of trial; or 2) date final closing submissions filed; or 3) date court informed that parties have settled (e.g., memorandum or notice of discontinuance).
6. Judgment or Settlement: date that trial concludes, or court notified that parties have settled, up until the date that all outstanding matters are finalised (e.g., costs judgment, settlement finalised and parties file notice of discontinuance).

Next, using the dates in the précis, a time interval was calculated between each individual event. The researcher then coded each time interval to explain – based on the purpose – what the event was, what was going on during that interval (e.g., service of documents, judicial management, or general document preparation), and who was driving that act (e.g., court staff, Judge, or expert). Across the 90 cases, 2,323 intervals were coded. See Figure 2 for an example of the coded précis in Phase II.

Figure 2. An example of the coded *précis* in Phase II

1	Case Type	Document	Phase	Date	Filing Party	Event	Interval (days)	What's Going On	Who's Driving It	Purpose
2	...									
3	Intellectual Property	Joint Memo	Case Management	13/05/13	All Parties	Consent/Joint Memorandum				Discovery has not been completed because settlement discussion began after first CMC. There is a settlement proposal being considered; resolution likely. Request 15/5/13 CMC be adjourned.
4								Conferring/ Negotiating 0 Settlement	Parties	
5		Minute	Case Management	13/05/13		Mention/Call				CMC adjourned until 10/7/13
6								Judicial Management 55	Parties	
7		Joint Memo	Case Management	7/07/13	All Parties	Consent/Joint Memorandum				Substantial progress towards settlement. Request adjournment of CMC.
8								Conferring/ Negotiating 1 Settlement	Parties	
9		Minute	Case Management	9/07/13		Mention/Call				CMC adjourned until 13/10/13 for settlement discussion to continue.
10								Judicial Management 63	Parties	
11		Fixture Allocation	Case Management	9/09/13	Registry	Fixture Allocation				Presiding Judge no longer sitting in Auckland Registry, and file reassigned. New CMC date of 23/10/13 assigned.
12	...									

The coding of this data was checked by two researchers before being inputted into SPSS for analysis.

G. Qualitative Data Analysis

The focus groups and interviews were audio recorded, transcribed and then analysed in the qualitative data software NVivo. The coding approach was derived from thematic analysis, searching for patterns within the data. An initial coding structure was derived from a review of the literature. Some initial interview transcripts were subject to open coding, whereby the transcripts were read line by line to generate codes and refine the initial coding structure. The remaining transcripts were coded using the coding structure. Next, using inductive reasoning, the extracted codes were reviewed to determine what themes were present in the data. Finally, we reviewed and refined our themes, which were then grouped according to the core research questions. The process was cyclical, with the interview text continually referred to while each theme was refined.

H. Mixed Methods Interpretation and Reporting Plan

While the discussion above sets out how each phase was analysed independently, this was not the end of the analysis. The mixed methods design meant that the data sets were connected, built, and merged in a number of ways, as set out in Table 3-3.

Table 3-3. Integration of quantitative and qualitative data collection methods

Approach	Description
Connecting	The data in each phase is connected through sampling methods. The sample in each phase is drawn from the same dataset. Phase I sample encompasses the full dataset; whereas, samples in Phase II and III comprise a stratified random sample of the full sample.

Building	The findings in each phase are built into the methodology of the next phase. The quantitative findings of Phase I and Phase II informed the content of interview questions that were posed during the focus groups and semi-structured interviews in Phase III.
Merging	The data from the first two phases were merged to allow for direct comparisons, which confirmed when further data collection was necessary.

The integration of the three phases during data collection and analysis required multiple steps, which are shown in Table 3-4. The starting point was to construct and analyse the quantitative data from Phase I and Phase II (Steps 1-2). Data comparison across these two phases resulted in the refinement of the dataset in Phase I (Steps 3-4; see Appendix A). Data integration across Phase I and II helped to develop interview protocols for Phase III (Steps 6-7).

From the analysis of the Phase III data, themes were developed. We then investigated whether there was any evidence for these themes in the quantitative data (Step 9, 12). To further explore one theme – whether particular litigant types (e.g. company vs individuals) relates to longer disposition times – we generated a random sample of general proceeding cases ($n = 512$) from the Phase I data, and quantified the types of litigants filing in the High Court (Steps 10-11).

Table 3-4. Illustration of steps taken in the mixed methods design

Steps	Phase I	Phase II	Phase III
1	Dataset development	Dataset development	
2	Data analyses	Data analyses	
3	<i>Data Comparison and Integration</i>		
4	Refine dataset ¹¹⁶		
5	Data analyses		
6	<i>Data Comparison and Integration</i>		
7			Dataset development
8			Data analyses
9	<i>Data Comparison and Integration</i>		
10	Dataset development		
11	Data analyses		
12	<i>Data Comparison and Integration</i>		

Results from the analyses conducted for all three phases are reported according to overarching themes. In Chapter 5 we report the quantitative analyses from Phase I and II, and set out how long cases do take – as far as we can tell. In Chapter 6, we evaluate the qualitative data from Phase III, and set out participants' perceptions about ideal case length. In Chapters 7 and 8, we rely on the data from all three phases to discuss pressure points in the lifecycle of a case, and the factors

¹¹⁶ See Appendix A for further details on this process.

that might alter pace. Before reporting the data analysis, we consider the costs of litigation, not only delay but also psychological and economic costs.

4. The Costs of a High Court Proceeding

High Court proceedings have both a public cost (the cost of providing the system, funded by tax and user-pays charges) and a private cost (the cost borne by the litigants). Semple suggests that the private costs for litigants can be broken into three categories:¹¹⁷

- i. Duration: in terms of the months (and sometimes years) over which the effort to obtain civil justice persists in a person's life;
- ii. Workload: in terms of the hours which the effort requires while it is on-going; and
- iii. Opportunity: in terms of the opportunity costs imposed by the time requirements of seeking civil justice.

The public costs could be similarly categorised:

- i. Duration: in terms of the time it takes for a court to dispose of the case;
- ii. Workload: in terms of the administrative and judicial time in monitoring and progressing cases; and
- iii. Opportunity: in terms of the temporal costs to other litigants who want to progress their own case.

Of course, these costs are related. Public costs are passed on, to a greater or lesser extent, to the litigants by way of court fees and taxes. Where the public costs are high – due to a long trial or many interlocutory applications – the corresponding private costs will also be high, as the litigant must pay for counsel to prepare and argue their case.

The temporal costs to litigants are also closely related to two other types of costs that Semple identified: financial and psychological.

A. *Financial*

The financial costs of a proceeding include the fees charged by a lawyer, court fees, and opportunity costs. The standard form of charging for legal services is hourly billing, which means there is a direct relationship between time and cost. A court staff member referred to the relationship between time and cost observing that, “generally, the longer something goes on in the courts, the more expensive it is” and if a case “drags on” it is “constantly bleeding money from a person”. Justice Kós has pithily summed up the problem: “Every time a file is picked up, it costs something. Every time it is put down it costs even more because, if there is a real gap in time, time and cost is spent relearning the file”.¹¹⁸

Lawyers were also cognisant of the relationship between time and financial costs. For example, a group of lawyers reasoned that cases should not exceed one year or it would be too expensive for the client: “Like with that four to five years, that’s usually yeah a couple of hundred thousand”.

¹¹⁷ Noel Semple "The Cost of Seeking Civil Justice in Canada" (2016) 93(3) Canadian Bar Review 639 at 660.

¹¹⁸ Kós, above n 3 at [16].

Lawyers also observed that the relationship between time and money was not straightforward. Although clients might want their case to proceed quickly, if lawyers expend a large proportion of effort in short period of time, this will concentrate the costs. The case will move forward quickly, but the client might also encounter a cash flow problem, as they are required to pay the monthly bill.

Lawyers also expressed concern about how costs and time might impact on just outcomes. Specifically, high legal fees will encourage settlement, even if this does not create a just outcome:

QC: We've made the process so expensive that 95% of cases do settle. The real question is, is it really justice?

Lawyer 1: Yeah well I don't think so.

QC: If people are being forced into settling

Lawyer 1: Yeah.

QC: ...because the process is so God damn expensive.

Lawyer 1: Yeah.

Lawyer 2: And you would say that the cost of even getting to being allocated a fixture is highly prohibitive let alone, let alone going to trial.

QC: Well I think we charge too much as lawyers but that is another issue. I mean it's outrageous – outrageous fees. I mean ... the other day ... I did a [case for a defendant]. Proceedings have just been issued ... , I think we had discovery – may have had a bit of a discovery – and their fees for the plaintiff after about two weeks was \$154,000.

Lawyer 1: Oh my God.

QC: It went to mediation, there's another \$30,000 they were saying ...

Lawyer 1: That's ridiculous.

QC: ... it was just insanity and you can see this guy [the plaintiff] – oh I was acting for a defendant so it suited me – but you could see this plaintiff saying, "I can't go to trial. I cannot. I've got to settle this right here right now, I've got to stop this clock". It's just crazy.

B. Psychological

Due to the very small number of litigant participants in our sample, we cannot make any generalisations about the psychological impact of litigation. But court staff were particularly sensitive to the emotional strain court proceedings place on litigants, especially if the litigation is protracted. One court staff member felt it was important to remind others that "behind these files are people's lives. It's not just boxes and papers. People's lives [are] on hold". Another court staff member explained:

We don't want it to take over and be drawn out over a long period of time because it's not fair on a person who is either owed this money or owes this money. Because for, even for a person who owes the money, they're just consistently going through that

worry of when it someone going to be knocking on my door to actually collect this money? ... You could just imagine how frustrated people can get if they're worrying about their families. ... What am I going to do? How am I going to pay my mortgage? And things like that. It, it's just incredibly unfair on everyone who's involved in that process to be subjected to that longer than they need to.

Ben's case study¹¹⁹ illustrates the psychological toll litigation can take on the users of the system. Although Ben was not a named party to the proceeding, the nature of the claim was such that he felt personally attacked. Ben's case also emphasises the link between psychological costs and delay.

Figure 3. Case Study - Ben, Commercial Dispute

Case Study – Ben, Commercial Dispute

A plaintiff company brought a proceeding against the company Ben worked for. The statement of claim included allegations about Ben's conduct as an agent of his company, so Ben was responsible for assisting the lawyers in preparing the defence. Ben acknowledged that he was "green" having never been involved in a court case before but did expect that the case would take last approximately one year. It took exactly two years from the original event that triggered the litigation until the plaintiff filed the claim. After the case was filed in court it took a further 845 days (2 years and 4 months) to conclude. During that period, there were eight interlocutory applications, of which four related to discovery.

The plaintiff's case collapsed during trial, vindicating Ben's belief that he had no case to answer: "I never felt, I never felt like I wouldn't win this thing". While the outcome cleared Ben, the case still had a significant emotional cost. He cited the time the case took as a major contributor to the stress he suffered: "If it had gone within a year, it would have been, you know been successful and you know we were all geared up ... but it dragged on for years. ... The whole thing was stressful really, ... really hard".

Ben felt unsupported as he believed that his employer did not share his confidence that there was no case to answer. His employer did not understand the facts, as Ben did, and had only seen the statement of claim that made damning allegations against Ben. Around the one year mark the head of the company sent the message "very, very strongly" that if the case was not successfully defended, Ben would lose his job.

Helping the lawyers prepare for the case considerably increased his workload. For Ben, the most onerous aspects (1) was sorting documents for discovery into defined categories that "kept shifting"; and (2) responding to multiple amended statements of claim:

It felt at times like being in the middle of a Kafka story. You know, those stories that were kind of circular and, and you know, like people caught up in dreams that they couldn't escape from. It felt like, it felt like, just like that actually.

Since the conclusion of this case, he has remained with his employer but on reduced hours so he can "step back and smell the roses a bit ... enjoy life a bit more". He considers his decision to reduce his working hours might not be a "bad outcome" but feels conflicted, because he would not have made this decision had it not been for the court case.

¹¹⁹ All names used in this report have been changed to protect participants' anonymity.

The emotional stress extends beyond Ben's professional life, and has also affected his health: "I went through a huge bout of depression ... I had irritable bowel and I couldn't sleep for ages". It also flowed over into "family stuff":

It impacts on all your relationships; it impacts on everything you know. I remember going on a school camp [as a parent help], spending the whole time working on statements of claim and then oh gosh, the same time, a year later [I was doing the same thing again]. 'Cos we thought that the case was going to be heard. So, there I was on the school camp, wasting two weeks of my life and then a year later, exactly the same again but on a different camp.

Ben never gave evidence as the plaintiff's case collapsed early in the trial. For Ben, this elicited mixed feelings. He was pleased it was over but disappointed he never had the opportunity to be formally cleared of any wrongdoing. Reflecting on this experience Ben said:

You know you, you wait three years without having the opportunity to prove you're innocent. It just seems so wrong. It's like putting an axe over your head, your neck for, for three years on the presumption that you might be guilty. ... So, to hasten that timeframe, that is what I would suggest.

C. Conclusion

This report focuses on the temporal costs of litigation, teasing out whether there is delay, where it occurs, and why. When thinking about reducing delays it is important to bear in mind that changing the pace of cases affects the financial and psychological costs. With that in mind, we now turn to the question of how long civil cases take.

5. How long do cases take? Can we even tell?

A preliminary step to making any findings about delay, is to determine how long cases take to proceed through the court. At first blush, this sounds like a relatively simple matter. In reality, it is much more complex. In this chapter, we present our findings on case length, using both Phase I and II data, while also traversing the various impediments to stating case length with any certainty. These impediments include defining when a case ends, how length is recorded, and what cases are included or excluded in calculating length.

A. How Long Cases Take

The length of Phase I cases ($N = 5,666$ cases) is presented in Table 5-1. Mean length of total case represents the time (in days) from when the first substantive application (i.e. statement of claim) was filed, through to when the case was finally disposed.¹²⁰ The mean length across all cases in the full sample was 191.52 days. The cases ranged in length from one day through to 3,983 days, with the median length being 85 days.

Table 5-1. Phase I case length

	N (% Total Sample)	Mean length of total case in days (SE)	Range	Median
Total Sample	5666	191.52 (3.91)	1 – 3983	85.0
Main Centres				
Auckland	2581 (45.55%)	192.95 (5.87)	1 – 3338	78.0
Wellington	749 (13.22%)	182.23 (10.75)	1 – 3732	88.0
Christchurch	686 (12.11%)	207.22 (11.62)	1 – 3983	94.5
Total (Main)	4016 (70.88%)	193.38 (4.71)	1 – 3983	82.0
Circuit Courts				
Blenheim	42 (0.74%)	165.26 (23.61)	2 – 582	107.5
Dunedin	148 (2.61%)	147.21 (19.82)	1 – 1914	70.0
Gisborne	35 (0.62%)	173.14 (38.26)	1 – 1330	103.0
Greymouth	32 (0.56%)	167.47 (27.58)	1 – 747	133.5
Hamilton	311 (5.49%)	196.69 (17.87)	1 – 2133	96.0
Invercargill	109 (1.92%)	188.47 (28.76)	1 – 2255	86.0
Masterton	23 (0.41%)	154.22 (66.68)	12 – 1555	73.0
Napier	113 (1.99%)	206.96 (28.59)	3 – 2201	100.0
Nelson	72 (1.27%)	228.54 (43.67)	1 – 1559	75.5
New Plymouth	60 (1.06%)	207.82 (35.56)	1 – 1227	93.0
Palmerston North	117 (2.07%)	197.62 (25.85)	1 – 1339	79.0

¹²⁰ See Appendix A for detail on how case length was calculated in the Phase I sample.

Rotorua	142 (2.51%)	178.77 (21.46)	1 – 1860	92.0
Tauranga	190 (3.35%)	198.92 (25.22)	2 – 3574	92.0
Timaru	52 (0.92%)	144.38 (21.50)	1 – 688	86.5
Wanganui	40 (0.71%)	147.05 (23.05)	8 – 686	91.5
Whangarei	164 (2.89%)	189.51 (19.17)	1 – 1512	96.5
Total (Circuit)	1650 (29.12%)	186.96 (6.99)	1 – 3574	89.0

1. *Case Length by Location*

The High Court operates as a national court with 19 centres. Table 5-1 presents the geographic distribution of the cases within the national court, across the main centres and circuit courts. The majority of civil cases were filed in one of the ‘home’ centres (i.e. Auckland, Wellington, or Christchurch), with these locations accounting for 70.88% of civil cases ($n = 4,016$); only a small portion of cases ($n = 1,650$; 29.12%) were filed in a circuit court. Reflecting the distribution of population and commercial activity, the largest proportion of cases were heard in Auckland ($n = 2,561$; 45.55%).

There is a national roster for the High Court, which aims to achieve similar disposal times across the centres.¹²¹ However, the experience of some counsel was that the circuit courts (where Judges visit, rather than are resident) had slower case processing times. Specifically, it was difficult to get dates for fixtures in the circuits: “trying to get a date for an application, you can be waiting months for a hearing date to get a relatively straight forward application heard” (Lawyer). The Phase I data did not allow us to specifically test whether the lawyers’ impressions were correct. We were able, however, to compare overall case length between the main centres and circuit courts. There was no significant difference in case length between the main centres and circuit courts.¹²² There was also no significant difference in case length across the three main centre courts (Auckland, Wellington, and Christchurch).¹²³ These findings suggest that the national roster is achieving the prescribed aim of similar disposal times across centres. These means are presented in Figure 4.

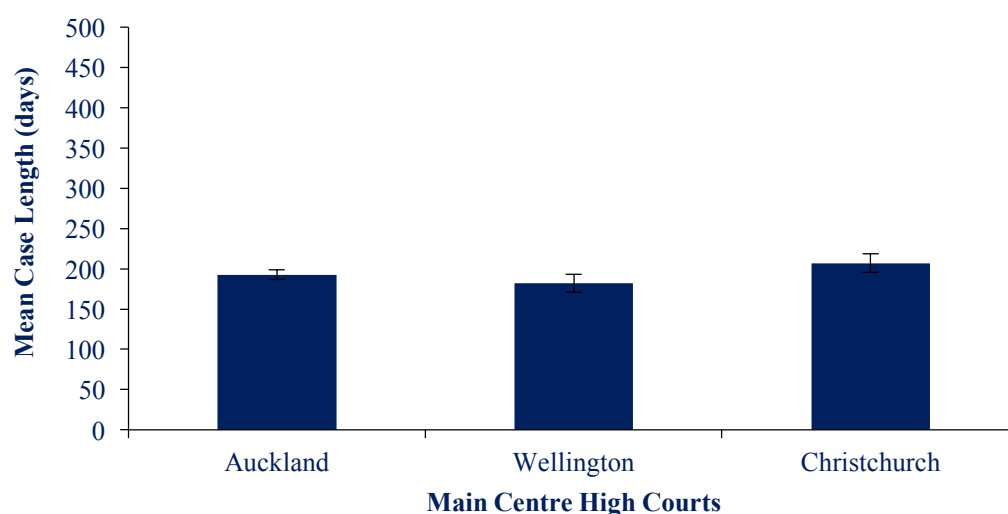
¹²¹ Correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017.

¹²² A Welch’s t -test revealed that there was no significant difference in length ($p = .456$).

Throughout this report we have used the more robust Welch’s t -test (or ANOVA in other analyses) because we had unequal variances and sample sizes between groups – this minimises the risk of Type I or Type II errors. See Graeme Ruxton “The unequal variance t -test is an underused alternative to Students t -test and the MannWhitney U test” (2006) 17(4) Behavioral Ecology 688 for further discussion.

¹²³ A one-way Welch’s ANOVA revealed there was no significant difference in length across the three main centres ($p = .287$) We were unable to conduct analysis of any difference across the 16 circuit courts because some of the sample sizes were extremely small and were unequally distributed across the circuit courts (e.g. Masterton $n = 23$; Tauranga $n = 190$). The risk of Type II errors (i.e. failure to detect an effect) in the analyses was deemed too high.

Figure 4. Mean case length of civil cases heard in the main centre High Courts



Next, we investigated how many cases *exceeded* the average case length. Only 25.1 per cent ($n = 1,421$) of cases exceeded the mean length of 191.52 days. Cases heard in the main centres were more likely to exceed the average length of case ($n = 1,043$; 26.0%), relative to cases heard in the circuit courts ($n = 378$; 22.9%).¹²⁴ We also investigated whether there were any geographical differences in the number of cases that took longer than average to resolve. Cases heard in the Christchurch High Court were significantly more likely to take longer than the average length to resolve ($n = 206$; 30.0%), relative to cases heard in the Auckland ($n = 650$; 25.2%) and Wellington High Courts ($n = 187$; 25.0%).¹²⁵

Based on the Phase I data alone, it is not possible to explain *why* cases filed in the main courts, and Christchurch in particular, were more likely to be longer than average, relative to cases filed in the circuit courts. Possible explanations include: (1) during this period there was a focus in disposing of very old files in the main centre courts;¹²⁶ (2) the Christchurch High Court's case progression times were affected by the significant litigation generated by the Canterbury Earthquakes, much of which was complex litigation;¹²⁷ (3) the nature of litigation filed in the main centre courts is more complex than that filed in the circuit courts; (4) there are resourcing differences between these courts resulting in different case progression times. There could also be other explanations. The Phase I data does not provide enough detail to tease these relationships out further.

¹²⁴ A Yates' continuity correction analysis was used: Yates' (1) = 5.674, $p = .017$, $\phi = .032$.

¹²⁵ Pearson's χ^2 analyses: $\chi^2(2) = 7.165$, $p = .029$, $\phi = .042$.

¹²⁶ Venning, above n 90 at 5: "Contrary to recent trends, average and median time to trial for general proceedings trial adjudications increased last year. This is a result of the focus on disposing of old files".

¹²⁷ See p. 73 of this report for further discussion of the complexity of CEQL cases. Cf the Chief High Court Judge reported that "The Earthquake List in Christchurch is functioning well ... Filings peaking for the Earthquake List in mid-2013. In 2015 over 90% of the cases which disposed, were settled" (pp. 5-6).

2. Case Length by Proceeding Type

The High Court divides civil disputes into six categories: appeals, bankruptcy, company liquidation, general proceedings, judicial review, and originating applications. Table 5-2 shows the frequency of each case type and the mean length of cases, as a function of case type.

Table 5-2. Frequency and mean case length across six case types

	N (%)	Mean length of total case in days (<i>SE</i>)	Range in days	Median in days
Appeals	317 (5.60%)	212.43 (14.75)	1 – 3732	159.0
Bankruptcy	1023 (18.06%)	96.50 (2.43)	1 – 632	67.0
Company Liquidation	1856 (32.78%)	100.47 (3.80)	1 – 2287	63.0
General Proceedings	1525 (26.88%)	381.06 (10.54)	1 – 3574	248.0
Judicial Review	190 (3.35%)	199.51 (13.78)	1 – 869	154.0
Originating applications	755 (13.33%)	150.37 (10.94)	1 – 3983	56.0

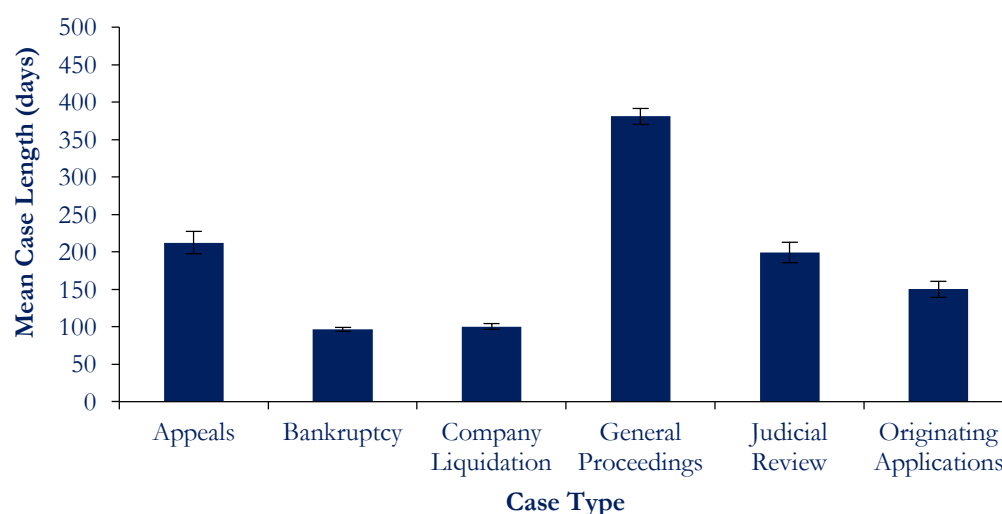
We investigated whether there was any difference in case length across case types.¹²⁸ Figure 5 shows some of these findings. There was no significant difference in length between bankruptcy and company liquidation cases ($p = .951$), but both of these case types were significantly shorter than the other four case types (all $ps < .001$). Together bankruptcy and company liquidations account for 50.84 per cent of the cases.

There was also no significant difference in the length of case between appeals and judicial review ($p = .988$), and the difference between judicial review and originating applications was only marginally significant ($p = .06$). These three categories of cases together account for 22.28 per cent of all the cases.

General proceedings took significantly longer to proceed than *all* other case types (all $ps < .001$). Figure 5 clearly shows that the mean length of general proceedings is much greater than any other category of case. This category alone accounts for 26.88 per cent of the High Court case load.

¹²⁸ We conducted a one-way Welch's ANOVA. A main effect of case type emerged, *Welch's* $F(5, 1119.65) = 159.96, p < .001, d = 0.41$. Post-hoc Games-Howell comparisons revealed a number of interesting findings presented in Figure 5. Post hoc Games Howell comparisons that have not been specifically discussed were all statistically significant ($p < .001$).

Figure 5. Mean length of total case in days as a function of the six case types



We also examined whether the number of cases exceeding the average case length (191.52 days) differed as a function of case type.¹²⁹ The results are shown in Table 5-3. Significantly more general proceeding, judicial review, and appeal cases exceeded the average length of case, relative to the expected number of cases. In contrast, significantly more originating application, bankruptcy, and company liquidation cases did not exceed the average length of case, relative to the expected number of cases.

Table 5-3. Percentage of cases across the six case types, that did or did not exceed the average length of case

	General Proceedings	Judicial Review	Appeals	Originating Applications	Bankruptcy	Company Liquidation
Percent cases exceed average (<i>n</i>)	57.2% (871)	37.9% (72)	40.1% (127)	16.3% (123)	9.3% (95)	7.2% (133)
Percent cases do not exceed average (<i>n</i>)	42.8% (653)	62.1% (118)	59.9% (190)	83.7% (632)	90.7% (928)	92.8% (1724)

B. Focus on General Proceedings

The analysis above shows that general proceedings are the longest cases and are much more likely to exceed the average case length. General proceedings also comprise a significant proportion of the courts total case load: 28.8 per cent.

The balance of this report will focus on general proceedings. We acknowledge that delays can occur in the other types of proceedings but as they are much shorter, general proceedings are the logical focus of this report. To try and study all types of proceedings in one report would be, as

¹²⁹ A Pearson's χ^2 analysis revealed that significantly more general proceeding ($p < .001$), judicial review ($p < .001$), and appeal ($p < .001$) cases exceeded the average length of case, relative to the expected number of cases ($\approx 25\%$). In contrast, significantly more originating application ($p < .001$), bankruptcy ($p < .001$), and company liquidation ($p < .001$) cases did not exceed the average length of case, relative to the expected number of cases, $\chi^2(5) = 1372.925$, $p < .001$, $\phi = .492$.

the Chief High Court Judge pointed out when first consulted about the project, “unduly ambitious”.¹³⁰ This is because each class of case has quite different dynamics that must be considered when untangling explanations for the pace of a case. These differences include types of parties (e.g. impecunious litigants in person are more common in bankruptcy cases than in general proceedings), the rules of procedure, and the professional participants (e.g. associate judge vs judge, different court staff, different sections of the bar). For the remainder of the report we focus on answering our research questions with respect to general proceedings.

C. Distorted Data and Shifting Sands

After the initial Phase I analysis, we began Phase II where we reviewed physical general proceeding files. As we carried out this exercise, we observed discrepancies between the Phase I and II data. Most notably, we found a difference between the mean length of general proceedings cases in the two datasets.¹³¹ We spent considerable time and effort to try and account for discrepancies in the data; despite these efforts, we were not able to reconcile all the differences. While we do not wish to clutter this report with the intricacies of these issues, they are potentially important given the likelihood that any public reporting of this data will shape public perception. As such, we have outlined these steps in detail in Appendix A and B.

Data extracted from CMS is publicly reported in two forums. Every six months, the Courts of New Zealand (CoNZ) report the workload statistics in the High Court for the preceding 12 months.¹³² The CoNZ reports on new court business, active cases, and disposals, separately for the criminal and civil jurisdictions. We understand, through conversations with the Ministry of Justice,¹³³ that the statistics reported on CoNZ are drawn directly from CMS. Additionally, the Chief High Court Judge annually produces a short report of the courts workload from the preceding year.¹³⁴ We understand that the reported trends in Chief High Court Judge’s report are also drawn directly from CMS.¹³⁵ The intention is that interested media and the public can therefore evaluate, with reasonable ease, how long cases are taking in the High Court. However, in conducting this research we have found reason to question the reliability of data drawn from CMS for the purpose of reporting.

1. Recording Issues

In this research project, we had a unique perspective on case length. We had access to: (1) public reports, (2) raw data from which these public reports were presumably generated, (3) a sample of physical files, and (4) the users of the system. These sources have allowed us to tease out any evidence of data distortion and consider the impact. We have recorded our analysis and speculations in Appendix B, as they are potentially of use to both the judiciary and Ministry of Justice in evaluating how data is being recorded and used. In the remainder of this section, we

¹³⁰ Letter from Chief High Court Judge Venning to Professor Mark Henaghan, 15 August 2015.

¹³¹ See Table 13-1 for a comparison of length of general proceedings in Phase I and Phase II.

¹³² These are published on the Courts of New Zealand website www.courtsofnz.govt.nz.

¹³³ This information was provided by Ministry of Justice staff to our researcher at a meeting to discuss the Phase I data held in the Ministry of Justice’s offices, Wellington, 12 December 2016.

¹³⁴ For example see Venning, above n 90.

¹³⁵ Correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017.

broadly outline the issues that have given us pause in relying on case length statistics generated from CMS data.

When dealing with datasets of this magnitude, it is inevitable that human error (e.g. data entry) or systemic error (e.g. computer programming) will creep in. We have illustrated a number of places where, in our view, there are potential errors in the Ministry of Justice dataset (see Appendix B). These potential errors must raise red flags about the reliability of any conclusions previously drawn from the Ministry of Justice data.¹³⁶ In this report, we took various steps to redress the identified data errors in the Phase I data (see Appendix A and B) prior to analysis, so we are reasonably confident in any subsequent conclusions that are reported here based on Phase I data.

Decisions about how, and which, cases are recorded in CMS can also distort the data. For example, a decision to omit a particular type of case from the data (e.g. historic abuse cases, see Appendix B), or to curtail when a case is recorded as active in CMS (e.g. cases are deactivated prior to cost issues being heard, see Appendix B) can give the appearance that cases are proceeding more quickly than they actually are. These decisions both minimise the perspective of the user (e.g. litigants are unlikely to consider their case finished or disposed when a costs decision is still to be made), and can have practical ramifications on efficiency (e.g. cases recorded as ‘disposed’ are less likely to be monitored and can therefore be overlooked by court staff). These examples illustrate how easily decisions about how data is recorded can cause distortion. This reinforces the need for transparent reporting procedures.

2. *Influences on Recording Decisions*

It is not always clear why decisions have been made about when cases are recorded in CMS as active, inactive, or are removed altogether (e.g. the historic abuse cases). One possible driver for such decisions, however, is a desire to reduce apparent overall case length. An example of this is given in Appendix B, concerning the issue of whether a case should be considered active or inactive during the costs phase. Including the costs phase has implications for case length (cases appeared longer) but allows for better monitoring (cases could be more easily reviewed in CMS). In the Phase One data, cost applications were excluded by the Ministry of Justice from the overall length of case – case length appears to trump the advantages of administrative monitoring. However, the Phase Three data suggested that that practice had recently changed, and the administrative goal of accurate monitoring has been considered more important. The decision was apparently made with full awareness that the appearance of average case length would be negatively affected. As the court staff member explaining the decision said, “But this is what it’s going to cost us. It’s going to cost us longer disposal time” (Court staff).

The desire to reduce overall case length may originate from the High Court’s own reporting goals or from Ministry of Justice goals. An example of a Ministry of Justice goal was a plan court staff referred to as the “Olympic Goals” or “Olympic Plan”. The court staff were not always clear on exactly what this plan entailed but they had the impression that they were, as a whole, expected to reduce the average age of cases by 50 per cent. Some court staff reported that their managers had

¹³⁶ For example, we have been cautious about how much we have relied on the published findings of the researchers who initiated this research, as their findings relied on Ministry of Justice data: Righarts and Henaghan, above n 68; Laing, Righarts and Henaghan, above n 68.

considered this unrealistic and set interim targets of 15 per cent or 30 per cent. In some circumstances, the targets were regarded as unrealistic because cases were already proceeding as fast as they could:

The Ministry had a target of fifty per cent faster, but we'd already reduced it from three years to one and the reality is, you cannot go quicker than one year. (Court staff)

The Ministry of Justice confirmed a “Higher Courts Olympic Plan” did exist, concluding in 2016.¹³⁷ They said that this plan comprised several facets, with timeliness of case disposal being one aspect. The goal, however, was to reduce the average age of active cases in the High Court by 20 per cent, not 50 per cent, by December 2015. Regardless of the actual figure, the interviews suggested the court staff had absorbed the message that average case length needed to be reduced.

Court staff had some difficulty, however, even assessing the average age of a case. CMS can produce an internal report on the average age of cases but one team leader suggested that the report was too hard to understand and instead they were simply looking at the CIV number. Each file is allocated a CIV (short for civil) number when it is filed in court. The CIV number includes the year of filing. So, in 2017, looking for files that begin “CIV-2014” (or CIV-2012, CIV-2013) will give the court staff a quick guide on the cases that are “old”. This technique is, in itself, fairly crude. The goal – whether 20 or 50 per cent – is an arbitrary goal. Time can be passing for good reasons (as is discussed in the next chapter) but this goal can create pressures on court staff, an issue discussed further in Chapter 9.

D. Conclusion

Data on length of case needs to be treated with an abundance of caution. Median case length can act as a bellwether for trends in case progression times but even medians can be affected by changes in how courts record case length, rather than any actual change on the ground. What might seem like a simple matter of ‘when does a case begin and end’ is actually much more complex once we scratch below the surface.

We are nonetheless reasonably confident in our own data on case length as we have corrected for many of the issues identified in the Ministry of Justice’s data. General proceedings have the longest average length and are also most likely to exceed the overall average case length. We therefore concentrate our analyses on this category of case. In the next chapter, we consider the length of general proceedings, not just in the descriptive sense, but as a normative question: how long should a general proceeding take?

¹³⁷ Email from Ministry of Justice to Dr Bridgette Toy-Cronin, 9 October 2017.

6. How Long Should Cases Take?

A. *Preliminary Notes*

Answering the question “how long should a civil case take to be resolved, depending on the nature of the proceedings?”, immediately poses some very significant conceptual problems:

- i. What is the “nature of a proceeding”? In this section, we concentrate only on general proceedings (already a sub-type of cases) but even within that category there is a huge variability across cases: number of parties, issues at stake, type of evidence, involvement of overseas parties or witnesses – the list goes on.
- ii. The length of time taken (how long) may involve periods of acceptable or even helpful delay; pausing a case to negotiate settlement being a prime example.
- iii. What is acceptable delay or passage of time to one participant in the proceeding (e.g. the judge) may not be to another (e.g. the litigant). Ideal length of case is in the eye of the beholder. Whose perspective do we take?

In this chapter, we consider the participants’ answers to questions about ideal length. We then attempt to unpick the implications of these conceptual conundrums, examining both participants’ perspectives, and what the Phase I and II data can tell us about general proceedings and ideal case length.

B. *What Participants said about Ideal Length*

We asked all participants what they considered the ideal length of an average general proceeding, from filing to disposition. One judge, one court staff member, and one lawyer’s focus group refused to be drawn on this, stating it was too difficult to say. All other participants provided a response, and there was significant consensus in the answers. Eight court staff, two focus groups of lawyers, and three judges stated that one year was an ideal length of time for an average general proceeding. Whereas five court staff, seven focus groups of lawyers, and four judges provided a range: one year being the lower end of the range and up to either 18 months or two years as the upper limit. There was, therefore, significant consensus around 12-18 or 12-24 months as ideal.

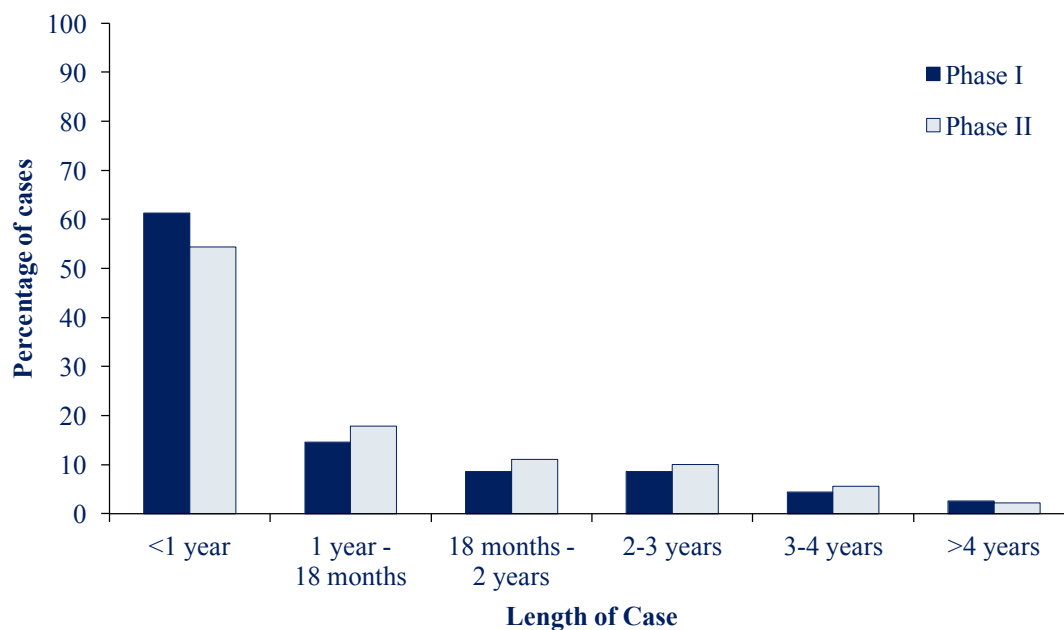
Many of the participants noted that there were exceptions to this ideal length. A number of court staff wondered whether one year is too long from the litigant perspective and commented that for some types of cases “sometimes a year is too long”. A few lawyers also shared this concern and felt that one year was usually within a client’s expectations but once it ran up to two years then that “is too long for the client”.

When discussing the upper end of the ideal length of cases, lawyers, judges, and a few court staff, noted that cases may need to run more than two years if they were very complex. Leaky building

cases and the *Dotcom* litigation¹³⁸ were commonly cited as examples of cases that were inevitably going to take more than two years.

When we grouped the Phase I and II cases according to length in years (see Figure 6), we found that case progression was largely consistent with the expectations of interviewees. In fact, the majority of cases took less than one year to conclude, and few cases exceeded two years in length (cases exceeding two years: Phase I = 15.5%; Phase II = 17.8%).

Figure 6. Distribution of the length of general proceeding cases for Phase I and Phase II



In weighing up their answers about case length, most participants considered that anything under six to nine months was not possible, simply because of the need to prepare and serve documents, give the opposing party time to reply, have room to argue the case, and then for a judge to give a judgment. Two court staff also made comments about the risk of a case going “too fast” for the litigants. As one explained:

A year feels about right. Whereas if that went from a year down to three months, it's like that's just way too quick and yeah people just haven't had that chance to kind of get over it.

We now turn to the difficult issues that underlie interpreting this data: the variable nature of general proceedings, the relationship between the reasonable or even beneficial passage of time and delay, and the different perspectives on ideal length between different types of participants (e.g. judges vs litigants).

¹³⁸ This is a series of litigation relating to extradition proceedings for Kim Dotcom see e.g. *United States of America v Dotcom* [2012] NZHC 2076.

C. The Variable Nature of Cases: “We’re not making Model T Fords here”

Variability is one of the most striking features of the High Court case load:

It’s what we try and explain to the Ministry is actually we’re not dealing with a process that applies to you know each ... we’re not making Model T Fords here. It’s not just a standardised process. Each case is actually different. (Judge)

Some court staff suggested that this variability was not necessarily recognised by administrators in Wellington who questioned case progression times:

So, their system is really like number based and it’s all stats. ... They don’t actually take into account ... the types of variables that, that make those statistics inaccurate. So, while you might be able to achieve forty, fifty items in forty hours in Wellington, have you considered the fact that like it might take me four days to hear back from [a third party whose input is needed for the case]? (Court staff)

Variability comes in many forms. A broad spectrum of matters falls under the heading ‘general proceedings’. What is a reasonable length for one subtype of case might not be a reasonable length for another subtype of case. This was acknowledged in the definition of timeliness developed by the Timeliness Project, “... avoidable delay has been minimised or eliminated throughout the process on the basis of what is appropriate for that particular *category or type of dispute*”.¹³⁹ Table 6-1 illustrates the breadth of general proceedings we précised the Phase II sample.

Table 6-1. Type of general proceedings in Phase II sample

General Proceeding Types – N (% Total Sample)			
Debt Recovery	8 (8.9%)	Professional Negligence	5 (5.6%)
Action on Guarantee	4 (4.4%)	Intellectual Property	4 (4.4%)
Sale and Purchase	4 (4.4%)	Other Tort Claims	3 (3.3%)
Landlord-Tenant Leases	1 (1.1%)	Relationship Property	3 (3.3%)
Other Real Property Disputes	3 (3.3%)	Estate Litigation	7 (7.8%)
Contractual Disputes	11 (12.2%)	Other Trust Litigation	4 (4.4%)
Commerce Act	1 (1.1%)	Insolvency related claims	7 (7.8%)
Security Act	1 (1.1%)	Other company law disputes	3 (3.3%)
Finance Companies	1 (1.1%)	Tax	3 (3.3%)
Insurance Claims	4 (4.4%)	Body corporate disputes	3 (3.3%)
Building Defects – Weathertight	3 (3.3%)	Other claims	7 (7.8%)

There is variability even within these general proceeding case types; one contractual dispute will be more complex (e.g. more parties, more complex legal issues) than another. Participants repeatedly mentioned four types of general proceedings as having special characteristics that do, or should, affect pace: historic abuse, cases involving children, leaking buildings, and earthquake cases.

¹³⁹ Australian Centre for Justice Innovation, above n 86 at vi (our emphasis).

1. *Cases that need to be processed fast*

Participants noted that some types of case require faster processing than others. This might be because the remedy would no longer be relevant if the case took too long. As one lawyer stated:

I mean if you're trying for example to enforce a restraint of trade, which I often am, if you can't get a hearing for six months and the restraint lasts for nine and six. You know the system has failed you. By and large, the High Court is very good at dealing with those things promptly. But it's not as though all cases are equal in terms of deserving of judicial resources. There are other things, perhaps the family stuff is very urgent I suppose. (Lawyer)

Several court staff noted the need for family cases to be processed quickly:¹⁴⁰

It's not a case of the loudest actually gets done first, it's actually they look at the circumstances surrounding a case. So, if it's more personal stuff like in relation to family members estates and things like that, they try to get those ones out a little bit faster. (Court staff)

A lawyer who represents claimants in historic abuse cases was very firmly of the view that these types of cases should be processed quickly but found some judges did not share this view:

I think we've had some really poor case management from some of the judges who've been case managing our cases. [They] look blank every time you kind of talk about this in terms of its impact on our plaintiffs. Just absolutely, oh they might be upset. No, no, we're not talking about upset here, we're actually talking about trauma, which is quite different from somebody being upset. And that's what I mean. Just not a shred of understanding about the impact of legal processes on plaintiffs, abuse victims.

A court staff member remarked that these cases had a very different track from other cases:

They sort of take their own course because there's an alternative dispute resolution service set up by the Government so people negotiate that first, and then when that fails – or if that fails – then they bring it back to the Court so there's loads have been just filed just to keep the option open. (Court staff)

There was, therefore, no clear agreement on which categories of cases need to be processed quickly, but there was agreement that some cases require faster processing for justice to be done.

2. *Cases that need to take longer*

Similarly, many participants agreed that some classes of cases necessarily took longer than average. Leaky building and earthquakes cases were frequently mentioned as belonging to this class. We do not explore this further here as the particular issues that cause these cases to take longer, for example, the availability of expert evidence, is discussed in Chapter 8.

¹⁴⁰ Lawyers also mentioned that family cases often required urgent attention. Two lawyers, however, identified estate litigation as a particular subtype of case that was not urgent, and both agreed that two years would be acceptable timeframe for an estate case.

3. *Variability of type and number of parties*

There is variability not only in the subject matter of litigation but also in the types of parties. We investigated the types of parties bringing a general proceeding claim in a subset of the Phase I sample.¹⁴¹ Table 6-2 shows the range of parties that appear in the High Court: individuals (40.1%) and companies (38%) were the most prevalent type of litigants; Local/Central Government rarely brought claims (4.1%) but did have to respond to a number of claims (14.8%). Other bodies included a large range of parties that rarely litigated: body corporates, professionals, liquidators, receivers, partnerships, trusts (including Iwi), charity and religious organisations, executors, or guardians.

Table 6-2. Types of parties appearing in general proceedings filed in the High Court

Litigant Types	Frequency of types of Plaintiff Litigants (%)	Frequency of types of Respondent Litigants (%)	Overall frequency of types of litigants (%)
Individual	224 43.8%	187 36.5%	411 40.1%
Local/Central Government	21 4.1%	76 14.8%	97 9.5%
Company	203 39.6%	186 36.3%	389 38%
Other Bodies	64 12.5%	63 12.3%	127 12.4%
Total	512 (100%)	512 (100%)	1024 (100%)

We consider the impact types of parties might have on the pace of litigation in more detail in Chapter 8. For now, we simply note that the type of party is another factor influencing the variability of the High Court general proceeding case load.

Similarly, cases involve a variable number of parties. We investigated the frequency of parties in the Phase I subset.¹⁴² There were, on average, six parties involved in a proceeding, with a range of two through to 269 parties (median of 3 parties). We also consider the effect of this variability in Chapter 8.

4. *Summary of the variable nature of cases*

For now, it is sufficient to note that although “type of case” might appear to be a coherent category, collapsing individual cases into one category can mask a great deal of variability.

¹⁴¹ A random subset sample of the Phase I general proceeding cases ($n = 512$) was further analysed to investigate the types of litigants that are typically filing general proceedings in the High Court. This data is not collected by the Ministry of Justice. To do this analysis, a researcher reviewed the case names and parties of 512 cases and then coded the number and type (e.g. individual, company) of parties in each proceeding. If there was insufficient information from CMS to code a case, the researcher used the CIV-number to further investigate the parties on databases and using a company search. This method was derived from Suzie Forell and Catriona Mirrlees-Black *Data Insights in Civil Justice: NSW Local Court* (Law and Justice Foundation of New South Wales, November 2016).

¹⁴² See footnote 141 for an explanation on how this subset of the Phase I sample was generated.

Contractual disputes illustrate this dilemma: the dispute might be between two first time litigants, who are unsophisticated users of the courts; or it could be between multiple, large companies, who are experienced users of the courts. The sophistication of different parties involved in the same type of dispute will elicit very different dynamics underneath the surface. This, in turn, can affect pace. Even though we focus on general proceedings, the variability within this category of cases still means there cannot be a simple answer to the question of ideal length.

D. Time Passing ≠ Delay

Conceptualising the relationship between time passing and delay is a difficult but important issue in determining whether there is delay in a case. Put simply, a long case does not mean that there has been delay or that justice is being denied. The passage of time might be necessary or desirable to secure a just outcome. Some time is necessary to allow people to prepare and respond to the other party. That is a fundamental underpinning of justice: the right to be heard. One lawyer explained that cases need to travel through the “lifecycle”:

You file, then there’s case management, you have a timetable. The next thing would be a document exchange. There might be some interlocutories but that’s normally a little bit rare. Ok. There might be a summary judgment application at some point. But you know, if anything that resolves the case. And then there’s evidence. And at the point where evidence gets in, you’re able to hear the case. All of that should be, will be timetabled within a year and it’s just finding a date. (Lawyer)

A court staff member also commented that the parties need time at the beginning of a case:

[They need time] to make a call whether they’re going to get representation, are they going to fight it? Is there just a debt that they have to pay? I think people need time to be able to make all those decisions and organise that side of it before they have to turn up to court. (Court staff)

There is also a variability in work pressures in the annual calendar, particularly the period before and after Christmas. An upturn in work occurs right before Christmas: “Before Christmas suddenly the world is ending and then everybody’s running in going “oh this needs to get done ... before the end of the year” (Court staff). The court then closes from Christmas until mid-January. The days between are not counted as “working days” in the High Court Rules and the court staff take leave:

[The] court holidays ... are only fair because they [the litigant] may not be able to get hold of a lawyer in that period or they may be travelling on holiday and it’s not very easy for them to address something when they’ve been served something just before Christmas and then organise defence. ... So the working days, you know hopefully [laughs], hopefully will allow that we [the court staff] can take leave. And we do have four weeks leave a year now instead of three so we’re all still adjusting to that a bit. (Court staff)

In addition to these other factors, cases might simply be “parked” for a considerable period of time by mutual agreement of the parties. As one judge noted, a case of more than two years “might suit the parties”. Common reasons for parking a case include:

- i. Allowing time for out of court negotiations or settlements to be undertaken and finalised;

- ii. Waiting for a related case to run its course when that case will have a bearing on whether the High Court case should proceed;¹⁴³
- iii. Filing to beat a limitation period but with the intention only of protecting the plaintiff's rights.

One of the cases reviewed in Phase II provides an instructive illustration of all these factors at work. A summary of this case appears as Figure 7. This case was, by any measure, a long case: total length of 1,713 days (4 years, 8 months, and 1 week). Within a few weeks of filing the case, the parties filed a joint memorandum stating that “proceedings were filed to protect the plaintiffs’ position on limitation”. The parties sought an enlargement of the timetable so that they could first consider the claim, exchange information, and seek a resolution. The case was one in a series of leaky building litigation, which a judge explained:

They [the plaintiff] have their eye on the clock and they make sure that they get their proceedings for any [building] issued before they become time barred by the limitation period. And so they’ve got a production line and statements of claim coming out... But as soon as they’ve issued the proceedings, you know just to [avoid], the time bar, they’ll serve the proceedings and then they’ll say to the defendants, “Look, don’t serve a statement to the defence yet, we must talk to you.”... So by consent of the plaintiff, the case is actually on hold while they just explore settlement. Very relaxed way of doing a case but it seems to be very effective. (Judge)

Negotiations did not resolve this particular case, so the defendants did ultimately file a statement of defence. It was not filed until 434 days after the proceeding began so the first 14 months of the case did not involve the court at all; the proceeding simply sat on the courts’ books. Once the statement of defence was filed the court moved relatively swiftly, categorising the proceeding as complex, beginning case management, and allocating a trial date. Active case management only paused when the parties told the court that the defendant may be impecunious. This was three months before the trial; four months after a trial date was allocated. The court was only in control of the case for 11 months before the case was again parked to: (1) allow for the proceedings to liquidate the defendant to be determined, (2) allow the parties to negotiate settlement, and (3) finalise and implement settlement. The court’s active involvement in this very long case (4 years, 8 months) was in fact very limited (11 months), and the court certainly contributed no recognisable delay. For the vast majority of this case’s lifespan it simply sat, by mutual agreement of both parties.

Figure 7. Leaky building case

Days between case events	Total days elapsed	Event
0	0	Plaintiffs file statement of claim. By consent, the date to file statement of defence is deferred so parties can negotiate.
434	434	Court is informed that negotiations did not result in a resolution and defendants file statement of defence.

¹⁴³ A court staff member noted that proceeds of crime cases relied on resolution of the criminal trial: “So some of those files literally could be living for five or so years, and then only really get dealt with at the end, once the criminal trial has happened”.

10	444	Case management by the court begins (complex track). Parties are to amend pleadings and plaintiff to particularise quantum.
196	640	Parties amend pleadings. Proceeding against a named third party is discontinued. Case is declared ready for trial and a 10-day trial is allocated (to begin in 203 days' time). Parties are to have experts confer.
116	756	Questions have arisen about the defendant's liquidity. Defendant confirms it is taking advice on its financial position. Both parties agree that preparing evidence would be wasteful and ask for the trial to be adjourned. Court adjourns the trial while defendant's financial position is reviewed.
180	936	Investigation into the defendant's financial position takes place. Parties file two joint memos during this period updating the court and further adjournments are granted.
19	955	Parties file a joint memorandum saying they have begun negotiations.
23	978	Parties tell the court that negotiations are not successful. The plaintiff applies to put the defendant into liquidation. Proceedings are stayed while the liquidation proceedings are heard (defendant is defending them).
622	1600	Liquidation proceedings begin and are allocated a fixture. Parties then tell the court they have reached a settlement. Settlement will not be implemented until certain actions are taken. Matter is stayed until the expected date of the actions being completed.
113	1713	Case is discontinued with no issue as to costs.

1. *A short case might contain delay*

Conversely, a short case does not necessarily equate to the absence of delay. Figure 8 illustrates this notion in an estate litigation case. This case was classified as an ordinary proceeding, and only had one plaintiff and one defendant (three other people were served but they took no role in the proceeding). The proceeding took 415 days, so within the realm of an average or reasonable length case. But on closer inspection, there appears to be significant slippage in the timetable. When the case concluded (by way of settlement), the parties had not even completed discovery.

Figure 8. Estate Litigation

There was an initial delay in this case because the defendant was overseas and did not file the statement of defence. There were further pauses in progress when the parties waited for court time: a 51 day wait for the first case management conference, 30 days for the first interlocutory application to be heard, and 19 days for the second interlocutory application to be heard. These periods, of course, add up, although they are potentially productive periods where counsel can prepare. In this case, however, counsel (or at least the plaintiff's counsel) did not appear to have prepared in advance of the next court date. We could interpret from the file (including correspondence on the file) that all preparation seemed to occur in the days leading up to the next deadline. Much of the delay seems to have been caused by the plaintiff's counsel who:

- a) Did not reply to a request for an extension for filing the statement of defence. The created the necessity for the first interlocutory application and delayed the case by at least 30 days, perhaps more as an earlier case management conference could have been allocated;

- b) Did not tell the court until the day before the hearing of the first interlocutory application that the late filing of the defence is unopposed;
- c) Could not attend the first case management conference because of trial commitments, adding 47 days to the timetable;¹⁴⁴
- d) Filed new submissions for the second interlocutory application on the eve of the hearing, necessitating an adjournment of 64 days.

Days between case events	Total days elapsed	Event
0	0	Plaintiff files statement of claim.
72	72	Defendant files interlocutory application to file a defence out of time. Defendant was in Europe and returned 8 days ago. Defendants solicitor asks for an extension of time but plaintiff's solicitor does not reply. Interlocutory application to file a late defence is scheduled to take place in 30 days' time.
16	88	Statement of defence is filed.
14	102	Interlocutory application is vacated (the day before it is scheduled) because the plaintiff does not oppose the late filing of the defence.
18	120	First case management conference is allocated to happen in 51 days' time but plaintiff asks for it to be rescheduled because plaintiff's counsel has a four-week trial during the period the conference is allocated.
8	128	New date for case management conference is allocated in 98 days' time.
92	220	Six days before the case management conference, the parties tell the court they have agreed on discovery orders and ask for the case management conference to be adjourned for four months.
18	238	New case management conference scheduled in 94 days' time (as per counsel's request).
84	322	Plaintiff files an interlocutory application to set aside defendant's claim for privilege over documents.
11	333	Interlocutory application re privilege is scheduled to take place for half a day in 19 days' time.
18	351	Plaintiff files submissions at 4:57pm on the eve of the hearing for the interlocutory application. Plaintiff says these are to replace "incomplete submissions" filed 10 days earlier (but also three days late). Defendant says there are "completely different" submissions and the defendant requests an adjournment to have time to consider them. The court adjourns the hearing to take place in 64 days' time.
15	366	Defendant files submissions two days late "due to unexpected counsel commitments"

¹⁴⁴ Six days before the rescheduled case management conference the lawyers agree matters between themselves and the case management conference is adjourned because it is unnecessary. This leaves open the question of why the adjournment was necessary in the first place. The plaintiff's counsel does not, on the face of it, seem to have approached the defendant's counsel before asking for the adjournment.

47	413	Two days before the hearing of the interlocutory application the parties tell the court they have reached a settlement
2	415	Notice of discontinuance is filed.

We do not know whether these delays were convenient to the defendant or whether they in fact assisted the parties to resolve matters between them. It remains possible that some of the delay was beneficial. It was our impression, however, that the plaintiff's lawyer was overstretched, which caused significant disruption to the smooth progression of the case. So, despite not being an excessively long case, it looks like a delayed case.

2. *Settlement might abbreviate a case, but justice might still not be done*

The complex relationship between delay and case length is also important when contemplating how a case might end. As Table 6-3 shows, settlement was the most common outcome for the general proceedings: 56.7 per cent of cases.

Table 6-3. Manner in which Phase II cases resolved

Resolution Type	N	%
Judicial-Driven Resolution		
Summary Judgment/Declaratory Judgment or other Interlocutory Judgment resolving all issues	9	10%
Judgment by Default	4	4.4%
Substantive Judgment	11	12.2%
Total	24	26.6%
Party-Driven Resolution		
Settlement	46	51.1%
Settlement immediately following resolution of an Interlocutory Application	5	5.6%
Total	51	56.7%
Other Resolution		
Proceeding never served	4	4.4%
Service/Registration for Foreign Jurisdiction	6	6.7%
Related proceeding resolved causing this case to be stayed, withdrawn or settled as a result ¹⁴⁵	5	5.6%
Total	15	16.7%

¹⁴⁵ For example, one case was waiting on an appeal on a related case to be determined by the Supreme Court. In another, a determination by the Family Court setting aside a relationship property agreement, which was the subject of the High Court litigation, effectively brought the High Court litigation to an end (although another 110 days was consumed arguing over costs).

A case that is resolved by settlement is likely to be a shorter case (although not necessarily) as there is no hearing or judgment writing time. But settled cases must be treated with caution. While they often shorten the life of a case, they may not always be in the interests of justice. As one Queen's Counsel suggested, the "extreme cost" of the High Court process may incentivise the parties to settle even when settlement is not a just outcome. Similarly, delays early in the case may wear the opposing party down and encourage settlement.¹⁴⁶ This again highlights why overall case length is not the complete answer to questions about delay.

E. Ideal Length is in the Eye of the Beholder

A very significant, and perhaps intractable, problem is who is the arbiter of how long a case should take? As one Judge said when discussing ideal length of a case:

I mean it is very hard to say what's acceptable. Because what's acceptable to me might not be acceptable to the parties, or what's acceptable to the parties might not be acceptable to me. (Judge)

It is likely that litigants, lawyers, court staff, the Ministry of Justice, and judges all have different ideas about what is a reasonable length of time. Their ideas will arise, in part, from their interaction with the system. Those who have regular contact with the system are likely to have shifted their expectations to meet what the system can potentially deliver. This is apparent in one focus group's discussion about what clients' regard as a reasonable length of time for a case:

Lawyer 1: It depends on how sophisticated or commercial ... how sophisticated the clients are, some of them, you know for the time periods I've just said [12-18 months], I think that would be within their reckoning. I've had other cases which have taken many - several years - to resolve and those clients have been very unhappy. Yeah I think most people have sort of heard anecdotally from other people that it takes a long time so they're sort of mentally prepared for it to be a year or so.

Lawyer 2: I agree with [Lawyer 1], if you've got a sophisticated regular user of the court system, often their sense of how long a matter will take is probably just as good as yours.

While there is an emphasis in the current climate to provide a user-focused court system, meeting all litigants' expectations might also not necessarily be an unqualified good. As a lawyer observed:

While clients generally want things over as quickly as possible, actually a little bit of, like wine, a little bit of time does it no harm. If you... , dare I say it, start making people think rationally about what they're doing and why they're doing it and it also tempers people's expectations around how it will be resolved. (Lawyer)

Similarly, court staff observed that progressing a case quickly might achieve the desire for a fast result but not the sense that justice has been done:

For instance, in a Family Court case, which has parties on it that have been embroiled in this dispute for the last six, seven years' kind of thing, and you not knock their appeal out within two weeks, they're going to be like, "Ah, well that's not justice. I haven't actually had time to absorb the judgment. I haven't had time to think about whether or

¹⁴⁶ For further discussion see p. 98 of this report.

not this is actually the right thing to do. I'm going to appeal it to the Court of Appeal," and I think you'll end up increasing work for other jurisdictions. (Court staff)

Ideas about procedural protections and the rule of law can also inform expectations about efficiency. This is a balancing act. Some participants will value procedural protections, which increases the likelihood that the outcome reflects the correct legal position, over efficiency; the reverse is also true. Mark's case illustrates this point (see Figure 9). Mark was a litigant who strongly valued efficiency and had limited regard for procedural protections.

Figure 9. Case Study - Mark, Estate Litigation

Case Study – Mark, Estate Litigation

Mark was the executor of his deceased mother's estate. His co-executor was his Aunt Jane (his late mother's sister). Mark's mother had left a house for Aunt Jane to reside in for life. Once Aunt Jane had finished living in the house it was to be sold. The house was in Aunt Jane's and Mark's names as they were the executors.

Many years after Mark's mother died, Aunt Jane developed multiple health problems, including dementia. She was unable to continue living in the house and was also unable to continue her role as a co-executor. Unfortunately, Aunt Jane had not given anyone an enduring power of attorney. Mark therefore applied:

1. To become a welfare guardian of Aunt Jane, an application made in the Family Court; and
2. For an order vesting the house in Mark's and the new co-executor's names, an application made in the High Court.

The High Court file shows the following timeline of events. Footnotes indicate where further information has been sourced to confirm and complete the timeline.

Days between case events	Total days elapsed	Event
0	0	Aunt Jane moves out of the house.
37	37	Family Court application for welfare guardian. ¹⁴⁷
132	169	Deed appointing a co-executor to replace Aunt Jane.
18	187	Claim filed in the High Court with application for directions as to service.
6	193	High Court Judge makes order that Aunt Jane's family court lawyer and the property manager are served.
11	204	Affidavit confirming service is filed in the High Court.
14	218	Memorandum from Aunt Jane's family court lawyer and Public Trustee consenting to the vesting order.
11	229	High Court hearing (1 hour) and a judgment delivered on same day.
6	235	Vesting order sealed.

¹⁴⁷ We do not have the Family Court file so this date is based on Mark's recollection of when the Family Court case was filed. We cannot record in the timeline any of the other events that occurred in the Family Court.

17	252	House is transferred to names of Mark and the new co-executor in the property records. ¹⁴⁸
19	271	Correction made to Certificate of Title to make it clear Mark and the new co-executor hold the property as executors.

On the face of it this is a very short general proceeding, being 48 days from start to end.¹⁴⁹ Mark's informed us, however, that the proceeding was very long and drawn out. From Mark's perspective, the case started when Aunt Jane moved into a rest home and finished when the legal issues were resolved, some 9 months (271 days) later. This seems to be because, unsurprisingly, he considered that the Family Court and High Court cases were one case. The same facts and the same parties were involved in both so he perceived it as having had to "go all the way up" to the High Court. He said "It started off in the Family Court, I believe, and moved through to the [High] Court over a period of um... six months perhaps". In fact, there were two different cases triggered because of two different legal issues: one being the need to have a welfare guardian appointed so that someone could deal with the property on Aunt Jane's behalf, and one to enable the transfer of the certificate of title into the names of Mark and the new co-executor.

The largest period of time (187 days) elapsed before the proceedings were issued in the High Court. Mark suggests this is the Family Court's fault because his perception is that the Family Court "couldn't make a decision" and "no-one seemed to be able to know what to do or make a decision". As we do not have access to the Family Court records we cannot make any comment on the accuracy of this recollection. Mark also saw the lawyer appointed to represent Aunt Jane in the Family Court proceeding as a source of delay:

The legal representative had to be appointed for my aunt, and he was absolutely hopeless. He was never there, he seemed to be on holiday, he didn't seem to be interested. So, my observation was that this court-appointed lawyer acting for my demented aunt was not very... neither competent nor professional.

He considered that it was "a bit rotten" that his Aunt's meagre assets were going to pay for this court appointed lawyer and was "funding his pleasure". In contrast, he was very happy with how his lawyer had managed the proceeding, saying he "was a very competent guy".

Mark's major complaint was that he saw the system as "bureaucratic" and complex. He referred many times to seeing the proceedings in terms of a "business transaction" in which he was a "customer", and a very simple one at that. He believed that the facts giving rise to the case were common and the case should be "able to [be] do[ne] over the internet":

I think, as I say, the process should be when someone is named to a position of legal responsibility or legal obligation and they're no longer able to act there for one reason or another it should be a formality to have them removed from that office. You shouldn't need to go through a series of court actions. You certainly should be able to take a Medical Certificate in to a relevant authority and say look this person is now incapable, take them off the document.

He did pause towards the end and reflect "That would be almost too easy, wouldn't it?". For Mark, the length of time it took for this to resolve, and the issue of the house lying empty in the interim,

¹⁴⁸ This information and the information in the line below it are taken from a search of the Certificate of Title.

¹⁴⁹ The Ministry of Justice records it as even shorter, ending the file on the day of judgment, rather than the date that the Court sealed the judgment. This calculates a total case length of 42 days.

was a source of “concern” and an “unnecessary annoyance - it was something I didn’t need, I didn’t need this”. A lawyer or judge looking at the same case might see the length as entirely reasonable because it afforded procedural protections to the other party, ensuring their property was not unlawfully taken.

But Mark’s case does emphasise the importance of considering length from the litigant’s perspective. Mark recalls his case as “long” because his narrative encompasses all the events related to the situation, not only the part addressed by the High Court. Similarly, Ben’s case study (see Figure 3.) illustrates how a case does not simply ‘start and stop’ for the litigant when proceedings are filed and concluded. For the court, Ben’s proceedings took two years and four months. For Ben, the case took more than four years and has had ongoing ramifications. These case studies illustrate that litigants’ perspectives on case length is likely to be very different from the court’s perspective.

F. Summary: Delay is Not Just One Problem

There was consensus among the professional participants (judges, lawyers, and court staff) that cases which exceed two years are taking longer than they probably “should take”. Litigants themselves probably have expectations that are much shorter but might sometimes be unrealistic.

To a large extent, the High Court is meeting the professional participants’ expectations of case length as only 16 per cent of our sample exceeded the two-year timeframe. Participants conceded that the nature of some of these longer cases may mean they just need time. A large number of variables can affect how long a case should take: category or type of dispute, number of parties, the type of parties, legal and evidential complexity, the subject matter (e.g. cases involving small children, abuse victims) – the list goes on. This variability makes it very difficult to give a clear answer to how long a case should take.

Reflecting on overall case length is still helpful, however. Both as a way of communicating normative expectations and of monitoring case progression. But case length alone cannot answer all the questions about delay. For example, assuming that cases which settle within the expected timeframe is satisfactory will obscure the fact that delay can still occur in shorter cases. A case might only be short because one party has delayed the case to a point that the other party can no longer sustain the burden of the litigation. Overall, time to disposition reveals only part of the story about delay.

The passage of time in the lifecycle of a case is attributable to many factors – some negative (strategic delay), some positive (parking a case for settlement discussions), some neutral (parking a case for a related case to be resolved). To be able to tease out these intricacies of delay, we need to look deeper into what is happening during the life of a case. We used the data collected in Phases II and III to undertake that task. In the next two chapters, we report on our findings from the interviews and case précises. We outline the common points in the life of a case where proceedings might stall, factors that might alter the pace of a case, and their role in delay.

7. Court Resources

In this chapter, we explore points of possible delay that relate to court resources: the availability of hearing time, waits for judgments (interlocutory and substantive), waits for decisions on related cases and appeals, slips or errors. These were areas of possible delay identified in the Phase III interviews and we tested these impressions using Phase II data.

A. *The Doomsday Clock: Setting a Trial Date*

There was consensus between the judges, court staff, and lawyers that setting a firm trial date was beneficial in motivating parties to resolve the case, either by way of settlement or preparing for adjudication:

[It] really does focus everyone's attention ... that's doomsday right, for somebody, so you know, you've either got to settle it or you've got to progress it before then. (Lawyer)

Giving a date and having date certainty is a real motivator, I think, for the parties to work together and get the proceeding through the court. (Court staff)

If you've got a hearing date, it's often a date to work to. If it's not too far in the future generally people have to get off their backsides and do some things, and that's when often some talking begins. (Judge)

Four of the lawyer focus groups raised concerns about delays in securing a hearing time. A few lawyers complained that they were sometimes ready to proceed to trial but no date was available:

All our briefs were in and we were just sitting around waiting for the date to be allocated thinking it would be in ... 2016 and it ends up being February 2017, you know? Everyone's just, a six-month gap after doing all that work, we could go in two weeks' time. (Lawyer)

Similarly, some lawyers complained about the time it takes to have an interlocutory application heard:

But the delay in getting hearing time for interlocutories is quite disappointing. ... [In a] recent example, we applied for the class action we're doing. We needed ... to proceed as a representative action, that was filed in October. Couldn't get hearing time on it until June [the following year]. (Lawyer)

Hearing time relies largely on the availability of judge time.¹⁵⁰ As a court staff member summed it up: "you can't schedule time if there is no judge available". Court staff must also fix hearing dates knowing that most, if not all, case will settle well before the trial begins and fixture vacated. The High Court has therefore adopted the practice of overlisting or overscheduling hearing times – that is, allocating multiple cases to the same hearing time.¹⁵¹ Different registries have different practices but the overloading is currently 300-500 per cent (i.e. allocating three, four, or five trials

¹⁵⁰ Finding hearing time is not only a matter of judicial availability, however. It is also necessary to find a date that counsel and witnesses are available. This is an issue discussed in the next chapter.

¹⁵¹ This practice is not unique to the High Court. It is practiced in many jurisdictions: Sharyn Roach Anleu and Kathy Mack *Performing Judicial Authority in the Lower Courts* (Palgrave, London, 2017) at 41.

on the same date).¹⁵² The court staff proudly stated that they rarely have to call a trial off: “I haven’t lost a fixture because of not having a judge available ... for probably eight years”. Some juggling occasionally has to occur (moving a one day hearing from Monday to Thursday, or bringing a Judge in from another centre) but a judge and fixture date within the week is always found. A Judge said “we’ve been caught a couple of times sort of, which means we’ve got to get a ... judge from out of town, but generally speaking, that’s worked. It has enabled us to give early dates.”

So how long does it take to get a hearing? In the Phase II sample, 27 cases were allocated a trial date for a substantive hearing (30%). The average length of trial sought was seven days, with the median length of five days (range = 2 days to 60 days). The interval between the decision to allocate a trial (the case was regarded as ready for hearing), and the actual trial date was 215.5 days (approximately 7 months) with a range of 74 (2.5 months) to 375 days (1 year). This finding suggests that the High Court are achieving their own time standards for setting down cases for trial.¹⁵³ We expected that longer trials might mean a longer wait for a fixture, but there was no significant correlation between the length of trial sought and days until trial date.¹⁵⁴ For long cases, the High Court were in fact bettering their time standards; trial length does not appear to be a barrier to a speedy trial date.

From a litigant perspective, however, this is still a long time to wait. Some lawyers were concerned that these periods had not only temporal costs for their clients but also financial costs. Three lawyers, discussing this issue in a focus group, commented that delays in proceeding to trial were “just double expense for your client because you got on top of the case and then you, yeah forget it and you’ve got to do it all again [closer to trial]”.

1. *Can trial dates be brought forward?*

The ability to allocate earlier hearing dates is, at least in part, a court resourcing issue. When parties are genuinely ready to proceed to trial having to wait several months for a judge to be available is undoubtedly delay. With more resources, would delay then be minimised? This is only unequivocally the case if the parties are genuinely ready to proceed to trial. The period between declaring a case ready for trial and it actually going to trial is when witness briefs are prepared and any interlocutory arguments are brought. These take time. If the case is not ready for trial on the date allocated, it has to be adjourned and then there can be a long wait to find another trial date:

If you’re getting adjournments ... they’re having to go to the back of the queue, so they may have waited their nine months for a hearing, they get to a month before and say, “we need an adjournment because the wheels have fallen off”. ... [I]f the Judge happens to grant that adjournment – and sometimes we’re caught between a rock and a hard place and they kind of have to – then they might have to go another nine months, and that’s how the ... life of the file can get pushed out. (Court staff)

¹⁵² The percentage of overloading depended on the number of judges available at the court: “The smaller number of Judges you’ve got, the less bold you can be because you don’t have the possibility of people in reserve who can be brought on at short notice, if necessary, to take over a fixture that’s in a week where there has been an unexpectedly high number of cases actually going ahead” (Judge).

¹⁵³ See footnote 90 above and corresponding text.

¹⁵⁴ Due to the small sample size and outliers (i.e. 60-day trial), we conducted a bootstrapped Kendall’s tau correlation to investigate whether the length of trial sought correlated with the interval that elapsed between fixture allocation and trial date. There was no significant correlation between the two variables: $Tau-b(25) = .229, p = .057$, BCa 95% CI [-0.073, 0.533].

As one Judge explained, there might be a “little bit of room” to set the trial dates “a little bit earlier”. But you do risk “build[ing] in quite a bit of inefficiency into the system” because if there is not time for at least some interlocutories to be argued first, then “you could well end up having to adjourn that trial date.”

We analysed the Phase II data to investigate some participants’ perceptions that setting an early trial date increased the likelihood of an adjournment. We calculated the point in each case where it was set down for trial, as a proportion of the total case. Trial dates were allocated on average 264 days after the statement of claim was filed. We then investigated how many trial dates were later altered in some way (i.e. adjourned). Unfortunately, our sample size was too small to statistically detect any differences, but some trends did emerge. For the cases where the trial date was altered, they were set down approximately 32 per cent of the way through the case; whereas, for cases where the trial date was not altered, they were set down for trial approximately 43 per cent of the way through the case. This lends some support to the idea that setting a trial date too early may create delays.

2. *A moveable feast?*

The impact of adjourning the trial date was evident in the Phase II data. Twenty-seven cases were allocated a substantive fixture. Of these cases, nine had the trial date altered for the following reasons: stayed, adjourned, or vacated. The trial date was altered on average 51 days prior to the date that the trial was due to start (range = 0 days to 97 days), and seven of these cases were allocated a new trial date (in one case, two new trial dates were set). These new trial dates were allocated, on average, 179.5 days after the new fixture allocation (range = 35 to 300 days), and therefore significantly extended the lifecycle of these cases.

Avoiding adjournments is desirable to ensure a case proceeds efficiently, but adjournments might also be necessary to ensure justice between the parties. Participants gave various reasons for why parties might need a late adjournment. First, late exchange of evidence can create a surprise immediately before the trial:

[A] major reason why cases are adjourned at the last minute seems to me to be that when briefs are exchanged, they actually do include material or issues that counsel hadn’t appreciated or thought of and so then there’s an application for adjournment because a case is different and they need to amend pleadings or they need to respond on that issue (Judge).

Some lawyers suggested this as a failure on the part of the lawyer, “a tendency to wait to the next scheduled event” rather than having their case organised well in advance of a deadline. Because briefs of evidence are exchanged only in the weeks leading up to trial they can have a particularly significant effect. This was the reason for the adjournment of the trial in Dave’s case study, presented at Figure 10. An adjournment was granted 11 days before the trial began. The next available date was a further 208 days wait.

Figure 10. Case Study – Dave, Commercial Dispute

Case Study – Dave, Commercial Dispute

This case involved two corporate parties. The explanation of the pace of this case is drawn from an interview Dave (an employee of one of the companies who was involved in the dispute), and a review of the physical court file. Dave’s employer (i.e. the company) is a frequent High Court litigant and Dave has been involved in many of these cases.

This case was very long, spending 1,175 days in the High Court (3 years and 2.5 months). A breakdown of the time spent in each phase during the life of the case is set out below:

	Days in each phase	Total days elapsed
Pleadings	27	27
Case management period	154	181
Time from ready for hearing until hearing (including adjourned trial)	508	689
Hearing	5	694
Time from hearing to judgment	152	846
Time from judgment to hearing on quantum	266	1,112
Hearing on quantum	1	1,113
Time from hearing on quantum to judgment	62	1,175

Ready for Hearing until Hearing

The initial phases of the case proceeded as normal; the pleadings and case management period were relatively uneventful. The intervening time between being ready for trial and the trial occurring, however, was unusually long. Initially, the allocation of a trial date was uneventful. The court offered various dates and one date was suitable to both counsel. The trial was to occur 312 days (10 months) after being declared ready for trial. This would have ordinarily allowed ample time to prepare the case for trial. Eleven days before trial, however, the plaintiff filed for an interlocutory injunction on the basis that a witness was unavailable. Dave recalls what happened:

There was one particular witness that the plaintiff ... had tracked down, but he was overseas, I just can’t remember where, but it was somewhere like Indonesia or Malaysia or somewhere like that, and um they claimed that he wasn’t even available to give evidence by video link. And so the Judge adjourned it, which meant we went back in the queue.

Dave suggests that the adjournment was the result of the plaintiff’s poor preparation. He perceived that the plaintiffs had been granted an indulgence that as defendants would not have been allowed. Dave qualified this comment as perhaps a “cynical” and “jaundiced” view as a repeat defendant. The Judge records in the minute that the plaintiff applied for the adjournment because the company had been taken by surprise by allegations in one of the defendant’s briefs of evidence and needed to obtain rebuttal evidence. As that witness was overseas and unable to attend the trial the next week, the Judge granted the adjournment. The next available date was not for another 208 days.

Time from Judgment to Hearing on Quantum

After the hearing, there was a period of 152 days (5 months) before the judgment was handed down. As the High Court has a target of 90 per cent of judgments being delivered within three months, this case was within the 10 per cent of outliers.

The delivery of the judgment did not spell the end of the matter. The judgment found that although the defendant was liable, the plaintiff had presented inadequate quantum evidence of the loss. This was despite the hearing having been on both liability and quantum. The next period of time lasted 267 days made up as follows:

Event	Days allowed/taken
The judge asked the parties to confer on quantum and if they could not agree, to file a memorandum.	31
Plaintiff's counsel was however overseas and could not file memorandum within 30 days, an extension was requested.	47
The parties did not agree on quantum and filed memoranda. Christmas intervened and the Judge did not consider the memoranda until the new year.	52
The plaintiff wished to call new expert evidence, which was allowed, along with time for the defendant to file evidence in reply.	71
Date was to be allocated for hearing as soon as the briefs of evidence were filed. However, both plaintiff and defence counsel were unavailable for the initially suggested dates and the day allocated was at the end of the suggested period.	66
	267

The hearing proceeded on this day and judgment was delivered 62 days later. The issue of quantum therefore took 329 days to finalise.

The defendant cited the Judge's decision to allow an argument on quantum as a source of delay and unfairness. He considered that the Judge had allowed "a second bite at the cherry" and suggested that courts "forever and a day they will always err on the side of the little man ... and I mean equity wise that's fine, but sometimes it's wrong". In this case he suggested that they were both "big man" parties so "there shouldn't have been any sympathy either way".

The case spent a further 336 days on appeal in the Court of Appeal¹⁵⁵ but Dave took no issue with this: "Once we appealed to the Court of Appeal that got dealt with very promptly and efficiently".

Discussion

Dave is very familiar with the court system, so his expectations of pace are likely to be closely aligned with the average pace of the courts. This would explain his perception that the Court of Appeal dealt with the appeal "very promptly and efficiently", whereas for less experienced litigants that period might be cast in a different light.

Instead, Dave focused on the adjournment of the original trial and the second hearing on quantum. He conceived these points as indulgences that went beyond what was reasonable in the circumstances. These two exercises of the court's discretion increased the length of the case by 18 months (207 days for the

¹⁵⁵ The time from filing the notice of appeal in the Court of Appeal until the Court of Appeal judgment was 636 days.

adjourned trial and 329 days for the hearing on quantum). Without these exercises of judicial discretion, the case would have only been 21 months.

Another reason offered for late adjournments, cited by some, was that one party ran out of money to fund the litigation:

People [who] have been represented, run out of money and their lawyers withdraw before a two-week fixture late in the piece. And so generally we have to allow them an adjournment either to try and scratch around and get legal aid or else scratch around and prepare themselves to do the case which is all pretty unsatisfactory. (Judge)

This was evident in the case précised at Figure 18. After one year (379 days) of litigation, and 26 days before the trial was scheduled to begin, the defendant's counsel sought leave to withdraw because "the defendant's solicitors have not been placed in funds to conduct the trial." It took a further 222 days before the trial began.

Cases can also be adjourned part heard if counsel incorrectly estimate the length of the hearing. Underestimating hearing time mean that trials overrun and the courts have to find additional fixture time:

People say they want a half day. The half day comes and it takes more than a half day, but the judge has something else that afternoon. [It] can't be heard. Another date, three months out [has to be allocated], just to finish whatever they were doing that time. (Court staff)

Hearings that run overtime can also cut into judgment writing time, creating further delays in the case at hand or in other matters.¹⁵⁶

Lawyers suggested that there were inconsistencies between judges as to their willingness to adjourn trials:

There tends to be, with some judges, a really relaxed attitude towards vacating fixtures. ... There are other judges who will try extremely hard to avoid that so there's an inconsistency in the, certainly in the Auckland High Court bench, as to that attitude and the vacation of a hearing. (Lawyer)

Similar opinions were expressed about the Wellington High Court bench. The Chief High Court Judge, however, said that this was not the case as applications for adjournments are directed by the List Judge in each home court (Auckland, Wellington, and Christchurch).¹⁵⁷ Whether or not consistency is an issue, court staff expressed considerable frustration about adjournments. The trial date is highly prized in the registry as it creates a fixed deadline to work towards:

Lawyers have a date to get everything sorted, you know that's the end date. You know ... that's the lifespan of this file. It's going to finish here. And then, and then you do

¹⁵⁶ See the discussion on judgment writing time from p. 62 of this report.

¹⁵⁷ Correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017.

your part to manage all of this. But if there's nothing, it's just, judges just adjourn, adjourn, adjourn. It just creates problems and it delays cases. (Court staff)

Rescheduling the case creates significant additional work for the court staff. It also impacts on registry goals in reducing the age of cases.¹⁵⁸

3. *Settling at a minute to midnight? Doomsday as a motivator for settlement.*

Setting a trial date not only about motivates the parties to prepare for trial but also focuses them on settlement:

When the trial is on next week, everything starts becoming real. When it's on next year, ... I'll bluff my way through this and bluff, not really worry about it. You only see the whites of the eyes – you're only seeing reality – when it's on next month and you can say to someone, "say whatever you like, we'll be in trial next month, you know save it, there's no point in persuading me, tell the judge next month". And then you get a settlement. For me, fixtures are the key for settlement. (Lawyer)

The trial is everything ... when you allocate a trial date the parties really begin to focus on the realities of their case and the economics. And they get into a mode to settle a lot more, much more realistic about that. (Judge)

We analysed our Phase II data to examine at what point settlement occurs for cases that have been allocated a trial date. In our sample, 17 cases were allocated a trial date but settled prior to going to trial (63% of the 27 cases allocated a trial date). Given that almost two thirds of cases allocated a trial date eventually settled, pending trial dates can motivate settlement. We also investigated whether trial imminence correlated with settlement. On average, cases settled 57 days prior to the allocated trial date.¹⁵⁹ There was a significant range, however, with one case settling on the day of the trial and another three cases settling in the week leading up to the trial. But the remaining 11 cases settled between three and 21 weeks prior to the allocated trial date. Cases settled across the range of the pre-trial window; not just 'a minute to midnight'.

To investigate how important the pre-trial window is for driving settlement, we then looked at all cases that settled in our Phase II sample.¹⁶⁰ Similar to Justice Miller's results,¹⁶¹ we found that the pre-trial window is a critical point for settlement: Figure 11 shows that 23.5 per cent of our cases settled during this time. This is not unexpected given that Justice Miller recommended that this window be widened to maximise the opportunity for settlement discussions. We therefore investigated whether the judiciary have used their discretion to extend the pre-trial window beyond

¹⁵⁸ These might be either the High Court's own reporting goals (e.g. time standards discussed in Chapter 2 of this report) or the Ministry of Justice's (e.g. the Olympic Plan current discussed p. 38 of this report).

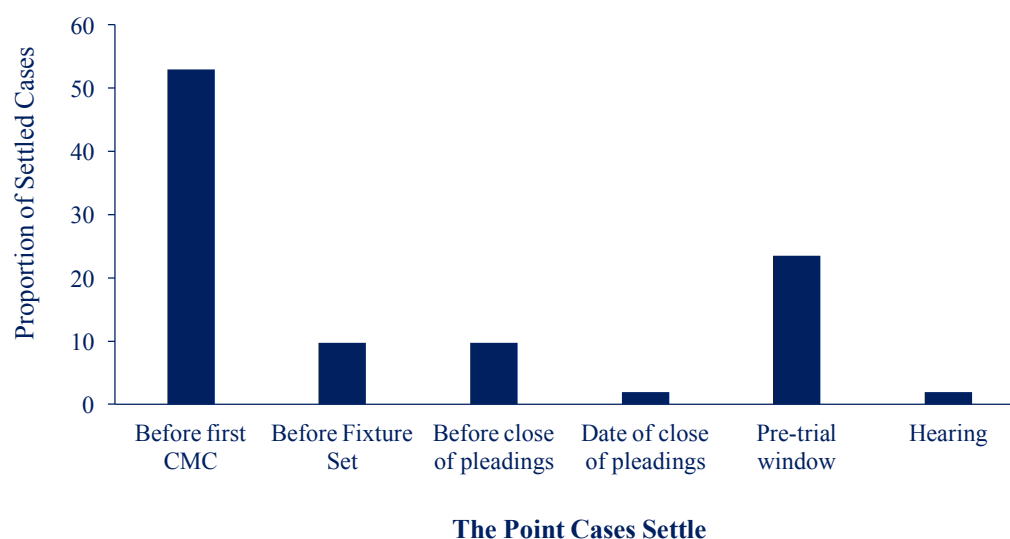
¹⁵⁹ Two cases were excluded from the subsequent analyses. One case was excluded because the fixture was vacated, and the case settled prior to a new fixture being allocated. The second case had been stayed, and the parties settled prior to a new fixture being allocated. Seventeen cases were included in the subsequent analyses.

¹⁶⁰ We reviewed all 51 cases that were settled in the Phase II sample. Each case was coded according to what point it was settled – before the first case management conference; before fixture set (i.e. when trial date set), before the close of pleadings, on the date of the close of pleadings, during the pre-trial window (i.e. after the close of pleadings but before trial), or during the hearing.

¹⁶¹ Miller, above n 2.

60 working days (under the previous rules).¹⁶² This discretion is being used, as the pre-trial window in our sample was, on average, 73.25 working days (range = 5 – 121 days).¹⁶³

Figure 11. The proportion of cases settling at various points in the lifecycle of a case



Interestingly, the majority of cases (53% of our sample) settled prior to the first case management conference occurring (see Figure 11). In contrast, Justice Miller reported that only 30 per cent of general proceeding cases settled before being entered on the ready list (i.e. a trial date is set).¹⁶⁴ Based on his finding, Justice Miller recommended that extra time should be allowed prior to allocating the first case management conference to allow the parties time to consider substantive issues and settle when appropriate, which ultimately saves litigants costs and frees up court resources. The findings from our data show that the implementation of this recommendation has achieved the desired objective: the majority of cases are now settling prior to the first case management conference.

a) Settlements and adjournments wasting resources?

Some more junior court staff and some lawyers were concerned that cases settling or being adjourned at the eleventh hour meant that court resources were being wasted. Senior court staff, however, were clear that no wastage was occurring. As trial time is loaded up to 500 per cent then another case may be ready to proceed. If no cases need the hearing time, then this time can be used for other purposes. Judges can be moved into doing other court work, including criminal work. Criminal trials are not overlisted, only firm fixtures are issued because “you couldn’t not run a murder trial” but judges could be reallocated to criminal appeals to clear a backlog. As a senior court staff member said: “There’s always work, it’s just a question of how it’s made up”.

¹⁶² Miller, above n 2, made several case management recommendations which were incorporated in the Rules via High Court Amendment Rules (No 2) 2012 (SR 2012/409), which came into force on 4 February 2013. These recommendations were intended to both promote efficiency in terms of court resources and case progression, while also reducing costs for litigants.

¹⁶³ In the Phase II sample, 24 cases had both a close of pleading, and trial date on the file, so the pre-trial window could be calculated.

¹⁶⁴ Miller, above n 2 at [67].

B. Time to Write Judgments

Judgment writing is a fundamental aspect of judicial work, but it is also another possible point of delay. The time it takes to deliver a judgment is particularly important for litigants who, having finally made it to a hearing, would find it “terrible” to have to wait “months and months for a decision” (Lawyer).

1. Analysis of time between hearing and delivery of judgment

We looked at the amount of time that elapsed between the close of a hearing and delivery of judgment. In our Phase II sample, 10 cases proceeded to a substantive hearing. The hearings for those cases lasted an average of four days (range = 1 – 6 days). Table 7-1 shows the hearing length and writing time for each of the judgments. Contrary to our expectations, there is no clear relationship between hearing length and the length of time to write the judgment.¹⁶⁵ The judges took, on average, 82.7 days to deliver the judgment. Notably, 50 per cent of our sample had judgment delivery times over 90 days, whereas the Court’s target is that only 10 per cent should take more than 90 days.¹⁶⁶

Table 7-1. Trial length and writing time in Phase II

Trial length (Days)	Writing time (Days)
1	0
1	10
4	18
4	21
5	27
6	94
5	100
5	150
4	194
3	213

We cannot know the reason for the time taken between hearing and judgment delivery. Was the judge turning over every stone? Was the judge unwell? Did the judge lose important writing time

¹⁶⁵ We cannot statistically investigate the correlation due to small sample sizes.

¹⁶⁶ This finding differs to those publicly reported by the Chief High Court Judge (see footnote 91). In correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017, the Chief High Court Judge explained how judgment delivery is calculated for the annual report. Judgment delivery times are drawn from the judiciary’s internal system: JAX. When a reserved judgment is finalised, the following variables are entered into JAX: (1) date hearing concluded; (2) date final submissions filed; and (3) date of judgment delivery. Using these variables, the length of taken to deliver the judgment is calculated. A number of explanations could explain why the Phase II results differed to the Chief High Court Judge’s report, including: (1) errors in either the Phase II or JAX data; (2) the data is drawn from two different time periods, with only six months overlap. Perhaps these cases with longer judgment delivery periods were not in the Chief High Court Judge’s sample; or (3) we only report on general proceedings which might have inflated the average judgment delivery period in our report. Another explanation entirely might account for this discrepancy. See Appendix B for further discussion about the accuracy of judgment delivery times in CMS.

because the judge was allocated to hear another matter? Or was it simply a complex judgment that required a great deal of thought and reflection? Reviewing a court file cannot answer these questions. For example, the case described in Figure 12 has a wait of 194 days (38 per cent of the case length) for judgment delivery, but we cannot determine from the file alone *why* it took that long.

Figure 12. Contractual dispute with long period between hearing and judgment

This case was a contractual dispute between two companies. The first part of the proceeding progressed quickly with the court accommodating a hearing date 125 days after filing. The matter was ultimately heard 146 days after filing (the date being pushed back to accommodate a dispute that arose between the parties as they prepared).

Days between events	Total days elapsed	Event
0	0	Claim is filed and application for directions as to service made.
2	2	Proceedings have been served.
7	9	Hearing of 2 days is allocated to take place in 116 days' time. Defendants need to file a statement of defence.
15	24	Statement of defence and counterclaim is filed.
6	30	Dispute between plaintiff and defendant about an issue raised by the plaintiff. Hearing fixture is vacated and new pleadings and discovery timetable set out. 4-day hearing is allocated to take place in 116 days' time.
50	80	Amended pleadings have been filed but plaintiffs now file an application for particular discovery. This is given a date in 7 days' time.
6	86	Parties have resolved the discovery issue and a hearing is not necessary.
60	146	Substantive hearing begins.
3	149	Substantive hearing finishes.
194	343	Judgment (over 100 paragraphs) is sent to parties.
13	356	Redactions to the judgment, to protect commercially sensitive material, are made. Court is notified that the judgment is being appealed.
150	506	Judgment re costs given on the papers.
5	511	Costs order is sealed.

The major period of time in this case was the time from hearing to judgment: 194 days. The remaining 168 days are taken up with determining costs, but during this time the judgment is also under appeal in the Court of Appeal.

Similarly, the case discussed in Figure 13 has a large proportion of the total time allocated to judgment writing time (26 per cent). Again, it is not apparent why.

Figure 13. Body corporate dispute with long wait to judgment

This is a body corporate dispute lasting 817 days. Sixteen per cent of the time is spent on the parties' pleadings and 33 per cent (272 days) on preparing for trial. The case is therefore ready and proceeds to trial largely within expectations (see Chapter 6 for how long a case should take). However, 213 days then elapse from when the trial has finished and the parties have filed further submissions, until judgment.

Days between events	Total days elapsed	Event	Summary
0	0	Claim filed.	Party driven time: pleadings being amended (131 days in total).
42	42	Defence and application to strike out proceeding filed	
22	64	Strike out scheduled to take place in 83 days.	
67	131	Plaintiffs amend statement of claim and defendants withdraw application to strike out. Parties request a case management conference to take place more than 50 days from now (to allow pleadings to be finalised).	Court adds a two week wait to the desired case management date, the rest is party driven (64 days total).
1	132	Case management conference allocated in 63 days' time.	
63	195	Case management conference takes place. The parties have now filed amended pleadings (last one was filed six days before the case management conference). Associate Judge sets timetable for trial preparation and allocates a hearing date for three-day hearing beginning in 209 days' time.	
208	403	Preparation runs mostly to time. Affidavits are filed, including by an expert. There is some slippage but parties agree between themselves and maintain the trial date.	This is seven month wait for trial. Preparation is occurring during this time but probably more time is allowed here than is required.
3	406	The trial begins on time and runs for three days, as scheduled. Hearing finishes. Parties are asked to file written submissions.	The hearing finishes but the time to write the submissions means we have not counted the 40 days as judgment writing time.
40	446	Final date for submissions to be filed.	
213	659	Judgment is delivered.	26% of the case length is here.

81	740	Party requests the judge formally record that one of the plaintiff's causes of action was abandoned.	Procedural tidying up while the appeal is underway.
77	817	Minute from judge regarding abandoned cause of action. Judgment is now under appeal.	

The time to deliver interlocutory decisions can also cause delays in the progress of the case particularly if the next steps, or outcome, of the case is dependent on the decision. In our sample, 24 cases involved interlocutory applications: 12 cases' applications were heard on the papers, and 12 cases had a hearing. Of the 12 cases that had a hearing (which averaged 1 day), judgments were delivered within 31 days ($SE = 12.04$; range = 0 – 115.5 days).

The data alone does not tell us whether these waiting periods amount to delay or not. The Phase III data can, however, provide some explanation as to why these waiting periods occur.

2. *Workload Pressures*

Lawyers considered that where judgments were slow, it was due to the pressure judges were under. Lawyers expressed concern that judges were being “overworked” and are “frantic” moving from one case to another without being given enough time to write judgments.

An Associate Judge explained that the current formula used to allocate judgment writing time was based on fifty percent of the hearing time.¹⁶⁷ For example, a one day hearing would be allocated half a day of judgment writing time. Another Judge explained that the only other formally allocated judgment writing time was “one reserve week per quarter.” This did not equate to sufficient time to stay on top of writing judgments. Instead, judges often rely on other fixture cancellations to write their judgments. As a Judge explained:

During say a short causes week, you might have three days where you've got hearings and two days where you don't. But, you know a judgment on a complex interlocutory, you know if you're unlucky it could take two or three days to write. (Judge)

Another Judge explained how after a one day hearing it took him nine days to write the judgment:

I'm reasonably efficient as a judgment writer. I get all my stuff out in three weeks and nine days - if I hadn't had a whole bunch of things settle just by chance - that [writing the judgment promptly] wouldn't have happened. Hell, that would have been a challenge. But that's how long it took. (Judge)

¹⁶⁷ In correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017, the Chief High Court Judge confirmed this formula: “Judges are allocated judgment time following a civil case on a two to one basis, i.e. a two-week civil case will be followed by one week of judgment time. There may be some instances where that may not be achievable (such as urgent circuit matters or if the case overruns) but that is the objective. The same rule applies for shorter causes.”

Delays in handing down interlocutory decisions could have a particularly significant effect on the pace of the case as a whole, as the case is effectively paused while the parties wait for the decision on the interlocutory matter:

I'm involved in one piece of litigation that was started in 2012 ... it's been through two strike out applications and a successful stay application. And the average judicial response time from each of those half day hearings – I worked out this morning – is four months. So basically, something's happening once a year. (Lawyer)

One of the delaying factors in the life of a case is that delay by the judge in giving [a] decision ... and in particular it can happen during the interlocutory phases. ... I'm about to give a decision next week where I heard the case more than three months ago and I feel a bit embarrassed it's taken me three months to write the decision. And that's slowed down the case entirely. (Associate Judge)

There was particular concern (expressed in four of the focus groups) that judges are not given protected time immediately after a hearing to write the judgment. Not allowing time immediately after the hearing to write the judgment compromises the quality because “fine points slip away” (Lawyer). A senior barrister opined that “they need time off, in my humble view, they need time off immediately after a trial to do judgment related to that trial” (Senior Barrister). When immediate judgment writing time was not provided, a lawyer said that the judgment that eventually emerged, sometimes bore “no resemblance really to what the issues were as they were refined and then argued in court”. Another focus group commented that “the longer it [the judgment] takes, the worse it [the quality] is sometimes”. They went on to say:

Lawyer 1: It seems to me that it must be quite tricky to make clear in somebody's mind what the evidence was that they had heard six months ago when they were writing a decision so I would imagine if they had time immediately available to them afterwards, it would make their life easier to get the decision done.

Lawyer 2: They need to have that time. I think it's just reckless by having a judge sit through two or three weeks of evidence and then go straight into another fixture.

One focus group contrasted this to arbitrators, “the good ones anyway”, who will write judgments immediately after the hearing, rather than go straight into another fixture. The lawyers acknowledged that “the system perhaps doesn't always allow” for immediate judgment writing but said that it “would be ideal” if they could write when the evidence was “fresh in their mind.”

The Judges agreed that writing “a judgment straight away while it's fresh in your head” is “optimal” but not always possible:

... all of a sudden somebody's ill in Auckland and they get bumped up there to hear a case, you know, during that precious judgment time. Well, judgment time never gets reinstated. Plus, they've got another judgment on their hands straight away from the one they've gone up to Auckland to hear. (Judge)

The loss of judgment writing time can also be caused by incorrect estimates of trial time. One Judge illustrated this problem using an example of a “very complex” judgment with “a whole pile of really knotty legal issues”:

I'd originally had five days set aside straight after an eight-day hearing to write the judgment. And the hearing overran by four days. And with everything else, I've not had time to come back to it. And of course then [it] ... takes about twice as long because the facts, you've got to get back to grips with. ... I get very annoyed if I go beyond three months. I tend to beat up on myself rather than anything else. But sometimes it can't be helped. And if you don't get the right amount of judgment time, to do things reasonably promptly, it can cause a blockage. (Judge)

Other judges emphasised that they felt uncomfortable about delayed judgments but it was a reality of not having enough time:

I work as hard as I did at [major law firm], if not harder. You know I, I work pretty much every Sunday. So I work six days a week. I would say many judges you know work evenings, weekends. ... I can't get my judgments out any faster than I currently do because you can't work any harder because there are only so many hours in a day. (Judge)

Court staff, likely aware of negative public perceptions, emphasised that judges were not “spending Wednesday afternoons playing golf” or “sipping cocktails on Waiheke” and that any judicially driven delays through late judgments was because of the high workload.

In addition to a lack of time to write judgments, two other reasons were identified for judgment delivery delays: judgments are increasingly long and complex, and there is variability in judicial writing speed.

3. *Judgments: Audience and Complexity*

Some court staff, judges, and lawyers observed that the nature of judgment writing has changed. Decisions are becoming longer and more detailed. One court staff member suggested this was motivated by appeal proofing: “the Court of Appeal is looking for more so it flows onto everything. So judgments are bigger.” Another court staff member suggested it related to the complexity of evidence and the time judges need to understand expert evidence. A Judge explained this tendency as being due to the greater availability of judgments:

I think in the old days, people said oh they churn out judgments faster, but it was all for the culture where no one ever saw those judgments apart from the parties, unless they were reportable, which was a huge minority. ... So, if you look sometimes... [at the] old judgments that people refer to, you know, they're pretty rough round the edges. [Laughs]. Whereas now, everything goes up on, online and is available forever. (Judge)

Judges have to balance the desire to write well-crafted judgments against their workload. As an Associate Judge recounted:

I can remember one judge – who had been a leading silk – soon after he'd been appointed, suddenly be disappointed he didn't have enough time that he thought he deserved to spend time on crafting a good decision because more work came crowding in. (Judge)

Some judgments are simply complex and a significant amount of time is required to do them justice. This might cause delay in the time to write the judgment but the delay is justified:

There may be good reasons why a particular judge has taken a long time to give a particular decision. And it's often hard for the public to understand about the particular complexity of some cases. You know which, you know necessary require a lot of time to work on the decision. (Judge)

There is probably some delays in ... getting complex interlocutory judgments out. So, if you have a number of interlocutories and you've got to reserve judgment on them because sometimes they're quite complicated. (Judge)

4. *Variability among Judges*

Lawyers, judges, and court staff noted that there was variability among judges as to how fast they were at writing and finalising judgments. Lawyers commented that the time taken to receive judgments “seem very dependent on the personality of the judges... Certain judges will always take a long time, others will not”, “some are better than others”, “it varies greatly in my experience between some judges”.¹⁶⁸

Two Judges also commented on the variability of speed between their colleagues. They were clear that they were not critiquing the “quality of the decision” but simply the fact that some judges worked faster than others:

Some will have more difficulty deciding than others. And often it's not the decision that's so difficult, it's the reasoning. And you'll get some judges who will want to polish and polish and polish, so they give a perfect diamond decision, if there is such a thing. And actually there isn't, there isn't such a thing. Then you'll get others who'll just say “No, this is fine. Out it goes.” (Judge)

These Judges accept that some judgments take longer to write; rather, their concern was that some of their colleagues took considerable time “turn[ing] over every stone” without necessarily improving the quality of the judgment ultimately delivered. One of the Judges suggested that a person's ability to deliver prompt decisions should be taken into account when appointing Judges: “There needs to be some kind of an inquiry made as to, does this lawyer [who is being considered for appointment] get on with his or her work and make decisions and get cases through.”

5. *Judgment delivery times have improved*

Several lawyers commented there had been major improvements over the last ten years in the time to deliver judgments:

I agree it's got much better and they put, they've tried to put timeframes around themselves but I still don't know whether judges are actually being given enough time off sitting. (Judge)

These improvements were contrasted to wait times in the Human Rights Review Tribunal and the Employment Court, which were identified as jurisdictions with particularly long delays. The improved times in the High Court were largely attributed to the protocols on judgment delivery time.¹⁶⁹ An Associate Judge also commented that the lists that are circulated among the judges

¹⁶⁸ Mark Ramseyer “Talent matters: Judicial productivity and speed in Japan” (2012) 32(1) International Review of Law and Economics 38, found that speed of judgment writing correlates with apparent intellectual ability and effort.

¹⁶⁹ See discussion on time standards at p. 13.

showing the judge's name and the outstanding judgments was helpful: "It reminds judges of the importance of getting their judgments out and if they feel some humiliation or embarrassment because they don't meet the required standard then well so be it."

6. *Impact of delays in delivering judgments*

Even if there are delays in delivering judgments, delays at this point in proceedings can only explain delay in a minority of cases. Only 10 per cent of our Phase II sample was disposed by way of substantive judgment; we have many other examples of cases that took a long time to resolve but were not finalised by a substantive hearing (i.e. discontinued or settled). In fact, 44 of these cases (of 80) fell within the same range of length for the cases involving a substantive trial; and two cases *exceeded* the range (range: cases with substantive trial = 205 – 1412 days; cases without substantive trial = 2 – 1714 days). Cases can take still a very long time to resolve, even without a substantive trial and a written judgment. Nevertheless, there is some evidence that delays in the delivery of judgments is a delaying factor in some cases.

C. *Appeals and Related Cases*

Waiting for appeal decisions (e.g. to the Court of Appeal on interlocutory matters,¹⁷⁰ or a High Court Judge following the decision of an Associate Judge) can also extend the life of a case. Courts do not operate in isolation; a delay in one court can have unavoidable consequences for another. The following example illustrates the interdependent nature of the court system:

The time to have appeals dealt with is another issue that affects us quite a lot. And I mean, I think we just had one in the Court of Appeal and we've waited nearly six months for our decision ... [and that was a] fast tracked appeal. So we had to get them on for hearing within about two months, to wait six months for the decision! [laughs]. It's not, um, it was not ideal. Basically that stalled one of the trials. We've lost our date [trial had to be adjourned] and not got another date. (Lawyer)

Waiting for related cases to proceed, in either the High Court or another court, can also impact on pace. In the Phase II data we found that nine cases (10%) were "parked" at some point to allow a related case to proceed. This can cause significant delays in the life of the individual case but may not necessarily equate to delay. The cases presented in Figure 14 and Figure 23 both have long periods where they are parked waiting for an outcome in the related case (388 days and 1,093 days respectively).

Figure 14. Case is "parked" for 38 per cent of its total life span

This was a claim related to an estate. This case was "parked" for 388 days of its life, awaiting the resolution of a related proceeding. 498 days were allowed for the parties to prepare for trial (which also included time for settlement discussions). The preparation phase is long, partly because it was completed twice: once with one set of issues and then a second time after the related proceeding is finalised. The court allocated dates promptly (requested dates are allocated with minimal extra time: two extra weeks for a conference, two extra weeks for the trial). Judgment was delivered in 100 days, this is outside the 90-day target for 90 per cent of cases, but only by 10 days.

¹⁷⁰ Appeals from interlocutory decisions now need leave of the High Court: Senior Courts Act 2016, s56(3).

Days between events	Total days elapsed	Event	Summary
0	0	Claim is filed.	Case is parked for the related proceeding to run (211 days).
2	2	Judge makes directions as to service.	
108	110	Plaintiff informs the court there is a related proceeding and asks the case management conference to be scheduled after the first case management conference for the related proceeding. Court adjourns case management as per request.	
101	211	Case management conference is held. In the intervening time the Associate Judge has issued three minutes regarding monitoring of the related proceeding. Timetable for pleadings is established and next case management conference scheduled in 69 days.	
90	301	Pleadings and affidavits have been filed. Discovery issues have arisen. Trial is set for three days to begin in 145 days (this period includes the Christmas court closure).	Time for parties to finalise pleadings and prepare for trial (144 days).
54	355	A judicial settlement conference is allocated to be held in 60 days' time (this period includes the Christmas court closure).	
60	415	Judicial settlement conference is held. Parties believe they can resolve issues. Dates for preparation for the hearing are delayed by two weeks to allow this but the trial date is to stay in place.	Parties are attempting to settle and prepare for trial (91 days).
31	446	Matter has not settled but trial adjourned due to progress in the related matter.	
151	597	Judgment is delivered in the related matter.	Waiting for the related matter to be determined (177 days).
26	623	Court requests clarification from the parties about their position now the related matter has been determined. Relists for a case management conference in 65 days' time.	
65	688	Case management conference is held. Hearing to be allocated not sooner than 188 days' time. This allows parties to amend pleadings and file evidence.	Trial preparations begin again but issues are narrowed (263 days).
6	694	Five day hearing to take place in 199 days' time.	
192	886	Trial preparation proceedings smoothly. Judges issue three minutes during this period to resolve preparation issues.	
1	887	Hearing begins.	Trial time (5 days).
4	891	Hearing finishes.	
25	916	Final date for parties to address an evidential issue that arose at trial.	Parties finalise matters for judge's

			determination (25 days).
100	1016	Judgment is delivered.	Time to write judgment (100 days).

D. Slips or Mistakes

In any system, slips or mistakes can potentially cause delay. This was not raised by many participants as a concern but was something we could specifically test for in the Phase II data.

We coded the Phase II cases for any passage of time that could be attributed to slips or mistakes. Four cases (4.5% of the sample) had errors we attributed to the registry. Two errors were for failing to refer a matter to the judge, creating a delay of 14 and 294 days respectively. The case with a delay of 294 days (10 months) is described at Figure 16, showing the 294 days was between the court receiving the final submission on costs and the costs decision being delivered. The Judge recorded in the costs judgment that the delay was the result of the registry failing to refer the file to the judge and apologies had been extended to counsel.

The two other errors occurred earlier in the lives of the respective cases. In one case, the registry did not schedule an initial case management conference. It is difficult to state what, if any, delay occurred as the lapsed period included the Christmas break, but counsel commented that the matter had “an unusual history”, including: poor communication from the registry, and late notice of the case management conference once it was scheduled. We estimate that the slip caused approximately 40 days’ delay. In the fourth case, the judge had finalised a costs judgment on an interlocutory matter within 79 days of receiving the final costs memorandum. That decision, however, was not distributed by registry; it was not until counsel specifically requested it, some 411 days later, the mistake was discovered. Fortunately, this mistake did not impede the case’s overall progress as discovery was proceeding in the interim.

In some instances, the passage of time caused by these slips might amount to delay according to the International Consortium for Court Excellence’s definition of timeliness, as the unreasonable time passed “due to inefficient processes and insufficient resources”.¹⁷¹ The court staff were acutely aware of the potential for errors leading to delay. Two court staff referred to their discomfort when they are questioned by judge about missing court documents: “Where is it? Why haven’t you done this” or being publicly embarrassed:

The [document missed off the court file] will still get to the judge but late. ...
[S]ometimes lawyers can hand up a copy in court ... this is painful for us if you see it
in the minute – “I did not receive this memo that was filed” – and you know it’s you.
(Court staff)

¹⁷¹ New Zealand and Australia are signatories to this Framework (via the Australasian Institute of Judicial Administration).

Court staff are actively trying to identify and avoid these errors. Two court staff alluded to the need for more training within their own systems to ensure that processing errors were minimised. Other court staff had already identified the risk of overlooking costs decisions and taken steps to address this problem.¹⁷²

E. Conclusion

We have identified both waiting for hearing time and waiting for judgments as points of delay in some cases. The attempts to reduce waiting times for hearings (overlisting) may, in some cases, create pressure on judgment writing time. Heavy workloads may also create delays in judgment writing. Occasionally the registry makes errors in processing files that cause delays; while unusual, we did find evidence they do occur. Finally, the length of a case is sometimes extended by the need to wait on the outcome of appeals and related cases. These are not, however, matters easily in the High Court's control; they are a function of the interdependent and complex nature of litigation.

¹⁷² See discussion p. 131 "Excluding costs applications".

8. Case Characteristics and Participant Conduct

We have considered how the availability of judicial time can affect pace and cause delay. In this chapter, we consider how other case variables (complexity, party type, and representation) and the availability and conduct of other litigation participants (e.g. expert witnesses, lawyers) affects pace.

A. Case Complexity

Participants commented that case complexity was a significant factor in drawing out the length of a case. When pressed for what they meant by complexity, a number of factors were consistently identified: large numbers of parties, large amounts of documentary discovery or other complex evidence, and legal complexity (i.e. difficult legal issues).

Legal complexity was identified as one factor that causes delays across various points of the life of the case. For example, legal complexity contributes to delay at the outset because “it takes the parties time to get to the starting barrier” (Judge). It also means, as discussed in the previous chapter, that the Judge needs more time to write the judgment. Counsel seniority was identified as one factor that off-set the delaying effect of case complexity. If a complex case was urgent, it would often be handled by senior and experienced counsel:

... the more complex cases that need to be dealt with quickly are prepared more efficiently, because you're dealing with senior people who know how to prepare efficiently. So, you'll often get them on for hearing quicker than your, your bulk standard civil case of four or five days. (Judge)

Complex cases do generally take extra time. In recognition of this fact, the court now classifies case as either complex or ordinary. Complex cases receive more intensive case management:¹⁷³

Cases are triaged into either standard or complex. If they're complex they're assigned to a Judge and that Judge manages the case as he or she sees fit in terms of the timing of conferences and things like that. (Judge)

The same judge will manage complex cases throughout the life of the case.¹⁷⁴ Court staff commented that complex cases now proceed more efficiently because they are only managed by one judge. The assigned judge, knowing they will hear the case through to its conclusion, is more motivated to get to know the issues and parties. The judge is therefore better able to assist the parties in identifying contentious issues for trial and seeing it swiftly to its conclusion.

Separate lists and case management procedures have also emerged to deal with particularly complex cases: leaky building and earthquake cases. Multiple parties and complex evidence are common features of these categories of cases.

1. Leaky Building Cases

The complexity in leaky building cases is due mostly to the number of parties involved both plaintiffs (particularly in apartment buildings) and defendants, as well as the need for expert

¹⁷³ High Court Rules 2016, r7.1.

¹⁷⁴ Cases assigned as ordinary are case managed by Associate Judges.

evidence. The large number of people involved in these cases means it is often difficult to secure court dates where all participants are available. There is also only a small pool of lawyers and expert witnesses who specialise in this work, so availability of the ‘right people’ is also an issue.¹⁷⁵ Leaky building cases are also often parked for substantial periods while repairs are carried out as either part of a settlement or to quantify the damages. All these factors create a situation where leaky building cases proceed slowly. As a Judge explained:

[In] this court we deal with some fairly major leaky building cases. For example, we have blocks of apartments that have been built badly. And you might have a case for the body corporate and a hundred plaintiffs. And, it will be numerous defendants as well. Now to go over a ten storey building and find all the leaks in it and then identify who’s caused the leaks and whether there was any negligence in, in the way that those leaks arose and to assess what the damage is and to work out what the costs of repair are and mount, prepare a case against anyone, is an enormous job. That requires input from experts from many different areas. And you know repairs will take a long time as well. (Judge)

A court staff member outlined why there is a limit as to how fast these cases can progress:

They take a time to get through the system. And you can’t speed it up. You can’t, you can’t repair buildings quicker. So those, there’s just nothing you can do about. They just have to go through at a particular pace. We can try and get them, we can do our bit as quickly as we can but at some point, it’s just not going to go any quicker. (Court staff)

Judges, court staff, and lawyers all identified the impact that leaky building cases have had on the litigation load in the High Court: “I don’t think anyone realised or still does, I don’t think anyone realises how big that is and was and continues to be and how much of an effect on the courts it had” (Court staff).

In order to comment on how much court time is consumed by leaky building cases, we reviewed the Phase I and Phase II data. We reviewed three leaky building cases in our précis (3% of sample). These cases took an average of 956 days to conclude. The Ministry of Justice only recorded 10 leaky building cases being heard in the High Court (0.6% of general proceeding sample), with an average case length of 1,022 days, although this may be a recording error.¹⁷⁶ There was some consistency in length across these cases, suggesting that these cases take significantly longer than the average disposal time.

2. *Earthquake Cases*

The High Court anticipated the large number of civil claims arising from the Canterbury earthquakes and established the Christchurch Earthquake List (CEQL).¹⁷⁷ The CEQL now deals

¹⁷⁵ See p. 78 of this report.

¹⁷⁶ There was a discrepancy between the Phase I and Phase II datasets as to the frequency of leaky building cases (0.6% vs 3% respectively). It is possible that we just oversampled leaky building cases in Phase II. An alternate explanation, however, is that CMS had not correctly identified all of the leaky building cases (named as ‘weathertight cases’) in the Phase I sample, particularly given that 27% of general proceeding cases had ‘not recorded’ entered for the nature of claim. While we cannot give a fixed estimate, we would suggest that up to 3% of general proceeding cases involve a dispute over a leaky building.

¹⁷⁷ See p. 7 for a background discussion of the earthquakes and the CEQL.

with a high volume of complex cases; approximately 11 per cent of all civil proceedings issued in the New Zealand High Courts.¹⁷⁸

Cases with precedent value were identified and prioritised for trial so that they could provide guidance for other claimants and encourage settlement. This process is time consuming, although the trials potentially less so as they considered the specific, identified issue. The requirement of complex expert testimony is a potential delaying factor; many cases require input from structural engineers, geotechnical engineers, building practitioners, and quantity surveyors. These various experts are in short supply.¹⁷⁹

Despite these various factors that add complexity, Khouri observed that cases heard on the CEQL still proceed quickly, relative to other cases. For example, cases on the CEQL list that were deemed ready for trial had a fixture allocated, on average, within 280 days, whereas non-CEQL cases had to wait 325 days on average.¹⁸⁰ Some commentators have postulated that the success of the CEQL is due to the mandatory in-person requirement at the first case management conference (which was recently amended). This forced the parties to meet face-to-face, and for some parties could provide a much needed ‘reality check’ at the earliest opportunity.¹⁸¹ As a Judge explained:

The parties came in and it was a chance to talk to them about what their expectations might have been. You know? In other words, do you want to rebuild? Do you want money? Etc., etc. For them to have their say, a little bit. (Judge)

Because cases on the CEQL are heard in the Christchurch High Court, we have not précised the physical files and cannot provide any further insights to these cases. We simply note that these are often regarded as a special type of case because of both their complexity and special case management.

3. *Multiple Parties*

General proceedings rarely involve one party bringing a dispute against another. As previously explained, we analysed a sub-set of Phase I cases,¹⁸² and found that there were, on average, six parties involved in a proceeding, with a range of two through to 269 parties (median of three parties).¹⁸³ As the number of parties involved in the proceedings increased, the time it took the case to proceed also increased.¹⁸⁴ The participants commonly identified multiple parties as a factor that made a case complex. A large number of parties increased the procedural issues and made it more difficult to schedule time for conferences, exchange evidence, and schedule a trial.

To specifically investigate the impact of multiple parties – as opposed to only two parties (one plaintiff and one defendant) – on the overall pace, we coded each case according to whether there were one, or multiple, plaintiffs and defendants. The descriptive statistics are set out in Table 8-1.

¹⁷⁸ Khouri, above n 42 at 322.

¹⁷⁹ See discussion at p. 79 of this report.

¹⁸⁰ Khouri, above n 42 at 341-342.

¹⁸¹ At 331.

¹⁸² See footnote 141 of this report.

¹⁸³ See p. 44 of this report.

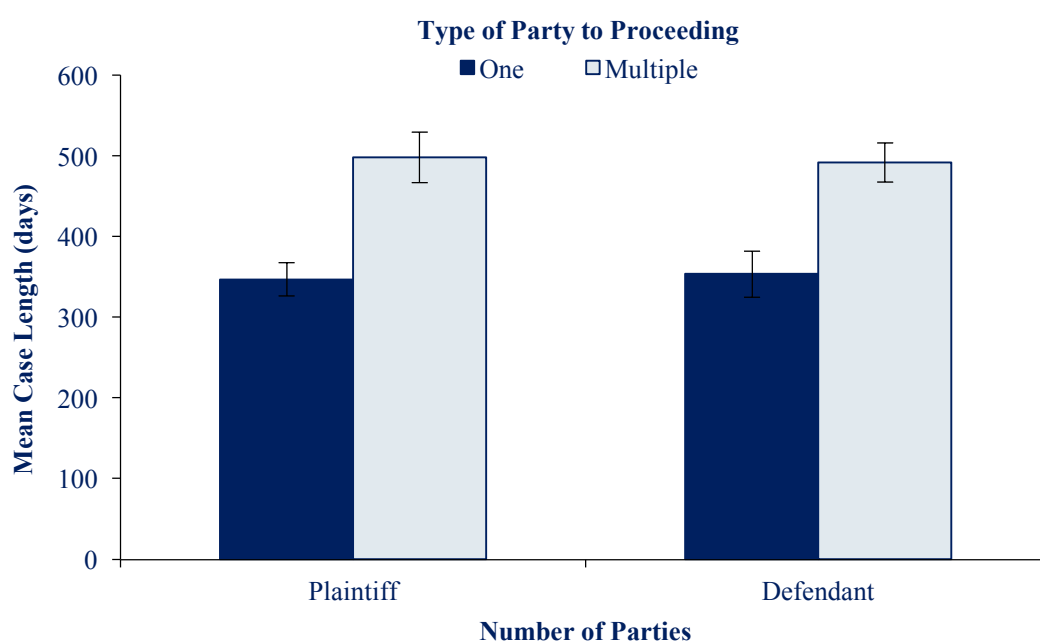
¹⁸⁴ A bootstrapped Kendall Tau’s correlation revealed that there was a moderate positive correlation: *Tau-b* (500) = .276, *p* < .01, BCa 95% CI [0.219, 0.331].

Table 8-1. Descriptive statistics of parties to a proceeding

Plaintiff Parties	Defendant Parties	Frequency
One Plaintiff	One Defendant	179
	Multiple Defendants	170
Multiple Plaintiffs	One Defendant	61
	Multiple Defendants	102

Subsequent analyses revealed two main effects.¹⁸⁵ Figure 15 shows that cases took longer to proceed when there were multiple plaintiffs, as opposed to one plaintiff, irrespective of the number of defendant parties. The reverse was also true: cases took longer to proceed when there were multiple defendants, as opposed to one defendant, irrespective of the number of plaintiff parties. This finding shows that multiple parties is another factor that can affect the pace of a proceeding.

Figure 15. Case length according to the number of parties



‘Who’ the parties are often evolves during a proceeding. Some participants identified the process of actually joining plaintiffs, defendants, or third parties as a source of delay:

It takes time on those major commercial cases to sort out, bluntly, who the parties are. You know? I mean this, this would have been eighteen months delay in sorting out who’s actually going to be fronting up to court. (Lawyer)

¹⁸⁵ We conducted a 2 (number of plaintiff parties) x 2 (number of respondent parties) ANOVA, which revealed significant main effects of the number of plaintiff parties, $F(1, 508) = 16.45, p < .001, d = 0.18$, BCa 95% CI [72.89, 232.27], and respondent parties, $F(1, 508) = 13.67, p < .001, d = 0.16$, BCa 95% CI [54.57, 217.56]. There was no interaction, however ($p = .396$). The main effects illustrate when there is a significant difference between the levels of a variable, independent of any variations in the other variable.

... a third party, that's always one that pushes dates out as well because essentially you get to a point and then they just want to join a third party and essentially you get that party in if they're joining it, it starts from scratch almost again. (Court staff)

Figure 16 illustrates how the process of joining other parties and amending pleadings (usually necessary if a party is added) can cause delay. The first defendant was involved for the duration of the proceeding, which lasted 1,070 days. 320 days into the proceeding the plaintiff added three further defendants. This necessitated amending pleadings and the trial was only scheduled 399 days after the proceeding was filed, beginning 691 days after the proceeding was filed.

Figure 16. Contractual dispute where pleadings and parties amended

Days between events	Total days elapsed	Event
0	0	Plaintiff files claim against the first and second defendants and applications for summary judgment, directions, and interim orders.
92	92	The first defendant files an application for summary judgment against the plaintiff. These are heard and an oral judgment is delivered. The plaintiff's application against the second defendant is unopposed and is entered. The plaintiff's application against the first defendant and the first defendant's application against the plaintiff are adjourned part heard pending completion of discovery.
27	119	Inspection has not been completed and the parties agree to an extension.
36	155	Inspection has not been completed; awaiting report from an accounting expert. Mention vacated. "No further mentions available this year" (40 days before Christmas closure begins). Allocated mention in 82 days.
103	258	Expert's report is received. Defendant says that expert report is long and the defendant needs to time to consider it. Parties ask for adjournment.
23	281	Second defendant is in liquidation and first defendant has withdrawn summary judgment application. Plaintiff wishes to amend claim and proceed against the first defendant. Timetable established and first case management conference scheduled to take place in 97 days (this allows time for amended pleadings and discovery).
25	306	Parties seek a two-week extension because new facts have arisen and the statement of claim needs to be amended. New timetable set and the case management conference is pushed back 21 days.
14	320	Plaintiff makes an application to join three more defendants.
30	350	Joinder of further defendants is unopposed. Timetable established for new pleadings (third amended statement of claim and statements of defence).
49	399	Parties agree timetable orders and case management conference is vacated. Trial of four days to begin in 227 days.
27	426	Counsel unavailable for date allocated. Trial moved back 64 days.

260	686	Judge records that there "appears to be fairly serious non-compliance matters re readiness for trial". Requests that counsel inform registry of progress on preparation. Plaintiff apologises for delays in preparation but gives no explanation. Files synopsis of argument (one week late).
1	687	Defendants complain about late submissions from plaintiff and that common bundle was prepared without consultation. Judge notes this is a breach of the rules and asks to hear from counsel if it cannot be resolved between them.
4	691	Hearing begins and runs for four days.
3	694	Plaintiff has sought leave to amend pleadings at the end of trial. Judge requests submissions on the point.
26	720	Final submissions received on whether the plaintiff should be allowed to amend its pleadings.
21	741	Judgment is delivered in favour of the defendants.
35	776	Final submissions received regarding costs.
294	1,070	Judgment on costs is delivered.

B. Availability of People in Cases

A team of people needs to be assembled to get a matter to court: the judge, court taker, litigants, witnesses, and lawyers. The availability of people is closely related to case complexity. Complex cases involve more experts, more parties, and therefore more lawyers. Corraling all these people is challenging and the interview participants suggested this issue is a very significant factor in the pace of a case.

Litigation participants might be unavailable for a range of personal reasons and sometimes at short notice. A court staff member observed that these reasons included “funerals and illness and family issues”. Professional reasons can also impact on availability. Judges, for example, might have to recuse themselves, and legal counsel might have conflicting commitments with other cases.

A senior court staff member explained that people frequently compared scheduling trials to scheduling medical operations but she considered the analogy false:

You know the difference between me and a hospital? The hospital has control of the doctor, the nurse, the [operating] room, the medicines, everything involved. The only person coming to them is the patient. The only person I have control over is, well and that's not even the person, it's ... the court room. Because anything can happen with a judge ... they might ... suddenly not be available. Yes, you could potentially say you have another judge available. But the parties all come to you. The witnesses all come to you. The lawyers all come to you. The public all come to you. Everyone's coming into you. Whereas with the hospital, you've got everyone. You control everybody that needs to be there other than one person [the patient]. (Court staff)

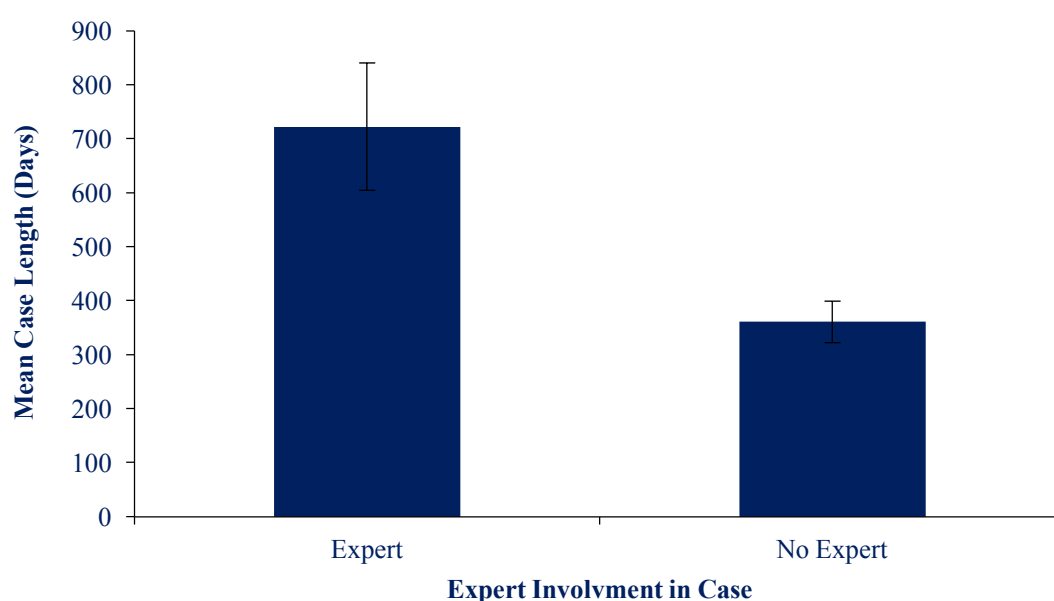
Only some of the participants in a trial can be interchanged at the last minute. Sometimes the judge and court staff can be substituted, but the witnesses and lawyers cannot be the subject of eleventh hour substitutions. Lawyers can only be changed with a reasonable period of warning, and this is often still at considerable cost (temporal and financial).

1. *Expert Witnesses*

Many participants also commented that the limited pool of experts, with limited available time, was another point of delay. We analysed the Phase II sample to determine what influence this might have on the pace of general proceedings.

In our Phase II sample, we only recorded input from an expert (e.g. engineer) in 15 cases. We investigated whether there were any differences in case length depending on whether or not an expert was involved in the case. A Welch's *t*-test revealed that cases that had an expert involved took longer to proceed, relative to cases that did not have an expert involved (Figure 17).¹⁸⁶

Figure 17. Case length as a function of expert involvement in case



From these findings alone, however, we cannot comment on whether any causal relationship between expert involvement and case length exists, as there are two equally plausible interpretations of Figure 17:

- i. expert involvement causes cases to take longer; or
- ii. experts typically only become involved in complex, lengthy cases.

To assess whether we could tease out a causal relationship, we recorded any commentary where the expert was mentioned (e.g. in a memorandum) as a reason for prolonging the proceedings (e.g. expert unwell, counsel had difficulty in briefing appropriate expert). In five of the fifteen cases, commentary explicitly stated that there were difficulties securing appropriate expert evidence, which was having a negative impact on case progression. Unfortunately, the sample sizes were too

¹⁸⁶ Cases that had an expert involved: $M = 722.33$ days; $SE = 118.29$; range = 124 to 1714 days. Cases that did not have an expert involved: $M = 360.93$; $SE = 30.05$; range = 2 to 1683 days; $t(88) = 3.55$, $p < .01$, $d = 0.75$.

small to statistically investigate whether there were any differences in overall case length as a function of this proxy measure.¹⁸⁷

The interview participants were of the view, however, that a causal relationship existed:

The factor [in delay], the principle factor in my view has been the availability of expert witnesses. Many cases in the civil jurisdiction of this court, because they tend to be more complex and involve bigger sums of money, involve witness as experts. And I'm talking about pretty well every branch. The common branches are accountants, sometimes lawyers, sometimes doctors, ah specialists in particular. Sometimes when you get out of sort of ordinary civil litigation and want them to say something more specific like earthquakes, engineers and quantity surveyors and geotechnical experts. There's only a certain number of those people in the country. (Judge)

This is partly the result of a perceived increase in knowledge and expertise generally:

I mean once upon a time we wouldn't have had an expert in England that could explain the difference between the weights of denim and how that particular cotton breaks and that one doesn't. Well, nowadays you can get access to those sorts of people. (Court Staff)

Other participants perceived that the increasing availability of experts led to increased financial and temporal costs: fees of the experts, time to brief the experts, and additional hearing time.

The time it takes to have experts briefed and report back was identified as an important factor across all types of general proceedings: "[In] most complex litigation the experts play a fairly big part in it" (lawyer). Court staff and lawyers commented that expert reports take time to compile and then the other side needs time to respond. Availability of experts is a particular issue in leaky building and earthquake cases, which "require input from experts from many different areas" (Judge). Experts are often asked to first confer, which in some cases might save time, but it can also cause additional delays "because they've all got competing timetables" (Associate Judge). When discussing earthquake litigation one Judge said:

[There is] only a small, limited number of experts in and around Christchurch and they're run off their feet. So, structural engineers, geo-tech engineers, quantity surveyors, architects etc. We try and set some time limits and try and direct that they will meet together, meet on site and try and narrow issues. But getting them to the post is difficult. (Judge)

In one focus group three lawyers agreed that changing experts was a problem, particularly, but not exclusively, in earthquake cases:

So when you, commonly what happens during the process, there's a joint expert consultation. ... And then when they're just, when they reach agreement over what should happen or are close to that, one party might disengage the expert and go and find another one. So we've lost all of that time. (Lawyer)

Some lawyers also suggested that it was not only expert availability that was causing delay but also that lawyers were failing to instruct experts in time. This factor was not evident on the court files

¹⁸⁷ We also note that as the Phase II analysis for this report is only for the Auckland High Court, this data cannot address the concerns raised by our participants in Phase III in relation to the delays caused by experts appearing in cases on the CEQL.

(it is unlikely to be something that a lawyer would disclose to the Court) but the recent High Court case of *Bligh v The Earthquake Commission* provides an example.¹⁸⁸ In that earthquake case, the lawyers had instructed experts to report in the days leading up to and even *on* the day of trial.

A Judge commented that the problem of expert availability was avoided where “the case has been front end loaded with costs” and the lawyers have expert witness statements before filing the case. The Judge said in this situation “there’s very little time actually needed for interlocutories and you can move straight away to a hearing”.

2. *Lawyers*

The availability of lawyers was consistently identified by court staff and lawyers as a reason why a case might be delayed. This unavailability stemmed from either personal reasons – illness, bereavement and even death – or more commonly from counsel having busy schedules and having difficulty finding dates that suited both parties. A court staff member said that while some lawyers reply to requests for dates and give availability, others “get a reputation for being famously unavailable ... you just can’t get an answer.”¹⁸⁹

Where there were multiple parties, and therefore multiple lawyers, this compounded the problem:

Trying to... sometimes it’s like eight counsel that you’re trying to organise all at the same time, it can take a while trying to find one date. For a 20-minute conversation that’s... yeah that’s really hard. Just because of that availability [they’ve got a] whole bunch of other stuff that they’ve got going on. (Court staff)

You know the schedulers have to work really, really hard. ... They’ll find a hearing date and then ... the counsel come back and say “Well, then, ... that doesn’t work for me.” ... Obviously they have commitments and things, but busy counsel have quite a lot of commitments going quite a long way out. ... If you’ve got quite a busy barrister and you’re looking for a four-week hearing, or two-week hearing even, you know, [that is difficult]. And then you’ve got three or four of those to juggle. (Judge)

Lawyer availability was clearly a cause of frustration for the court staff, but unfortunately it was difficult to assess the extent of this problem in the Phase II data. This was because it was not always apparent on the file why the date was scheduled when it was. There were many references to lawyers’ unavailability or late filing of documents, with reasons including: illness (e.g. flu) or medical treatment for the lawyer (e.g. cancer), illness or medical treatment for a family member (e.g. spouse in an accident), scheduled annual leave, or other professional commitments (e.g. teaching university courses). It was also apparent that fixtures were either delayed, or could not be set down at the court recommended time, because the lawyer had conflicting case commitments or were “unavailable” with no reason stated (e.g. “unavoidably absent from work”). The difficulty we encountered was accurately attributing how much, if any, delay these events caused.

We did précis a number of cases that illustrate the difficulty of lawyer’s unavailability in setting court fixtures. The contractual dispute outlined in Figure 16 provides a good example. In June

¹⁸⁸ *Bligh v The Earthquake Commission & Anor* [2017] NZHC 995.

¹⁸⁹ The practice in some courts is to request counsel “unavailable dates” and then schedule the matter. In other courts, the practice is to send out a fixture date and it is for counsel to tell the court if they are unavailable and request it is rescheduled.

2014, registry asked for counsels' availability for a five-day trial between September 2014 and April 2015 (i.e. a seven-month period excluding the Christmas closure). The plaintiff's lawyer was available on multiple dates, but the defendant's lawyer only had three weeks availability. A fixture was ultimately allocated for May 2015. The case then settled in March 2015, two months before the trial was due to begin. We cannot identify from this evidence whether the lawyers' availability was a negative or positive for the case. Perhaps the intervening time allowed parties to negotiate settlement, rather than proceeding to trial (which of course adds a financial cost). Or perhaps the parties were of the view that the intervening time significantly dragged out their case.

Judges, lawyers, and court staff often mentioned that there were particular issues with the availability of the most senior lawyers, Queens Counsel, sometimes referred to as a "silk":

I find other counsel are the cause for most of the delay and also acting with senior QCs getting timetabling is really difficult, it can push out things months and they sit around and go, "no not available, not available". (Lawyer)

I mean if you want to instruct a QC or a senior counsel or something then their availability is definitely going to be an issue. Someone like [name] QC and they're very specialised or they're known quite well and they really want to use that person or something then yes it's definitely going to be an issue with the lawyer's availability. (Court staff)

The QC, [acting for] the seventh party is, you know, kicking up a huge fuss [because the case has] been set down at a time that doesn't work for him. And, from his client's perspective, you know they should be able to have the counsel of their choice and he's been involved from the outset and all these things. But then to find a time that's also going to work for him and work for all the other six people, you know it could push it out months. (Judge)

A senior partner in a major law firm suggested that the availability of Queens Counsel was sometimes used as a way to "game the system". This lawyer gave the example of a case where the opposing party had instructed a Queen's Counsel:

[Name of QC] had literally been instructed the day before. There was a date available within the month and our client was saying, "yep, we'll go with that". [The QC says,] "Oh no, sorry, I'm in the Supreme Court on that day". So you know, immediately the Court says, "oh well" [and did not allocate the date]. (Lawyer)

The lawyer said "that annoys me a little bit because if you get clients who are saying, 'this is creating cost, this is creating delay' and they get quite frustrated".

Analysis of the Phase II data showed that judge's decisions to allow adjournments due to seniority or unavailability was mixed. For example, in one case the adjournment was refused. A hearing fixture had been allocated to occur in two months' time. Queen's Counsel had been appointed for the defendant but he was unavailable and the defendant filed a strongly worded request for an adjournment on this basis. The other party objected on the grounds that the next available fixture was three months away and a commercial deal that was contingent on the outcome of the case might be lost. The Judge refused the adjournment stating:

I take into account that although [counsel's name] is a Queen's Counsel and a leading member of the New Zealand Bar, he is not irreplaceable. It is my judgment that his client can retain another leading counsel who can be briefed, with the assistance of [current QC], well before the fixture commences [in two months' time]. (Judge)

3. *Unavailability of Multiple Parties*

Where there are multiple parties, the chances increase of someone being unavailable for a court date, at some point during the life of a case. Figure 18 illustrates how unavailability of various participants in the process, at various points, can create a cumulative delay.

Figure 18. Long case with multiple sources of delay

This case involved complex trust litigation, which was originally filed in the Family Court and then removed to the High Court. More than five months elapsed between the High Court being seized of the proceeding and the first case management conference. This delay was caused by the defendant's ill health and difficulties with arranging evidence from an overseas witness. Despite this, the trial was to have occurred 13 months after the case was filed. The trial date was delayed, however, by the defendant's application to strike out causes of action. The court took the opportunity to cut down the scope of the trial by hearing this application and the trial was only delayed slightly (by three weeks). The application was unsuccessful and so trial was to take place 14 months after the case was filed. However, that date was lost as a result of the defendant's representation issues: no representation (supposedly due to insufficient funds), counsel's illness, and then counsel's unavailability. This created a six-month delay. The judgment was then issued three months after trial. The judgment, unfortunately, did not resolve all the issues between the parties. A period of almost a year (329 days) elapsed before the parties came back to the court asking for a half-day fixture to resolve the outstanding issues. The court allocated a hearing date with a wait time of 69 days (just over two months). New issues arose and two days then needed to be found to hear those issues. A date was allocated with a wait time of 103 days (just over three months).

Days between events	Days elapsed since filing	Event
0	0	Complex trust litigation, removed from FC and filed in HC
63	63	Pleadings (including counterclaim) filed and a first case management conference is allocated to take place in 43 days' time.
24	87	Defendant is ill and case management conference is vacated for 75 days to give defendant time to recover.
75	162	CMC proceeds as scheduled although there is another request for adjournment due to defendant's ill health. The request for adjournment is rejected as counsel can appear on defendant's behalf. Five-day trial is to be allocated no sooner than six months' time. The six-month period of time is necessary to allow parties to mediate and to prepare for trial (one witness is abroad). Trial is allocated beginning in 220 days' time (seven months' time)
162	324	Pleading are amended in the lead up to trial. There are some difficulties arranging evidence of overseas witnesses. At the end of this period the defendant files an application to strike out seven of the plaintiff's causes of action. This will reduce the scope of the

		trial so trial is adjourned. A new date is given, it is 21 days later than the original trial date
22	346	Interlocutory application to strike out the seven causes of action is heard.
24	370	Judge delivers decision on interlocutory application to strike out seven causes of action. The defendant is unsuccessful. Trial preparation is to continue.
9	379	Counsel for the defendant is given leave to withdraw because "the defendant's solicitors have not been placed in funds to conduct the trial". The trial is to begin in 26 days' time and the defendant is now without representation.
16	395	Defendant's counsel has been reengaged but is now ill and cannot conduct the trial. Fixture beginning in 10 days' time is vacated.
6	401	Parties request a Judicial Settlement Conference
8	409	Defendant's counsel writes to tell the court there are no instructions from the defendant to go back on the record. The defendant remains without representation.
3	412	Court tells the parties that a Judicial Settlement Conference is "not appropriate where the defendant remains unrepresented". Dates are offered for a trial beginning between 30 and 120 days' times. Defendant's counsel will be re-engaged for the trial and is not available for these dates. New trial is allocated to begin in 189 days' time (six months' time).
24	436	Plaintiff is upset about the new trial date being so far in the future. Plaintiff believes the defendant is "engaging in an ongoing campaign to delay resolution". Defendant says it is only unrepresented to save costs but will be represented and no deliberate delay is taking place. Trial date remains in place.
152	588	Defendant has engaged new counsel, a QC. Trial estimate reduced - now three to four days, not five days. Defendant discontinues counterclaim.
13	601	Hearing begins and takes six days
101	702	Judgment is issued in favour of the defendant. Some issues remain outstanding and if they are not resolved the parties can apply for further orders.
329	1031	Parties are unable to resolve outstanding issues and return for a case management conference. Half a day hearing is ordered to take place in 69 days' time. Timetabling orders given for evidence.
69	1100	All the evidence is late but the hearing proceeds as scheduled. New issues arise during the hearing and it now needs two days allocated. A new hearing will take place in 103 days' time.
103	1203	On the first day of the two-day hearing the parties file a joint memorandum stating they have resolved matters and the hearing can be adjourned.

Of the elapses of time, 614 days were party (primarily defendant) driven: 75 days for the defendant's ill health, 21 days for the strike out application, 189 days due to counsel unavailability, 329 for discussions post-judgment. The other 529 days (19 months) included a seven month wait for trial (six of those

months at the request of the parties to allow preparation), a three month wait for judgment, a two month and a three month wait for fixtures to resolve post-judgment issues

C. Competence & Cooperation

The importance of competent and cooperative lawyers was an issue that emerged in every focus group and in all of the judges' interviews. Many participants saw this as the key to progressing a case quickly. Conversely, a lack of cooperation and competence can grind a case to a halt.

Lawyers described the importance of relationships with other lawyers. Cooperative relationships were considered an important aspect of moving a case forward efficiently. It meant that the issues could be narrowed, the scope of discovery reduced, timetables agreed, and the trial could deal only with essential issues.

Lawyers observed that there were a minority of lawyers with whom they were unable to form cooperative relationships; lawyers they described in more or less colourful terms as “idiots”, “prats”, a “brick wall”, a person who “you wouldn’t want at your barbeque”, “irrational”, “wired like that [obstructive]”, or “highly antagonistic”. They said that these lawyers were very difficult to litigate against as they would not agree on issues, which would slow the pace of the case. A lawyer illustrated the importance of cooperation by directly comparing two similar cases she had been involved in. In the first case, she talked about the “long and bitter experience” of having “battles over discovery” to receive “really relevant documents”, arguments over access to records and then those issues being appealed. The lawyer described this process as “quite wearying”. In contrast:

The other trial ... was a different trial team and we’ve worked really cooperatively. They were a pleasure to deal with. We had virtually no interlocutories because we were able to resolve things by consent. ... Who the [defendant] instructs ... as counsel just makes such a difference to the whole experience for us and for our clients. (Lawyer)

Other lawyers also referred to having to face “interlocutory warfare” or opposing lawyers who give either too much discovery, hide relevant documents in a vast mountain of documents, or withhold and drip feed documents. A Judge commented that:

The good lawyers talk to each other. And sometimes agree on tailored discovery just to get the matter going. ... [You] won’t have one side bombarding the other with a huge amount of material, most of which is of marginal relevance, perhaps with the odd little bit but could be useful, buried there somewhere in the hope that the other side mightn’t find it. You know? I mean that’s a cynical view but, but I’m sure at times that can happen. (Judge)

Many of the Judges referred to the importance of “good lawyers”. When asked to explain what a good lawyer was, the Judges described a lawyer who can drive a case forward “at sensible pace”, identify “the nub of the case”, keep a clear head, and tailor the discovery. These qualities almost all require a cooperative approach. Judges considered having competent counsel on both sides of a dispute as key to a case moving quickly through the court.

Figure 19 typifies a case (drawn from our Phase II sample) where there is a high level of cooperation between the parties: all memorandums to the court for conferences (three) were joint memorandum; the trial preparation proceeded without any conflict; and the hearing begins 376 days after the case was filed.

Figure 19. Case suggesting high level of counsel cooperation – no delays

Days between events	Total days elapsed	Events
0	0	Claim filed and application made for directions as to service.
5	5	Associate Judge gives directions as to service.
60	65	Defence is filed.
6	71	First case management conference is allocated to take place in 90 days' time (includes the period of the Christmas closure).
90	161	First case management conference is held. Parties have filed a joint memorandum asking for four-day hearing in 214 days' time. Court allocates a trial beginning in 215 days' time.
90	251	Parties file a joint memorandum informing the court that preparation is going well and seek some amendments to the timetable (by agreement). The Associate Judge makes these orders and vacates the case management conference.
65	316	Parties file a joint memorandum informing the court that preparation is going to plan and they do not need a telephone conference. The conference is vacated.
60	376	The hearing begins and lasts one day
10	386	Judgment is delivered
139	525	Costs order is made
21	546	Enforcement order is made

But just as lawyers cooperating can push a case forward, lawyers can also cooperate to deliberately slow a case down. If the litigants want the case slowed down this is perhaps unproblematic. However, lawyers are sometimes making agreements between themselves, not for the clients' benefit, but to balance their own workloads and to maintain cooperative relationships with other counsel. Lawyers said that whether or not they would agree to extensions in the timetable did depend on “what the client wanted” but also on “who’s involved”:

I'd say the vast majority ... of lawyers ... behave reasonably and are willing to accommodate people's timetables and obligations on the other side. That's how the system should function ... it swings and roundabouts and that's in the client's ultimate interest because ultimately things are dealt with more efficiently if people are co-operating. (Lawyer)

While these arrangements might be ultimately in the interests of the system as a whole, there is the possibility that the interests of individual clients might be traded off in such arrangements.

D. Strategic Parties and Interlocutory Warfare

Two competent, cooperative counsel is not always enough, however, the parties must “want to get on with it” (Judge). Lawyers, judges, and court staff all said that even counsel who are capable of a cooperative approach may be “hamstrung by their instructions” (Judge). As a lawyer said:

It’s not just the lawyer that dictates the strategic approach, sometimes it’s the parties themselves, they may have reasons for speeding things up or slowing things down, which might be contrary to the approach the lawyer may have otherwise have taken. (Lawyer)

Lawyers gave various reasons why a litigant may be unwilling to drive the litigation forward: to disguise a weak case; to allow room for a “fishing expedition” to try and shore up their case; or the litigant may have run low on funds. Parties might also engage in what three participants referred to as “interlocutory warfare”. A litigant deliberately slows the pace of the case and relies on their deeper pockets to “burn off the plaintiff who has a lesser pocket”; that is, force the other party to abandon the litigation. Judges and lawyers pointed to applications for security for costs, strike out, further and better particulars, and various discovery applications as commonly deployed strategies to use up the resources (financial and otherwise) of the opposing party.

We asked lawyers whether they would file an application that had some merit, despite suspecting that it was really for a collateral purpose. Lawyers were equivocal, saying while they either “would not” or “probably would not” file an application for that reason only, “it is not hard to convince yourself” that the application might be legitimate:

It’s a difficult dilemma because you’ve got an obligation to the court, primarily you’re an officer of the court and you can’t ... use those processes inappropriately. And sometimes it’s hard to know if the client is wanting you to press somebody on an issue because it’s genuine or because they’re using it for other reasons. Security for costs might be a great example where you burn quite a lot of money and time in determining something like that or the client might have a genuine fear. ... My view would be that if they’re saying to you to do something that is purely designed to be difficult, then I’d say no, but if they were giving you instructions to do something and you might not be sure if it’s a good idea or not but they’re clear in their instructions then you’ve got no choice but to pursue those matters so you know, that’s the dilemma I guess. (Lawyer)

Lawyers and judges referred to insurance companies as an example of litigants using interlocutories to create tactical delay. A lawyer who acted against insurance companies commented that the insurance companies’ lawyers will file “absolutely useless and ridiculous” applications: “But nevertheless, they turn up and take a beating and take a punching from the judge and go away. And what have they achieved? They’ve achieved time, delay”. Another lawyer in the group, however, suggested this was a “jaundiced view”.

A number of participants claimed that ‘interlocutory warfare’ was not limited to insurance companies, as one Judge said: “there are a number of ... bigger companies ... and rich individuals ... who do that”. Another lawyer who frequently acts against the Government also accused the Government of using interlocutories for delay.

Lawyers commented the judge is best placed to contain this sort of behaviour. Other lawyers observed that abusive interlocutory applications had been uncommon in the CEQL as the

Associate Judges are “very alive to it”. But lawyers did acknowledge that this behaviour can be very difficult to detect, at least in the early part of a case:

Lawyer 1: [It’s] very difficult to prove that someone is gaming the system. You know that, that was the situation of a very well-funded litigant on the other side and counsel who boasted about stringing this out until my client died. ... [T]he system can be abused. ...

Lawyer 2: [Lawyer 1] is absolutely right. The system can be gamed ... [I]f you have a determined litigant who’s well-funded and lawyers involved. I mean lawyers are trained to, in many cases get around the rules so the system can be gamed. ... You’re going to struggle to find a system that prevents that. ... Judicial monitoring is a good way to start ... [W]hen a judge gets an inkling that this is what’s happening, any latitude that may have once been afforded to the opposition suddenly dries up.

Other lawyers remarked that they had relied on the judge to restrain this type of conduct when they were acting for the litigant who was deliberately trying to slow the litigation:

Counsel shouldn’t file abusive applications, full stop. They should generally try and discourage their clients from dealing with litigation in anything other than efficient manner but ultimately if there’s a reasonable argument to be made and the client wants to do it – you don’t have to do it – but the court should dispose of it. (Lawyer)

Similarly, other lawyers talked about needing a judge “with experience”, “who understands ... the motive, the imbalance ... and can control it”.

Participants warned that simply limiting interlocutories is not the answer, however. Interlocutories play an important role in both efficiency and accuracy:

They might look like they’re slowing the process down, in some regards they often, quite often they lead to a resolution of the matter without having to go to trial. (Lawyer)

Discovery actually can win or lose a case, you know, discovery can turn up the smoking gun document which is critical. So you can’t downplay the importance of discovery or interlocutories or joining all the parties who should be in the litigation. (Judge)

Interlocutories will also narrow the scope of the trial, which subsequently reduces trial length and preparation costs (for example, see Figure 18). Another lawyer remarked that interlocutories helped parties realise “how big this case is going to be, how much is going to be involved” and that they were “an invaluable part of the process in terms of assessing each other’s position”. Interlocutories can also be essential to a weaker parties’ case if they are used strategically, as one Judge commented:

When you have a power imbalance between litigants, which you often do, then it can be the person that’s kind of on-the-outer that is having to pursue a lot of interlocutories to get disclosure, to get documents. And in those kinds of cases, shutting down or limiting interlocutories would actually potentially benefit someone who’s behaving in an abusive way. (Judge)

Finally, interlocutories do not always only have the intended benefit. One lawyer observed that the insurance companies, while possibly using their interlocutories for delay, were creating precedent

that may “make things easier for the people coming behind”, particularly when the decisions were appealed to the higher courts.

E. Type of Party

While no interviewees suggested that the type of party – for example, individual or a company – would influence the pace of a case, the academic literature suggests this can be a factor.¹⁹⁰ For this reason, one of our research questions asked whether civil case progression in the High Court differs for different types of litigants e.g. corporate or individual.

This data is not collected when cases are filed so we coded a sub-sample of Phase I.¹⁹¹ The most common combinations of parties were a company suing another company (21.1 per cent); an individual suing another individual (15.6 per cent); or a company suing an individual (13.5 per cent) (see Table 8-2).

Table 8-2. Who is suing whom in general proceedings filed in the High Court

Plaintiff Type	Defendant Type			
	Individual	Local/Central Government	Company	Other Bodies
Individual	80	57	47	40
	15.6%	11.1%	9.2%	7.8%
Local/Central Government	5	-	15	1
	1.0%		2.9%	0.2%
Company	69	14	108	12
	13.5%	2.7%	21.1%	2.3%
Other Bodies ¹⁹²	33	5	16	10
	6.4%	1.0%	3.1%	2.0%

We investigated whether there were any differences in the overall case length for these three most common party-type combinations. The analysis revealed that disputes involving companies suing other companies were significantly longer relative to disputes which involved companies suing individuals (see Figure 20).¹⁹³ No other significant differences emerged.

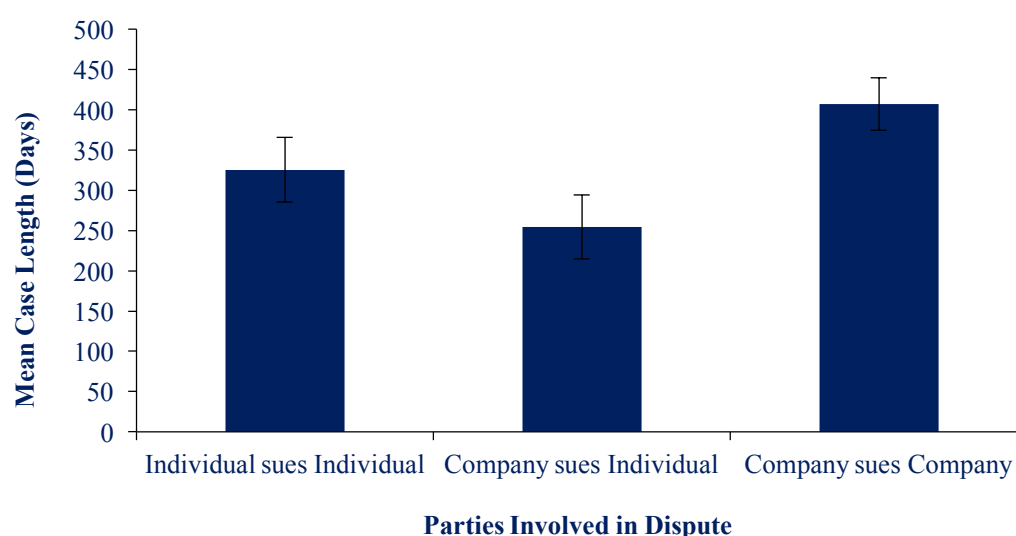
¹⁹⁰ Most famously, Galanter theorised that repeat players (who tend to be those with the advantage of greater wealth and status) have their advantages reinforced and augmented: Marc Galanter "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9(1) Law & Soc Rev 95.

¹⁹¹ See footnote 141 of this report for the method used to code types of party.

¹⁹² The category 'other bodies' includes: Body Corporates, Professionals, Liquidators, Receivers, Partnerships, Trusts (including Iwi), Charity and Religious Organisations, Executors and Guardians.

¹⁹³ A one-way Welch's ANOVA revealed a significant main effect; *Welch's F*(2, 156.51) = 4.476, *p* = .01, *d* = 0.18. Post-hoc Games Howell comparisons revealed that disputes which involved companies suing companies took significantly longer to proceed (*M* = 407.43; *SE* = 32.46) relative to disputes which involved companies suing individuals (*M* = 254.71 days; *SE* = 39.99), *p* = .01.

Figure 20. Mean case length by parties to dispute

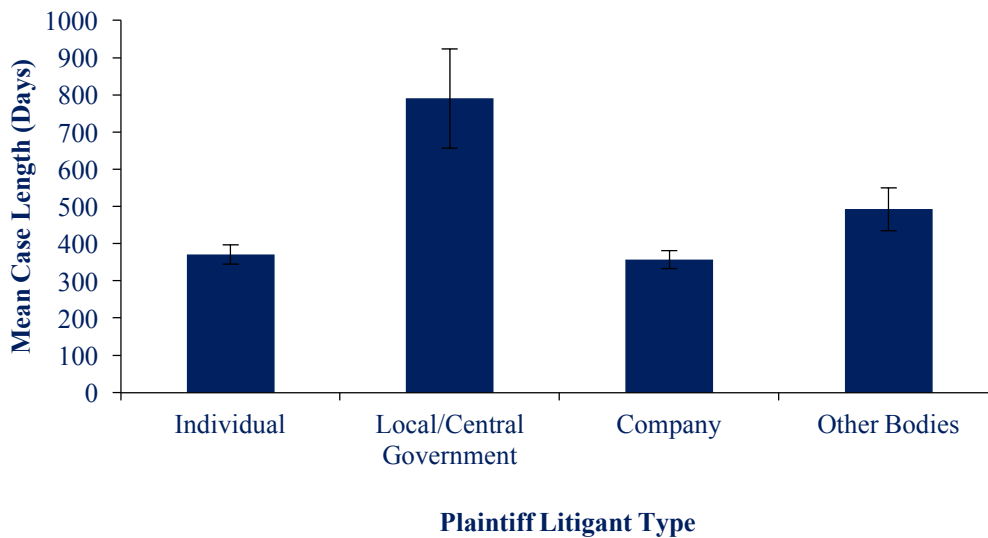


We also investigated whether case length differed according to who the plaintiff was in the case.¹⁹⁴ The only significant differences in the mean case length was between the cases filed by Local/Central Government, relative to cases filed by individuals and companies (see Figure 21). Unfortunately, this data does not allow us to explain *why* these cases are longer.¹⁹⁵ It is possible, however, that the cases being brought by Government are predominantly leaky building cases, and as previously discussed these cases tend to have longer progression times.

¹⁹⁴ A one-way Welch's ANOVA revealed a significant main effect, *Welch's F*(3, 77.42) = 4.690, $p < .01$, $d = 0.23$. Post-hoc Games-Howell comparisons revealed that the only significant differences in the mean case length was between the cases filed by Local/Central Government ($M = 789.95$ days; $SE = 133.27$) compared to individuals ($M = 370.61$ days; $SE = 25.42$; $p < .05$); companies ($M = 357.54$ days; $SE = 24.36$), $p < .05$.

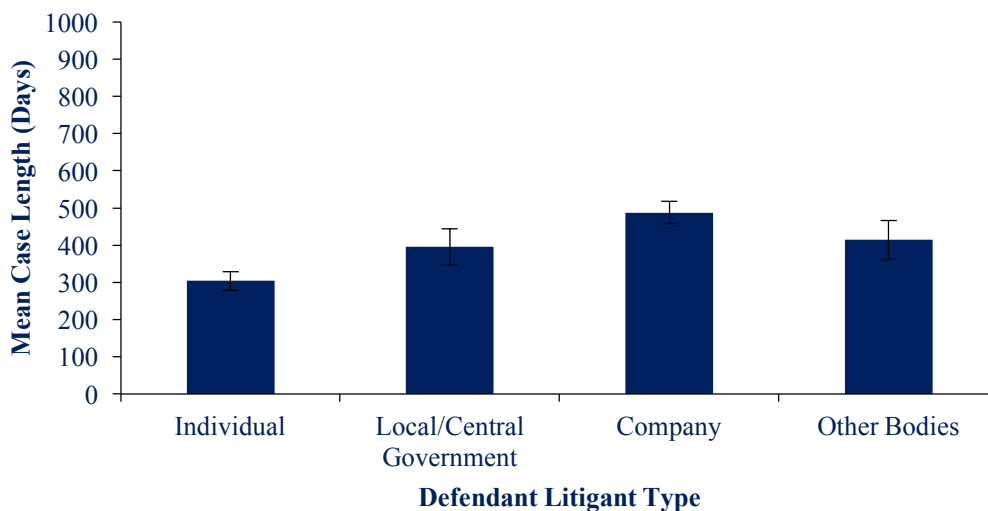
¹⁹⁵ We would need to employ other methodologies to investigate any causal relationship, for example: contemporaneous observations and interviews with a cohort of litigants.

Figure 21. Mean length of case by plaintiff type



We conducted similar analyses to investigate whether case length differed according to who the defendant was.¹⁹⁶ As shown in Figure 22, there were differences in mean case lengths for different types of defendants. But only one significant difference emerged: cases that involved individual defendants took less time to proceed, relative to cases that involved company defendants.

Figure 22. Mean length of case by defendant type



Again, we are unable to tease out precisely *why* cases involving individual respondents took less time; we can only speculate on the reasons. One interpretation is that individuals are pushed through quickly by court (i.e. prioritised) in recognition that they have less funds. There is no evidence of this, however, in the Phase III data. An alternative explanation is that individuals settle

¹⁹⁶ A one-way Welch's ANOVA revealed a significant main effect, *Welch's F*(3, 182.55) = 7.352, $p < .001$, $d = 0.19$. Post-hoc Games-Howell comparisons revealed there was only one significant difference. In cases where the individual was the respondent, the case took less time to proceed ($M = 304.06$; $SE = 24.94$) relative to cases where a company was the respondent ($M = 487.76$; $SE = 30.51$), $p < .001$.

or withdraw cases because they cannot bear the financial burden. There is some evidence of this in Phase II and III, but it is not conclusive.

1. *Litigants in Person*

While participants did not identify type of party as having a bearing on the pace of a case, several participants considered lack of representation might cause delays. A few lawyers and judges said litigants in person (LiPs) might be a factor in slowing cases and 11 out of the 19 court staff interviewees considered this was an important factor. The emphasis put on this factor by court staff likely reflects the level of interaction court staff have with LiPs:

Often they [LiPs] carry such emotion that it's really difficult to get them to just understand that a lot of these things are just process, and if they follow the process then we would get to the end game, but there's kind of a fight everywhere. Not just registry staff, but counsel, Judges, like they just ... yeah they're so emotionally challenged in the situation. ... we do take quite a bit of abuse really from some of those angrier litigants. (Court staff)

A Judge commented that LiPs inevitably do require more court time. For example, an Associate Judge acknowledge they do try to ensure that LiPs don't get lost in the process by deliberately slowing the pace of a case and holding more conferences. LiPs who are very active in the case can impose significant burdens on the system, however, in terms of registry and judicial time. This in turn can have flow on effects to court resources generally.

We analysed the Phase II data to assess whether we could detect any impact of LiPs on the pace of proceedings. Only six cases (6.7%) involved a LiP, with the mean length of cases being 632 days (range = 85 – 1683 days). LiP involvement in these six cases are set out in Table 8-3.

Table 8-3. Cases involving litigants in person

LiP Party	LiP Steps	Impact on Proceeding
Defendant	No active steps	-
Defendant	No active steps	-
Defendant + Plaintiff	Involved throughout case	File lasted only 104 days and then was discontinued by agreement.
Defendant	Involved for part of the case	LiP only involved for 212 days in a case that lasted 1203 days (this case appears at Figure 18).
Defendant (on behalf of company)	Involved throughout case	LiP did apply for legal aid, and the case was delayed while that application was processed but was ultimately declined. Summary judgment was awarded against the LiP, and the case lasted 563 days.
Plaintiff	Involved throughout case	LiP filed multiple related claims and was actively involved in the court process. The case lasted 1682 days, although for most of this time the case was “parked” for the related matters to be resolved (this case appears as Figure 23).

It is only in the last two cases in Table 8-3 that the litigant's status as a LiP might have contributed to the length of the case. These two litigants were very involved with the proceedings. This

supports other research that has found that where LiPs actively engage with the court process, proceedings may be lengthened, but that most LiPs take a very limited role in proceedings and so do not cause delay.¹⁹⁷

Figure 23. Long claim in which plaintiff is a litigant in person

This case is very long, lasting 1,682 days (4.6 years). Time was spent at the initial stages of the case considering the LiP's application for trial by jury brought because the LiP. Most of the case length can be attributed to the case being "parked" while the related proceedings were attended to. The number of related proceedings and their interdependent nature appears to be the LiP's litigation strategy. The length of the case may therefore be attributed, at least in part, to the LiP.

Days between events	Days elapsed since filing	Event
0	0	Claim is filed
79	79	First case management conference. Standard track. Plaintiff LiP wants to amend statement of claim. A timetable is set.
89	168	The amended pleadings are filed on time. Further case management conference takes place and a timetable for next steps is set out.
79	247	Further case management conference. Delay has occurred in the timetable because of dealing with two other related proceedings between the parties. The plaintiff LiP complains about the defendant causing the delay.
37	284	Plaintiff LiP applies for trial by jury (needs an extension of time to do so and gives the reason for the late application as follows: "I have had a very busy schedule and have also received discovery from the defendant which I have had to look through").
5	289	Case is called for mention. Timetable is established for the application for trial by jury.
37	326	Plaintiff makes an application for further discovery. Date is allocated for the application for further discovery (in 26 days' time to be heard by an associate judge) and for the application for trial by jury (in 97 days to be heard by a judge).
26	352	Hearing of application for further and better discovery.
29	381	Judgment on hearing for further and better discovery. Order cannot be made. The plaintiff needs to apply for non-party discovery.
42	423	Hearing for application for trial by jury is adjourned because it has significant overlap with another proceeding between the parties. The hearing of the related proceeding is to begin in 123 days. This proceeding is "parked" in the meantime.

¹⁹⁷ Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (2/05, United Kingdom Department of Constitutional Affairs Research Series, 2005) at 257 reporting a perception that LiP cases take longer but finding that there is "at best only modest evidence that cases involving unrepresented litigants took longer".

377	800	Judgment has been handed down in the related proceeding but it has now been appealed. This case is parked while the appeal is determined. The other related case is also proceeding through the court.
716	1516	The related proceedings are the focus of this period. There is also an application by the plaintiff LiP for the judge to recuse himself (which is refused and appealed) and an application by the defendant for security for costs (which is granted and appealed).
166	1682	The parties discontinue the proceedings (no reason given).

The mere presence of an LiP cannot, however, be said to be a substantial delaying factor in general proceedings. The proportion of LiPs appearing in these cases is too small to have a significant effect, particularly given the proportion of LiPs actively engaging in the case is even smaller. Of course, LiPs who do actively engage in their cases may place a strain on court resources, but as a group, LiPs cannot be seen as a particular isolated factor slowing the pace of cases.

F. Conclusion

The unavailability of key participants is a driver in slowing the pace of a case, but this is sometimes unavoidable, particularly in cases involving multiple parties and/or expert witnesses. Multiple parties do correlate with longer case length but the causal relationship is unclear.

Lawyers who are not competent, for example, who file late or poorly prepared documents, can be a source of delay. Conversely, where lawyers behave cooperatively and carry out the litigation tasks competently, proceedings can gain pace. Whether or not lawyers are cooperative is not only a matter of lawyer competence, it is also a matter of client instructions. Parties who engage in ‘interlocutory warfare’ (whether represented or not), can slow the pace of a case. While judges have some power to discipline this behaviour and play an important role in curbing it, abuse of process is not always easily identifiable and is therefore not easily remediable.

It is extremely difficult to tease out the causal relationships and explain the extent to which time passing amounts to delay. There are many tensions underlying the civil process, which is why there is no simple answer. The court itself has its own goals, which are sometimes contrary to those of the other court participants, who are also reacting to their own incentives and pressures. We now turn to these larger issues, and explore the tensions underlying the civil jurisdiction.

9. The Bigger Picture

In this chapter, we turn to some of the tensions and themes that underlie our analysis in Chapters 7 and 8. In particular, we consider the tensions between the three concepts that comprise the core objectives of the High Court's procedure: the just, speedy, and inexpensive determination of a case. We also examine the different interests, motivations, and communication between the participants in the litigation process. Finally, we briefly consider the relationship between the availability of resources for the courts and the demand for court time.

A. *Justice, Accuracy, and Efficiency*

The core objectives of the High Court is to “secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application”.¹⁹⁸ However, prior to the introduction of this overarching aim, as Sorabji argues, the aim of civil justice was to secure “substantive justice”: a correct decision, or justice on the merits.¹⁹⁹ Now substantive justice is only one of the goals of the civil justice system, sitting alongside the pursuit of efficient and expeditious disposition of proceedings.²⁰⁰ Sorabji calls this new theory of justice “proportional justice” and argues that it is a form of distributive justice, in which “a limit is now placed on the amount of resources individuals in the state can properly expend in securing substantive justice in any particular case”.²⁰¹

One of the difficulties with applying this new theory of proportional justice is that the three aims – just, speedy, and inexpensive – are in tension. Speed and cost, as previously discussed, are usually inversely related: as speed increases cost usually decreases.²⁰² However, if a case is disposed of with speed, then a substantively just outcome may be at risk. As one Judge in this study said: “sometimes getting justice takes a bit of time”. The substantively just outcome is important both to the individual litigants and to preserving the important public function of the court. We might be able to increase speed and reduce expense to some extent but there is a limit to this trade-off. As our own Chief Justice has observed:²⁰³

... while there is room for democratic choice in the resources to be applied to courts and some limitation and rationing is justifiable in a free and democratic society, there is an irreducible balance to be struck without which the rule of law is undermined.

So where does this “irreducible balance” lie? That question is difficult to answer as while speed and cost are possible to measure quantitatively (although not as easily as it might at first appear), justice is not easily measured. Former Chief Justice Spigelman of New South Wales summarised the problem:²⁰⁴

¹⁹⁸ High Court Rules 2016, r 1.2.

¹⁹⁹ John Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, Cambridge, 2014) at 2. New Zealand has mirrored these reforms.

²⁰⁰ At 3.

²⁰¹ At 3.

²⁰² See Chapter 4 of this report.

²⁰³ Chief Justice Sian Elias "Address Given at the New Zealand Bar Association Annual Conference" (Paper presented at the New Zealand Bar Association Annual Conference, Queenstown, August 2013).

²⁰⁴ Justice Spigelman "Judicial Accountability and Performance Indicators" (2002) 21(1) *Civil Justice Quarterly* 18 at 24.

The requirements of open justice, in which the quality of justice is the primary consideration, cannot be measured. Those requirements, not statistics, must continue to be regarded as the basic mechanism of judicial accountability ... Not everything that counts can be counted. Some results or outcomes are incapable of measurement. They can only be judged in a qualitative manner. Justice, in the sense of fair outcomes arrived at by fair procedures, is, in its essential nature, incapable of measurement.

Some of the cases we have précised illustrate how this tension plays out in practice. The case study of Dave (Figure 10, p. 57) is a stark example. In that case, there were two exercises of the court's discretion directed at ensuring the plaintiff was able to state their case to the court.²⁰⁵ This provided the plaintiff with the opportunity to put further material before the court, which the plaintiff may have considered a just process. The defendant however considered the process unfair (procedurally unjust) because of the time and expense it added. Without these exercises of discretion, the case would have been some 18 months shorter and undoubtedly thousands of dollars cheaper. Were these exercises of discretion necessary to achieve a just result? We do not know because we cannot measure justice. This is the conundrum that lies at the heart of identifying and solving delay.

B. Different Interests

When considering any explanations or remedies for delay, it is also important to attend to the informal practices and motivations of the various litigation participants. Each group – litigants, lawyers, court staff, and judges – are subject to different incentives and pressures. These must be considered to both understand how delay can occur and to ensure that any remedies are effective.

1. Litigants

While we often think of litigants as individuals seeking justice, they are not a homogenous group and do not always have the same motives. As we have seen, there are a range of litigants in the High Court, including large companies, trusts, small companies, and individuals.²⁰⁶ While some litigants will want their cases to proceed quickly, others may want to strategically slow the litigation. This might be a range of purposes from wearing down the opposing litigant to buying enough time to increase their resources so they can fight another day in court. Furthermore, the ideal pace of litigation for a litigant may vary over the course of the case. As one lawyer commented, “proceedings often start off with a hiss and a roar and then energy dissipates, bills mount, and businessmen go ‘what was this all about? I’ve forgotten’”.

2. Lawyers

Lawyers, who are paid by and owe a duty to their clients, respond to their clients’ instructions and preferences. In addition, lawyers are subject to a range of other cross-cutting pressures: their duty to the court (their primary duty), the demands of their practice (their workload and competing

²⁰⁵ On the first occasion, the plaintiff was allowed to call rebuttal evidence which added 207 days to the case. On the second occasion, the Judge allowed a separate hearing on quantum due to inadequate pleadings which added 329 days of additional time. Without these exercises of discretion, the case would have been 638 days (21 months) in total rather than 1,174 days (3 years and 2.5 months).

²⁰⁶ See p. 89 of this report for discussion of types of party.

obligations to other clients), and the demands of their colleagues. Lawyers are well aware of these competing demands:

The clients want one thing, counsel – just because of the way we manage our own practices – want something else, and the courts want something different again. I find that I need to manage both the court and the client in order to get things done the most efficiently for the client and to have the best outcome for what the court wants.
(Lawyer)

This lawyer said that what the court wanted was “to be able to do a judgment relatively quickly, usually”. Lawyers’ ability to meet this demand is restrained by the pressures of their workload and the demands of other clients. As one lawyer observed:

We all have a depth of practice. You know if you’re responding once every three weeks or something to a court, court deadline, you’ve got ten other cases that all have to go along. (Lawyer)

Lawyers expressed concern about cases progressing any faster than they are currently: “I think things seem to go about as fast I can keep up with them anyway” (lawyer). Another said “my hand shook” as she wrote down a suggestion for increasing the pace of the case because, while she recognised most clients would like their matter to proceed faster, she did not think she could work at a faster pace.

It should also be borne in mind that lawyers work, more or less, in cooperative groups.²⁰⁷ As discussed, the smooth progress of litigation relies on cooperation between counsel and conferring with opposing counsel is required by the High Court Rules. While co-operation can assist with case progression, it can also lead to trade-offs being made. A lawyer may seek an indulgence from another lawyer for the enlargement of a timetable. That lawyer will feel pressure to agree because they may need the same courtesy extended in either the case at hand or a future case. This can lead to changes of pace and indeed delay but might have a positive influence on pace in another case. Understanding these cross-cutting pressures emphasises the need to avoid simplistic notions of “lawyer-driven” delay²⁰⁸ and the need to take into account the various drivers of behaviour when considering solutions.

3. Judges

Judges’ motivations are quite different to lawyers’. Judges were interested in efficiently progressing cases and were all accepting of their role as case managers. But this is not the prized aspect of the

²⁰⁷ Lawyers practicing in sub-specialities and in smaller centres are even more likely to repeatedly encounter the same practitioners. For more on lawyers’ work groups see Herbert Jacob “Courts as Organisations” in Keith Boyum and Lynn Mather (eds) *Empirical Theories about Courts* (Quid Pro Books, New Orleans, Louisiana, 2015 (reprint of 1983 edition)) 197 at 201-202.

²⁰⁸ The present Attorney General (previously a commercial litigator) blamed delay on the unprofessional conduct of lawyers: Christopher Finlayson “The need for the Bench to administer, the Bar to employ, Rules of Procedure to make litigation quicker and cheaper” (Paper presented at the New Zealand Bar Association Annual Conference, Queenstown, 2013). Lord Woolf emphasised that ‘lawyer induced’ delay, particularly ‘procedural skirmishing’ (what the participants in this study referred to as ‘interlocutory warfare’), was one of the main drivers for what has become known as the Woolf Reforms: Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995); Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996). See also Scott, above n 53.

job. Most lawyers want to be appointed a High Court Justice or Associate Judge because they want to hear cases and write judgments, not undertake case management:²⁰⁹

On a personal level managing cases isn't the most enriching part of one's professional life. It's a bit like organising the barbecue as distinct from holding it. It's, it's an odd sort of a role and I don't find that at my level, you know, particularly enriching. But then again, there isn't all that much of it as a percentage of one's working life so it just goes with the, goes with the patch overall I suppose. But I think it's really useful. I think it's essential. (Associate Judge)

While the judges were mindful of efficient case progression, they viewed "parking" a case as largely unproblematic as long as the parties were in agreement.²¹⁰ This both smoothed their workflow, deferring more substantive considerations of the case for another day and provided space for the parties to negotiate settlements independent of the court.

Settlements are vital to the smooth running of the court schedule. The practice of overloading of fixture dates with multiple cases (up to 500 per cent) incentivises judges to encourage settlement. If parties settle the court avoids scheduling clashes, and if *all* scheduled matters settle, that frees up judgment writing time: "The reality of our lives is we get spare space because other things fall over. And so that's what makes it work" (Judge). Judges therefore allowed space for settlement discussions to take place, as a court staff member observed, "You know Judges are always looking for it to settle".²¹¹

Judicial encouragements and space to settle may be regarded as largely unproblematic. Settlements are widely regarded in the profession and judiciary as positive and indeed, preferable to adjudication. It should be borne in mind that settlements also serve organisational goals that are unrelated to the merits of the case. As Jacob observed:²¹²

[C]ourtroom personnel seek to push litigants toward settlements that litigants do not necessarily perceive to be in their best interests. This is an unavoidable conflict between the courtroom and the people it serves. It may lead to devices to disguise the courtroom's interests by seeking to convince litigants of the virtue of settling ...

The pursuit of these organisational goals can compromise the just outcome of a case. There is an extensive body of literature which suggests that settlement is not always in the interests of justice.²¹³ If too much pressure is put on judicial schedules, this is a potential effect.

²⁰⁹ See also Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis Unpublished Doctoral Thesis, University of Otago, 2015) at 230 for a discussion of prestige in judicial work.

²¹⁰ For discussion of parking cases see p. 45 of this report.

²¹¹ Adjournments are always given a "next event day" as CMS "cannot cope" with indefinite adjournments and because the court does not want cases to languish (Judge). For these reasons judges also unanimously opposed the preference of some lawyers for the older practice of adjourning to no fixed date. When asked whether parties should be allowed to do that if they preferred, one Judge retorted that the problem used to be that the litigants did not always know that the lawyer had had the case adjourned to no fixed date.

²¹² Jacob, above n 207 at 212.

²¹³ Owen Fiss "Against Settlement" (1984) 93 Yale Law Journal 1073; Judith Resnik "For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 University of Miami Law Review 173; Carrie Menkel-Meadow "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo L.J. 2663.

4. *Court staff*

Court staff's incentives are quite different from the judges'. Having cases "parked" while parties negotiate settlement means that the case is "ageing" in CMS. This impacts on the registry's age of case reduction goals and contribute to what the court staff referred to as "churn" in the system. A trial date is much prized by those tasked with case progression: "That's what we look forward to" (court staff). When an adjournment is granted for settlement negotiations, and then the settlement does not happen, the case returns to the case progression team's workflow. The court staff are responsible for fixing another hearing date.

In addition to overall case progression, court staff are also responsible for ensuring that each milestone is met, for example, amended pleadings, memoranda, and briefs of evidence must all be filed on specified dates. They are answerable to the judge for ensuring this is achieved.²¹⁴ With this responsibility, there is little formal power of enforcement. Cases are conceived of as the lawyers' (and/or litigants' case), over which the lawyer and judge have the control: "Ordinary [proceedings] should be bang, bang, bang [no adjournments]. That's our thinking. But who are we to think like that?" (court staff). The court staff do have some informal power, however, as they have "the judges' ears" (court staff). They can and do tell the judges about lawyers who do not comply with timetables. They can also schedule mentions if the lawyers do not comply:

The court staff are often quite proactive about you know monitoring those timetables. You know to, to counsels' surprise I think. ... If ... something hasn't been filed by due date, the registry staff will sometimes just stick it in the duty judge list and you'll come in and have these sheepish counsel coming along saying "Well, we agreed a variation of timetable between ourselves." And you have to say "Well actually, you're not entitled to agree a timetable. ... you've actually [have] to get judicial sign off on that". (Judge)

The court staff's informal power is constrained by the judge's power and willingness to enforce compliance. Court staff made many references to the frustration they felt in the face of non-compliance, because both the High Court Judges and the Court of Appeal did not enforce deadlines:

I think we do lose ground there and we take the files to the judge and they go "Oh well, we'll just let them you know do it tomorrow." Well, actually no, why are we letting them do it tomorrow? I think there does need to be, that there could be some real ground made. And I mean one of the problems is we had a judge last year throw out a case for non-compliance and then the Court of Appeal reinstate it.²¹⁵ And it's like, well what's the point? Why do we bother? Why do I bother making phone calls, if you're not actually going to back us up? (Court staff)

Court staff therefore feel significant pressure and responsibility to move matters rapidly but are frustrated by their inability to ensure this is achieved.

²¹⁴ See p. 71 of this report.

²¹⁵ We believe the court staff member was referring to *Hayes v Parlane* [2014] NZHC 1306 (Interlocutory Reasons Judgment) Duffy J and *Parlane v Hayes* [2015] NZCA 341 Miller, Lang and Wylie JJ. This case and appeal concerned the late filing of affidavits. The High Court refused to read the affidavits because Mr Parlane had shown "blatant and deliberate disregard" for the Court's rules of procedure but this decision was reversed on appeal.

C. *Interests in Tension*

The different pressures and incentives for each group of litigation participants creates tensions in how case progression and delay is managed. We explore these relationships and their different pressures that manifest when the groups interact with each other.

1. *Judges & Court staff*

While judges and court staff are concerned with the rapid progression of matters, their incentives are at odds. This tension was explicitly acknowledged by some participants. For example, a Judge said, “I think they [the court staff] are very conscious of their figures but they are so respectful of the Judge’s position they leave us to do our job”. While the court staff emphasised the importance of the relationship with the judiciary – “they rely on you”, “we are the judges’ eyes and ears”, “the judges trust us” – they also expressed resentment at judicial behaviour that slowed the progression of cases. Six of the court staff (from all courts) said that when the judges granted adjournments they felt “let down”, “disheartened” and “unsupported”, or more simply: “we don’t really like adjournments”. This view was not unanimous, however. A very experienced court staff member acknowledged the tension between the need for adjournments in some cases and pressure to minimise the “age of case”. This court staff member accepted that if the adjournment serves a purpose then “I don’t think it is helped by us pushing it though to make our stats look better”.

Court staff felt pressure to progress cases and frustration at being unable to enforce progression. This creates the possibility of blurring the lines between the roles of the judiciary and the court staff. For example, a court staff member suggested her prime function was to ensure that court files are “being progressed in line with the *Ministry’s guidelines* of events”. This was a misunderstanding of the High Court Rules, which are made not by the Ministry of Justice but by the Rules Committee.²¹⁶ While this was perhaps a minor slip, there was other evidence that the court staff’s frustration at not being able to push cases forward as they saw desirable, led to temptation to blur the lines between the executive and the judiciary. A senior court staff member referred to the frustration of counsel sending in consent memoranda agreeing to enlarge the timetables. The staffer said that they knew that “a judge is up against it, because they’ve got a caseload of sixty cases that they’re trying to get through on a chambers list ... and you know the judge is just going to sign in off”. In response, the court staff member suggested, “I think *we* could be a lot more upfront about the directions *we* make and then enforce those directions” (our emphasis). Another court staff member was more blatant:

With the Associate Judges, they have too many conferences. They drag that timeline. I mean, I’m not saying they mean to but they hold on to that case too long for it [to go to the Judge]. And we’re like – and we’ll just take it off them and say we’re sending this [to the Judge]. It’s sitting too long. (Court staff)

One Judge mentioned his registry had put a sticker on the front of the longest running files saying, “oldest file in the High Court”. The Judge said this was “the registry’s way of saying to the judge, is there anything you can do at the next event ... to speed this up?”. The Judge thought this was a “cute little trick” and supported the practice of applying the sticker which is rumoured “to be on

²¹⁶ The role of the executive is limited to cabinet’s power to sign off the High Court Rules: Senior Courts Act 2016, s 148.

about thirty files”. When asked about the District Court practice of affixing a similar notice but saying “no more adjournments” the Judge commented:

I don’t think that would be tolerated in our court. Our Chief Judge would direct the registry. So, that’s not appropriate. The adjournment decision is entirely the judge’s decision. So, our court would see that as, a misunderstanding by the executive arm of what the judicial arm are meant to be doing. (Judge)

While the judiciary may be very clear about this separation, one court staff member suggested that the power to refuse adjournments should be given to the registry in the interests of reducing delays.

2. Lawyers & Court staff

The relationship between lawyers and court staff is also characterised by both cooperation and tension. Most lawyers emphasised the importance of closely cooperative relationships with court staff. However, some lawyers saw the court staff as overbearing or over involved in “their case”. Court staff were aware that lawyers viewed cases as being in a lawyer’s, not the court’s control: “It’s their [the lawyer’s] case, not ours”. At the same time, court staff needed to perform their function of ensuring documents were filed in accordance with the timetable. When lawyers failed to understand and respect this, court staff were frustrated. They spend considerable time “chasing lawyers” for documents that were meant to have been filed, which generates a “heap of excess work”. Clear and prompt communication was essential, as they did not “waste time chasing people” (court staff) if they were told in advance that they had reached agreement. Some lawyers, our research showed, had limited understanding of the amount of registry time that is consumed chasing documents or how essential timely filing was to the smooth running of the court.

3. Lawyers & Judges

This ambiguity over control of a file also underlies how the pace of a file is negotiated between lawyers and judges. Some lawyers referred to what they saw as the “really fundamental proposition” that the litigation was the litigants’, not the court’s. They considered they were best placed to make judgments about the pace as they had knowledge about their client’s situation that the judge did not:

There’s nothing more disconcerting, in fact unsettling, to be told by a judge it’ll be heard in four week’s time etc. etc. I mean if the judge is without any cognisance of the realities of the parties in their situation, decided to push it along because he or she wants to get the matter heard ... it should be in the hands of the parties. (Lawyer)

Other lawyers and most judges, however, regarded the courts as a public resource that had to be used efficiently:

A court proceeding does make use of a ... public resource. In other words, the resources of the state are being applied to deal with the case. You know there’s an input of time, money, and effort from the state’s side. So the State has some interest in seeing that that resource is used properly and efficiently. And I think there is also public benefit in ensuring that proceedings once filed are disposed of. (Judge)

While “sympathetic to the argument that cases are the parties’ cases” (Judge), judges were of the view that “once they engage the process of the court then the court’s going to manage it” (Judge).

Another Judge noted that their power to push a case forward in the early stages was, however, limited: “you’re not really able to do very much at that early stage to force compliance”.

Even lawyers who were philosophically tied to the idea of party control over a case, recognised that this theory became dysfunctional when the opposing parties’ interests diverged. Where one party wants the litigation to proceed quickly and the other wants to slow it down, only court control of a dispute can minimise strategic use of delay. Lawyers considered that the only remedy to this was the court’s strict enforcement of timetables and a willingness to strike out or otherwise penalise unmeritorious interlocutories. Judges’ willingness to take a heavier handed approach to controlling proceedings is restrained by concerns about remaining impartial (fundamental to the system) and their sympathy to the idea that “some level of party autonomy is efficient and appropriate”.²¹⁷

D. The Communication Loop

Communication between the various litigation participants – an issue related to the different pressures and incentives – must also be considered.²¹⁸ In court, the judge is the focal point for communications for everyone: lawyers, litigants, witnesses and court staff. In case management conferences, the pattern is the same but with litigants and witnesses rarely included. Outside court, the patterns vary and tend to form a chain between various silos. For example, the lawyer holds conferences with the litigant, and separately with witnesses, and separately with the opposing lawyers. The court staff communicate with a judge or a series of judges about case progression issues; the court staff and lawyers for both sides discuss scheduling by email as a group, or the court staff speak to the lawyers individually.

The fact that communications are siloed in this way creates a number of issues relevant to explaining and changing case progression times. One difficulty is that the judge (or multiple judges) does not see the full picture of how counsel are behaving and how the litigation is progressing (or not). The court staff become familiar with the file and have conversations with counsel but the details and tone of these communications are not readily apparent to the judge, particularly if a series of judges are case managing the file. Another issue is the asymmetry of knowledge about the litigants’ case. For various strategic reasons, lawyers for each party will hold information that will not be disclosed to the court.

These communication patterns also mean that the court (the registry, judge, or both) has little assurance that communications are reaching the litigants or witnesses. As a judge said:

- | | |
|--------------|--|
| Judge: | I require counsel to give a copy of the minute to their client. And I similarly ... require the counsel to give a copy to the experts who are affected by the timetable of the minute. ... I do try to record who requested the adjournment, for what reason and why I’ve granted it, rather than just blandly grant it. |
| Interviewer: | And do you think the counsel do as that you’ve directed and send it to their client? |
| Judge: | I’m never that sure but I have in, in a couple of occasions recently, I’ve asked counsel – where there’s been a subsequent delay and I’m suspicious, for instance that the experts didn’t receive the minute as I’ve |

²¹⁷ Elias, above n 203 at 10.

²¹⁸ Jacob, above n 203 at 206-207 on the importance of communication patterns in understanding courts.

directed – I’ve asked counsel to come back to me with a memorandum confirming that they did pass it onto the expert.

Lawyers may not pass on communications or give the client a complete picture of what is occurring for any one of a number of reasons:

1. Lawyers are busy and sometimes forget to communicate with their clients;
2. Lawyers do not always want to pass on unpalatable messages to their clients, particularly if the judge has criticised something the lawyer has done;
3. Lawyers have incentives to blame the court or the other party when the case does not proceed quickly.

This last possibility was of particular concern to some of the court staff. A court staff member suggested that lawyers are potentially “incentivised to do badly in some cases, like to stall things” and that they are restrained from this behaviour by “reputation”. The court staff member suggested that some behaviour is, however, “invisible to people ... you might not know they’ve done a bad job”. The court staff member suggested:

The lawyer can just say “Oh, the other side has done this and that means we’ve got to do this which is going to cost more money and we’re going to have to move the fixture and things.” But the other side might not have done anything. They [the lawyer] might have just not been ready and then told the court “can I adjourn this fixture?”. (Court staff)

The potential for this was particularly apparent when we reviewed the correspondence on the court files in the Phase II data collection. The correspondence was between counsel and the registry office and it did not include the litigants unless they were LiPs. The correspondence may or may not have been passed on to the litigants but it concerned scheduling of fixtures around the lawyers’ availability (in Auckland this usually involves the lawyers sending a list of “unavailable dates” during a particular period). This gave rise to questions about the persuasiveness of lawyers’ arguments that if a litigant was not satisfied with the pace of a case, they could change lawyers: “that’s their [the litigant’s] choice, they can, if someone’s not dealing with something quickly enough, they can go to someone else”. This comment not only minimises the considerable cost (in both time and money) of changing lawyers, but it also assumes that the client knows their lawyer is the source of the delay. Communication patterns, as these examples illustrate, are relevant considerations in both explaining delay and considering solutions.

E. Resources for the Court

Adding more resources, for example more judges, is one of the seemingly obvious solutions to delay. Several factors, however, need to be kept in mind when considering this as a solution. Courts must be resourced to a level that enables them to fulfil their function as an institution that provides dispute resolution but also a public good, as discussed in Chapter 1. Once resources reach the level of ensuring this function can be carried out, the addition of further resources is a policy decision that involves balancing other competing needs. As a Judge observed:

It’s like hospital waiting lists. I mean if you want to reduce hospital waiting lists you could go and hire a thousand more surgeons from overseas. You know put in way, way

more resource. Then you'd shorten your hospital waiting lists but that, that's ultimately a policy issue. ... These things are all trade-offs and you can only do what you can with the existing resource. (Judge)

Simply adding more judges, however, will not necessarily reduce delay because demand for the court's services is elastic. This is because the High Court is not the only forum for resolving a civil dispute. Litigants can also choose – and lawyers may recommend – an alternative forum such as mediation or arbitration. Some disputes can also be heard in foreign jurisdictions; Singapore was cited by several lawyers as an exemplar and possible competitor to the New Zealand High Court. The availability of these alternatives mean the High Court caseload is dependent on its reputation in the eyes of lawyers and potential litigants. This reality was recognised by one court staff member:

I think the other thing that would happen if you moved cases faster, would be that, oh sounds awful, but, people would use you a lot more. And possibly use you when they didn't need to use you. Simply because, oh if you go to the court, they'll kick it out within a month kind of thing. Whereas previously if you'd have gone to the court, it would take x number of years. And we saw that in the increased filings that we had for the mid 2000's, where our filings were just going up and up and up and up. And as it takes longer to actually hear cases, you see the case filings coming down simply because people are saying "Oh it's going to be quicker if we go to arbitration or if we go to mediation or, and it's going to be private," and, and things like that. So if you moved it fast, faster, I think there would be an influx of work that would come through simply because people would want to use your business more. But that increase of work coming through will slow down the process. (Court staff)

Academic research has supported this observation: increasing the number of judges may not reduce delay because the availability of more court time may simply increase demand.²¹⁹ This factor, therefore, needs to be taken into account when considering whether and to what extent delay can be addressed by adding more judicial resource.

F. Getting Better, but Room for Improvement

It is important to note that there was strong consensus among study participants that the pace of High Court cases is improving and has improved considerably in the last decade. The following interchange was characteristic of many comments from judges, lawyers, and court staff about trends in case length:

Lawyer 1: I have to say I've got a fairly positive experience of the High Court recently. ... I'm thinking the things that I used to complain about have improved quite a lot.

Lawyer 2: There are some horror stories there but I think generally they've got a lot better.

Lawyer 3: I do think they've got better.

Some participants noted that the improved pace was not necessarily may not be sufficient to satisfy the litigants. For example, this court staff member explained the improvement over time:

²¹⁹ Valentina Dimitrova-Grajzl and others "Court output, judicial staffing, and the demand for court services: Evidence from Slovenian courts of first instance" (2012) 32 International Review of Law and Economics 19.

The change I've seen from when I first started to what I see now with cases it is quite an improvement, even though sometimes I do still look at it and think, well it still seems a long time ... I can see it from a party's point of view, but yeah. (Court staff)

Participants attributed improvements to a range of factors including greater control by the judges in case management, fewer delays in getting fixtures, and faster delivery of judgments. Only one lawyer believed delay was an overwhelming problem in the High Court, saying it was “endemic in the system”. Notably that lawyer acted exclusively for insured plaintiffs against their insurers.²²⁰

While noting progress, most participants saw room for improvement. In the next chapter, we outline possible areas for reform and improvement, drawing on comments of participants and on our analysis of the data.

²²⁰ See discussion on “interlocutory warfare” and insurers at p. 87 of this report.

10. Where to from here?

This project has yielded a great deal of data. This allows the investigation of a range of issues in High Court case progression but it also requires deep analysis. The timeframe set at the outset for this research allowed only for the research questions to be answered, not to consider any recommendations in light of these findings. While we are not yet in a position to offer any firm recommendations, in this section we outline the points of possible reform, based on our data analysis and the suggestions of the study participants.

Our analysis in the previous chapters has shown that there is not a single source of delay in a case but many possible points. Likewise, there are many possible points of reform. We offer a survey of these, outlining some of the arguments for and against but without making recommendations about their merit or order of priority. We also note points of reform suggested by the participants that have already been trialled or recently adopted.

We remain cautious in making suggestions for further inquiry, particularly as any change can have unanticipated consequences. These can often have perverse effects, such as encouraging manipulations of the system or increasing cost even though delay is decreased. As Feeley warns:²²¹

The pace and manner of handling cases are part of the fragile balance of the courts. To alter them will set up a chain reaction throughout the entire system and precipitate new problems.

This does not mean that we should be satisfied with the status quo but only that reform should be approached cautiously. We will further consider issues of particular interest or promise in the coming months, based on the data already collected. We also welcome comment from interested parties on any of these suggestions.

A. Case Management Cases

Case management is a firmly established practice and as one Judge said, moving away from that would require a “complete philosophical change” and a “return to the bad old days”. The question is, therefore, whether any aspects of case management can be improved to reduce the potential for delay.

1. “A bit of judicial shaking of the tree”: Identifying issues

Many participants (although this was not unanimous) favoured pushing parties to identify the issues earlier in the case:

I can think of many cases where a bit of judicial shaking of the tree, early on, asking people really to justify their positions would be useful. Now that’s quite radical in the sense that you know parties should be able to take whatever position they want and not have to disclose their hand, you know subject to the pleadings, what have you. But if you’re just looking at speed and getting to the nitty gritty and getting on with it quickly, more judicial leadership would be one way of doing it. (Lawyer)

²²¹ Feeley, above n 2.

Judges were concerned that cases were being filed without sufficient attention to identification of the issues and assessment of damages. This had flow on effects for the length of the case and also its temporal and financial costs. Pleadings needed to be amended, discovery was wider, and the trial length estimates longer than if more refinement was undertaken before filing. Of course, sometimes it is not possible to narrow and focus at the outset as it is only through, for example, discovery or undertaking some remediation work, that more particulars can be given.

Initiatives to encourage early identification of issues have already been trialled. There is the little used “issues conference” in the High Court Rules²²² and the case management conference memorandum is designed to attempt to focus the parties on conferring to agree the essential issues.²²³ The CEQL takes the “judicial shaking of the tree” further, identifying issues for separate hearing that have precedential value.²²⁴ Could this be extended to general proceedings?

The ability to refine and focus on particular issues also requires skilful and cooperative counsel.²²⁵ This is a training issue, both for the law schools, and for the continuing professional development of practitioners.

2. *Inclusion of litigants in case management*

Communication patterns were discussed in the previous chapter, including the problem of there being limited communication between the court and the litigant. The fact that the court has no direct control over the information between it and the ultimate court users, the litigants, is a problem both for the management of cases and the management of the court’s reputation (for example, being unfairly blamed for delay). Litigants are receiving information filtered by their lawyer and with the potential that information may not be relayed at all. We suggest that the court therefore needs to find new ways to communicate directly with the litigants, even if they are represented.

Requiring litigants to attend the first case management conference is one way of improving court-litigant communication. This was required by the Rules in 2003 with a threefold purpose:²²⁶

1. To encourage the parties to consider settlement or ADR;
2. To ensure the parties understood how their case was to be prepared for and run at trial;
3. To ensure counsel could take instructions immediately on issues arising at the conference.

Justice Miller suggests that the requirement for parties to attend was abandoned because the conferences seemed – at least to the lawyers and judges – routine and therefore unnecessary. Similarly, the requirement in the CEQL for parties to attend the first case management conference has been abandoned, Khouri says, for two reasons.²²⁷ First, lawyers became familiar with the case management process and each other and were “able to resolve many preliminary matters by

²²² High Courts Rules 2016, r 7.5. In our Phase II sample, no case had been allocated an issues conference.

²²³ High Courts Rules 2016, r 7.3.

²²⁴ Khouri, above n 42.

²²⁵ See p. 85 of this report for discussion.

²²⁶ Miller, above n 2 at [27].

²²⁷ Khouri, above n 42 at 346.

consent on a routine basis”. Second, the judicial time involved was too great. She quotes advice from the Court’s Judicial Support Adviser that if in-person conferences remained the default option then, at the current rate of filing, “the Court would be booked for 12 months of scheduled judicial time dedicated solely to such conferences”.²²⁸

While resource constraints mean this may not be possible in its current form, we suggest this issue needs revisiting. Is there a more creative solution to this problem? What about information sessions for litigants? A web portal explaining the court process with judges explaining case progression and what information they should receive? A worksheet that litigants must complete setting out their top priorities for the litigation? Finding ways for the court to communicate its expectations directly to parties and to involve them in resolving their disputes could potentially reduce delay.

3. Earlier date for briefs of evidence

A number of participants questioned whether briefs of evidence create delay and unnecessary cost. This is an issue that was debated by the New Zealand Bar Association and the Rules Committee but remains vexed.²²⁹ Questions remain about whether the timing of the briefs of evidence is optimal, as well as whether their benefits outweighed by the cost and delay created.

As discussed earlier, late exchange of briefs caused surprise and therefore necessitated adjournments. Bringing the date forward could avoid this:

If it were possible to bring the briefs forward that might address those issues. But again, I know that that would be probably unpopular for the profession because it’s more frontloading. (Judge)

That is, the cost of preparing the briefs would be incurred at the very beginning of the proceeding, greatly increasing the costs for the parties at the outset. Bringing the briefs forward to be well in advance of the trial, but not at the beginning, may assist:

I often think things settle and people don’t want to incur the costs of doing briefs earlier than they have to. So I still think, not too early and not too late but currently, I think they’re typically left until too late in the process. (Lawyer)

The cost of preparing briefs of evidence is, however, related to how they are prepared. The witnesses are interviewed by the lawyer and then the briefs of evidence are carefully edited and refined by the lawyers. This is both expensive and may affect the veracity of the evidence:

You end up with these really carefully manufactured or manicured briefs of evidence which there’s not a lot of evidential weight in them sometimes and it’s only after cross examination and re-examination that you start to get a feel for the real issues at dispute. (Lawyer)

We therefore suggest that there is a need to revisit both timing of briefs and the issue of whether briefs of evidence are the best means of eliciting evidence for civil High Court cases. Alternatives

²²⁸ At 346.

²²⁹ Minutes of the Rules Committee, 1 December 2008 at 4; Minutes of the Rules Committee, 6 April 2009 at 4; New Zealand Bar Association, Submission to the Rules Committee, 27 November 2009; Gillian Coumbe, “Witness Statements in Civil Cases – Show me the Evidence” (Litigation Masterclass seminar, Auckland, 25 November 2015).

include the use of “will say” statements, briefs of evidence prepared by legal executives or another assistant, or a return to oral evidence.

4. *Using the same judge and specialist judges*

Many participants referred to the benefits of having either the same judge for the whole case or a judge who was a specialist in the area of law at dispute. Using the same judge for one case is already used for cases assigned to the complex track. The benefits identified included that the judge is motivated to understand the details of the case and can therefore assist the parties in identifying issues. Inefficiencies arise, however, if the assigned judge becomes unavailable, for example if the judge goes on leave, sabbatical, or has another trial. This may be worthy further consideration, particularly if there is a move towards more early identification of issues.

The second aspect of this issue is assigning specialist judges to particular legal areas. This already occurs to some extent as registry staff take into account the judge’s preferences and skills (along with availability) when allocating cases:

We allocate work to the Judge that’s available. And of course, skill is required as well. We look at the skill of the Judge. Some Judges are really good at liquidation, some prefer summary judgments. (Court staff)

The merits and drawbacks of judicial specialisation in the High Court have long been debated.²³⁰ Several lawyers suggested greater specialisation would assist the pace of litigation as the judge would be able to understand the issues at stake and write the judgment more easily, particularly in highly specialised areas such as intellectual property. This suggestion has become a reality with the introduction of the Commercial Panel of the High Court, on 1 September 2016.²³¹ To be heard by the Commercial Panel, the claim has to be “commercial” in nature and the value of claim over \$2 million. The Panel can also hear appeals and judicial reviews that affect “domestic or international commerce”, mergers and acquisitions, and intellectual property claims. It also has a residual discretion to hear commercial proceedings falling outside these criteria that “are of sufficient private or public importance to justify consideration by a panel Judge”. This change may therefore increase the pace of cases that fall within its jurisdiction but this can only be evaluated after the Panel is well established. The data from this study may assist in providing a baseline against which the impact of this change can be measured.

5. *Firm timetables*

Some very senior lawyers supported the suggestion that judges take a tougher stance on lawyers meeting deadlines:

They just need to be tougher on timetabling and sanction the lawyers. ... You used to have people like Lang who was a bit more brutal. Sir Ian Barker, in the old days was similar. ... The parties would say, “oh well, you know, I’ve got something and it will take me a month” and he’ll say, “well, I’ll give you a week” at which point everyone would say, “oh okay, fine” and it would be done in a week. So, it’s a matter of them

²³⁰ For an overview of this debate see Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 99-115.

²³¹ Senior Courts (High Court Commercial Panel) Order 2017.

being a little bit more, you know, tougher and as soon as you get a reputation as an associate judge for being tough, then people prepare accordingly. (Lawyer)

The risk is that the litigant rather than the lawyer is punished for tardiness. Some participants suggested that strict enforcement of the rules would swiftly deliver a culture change, so only a few litigants would be negatively affected:

So, it wouldn't take, I mean, you would kind of be like damning a few cases in the short run because people, lawyers who are used to like the culture of just breaching these, these timetabling directions, would get caught out doing that if you were just going to say "Hey, well now you can't file it if your timetable has passed. Sorry." (Court staff)

Strict enforcement that punishes litigants is not likely to be a risk that the court, primarily interested in delivering justice, will tolerate. There is perhaps room for a system that punishes the lawyers directly, rather than the litigants, for tardiness:

Good lawyers, really professional lawyers accept the need to comply exactly with their obligations, others are not so worried about it and whether there should be some additional penalty regime I don't know. (Judge)

The Judge did not elaborate on penalty regimes. Given the considerable administrative work being generated by late filing of documents and the delay directly attributable to this in some instances, we suggest that this deserves further consideration.

B. *Counsel of Choice*

The analysis of the study data showed a widely-held belief that clients are entitled to their choice of counsel:

From his client's perspective, you know they should be able to have the counsel of their choice. (Lawyer)

These people [litigants] are paying for this person. If that's who they want then that's who they should have. (Court staff)

Counsel's unavailability was, however, a significant factor in creating delays in setting down matters for hearing and a reason for adjournments. This is a particular issue where one party has retained a counsel with a heavy workload or other commitments, for example a well-regarded Queen's Counsel. This is a difficult issue to deal with. If the busy counsel's commitments are accommodated, this can be oppressive on the opposing party who has to accept delay. If the busy counsel's commitments are not accommodated, then the litigant they are representing has to find new counsel, potentially at cost and delay as new counsel must be briefed. The judges will usually, but not always, accommodate unavailability rather than force a change of counsel:

A fixture [becomes available] and [if] counsel is not available, the judges do seem to accommodate that. And sometimes with good reason because from a client's perspective, if a judge is telling them, "no, you've got to ditch your lawyer who's had all this knowledge and find someone else who is available", it's just, it's not really fair. (Lawyer)

Both lawyers and court staff suggested that being firmer with timetables could encourage lawyers to more carefully balance their workloads, so this issue would not arise so frequently. As court staff member said, less flexibility in court timetables would encourage lawyers “to take on a more reasonable workload so that they can actually manage and attend to things ahead of time, which may then lead to things like earlier settlements and stuff like that”. A lawyer suggested that a strict timetable would “incentivise lawyers and shape the legal culture as they wouldn’t be able to just take any work that comes in the door, they’d have to be able to have it finished within that time period”.

An alternative proposal was that Judges should be much stricter when setting a timetable and not accommodate counsel’s other commitments when that created a delay that was oppressive to the opposing party:

Sometimes you come across judges who say well that’s just tough bikkies and you have to find somebody else and that’s kind of the best-case scenario. (Lawyer)

Judges [could] impos[e] timetables and say to counsel, ‘Well I’m sorry if you’ve got another fixture, you’ll just have to give that brief to someone else’. (Lawyer)

I guess it seems like with the allocation of dates and with you know with the time hearings and things, the lawyers are allocated equal sort of, equal rights I guess as the court. The court and the lawyers all sort of, if any of them, it doesn’t work for any of them, it just gets moved. It kind of seems like you might be able to just make times and stick with them. (Court staff)

An issue that is of particular concern is that the most well-known, highly specialised lawyer are the lawyer who are likely to be unavailable. The party who is represented by this type of lawyer has already secured an advantage. If court timetables are altered to ensure that the lawyer is available, this creates delay for the opposing party with the more available lawyer. This can operate as a double disadvantage to the opposing party.

This needs to be treated with caution however. A disincentive for lawyers to have a “depth of practice” i.e. lighter caseload, could encourage lawyers to get the most out of the cases they do have. Where a heavy workload will likely encourage a lawyer to deal expeditiously with all their cases, a light workload will not. We therefore suggest this is an area for further, careful consideration.

C. *Cost of Counsel*

Temporal and financial costs, as we have discussed, are closely related. The most obvious relationship between these costs is that the longer a case goes on, the higher the legal fees are likely to be. There are, however, other complex interactions between the financial cost of representation and the pace of litigation. These include:

- The high cost of legal fees can cause delay. This occurs if a litigant runs out of money during a proceeding and the litigant is no longer able to instruct counsel. Delays can then occur because the litigant needs time to prepare to litigate in person, find pro bono assistance, or apply for legal aid. This is an issue discussed in Chapter 8.

- Parties may settle early in a proceeding because of the high legal fees at the outset, meaning they cannot sustain the cost of the litigation. This problem is somewhat concealed in this research because of the focus on case length and delay. When analysing pace and delay, an early settlement is a positive feature of a case as it reduces overall length. The focus on the pace of litigation, therefore, obscures the real possibility that the settlement may be substantively unjust: a litigant who wanted to continue a claim or defence, and who had a meritorious claim or defence, might settle simply because they did not have the financial resources to continue the case. A settlement reached under such constraints – where there is no option but to settle – may not be fair (subjectively or objectively assessed) or just. This issue is mentioned in Chapter 4.
- The ongoing need to pay legal fees (usually on a monthly basis) may mean a litigant cannot afford to have litigation proceed more quickly; they may need to maintain cash flow over a longer period of time so that they can continue to afford legal representation. This issue is also mentioned in Chapter 4.

These examples show that the financial cost of litigation is closely linked to pace but the relationship is complex. They also illustrate that the cost of representation is a factor in both pace and the justice of outcomes. While the focus of this project was on the temporal cost of litigation, the financial cost is intertwined and equally important. We consider that investigating ways to lower the cost of representation (for example, by unbundling legal services)²³² and ways to better manage spending across a case (so that parties do not run out of funds on the eve of a trial), are very important areas for further work.

D. Protected Judgment Writing Time and Bringing Forward Trial Dates

The emphasis on overall case length and decreasing the wait for a trial date once a case is ready to proceed, creates pressure on judicial time to prepare for cases and write judgments. This can become “unseen work” (court staff) because the judge is not in the courtroom. It is, however, essential work to the progression of cases:

So you need, you either need the front end time [before trial] or you need the back end time [after trial], either way, you need the time. Time to prepare for conferences. Time to write judgments. Time to do some pre-reading for hearings. And that’s the time that nobody sees. Those are the times that when you’re looking at the statistics for how much work someone’s doing, doesn’t come through the volume. Because you know you might have someone who’s in court for three or four weeks on the trot and might have spent two weeks reading all that stuff in advance. But it doesn’t look as if they’re doing anything if you just look at the stats. So the stats are actually, can be quite misleading. (Judge)

Protecting judicial time to write judgments immediately after a trial could be an effective measure. This creates economies in that the judge does not need to spend time refreshing recall (as is necessary if judgment writing is delayed) and the immediacy also likely increases accuracy. Delays in receiving the judgment may also be particularly difficult for litigants who are left waiting for the

²³² Bridgette Toy-Cronin “Just an hour of your time? Providing limited (unbundled) assistance to litigants in person” (24 March 2016) 884 LawTalk 20.

outcome of the case. When the judgment takes a long time to arrive it can also create expectations as to its length and detail. A High Court litigant in a previous study was anxious awaiting the judgment in his case, particularly when the wait exceeded the published target of three months for 90 per cent of cases. The long wait had increased his expectations about how carefully crafted the judgment would be, and even though he was successful, he was disappointed at the lack of detail in the judgment.²³³

One lawyer offered another potential solution. Giving the example of Alberta, Canada, the lawyer said the practice in the Court was “if they got too many judgments backed up, they would just take, roster them off for two weeks immediately” (lawyer). A similar idea was raised by a Judge:

There’s absolutely no point – when you’ve got a judge who’s got ten reserve civil judgments to write – giving them another case to hear. It’s just stupid because the parties on case eleven are never going get their bloody judgment. (Judge)

The Chief High Court Judge said, however, that this was already the practice in the Court: “Judges are ... provided additional time or are taken out of the programme where they have a significant number of reserved judgments”.²³⁴ The other possibility is, of course, to add more judicial resources by employing more judges. This possibility is dependent on more government resource being allocated. When considering whether delay will be reduced by adding further judicial resources, the interaction between increasing the number of judges and any consequent increase of demand for High Court time, must be taken into account.²³⁵

E. Impulse to Centralise and Standardise

The Ministry of Justice has spoken of its intention to standardise and centralise its processes: “In recent times we’ve aimed to get people through the courts in the least possible time by simplifying and standardising the court processes”.²³⁶ Some centralisation has already occurred in the High Court. Case management of civil matters filed in circuit courts is undertaken in the three home courts (Auckland, Wellington, and Christchurch). No criticism was made of this initiative. The District Court has an 0800 number that all calls are directed through. High Court queries can also go to the central 0800 number and court staff were positive about routine queries being dealt with in that way:

We got constant phone calls on, we got rid of when we got the 0800 number so that was a boon because that took up a lot of time answering general queries of a more routine nature. And you know websites are more accessible, intranets and things so at the call centre they can print things out for people or email things to people. (Court staff)

Beyond routine matters, however, the court staff were vehemently opposed to further centralisation, for example a move away from having named case offices that litigants or lawyers can contact. High Court scheduling runs on a very delicate balance that relies in no small way on the relationship between counsel and the court. The case officers provide their direct dial numbers

²³³ Toy-Cronin, above n 209.

²³⁴ Correspondence from Chief High Court Judge to Dr Toy-Cronin, 15 September 2017.

²³⁵ See p. 105 of this report.

²³⁶ Ministry of Justice "Justice Matters" (June 2017, Issue 7) <www.justice.govt.nz> at 7.

to the parties and are available to discuss case progression with the lawyers. The ability to overload the court schedule up to 500 per cent relies on the Judicial Resource Management team knowing what is going on in cases and receiving confidential indications from counsel about what cases might settle:

I speak to them. They speak to me. They ring me. They'll ring me at nine o'clock at night and say "Look, just letting you know, that we've just had a settlement meeting. We think this is going to settle next week" It's also trust. They know that if they ring me and say "We're likely to settle this but you can't say anything to anyone," I'm not going to say anything to anyone. But I'm going to formulate plans based on that information. ... It would just be hopeless if people couldn't ring. (Court Staff)

Judges praised the court staff for their role in assisting with scheduling. One Judge emphasised the importance of their expertise in being able to pick which cases might settle: "they do an amazing job". Several lawyers also referred to the importance of their relationship with court staff. These personal relationships are put at risk if further centralisation occurs. Any benefits of standardising and centralising will need to be balanced against the benefits that are currently accrued by the more relationship-based method that currently underpins High Court scheduling.

F. Technology

Better use of technology offers the potential to increase case progression times beyond what is possible in the current system. A senior court staff member made a comment that accorded with our observations of the system:

You may be able to change sort of stats and things like that, but what those mean may be up for debate. But you're not going to get a significant *real* improvement using the same tools that we currently have. I feel like there's, there's been enough shuffling to maximise resources that using the current structure. ... For a significant improvement to happen, either you need to increase the resources or you need to change the system. (Court staff)

This resonated particularly after compiling the Phase II data for this project. That phase of data collection required laborious reading of paper case files, often containing documents printed from email. This struck us as a system whose time must surely have come, seventeen years into the twenty-first century. There are a number of possibilities for greater use of technology to improve processing of cases.

1. Case management software

Many court staff and lawyers suggested that electronic case management would reduce the burden on the courts and lawyers, reduce delays and ensure better communication. The Ministry of Justice has previously piloted an electronic case management system for criminal cases, but this was unsuccessful.²³⁷ Court staff referred to the potential for a sophisticated case management system as "such a dream" and "pie in the sky" but envisaged "huge" time savings could be gained from such a system:

²³⁷ See for example, Shane Cowlshaw, "Digital court system E-Bench's failure leads to near \$7 million write-off" (21 April 2015) www.stuff.co.nz.

Just thinking about that first case management conference. ... Imagine if, up in [the Judge's] chambers, his associate went "oh ok, this day this time". She ticked a box and everyone who's supposed to know does. So, I as a case manager know, and so does Spark [to schedule the telephone conference] and so do counsel, and the judge's programme gets populated. What if all of those things happened? (Court staff)

Some lawyers also shared the "dream" on electronic case management, pointing to other Government online systems for filing documents (the Companies Office, Landonline and the Intellectual Property Office):

I don't know why there's not just ... a work space for the proceeding and you upload the memo to the space and the judge can see it's there and the parties can see it's there and people can't allege that the registry has lost it. ... It's ridiculous, in this day and age, that you can't just be certain about when and where things are filed and served. If you had a cloud based [system] - it's not high technology, I mean many of the large firms use that for client stuff, you just upload stuff and you can see that it's there and I'm sure the court system could do that. ... These big IT projects often go off the rails, but ... if you had it nice and limited, not too many bells and whistles, just a straight, you know each CIV number we have an online space and anything that gets filed ... I mean it's vastly less complicated than the system that LINZ runs for conveyancing so it must be possible. (Lawyer)

At present, the system is an uncomfortable hybrid of mainly paper-based systems but with some documents being filed by e-mail. This creates many tensions, as a court staff member explained. The emailed documents can mean that they reach the court faster, beneficial for the judge, lawyers and parties when time is of the essence. The court staff, however, have to print these documents and put them on the paper file. This creates difficulty tracking the documents, as they are not coming via the normal process:

The bigger problem is that I think that we're becoming more and more electronic, but we haven't got good systems in place to manage electronic filing. And it's not something that we've been used to. ... Some of them [documents sent by email] are not urgent and then some of them fall through the cracks because you come tomorrow, another whole pile of them are coming. (Court staff)

Attempts have been made to reduce this problem with the introduction of the Senior Court Civil Electronic Document Protocol²³⁸ and High Court Practice Note²³⁹, which set out the processes for when, and how, documents should be filed electronically. While this may be helpful in the short term, the processes outlined mimic the paper court files rather than using design principles to develop a new more efficient system.

While large technology projects are always fraught with dangers, it seems that a more sophisticated, cloud-based, case management system or filing portal holds the promise in eventually making the court processes more efficient. This will require significant financial investment in the systems.

²³⁸ Senior Court Civil Electronic Document Protocol, Revision 3 – 22 May 2017.

²³⁹ 2016 Practice Note: The use of electronic common Bundles and Electronic Case books in the High Court. HCPN 2016/1 (civ and crim) (minor revision).

2. *Mountains of costly nonsense: The issue of discovery*

Discovery has been identified as a major cause of delay in the United States, so much so that delays discussion often revolves around this issue.²⁴⁰ In New Zealand, it has also been identified as a problematic issue and in 2012 new discovery rules were introduced in the High Court.²⁴¹ These rules reversed the *Peruvian Guano*²⁴² decision and allowed for tailored discovery. Participants believed this had improved discovery:

The discovery issue has got a bit better than it used to be. Under the old *Peruvian Guano* test, you know discovery was so wide ranging that, that there, they often have interminable fights about discovery whatever. It's a wee bit better now. (Judge)

A lawyer suggested possible room for further improvement:

Standard discovery order is the standard and you've got to basically um convince the court why a tailored discovery order is appropriate. And maybe, maybe one of the ways of, of speeding things up is to flick that around. (Lawyer)

Discovery always has the potential to be abused, either by stonewalling the other party or by over inclusive discovery. The problems associated with discovery, particularly in large cases, may be solved to some degree by the development of Technology Assisted Review (TAR). TAR has begun to be accepted as a form of e-discovery internationally.²⁴³ It can be used in different ways, but the most common is that software is used to generate a list of documents in order of relevance so that the manual review is greatly reduced. In very large cases, for example *McConnell Dowell Constructors*,²⁴⁴ it was used as a collaborative process to whittle down the 1.4 million documents initially discovered by the plaintiff.

3. *Closing the communication loop*

Another benefit of cloud-based case management is that it has the potential to be more inclusive of litigants. A litigant could log-in to view their case portal and read all documents filed in the case. This would close the communication loop, an issue discussed in the previous chapter.

4. *Low-tech solutions*

In the interim, there is the possibility of more low-tech solutions to allow at least the court registry to communicate more effectively with the judge about case progression. While, as discussed in the previous chapter, the court needs to guard against executive creep, more effective ways for the

²⁴⁰ Institute for the Advancement of the American Legal System (IAALS) *Creating the Just, Speedy, and Inexpensive Courts of Tomorrow: Ideas for Impact from IAALS' Fourth Civil Justice Summit* (IAALS, August 2016); Danya Shocair Reda "The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions" (2012) 90 Oregon Law Review 1085.

²⁴¹ High Court Amendment Rules (No2) 2011.

²⁴² *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

²⁴³ The Victoria Supreme Court published a practice note on Technology in Civil Litigation (SC Gen 5) that states its key principle is "to encourage electronic documentation in all civil litigation. Hard copy will be the exception, not the rule, and parties will have to justify why they need to convert electronic documents into hard copy and in large cases, technology-assisted review will ordinarily be an accepted method of conducting discovery, and the Court may order discovery by technology-assisted review, irrespective of whether the parties consent to it". (<http://assets.justice.vic.gov.au/supreme/resources/fba6720a-0cca-4eae-b89a-4834982ff391/gen5useoftechnology.pdf>)

²⁴⁴ *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors* (No 1) [2016] VSC 734.

registry to communicate with the judge could be trialled. One Judge favoured the sticker currently used:

I do favour the, the sticker that our registry use, I favour a system like that. In fact, I would be quite happy with a system that, that had a sticker on that sort of had a, a different sticker for the file now three hundred days old and now three fifty and four hundred or something. (Judge)

Stickers that identified the quality of the case progression could be used rather than just overall age of file. For example, a sticker stating the number of adjournments or persistently late filing of documents so that the judge was prompted to consider these issues. Court staff's frustration that the judge was not always aware of the nature of counsel's conduct might therefore be reduced.

G. More Data, Better Data

The larger issue is that New Zealand continues to lack basic information about its civil justice system. This study makes a contribution to increasing this knowledge but it has also highlighted the lack of reliable data that is readily available about who is using our courts, why, whether the litigants are accessing with or without representation, and how cases progress once they are in the system.

The most obvious deficit is the lack of detailed understanding of litigants' perspectives. Our study was only able to gather a very small litigant sample, building on other research efforts to understand litigant perceptions of the civil justice system.²⁴⁵ Much remains to be done. The judiciary and the legal profession will undoubtedly benefit from detailed research that elucidates – from litigants – the temporal, financial, and psychological costs of litigation. Other countries are making significant effort and investment in this area. The Canadian Forum for Civil Justice has embarked on a major research project, under the theme *The Cost of Justice*, examining citizens' legal need and their access to fair and effective resolution.²⁴⁶ Australia similarly conducted a rigorous nationwide legal needs survey.²⁴⁷ New Zealand lacks this data.²⁴⁸

If there is no replacement to CMS on the horizon that will offer the flexibility to both monitor cases and provide more reliable data, it may be worthwhile establishing a separate programme of data collection. For example, capturing representation status, case type (determined by a judge to ensure accuracy), and key dates (e.g. date statement of claim filed, date cost judgments issued), through an external statistical package such as Microsoft Excel. This would potentially create a more reliable dataset suited specifically to understanding the civil case load, reporting on it, and evaluating the effectiveness of case management changes, rather than having to use data from the live, complex, case management system that is CMS. It does, of course, create another layer of

²⁴⁵ Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12(2) *Otago Law Review* 329 84; Toy-Cronin, n 209.

²⁴⁶ Canadian Forum on Civil Justice *The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems* (Canadian Forum on Civil Justice, 2012).

²⁴⁷ Christine Coumarelos and others *Legal Australia-Wide Survey: Legal Need in Australia* (New South Wales Law and Justice Foundation, August 2012).

²⁴⁸ One legal needs survey was conducted in 2006: Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Legal Services Agency, 2006). Another survey is proposed but with a sample size that may be too small to yield accurate data.

work for court staff and also for judges, as judicial input would be required to ensure data accuracy. The Ministry of Justice have recognised the importance of reliable data:²⁴⁹

Data provides an objective view based on real experience. It helps us to see how things actually work and not how we think they work or should work. ... Importantly, better use of data can help us understand what the problem is, the catalyst behind it and what the solution could be. Simply put, it's a three step process: data to insights to action.

We agree with this comment but note that, like much commentary on the justice system, it was made in relation to criminal justice. We urge investment in processes to collect more reliable civil justice data, as it can have important ramifications both to the lives of individuals and society.

H. Conclusion

Our analyses demonstrate the difficulties in conceptualising and investigating what might appear, on the surface, as a straightforward issue. Overall case length can only give us some information about how efficiently cases progress and a deeper analysis is required to determine whether there is delay in the system and where it occurs. Pursuing a simplistic idea of efficiency is a mistake. There is no ideal pace of proceedings that will satisfy all participants. A balance must be struck between the needs of all the participants so that the aims of the system – both as a dispute resolution mechanism but also as an important public institution – are met. Delay, where it occurs, has a significant impact on litigants who bear the financial, temporal, and psychological costs. Delay has no single source, however, and therefore there is no single solution. Where reforms are pursued with the hope of improving the pace of litigation, collecting better data will allow more effective evaluation of these reforms. With carefully evaluated, incremental reform, we can design a system that responds to the needs of litigants and protects the central role of our courts in our democracy.

²⁴⁹ Ministry of Justice "Justice Matters" (June 2017, Issue 7) <www.justice.govt.nz> 236 at 2.

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12. Appendix A – Refining the Dataset

As discussed in Chapter 3, the design of this research was mixed methods. The integration of the three phases during data collection and analysis required multiple steps, which are set out in Figure 24. In this appendix, we explain how we refined the qualitative dataset for Phase I, steps 1 to 4.

Figure 24. Illustration of steps taken in the mixed methods design

Steps	Phase I	Phase II	Phase III
1	Dataset development	Dataset development	
2	Data analyses	Data analyses	
3	<i>Data Comparison and Integration</i>		
4	Refine dataset		
5	Data analyses		
6	<i>Data Comparison and Integration</i>		
7			Dataset development
8			Data analyses
9	<i>Data Comparison and Integration</i>		
10	Dataset development		
11	Data analyses		
12	<i>Data Comparison and Integration</i>		

For the purposes of this research, the Ministry of Justice supplied an excel spreadsheet of all civil High Court cases that were disposed between 1 July 2014 and 30 June 2015 (Step 1, Figure 24). There were 5,809 cases in this spreadsheet. Initial analyses revealed that the mean case length was 166.7 days, with the median length of 80 days. Cases ranged in length from 1 day through to 3,732 days (Step 2, Figure 24).

A. Data Comparison and Integration with Phase II

In step 3 we directly compared the data collected in the first two phases: the dates of court events recorded in the Ministry of Justice’s spreadsheet (Phase I), and the dates of court events recorded when we reviewed the physical files (Phase II). This comparative analysis revealed a number of anomalies between the two datasets. For example, in Phase II we recorded for one case that the statement of claim was filed in June 2013, and still ongoing in January 2017. When we reviewed the Phase I data for that particular case, we discovered that there were two lines of data in the spreadsheet (which suggests two different cases), which only encompassed the time period of March 2014 through to May 2015.

After discussions with the Ministry of Justice, we concluded that the anomalies were not data entry errors but instead reflected the different purposes for which the data was collected (see Appendix B). The Phase II data collection method was informed by one of the key research questions: “How long does a civil case take to be resolved?” This research question was framed from the

perspectives of the end-users (i.e. the litigant). It is our view that the end-user's definition of the length of a general proceeding civil case would be as follows:

1. A case starts when the notice of proceeding and first statement of claim is filed, and;
2. A case concludes when there is a final determination of all issues between the parties (e.g. a judgment is entered or the parties file a notice of discontinuance).

The Ministry of Justice's CMS does not collect the data in Phase I from the same perspective. Instead, a number of court events can dispose of a case in CMS, for example: a filing of a notice of discontinuance for a counterclaim, or an unsuccessful strike out application. The same case might later be reactivated by another court event under the same CIV number, for example, filing of an amended statement of claim. We raised this matter with the Ministry of Justice and they confirmed that CMS collects the data in this way, and CMS does not record the length of case from the end-user perspective.

B. *Final Phase I Dataset*

In order to address our research questions, we needed – at a minimum – accurate data of when cases began (i.e. statement of claim was filed) and when they were finally disposed of. To address that aim, we requested that the Ministry of Justice conduct the following actions in CMS:

1. Extract the CIV numbers (unique identifier) for the 5,809 cases provided in the original spreadsheet.
2. Search for these extracted CIV numbers in the CMS across all civil cases that were disposed of between 1 January 2005, and 31 March 2017.
3. Combine the original spreadsheet with any other lines of data that were located for the extracted CIV numbers between 1 January 2005 and 31 March 2017.

In response to this request, the Ministry of Justice provided us with 6,214 lines of data from CMS. This spreadsheet had to then be refined in three ways.

1. *Delete active cases*

CMS recorded cases as being either 'active' or 'not active' on 31 March 2017. There were 48 cases (70 lines of data) that were recorded as being active on 31 March 2017. These cases were excluded from our sample as they had not been finally disposed of – as per the end-user definition we had adopted – at the point we wanted to conduct Step 5 (Figure 24).

2. *Identify multiple lines of data*

Next, we reviewed how many CIV numbers had multiple lines of data appearing in the spreadsheet: 5,320 cases had only one line of data, whereas 346 cases had more than one line of data.

3. *Merge multiple lines of data.*

The final step was to manually merge – where possible²⁵⁰ – the variables for every CIV case that had more than 1 line of data. The final sample comprised 5,666 civil High Court cases that were disposed of, in some way, between 1 July 2014 and 30 June 2015.

²⁵⁰ Unfortunately, it was not possible to merge all the variables provided by Ministry of Justice. For example, discrete variables, such as case disposal type (e.g. non-judicial, non-trial adjudication, trial adjudication) often differed across the different lines of data, so it was not possible to accurately merge this data. We decided to prioritise accuracy and exclude these variables from the final sample but therefore had to accept the limits of the types of analyses that we could conduct with the Phase I data.

13. Appendix B – Issues with Data Accuracy

A significant portion of this report focuses on general proceedings. When we compared the refined Phase I dataset to the Phase II dataset for general proceedings, we again observed a number of discrepancies. Table 13-1 shows how the overall case length for general proceedings differed across the two datasets.

Table 13-1. Comparison of length of general proceedings in Phase I and Phase II data

Data Source	N	Mean length (SE)	Range	Median length
Phase I National, Ministry of Justice data	1523	381 days (10.54)	1 – 3574	248
Phase I Auckland, Ministry of Justice data	733	396 days (15.58)	1 – 3338	263
Phase II Auckland, physical file	90	421 days (40.34)	2 – 1714	327.5

In Phase I, the national mean length for general proceedings is 40 days shorter than the mean length observed in Phase II. We accept, on its face, that the Phase II random sample might have been skewed towards longer cases, which would compromise the representativeness of our sample. There are two other equally plausible explanations, however.

First, it is possible that general proceedings heard in the Auckland High Court take longer to proceed, relative to the national average for these types of cases. To investigate that possibility, we calculated the mean length of general proceeding cases heard in the Auckland High Court from the Phase I data ($n = 733$). The mean length was 396 days; still some 25 days quicker than the length observed in the Phase II data (see Table 13-1).

The second, and more likely possibility, is that we recorded case length differently to the Ministry of Justice.²⁵¹ To investigate this possibility, we directly compared the mean length we recorded in Phase II, to the mean length recorded by the Ministry of Justice for the same cases in Phase I. Analyses revealed that case length was recorded differently: the length recorded in Phase II was significantly longer than length recorded for the same 90 cases in Phase I (see Table 13-1).²⁵²

We investigated these discrepancies further. The case length we recorded during our précis (Phase II) was the same as the length recorded by the Ministry of Justice (Phase I) in 28 cases (31.1%). The Ministry of Justice's case length was *less* than our précis length in 49 cases (54.5%; range = 1 – 829 days); but *more* than our précis length in 13 cases (14.4%; range = 1 – 329 days). This finding confirmed that there were differences in the way that we conceptualised case length, relative to the way the Ministry of Justice conceptualised case length.

²⁵¹ See Appendix A for further discussion on how the perspectives of case length differed.

²⁵² A paired samples *t*-test confirmed that case length was recorded differently for Phase I ($M = 369.94$; $SE = 35.50$) and Phase II ($M = 421.17$ days; $SE = 40.34$), $t(89) = 3.432$, $p = .001$, $d = 0.36$.

To unravel the significance of these differences, we have spent considerable time and effort comparing our analyses to public reports that have relied on CMS data – specifically, the Courts of New Zealand Annual Statistics (CoNZ) and the Chief High Court Judge’s Annual Report.²⁵³ This comparative exercise allowed us to investigate why these differences might occur, and how they might impact on accuracy.

The first significant issue we encountered was that we did not even start with the same sample sizes, despite covering the same time period. CoNZ reported that there were 5,739 civil cases disposed, whereas we had 5,666 civil cases in our Phase I sample (see Table 13-2). The number of cases reported as disposed in the CoNZ dataset exceeds the number of cases included in the Phase I dataset, across all case types except for appeals.

Table 13-2. Frequency of CoNZ and Phase I disposals by case type

Case Type	CoNZ Disposals	Phase I Disposals
Originating Application	780	755
Judicial Review	195	190
General Proceedings	1529	1523
Insolvency	2922	2881
Appeals	313	317
Total Civil Cases	5739	5666

We discussed the CoNZ report with the Ministry of Justice²⁵⁴ to try and understand why there might be differences in the number of cases disposed. The Ministry of Justice postulated that the discrepancies occurred because the raw data was extracted from CMS on different dates. CMS is a live database, so data extracted at two points of time might vary when there is: (1) delayed data entry, (2) data entry errors, (3) corrections of previously incorrect data, and (4) reactivation of previously disposed cases. As the primary purpose of CMS is monitoring active cases, a live database is important for that purpose. But a live database can become problematic when the data is used for other purposes, such as to explain the pace of ‘finally’ disposed civil cases (see Appendix A). It is our view that CMS data cannot easily be used to accurately explain the pace of disposed civil cases, as the raw data can vary depending on the date it was extracted from CMS. This is the data that underlies the CoNZ reports and we therefore consider these reports should be treated with caution.

Further, in our view these discrepancies (i.e. frequency of disposed cases and mean length of disposed cases) between our sample and the CoNZ sample cannot be explained by the live database alone. A number of other possibilities better explain these discrepancies. We will discuss each of these possibilities in turn.

²⁵³ Courts of New Zealand, above n 92; Venning, above n 90.

²⁵⁴ Meeting to discuss the Phase I data held in the Ministry of Justice’s offices, Wellington, on 12 December 2016.

1. Determining age of case depends on case status

One of the features of CMS is that cases are recorded as ‘active’ or ‘inactive’. An active case appears in reports generated for the court staff to allow them to monitor the court’s caseload. When a case is active, court staff are able to generate reports that will tell them how long that case has been active as of the date the report was requested (start date: filing of the notice of proceedings). This allows court staff to monitor the age of all active cases. A case that is inactive remains in CMS but no longer appears in the monitoring reports.

The researchers who initiated this research assumed that because age of case can be calculated in real time for active cases, when a case finally concludes CMS will also have a record of the overall length of the case. These researchers had published papers, using Ministry of Justice data, about delay based on this assumption.²⁵⁵

It is now clear that the Ministry of Justice do not record age of case per se for disposed cases. A disposed case in CMS does have a start and end date, but these dates reflect significant court events, rather than mapping the entire lifecycle of a case. To use these dates as a record of case length, you must first be able to distinguish between ‘inactive’ cases (i.e. statement of claim amended) and ‘finally disposed’ (i.e. substantive judgment delivered and no costs issues) cases (see Appendix A). For the majority of the disposed cases, the CMS dates will mirror the overall length of a case (e.g. date of application for summary judgment, date summary judgment given); but for some, they do not (e.g. date of application of summary judgment, date summary judgment denied – case will proceed to trial). The analyses presented in this report uses corrected data after we pointed this problem out to the Ministry of Justice,²⁵⁶ but this explanation might partially explain why the frequency data displayed in Table 13-2 differs, and why we question the reliability of the data underlying the public reports.²⁵⁷

2. Excluding categories of cases

There is a series of cases filed in the Wellington High Court concerning historic allegations of abuse in state care. These cases are not included in public reporting on general proceedings, which is acknowledged in the CoNZ report:²⁵⁸

The reporting for the 2014/2015 annual statistics does not include claims of historic abuse occurring within state institutions. The significant majority of these cases are concluded by confidential settlement carried out with little input by the Court. They are excluded because they do not follow the normal process for progression through the Court. For this reason new business, disposal, and active case data for general proceedings in the 2014/2015 financial year annual statistics cannot be compared to annual statistics published prior to June 2012.

These proceedings do appear in the Phase I Ministry of Justice spreadsheet, however. There are 73 cases, which are categorised as lapsed after an average of 79.38 days. Including, and then lapsing, these cases can distort the data in two ways:

²⁵⁵ Righarts and Henaghan, above n 63; Laing, Righarts and Henaghan, above n 68.

²⁵⁶ Detail about how the corrections were made and the analysis carried out appear in Appendix A.

²⁵⁷ Courts of New Zealand, above n 92.

²⁵⁸ At 1.

1. The time the cases are left on the spreadsheet (an average of 79.38 days) is significantly shorter than the mean length of cases overall. Including them therefore skews the mean, reducing it and giving the appearance of faster progression times.
2. The full length of the cases is not reported. If it was this reported, this would significantly increase the mean, giving the appearance of slower progression times. Presumably this is the reason the CoNZ exclude them.

To investigate the level of distortion these cases create, they were removed from the Phase I sample. We then compared the average case length for Wellington High Courts cases – both with, and without cases, that were defined as being a ‘Social Welfare/Pikari Case’ claim types. The average length was 182.23 days with ‘Social Welfare/Pikari Case’ claims included; without these cases the average length was 193.37 days.

We do not know whether these cases were completely excluded from the CoNZ report, or whether the brief period that they appear in CMS (an average of 79.83 days) is part of the calculation of length. But what this does example does illustrate is how easily the data can be distorted. This suggests to us that the CoNZ report should be treated with a great deal of caution until more transparent reporting procedures are put in place.

3. *Excluding costs applications*

Decisions about how to define the lifecycle of a case might also distort the data. The time to address costs issues can be very significant. For example, a case we reviewed in Phase II was recorded as having a total case length of 723 days, as shown in Table 13-3. The time taken on the costs argument accounts for 55 per cent of the total case length.

Table 13-3. Case with long period of costs argument

Days between events	Total time elapsed	Event
0	0	Statement of claim is filed
104	104	Trial date is allocated (3 day hearing)
203	307	Trial begins
3	310	Trial ends
18	328	Judgment delivered
395	723	Costs argument (including 1 hour hearing)

It appears, however, that court time allocated to costs disputes is not recorded against the case in our Phase I data. As a court registry staff member explained, when the judge delivers a reserved decision the case is closed in CMS. A lawyer might then file a costs memorandum but because the case is closed, it will not appear on any lists of active cases and CMS will not provide pop-ups with reminders of dates. This procedure created inefficiencies for court staff, as the costs memorandum might be overlooked until the lawyer follows it up. To address this, costs memoranda now reactivate the case in registry reports.

It is unclear when this procedure changed. We strongly believe that the time taken to address costs disputes is not included in the Phase I data, nor in the data that the CoNZ relied on.²⁵⁹ But at the time of writing this report, we understand costs disputes are now recorded in CMS. It is important to acknowledge that this will now make the average age of cases appear to increase in the statistics, even though there is no real change on the ground. As the court staff member said, this will address the problem of “costs not being referred and dealt with on time. But this is what it’s going to cost us. It’s going to cost us longer disposal time.” These types of decisions illustrate the tension between the *appearance* of efficiency (i.e. if remove costs, cases appear shorter), and *actual* efficiency (i.e. if include costs, cases unlikely to be lost in the system).

4. *Human or computer error*

Finally, we also identified a number of places where the data appears to have been entered incorrectly, whether by human or computer error. For example, CMS calculates the length of time it takes for a judgment to be delivered. This data is extremely important to the judiciary, as they rely on these findings to benchmark their performance.²⁶⁰ To ascertain the accuracy of the Ministry of Justice’s data, we independently checked the 517 cases in the Phase I sample where a trial was adjudicated (9% of sample). These ‘time to judgment’ intervals are generated by calculating the time differential between two dates: date trial ends and date judgment delivered.²⁶¹ We independently generated our own time differentials and revealed there were errors in 95.4% of the intervals. The Ministry of Justice had slightly underestimated the time it took to write the judgment in 76.6% of cases (range = 1 – 6 days) and had significantly overestimated the time it took to write the judgment in 18.8% of cases (range = 1 – 989 days). These errors significantly altered the time to judgment interval: the Ministry of Justice intervals suggests that it took the judiciary 79.56 days to deliver a judgment ($SE = 6.66$), with a range of 0 days through to 2191 days; whereas, the accurate intervals show that it only took the judiciary 66.42 days ($SE = 5.57$) days to deliver a judgment, with a range of 1 day through to 2,112 days. It is unclear whether these inaccuracies are caused by human or computer error but illustrates how errors can creep into systems.

²⁵⁹ As we did not have the raw data from which the CoNZ reports were based, we used a proxy measure to reach that conclusion. The CoNZ reported that the average time to disposal for general proceeding cases that proceeded to trial was 618 days. It is likely that many of these cases included costs disputes. We also calculated the average time to disposal for the 10 general proceeding cases that proceeded to trial in the Phase II sample: 791 days – almost 6 months longer. It is very likely that at least some of this 6-month difference can be explained by the absence of costs disputes in the CoNZ timeframe.

²⁶⁰ See Chapter 2 of this report for discussion on time standards.

²⁶¹ It is important to note that these comparisons are based on the assumption that the dates are entered correctly. This assumption is not necessarily true and is another point where human error can creep in.



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