Civil Justice Responses to Natural Disaster: New Zealand's Christchurch High Court Earthquake List

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The Canterbury earthquakes of 2010 and 2011 generated hundreds of thousands of insurance claims, many of which were disputed. The New Zealand justice system faced the same challenge encountered by other jurisdictions following a natural disaster: how to resolve these disputes quickly and at minimal cost but also fairly, to avoid compounding the disaster with injustice? The thesis is of this article is that although the earthquakes were catastrophic for New Zealand, they also created a unique opportunity to design an innovative civil justice process—the Christchurch High Court Earthquake List—and to test, over a relatively short timeframe, how well that process works. This article describes the Christchurch High Court Earthquake List and analyses it by reference to civil justice theory about the relative normative values of public adjudication and private settlement and the dialogic relationship between them. It then evaluates the List, using statistics available five years on from the earthquakes and by reference to the author's own experience mediating earthquake disputes.

I. Introduction

On 4 September 2010 at 4.35 the Canterbury region of New Zealand was struck by a powerful earthquake registering magnitude 7.1 on the Richter scale. It caused no loss of life but widespread property damage. On 22 February 2011 at 12.51 the region was struck by another major earthquake, this time with more severe consequences. The second earthquake was centred just 10km south-east of the centre of Christchurch (the region's capital and New Zealand's third most populous urban area with approximately 360,000 residents) at a shallow depth of 5km.[1] 185 people were killed. The earthquake occurred during the lunch hour, increasing the

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[1] GeoNet, official source of geological hazard information for New Zealand. GeoNet is a collaboration between the New Zealand Earthquake Commission and GNS Science, a provider of Earth, geoscience and isotope research and consultancy services: *http://info.geonet.org.nz* [Accessed 5 May 2017].

number of people killed by falling debris on footpaths and in buses and cars. 115 deaths occurred in a single building—the Canterbury Television Building—when it collapsed and caught fire. In addition to the loss of life, the earthquake caused catastrophic damage to land and buildings in Christchurch. Many commercial and residential buildings collapsed in the tremors; others were structurally compromised, or damaged through soil liquefaction and surface flooding. An estimated 70,000 people had to leave the city after the earthquakes because their homes were uninhabitable. The New Zealand Government declared a state of national emergency which stayed in force for 10 weeks. Over 1,200 buildings in the central business district were eventually demolished as a result of the earthquakes.

The September 2010 and February 2011 earthquakes were just the first in a pattern of severe seismic activity in the Canterbury region. Approximately 14,000 earthquakes have been recorded since 2010, with particularly significant ones on 13 June 2011 and 23 December 2011. There was a 4.7 magnitude earthquake on 11 May 2016.[2] They are ongoing (collectively, the Canterbury Earthquake Sequence). There have also been significant earthquakes in other parts of New Zealand since, including a major (magnitude 7.8) earthquake on 14 November 2016 in the upper South Island and lower North Island.[3]

The September 2010 and February 2011 Christchurch earthquakes were by far New Zealand's most expensive natural disaster, and have been described as the third-most expensive insured disaster worldwide.[4] This is because the damage occurred in a highly developed urban area. In 2014 the New Zealand Government estimated that the rebuild process would cost NZ $40 billion (approximately £23 billion), a cost equivalent to 17% of New Zealand's annual gross domestic product.[5] Of that, the Government expected to contribute NZ $15.4 billion, either directly or indirectly through the New Zealand Earthquake Commission (EQC), a government-owned statutory insurer which covers the first NZ $100,000 of "natural disaster damage" to residential land and dwellings in New Zealand.[6] Private insurers would bear most of the balance. The latest reports indicate that nearly NZ $19 billion has been paid out so far.[7] Economists have estimated that it will take the New Zealand economy between 50 and 100 years to recover.[8]

The earthquakes generated hundreds of thousands of insurance claims against EQC and against private home insurance companies.[9] These ranged from claims

[2] "'Strong' 4.7 earthquake near Christchurch", *The New Zealand Herald*, 12 May 2016.

[3] This earthquake caused severe damage also, particularly in the small coastal town of Kaikoura and in Wellington, New Zealand's capital city.

[4] Swiss Re "Swiss Re's sigma on natural catastrophes and man-made disasters in 2011 unveils USD 116 billion in insured losses and record economic losses of USD 370 billion" (press release, 28 March 2012; "Christchurch counts the cost four years on from earthquake" *One News*, 22 February 2015).

[5] To put this in context, New Zealand spent NZ $15.2 billion on healthcare and NZ $13.8 billion on education in the 2015/2016 financial year. As such, the cost of the earthquakes to New Zealand is more than its total annual healthcare and education spend combined: Treasury "What are the government's main areas of expenditure?", *www.treasury.govt.nz* [Accessed 5 May 2017].

[6] It also provides coverage for the first NZ $20,000 of dwelling contents. Earthquake Commission Act 1993 ss.18 and 20. See also Jeremy Finn and Elizabeth Toomey (eds), *Legal Response to Natural Disasters* (Wellington: Thomson Reuters, 2015), p.1.

[7] Insurance Council of New Zealand "Insurers settle $19 billion Canterbury claims" (press release, 1 November 2016, *www.icnz.org.nz*; Insurance Council of New Zealand "Canterbury Progress Q3 2016" (Report linked to 1 November 2016 press release), *www.icnz.org.nz* [Accessed 5 May 2017].

[8] "Christchurch counts the cost four years on from earthquake" *One News*, 22 February 2015.

[9] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016); Earthquake Commission "Progress and Updates: Scorecard" (Updated to 29 November 2016), *www.eqc.govt.nz* [Accessed 5 May 2017].

for hundreds of millions of dollars concerning the local port[10] and university[11] to smaller claims in respect of the thousands of damaged residential homes. Many of the insurance claims resulted in 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.

Resolving these disputes became (and remains) central to the rebuild process. In most cases, no insurance payment would be made until the dispute was resolved, leaving policy holders living in limbo pending resolution. Some residential homeowners continued living in damaged properties where structural instability and issues of cold and damp caused by cracking to foundations and wall linings created new health and safety risks. Others were forced to live in rental accommodation (and incur the ongoing cost of this) or to leave the city altogether.

The New Zealand justice system faced the same challenge encountered by other jurisdictions following a natural disaster: how to resolve the disputes quickly and at minimal cost but also fairly, to avoid compounding the disaster with injustice? Other jurisdictions have responded to this challenge in a variety of ways. Examples include: the mass insurance mediation schemes established in the US following Hurricane Andrew in 1992, the Florida hurricanes of 2004, Hurricane Katrina in 2005 and Storm Sandy in 2012[12]; collectivisation of claims in response to the Victorian bush fires in Australia in 2009[13]; and the government establishment of the Nuclear Damage Claim Dispute Resolution Centre in Japan to resolve disputes between claimants and Tokyo Electric Power Company (TEPCO) following the Fukushima Nuclear Power Plant accident after the March 2011 tsunami.[14] Other examples include the special-purpose compensation fund established following the 11 September 2001 terrorist attacks in the US[15] and the so-called "creative judicial management" approach taken by Judge Jack Weinstein in response to the Agent Orange mass tort claims in 1980 (on the premise that mass claims bear similar characteristics to disasters in comprising a vast number of civil claims that stretch the capacity of the justice system).[16]

In New Zealand, the civil justice response to the earthquakes was not to promote settlement by incorporating settlement processes into the judicial process, by collectivising claims or by diverting claims away from the judicial process through alternative dispute resolution schemes. Instead, the response was to *enhance* those features of the judicial process that enable private settlement to take place outside the court system. In 2011 following the earthquakes, the High Court of New

[10] Alan Wood, "Lyttelton Port settle quake insurance claims" *Fairfax media*, 19 December 2013, *www.stuff.co.nz* [Accessed 5 May 2017].

[11] Vero Insurance "New Zealand's largest earthquake claim settlement led by Vero Insurance" (Press release, 15 December 2014) *www.vero.co.nz* [Accessed 5 May 2017].

[12] Maria R. Volpe, "Post Disaster ADR Responses: Promises and Challenges" (2014) 26 Fordham Evntl. L. Rev. 95; Mel Rubin, "Disaster Mediation: Lessons in Conflict Coordination" *Dispute Resolution Magazine* (United States, Fall 2006), p.17.

[13] See, for example, Peta Carlyon, "Black Saturday bushfires: Victoria's largest class action over Kilmore East fire enters final week", *ABC News*, 11 June 2014.

[14] See, for example, Naoki Idei, "Facing Mass Nuclear Damage Claims: Challenge of the Japanese Judicial System" (2013) 35 U. Haw. L. Rev. 559, 559–560.

[15] United States Department of Justice, "September 11th Victims Compensation Fund of 2001 Frequently Asked Questions — General Information", 10 February 2004, *www.justice.gov/archive/victimcompensation* [Accessed 5 May 2017].

[16] See, for example, Martha Minow, "Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies" (1997) 97 Colum. L. Rev. 2010; Ross Barkan, "Meet Ken Feinberg, the Master of Disasters", *Observer*, 9 March 2016.

Zealand made a commitment that earthquake-related civil claims would be dealt with as swiftly as the Court's resources permitted.[17] During the period in question, the High Court heard civil claims exceeding NZ $200,000 in value (approximately £ 115,000) or those involving particularly complex issues.[18] Many of the claims fell into this category.) The Christchurch High Court Earthquake Litigation List (CEQL) is the result of that commitment.

The distinctive feature of the CEQL is that it is designed to keep the judicial process — the public adjudication process—separate from the private settlement process, while facilitating the efficient functioning of both. For example, cases on the CEQL with precedent value, affecting many homeowners, businesses and/or insurers, are identified and then prioritised for early judgment. The public nature of those judgments is enhanced by reporting them not only through the usual law-related media (legal digests and so on) but through a publicly available online spreadsheet that is updated regularly with summaries of all cases before the Court. A special folder of earthquake cases is also maintained at the local law society library. This is designed to create a readily accessible body of law that resolves the most common legal questions that arise in earthquake insurance disputes. In turn, that enables parties to predict the outcome of their dispute should they proceed to trial. This facilitates private settlement negotiations, whether bilaterally or through mediation. The CEQL has other process features too, also designed to streamline the judicial process whilst at the same time creating the conditions necessary for settlement.

This article describes, analyses and evaluates the CEQL, using the data available five years on from the Canterbury Earthquake Sequence.[19] Its thesis is that, although the Canterbury Earthquake Sequence was catastrophic for New Zealand, it also created a unique opportunity to design an innovative civil justice process and to test—over a relatively short timeframe—how well that process works.

Part II of this paper describes the claims arising from the earthquakes that led to the establishment of the CEQL, and the basic features of the CEQL.

Part III lays the jurisprudential foundation for analysis of the CEQL through the lens of the well-established debate about the relative normative values of public adjudication and private settlement. It explains how the civil justice system functions through a combination of both processes, and how the proper role of the courts in that process is a recurrent and controversial issue in civil justice. It also explains how public adjudication and private settlement are inextricably linked in a dialogic relationship which is brought into sharp relief in the aftermath of natural disasters.

Part IV of this paper analyses the CEQL through this lens. It demonstrates that the design of the CEQL represents an understanding of, and desire to foster, the dialogic relationship between public adjudication and private settlement, while keeping the two processes separate.

[17] Winkelmann J, Chief High Court Judge, "An open letter to practitioners", 29 June 2011, p.3.

[18] The High Court is a court of general jurisdiction under the Judicature Act 1908. Civil claims for less than NZ $200,000 were heard by the District Court (District Courts Act 1947 s.29). The threshold amount was raised to NZ $350,000 on 1 March 2017 by s.74 of the District Court Act 2016.

[19] The five years being 2011–2016. While the CEQL was not officially established until May 2012, I am taking this poetic licence on the basis that the process was underway from mid-2011.

Part V evaluates how the CEQL has worked in practice, using the latest published statistics from the Insurance Council of New Zealand,[20] EQC, court statistics, news reports and my own mediation experiences. It considers whether the CEQL has achieved its goal of facilitating the efficient yet just resolution of earthquake-related civil claims.

Finally, Pt VI describes recent changes to the CEQL and considers their implications. It also considers the implications for recent earthquakes in other parts of New Zealand.

There are three preliminary points to mention. First, the meaning of the terms "public adjudication" and "private settlement". This article uses these two generic terms in the interests of simplicity, but some clarification is required due to the enormous variation in behaviour within these terms.[21] For the purposes of this paper, "public adjudication" refers to the process of the court in a publicly-funded judicial system making a binding determination of the parties' civil dispute according to law following an adversarial hearing process. As to the meaning of "private settlement", there is of course a vast array of dispute resolution processes available to civil litigants outside of the publicly-funded court system. These are historically called "alternative dispute resolution". They can encompass anything from arbitration and early neutral evaluation through to bilateral negotiations and mediation. In this paper the focus is on dispute resolution processes that function through agreement between the parties as to the terms of resolution, typically leading to the execution of a full and final settlement agreement. These processes are primarily bilateral settlement negotiations and mediation, which may take place with or without the assistance of lawyers. For the meaning of "mediation", this paper uses the working definition of the United Kingdom's Centre for Effective Dispute Resolution, namely[22]:

> "Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

The second preliminary point is that the primary sources of information about earthquake-related claims in Christchurch relied on in this article are public documents released by the New Zealand Ministry of Justice, EQC, the Insurance Council of New Zealand, and news reports. The views expressed in this paper are also informed by my personal experience mediating earthquake-related insurance disputes in Christchurch, but three caveats are required in that respect. First, having mediated only a tiny fraction of the total number of claims, my experience can only be of anecdotal significance and cannot be taken as anything more than a small, non-representative glimpse of private settlement activity as a whole in

[20] A representative body comprising most of the private insurers in New Zealand, *www.icnz.org.nz* [Accessed 5 May 2017].

[21] See, e.g. Carrie Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2671, on the array of meanings attributed to and the practice of negotiated settlement and adjudication practices; John Wade, "Mediation — The Terminological Debate" (1994) A.D.R.J. 204. See also Tania Sourdin. *Alternative Dispute Resolution*, 4th edn (Sydney: Thomson Reuters, 2012), p. 2: "… it is said to be impossible to construct previse definitions of ADR processes that are accurate in respect of the range of ADR processes available and the contexts in which they operate."

[22] Centre for Effective Dispute Resolution, "CEDR revises definition of mediation" (Press release, 1 November 2004), *www.cedr.com* [Accessed 5 May 2017].

post-earthquakes Canterbury. Private settlement being private, it is not possible to obtain an accurate picture of how many and on what terms earthquake disputes are being resolved, beyond what is reported publicly by the Ministry of Justice and by organisations such as the Insurance Council. Secondly, I am prevented from speaking about my mediation experience in anything more than general terms by both ethical obligations and contractual obligations of confidentiality. Lastly, I earn professional fees from mediating earthquake disputes. As such, I cannot claim to be an impartial observer. But this professional experience adds, I hope, a useful context and depth to the academic analysis in this paper.

The final preliminary point to mention is that the focus of this paper is on the response of the judiciary to the deluge of civil claims arising from the Canterbury Earthquake Sequence and its jurisprudential implications. It does not consider the logistical challenges faced by the courts in Christchurch in resuming operations following the physical damage to courthouses, efforts by EQC to establish efficient processes for resolving its own disputes,[23] or governmental responses to the Canterbury Earthquake Sequence such as the Canterbury Earthquakes Royal Commission of Inquiry[24] or the proposals to amend the Earthquake Commission Act 1993 to streamline the operation of EQC in the event of future earthquakes.[25]

II. Earthquake claims and the establishment of the Christchurch High Court earthquake list

The immediate response of the judiciary to the 22 February 2011 earthquake was to close the High Court at Christchurch due to earthquake-related damage. The Court resumed operations on 28 February 2011, although the courthouse itself remained closed.[26] On 3 March 2011 the Chief High Court Judge, Winkelmann J, wrote to local practitioners explaining the arrangements in place for the resumption of court business in alternative venues throughout the region and expressing the sympathy and support of the judiciary for all Canterbury residents, and Canterbury lawyers in particular.[27]

Three months later, on 17 June 2011, the Chief High Court Judge convened a meeting to plan for the ongoing operation of the High Court in Christchurch and for new work arising from the earthquakes. The meeting was attended by all judges of the Christchurch High Court, senior Court Registry staff and Ministry of Justice staff, two representatives of the District Court and representatives of the Canterbury legal profession.[28] The representatives of the profession were asked to "take soundings" in advance of the meeting as to the type and volume of litigation practitioners anticipated in the future arising out of the earthquakes and the recovery phase.[29] Reporting to practitioners on 29 June 2011, Winkelmann J advised that

[23] See, for example, the EQC Mediation Service, *www.eqcmediation.org.nz* [Accessed 5 May 2017].

[24] The Canterbury Earthquakes Royal Commission of inquiry was established to report on the causes of building failure as a result of the earthquakes as well as the legal and best-practice requirements for buildings in New Zealand Central Business Districts. See *http://canterbury.royalcommission.govt.nz* [Accessed 5 May 2017].

[25] Treasury *New Zealand's Future Natural Disaster Insurance Scheme* (July 2015), p.36.

[26] Winkelmann J, Chief High Court Judge "Christchurch High Court Temporary Arrangements" (Press release, 28 February 2011); Winkelmann J, Chief High Court Judge, "An open letter to practitioners", 3 March 2011.

[27] Winkelmann J, Chief High Court Judge, "An open letter to practitioners", above fn.26.

[28] For the jurisdiction of the District Court, see above fn.18.

[29] Winkelmann J, "An open letter to practitioners", 29 June 2011, p.3.

"significantly increased volumes of litigation flowing from the earthquakes" were anticipated, and that[30]

> "the High Court accepts a responsibility to ensure that cases relating to the earthquakes and the reconstruction phase proceed to a hearing as swiftly as possible. We believe that this is important for the recovery of the Canterbury region."

This prediction proved correct. By 30 September 2016 EQC had received 166,978 building insurance claims and 187,360 contents claims.[31] The Insurance Council reports that, as at the same date, its private insurer members had received 167,593 claims, comprising 141,360 claims in respect of domestic properties and 26,233 claims in respect of commercial properties.[32]

Many of these claims were disputed, resulting in civil proceedings filed in the High Court. Issues causing dispute included differences in interpretation of insurance policy coverage, difficulties arising from the serial nature of the earthquakes, difficulties proving extent of damage and loss, the relationship between and respective liability of EQC and private insurers, unrealistically conservative assessments by insurers and extravagant claims by policy holders, and failures in communication and delays caused by the overwhelming number of claims.[33] Other earthquake-related disputes arose but the majority by far were disputes between insurers (both EQC and private insurers) and property owner policy holders.[34]

Earthquake claims came to make up the majority of the Christchurch High Court's civil caseload.[35] They have also had a national impact. Between 1 January 2013 (when data began to be collected) and 31 December 2015, civil claims arising from the Christchurch earthquakes made up 11% (452 proceedings) of all civil proceedings issued in the High Court of New Zealand. This is second only to debt recovery in terms of number of proceedings, greater in number than general contractual disputes, estate litigation and tortious claims.[36] These proceedings represented only a fraction of the total number of insurance claims but were still far more claims than the Court had resources to handle. The resource challenge was exacerbated by the complexity of the cases; many involved multiple parties and required evidence from technical experts such as structural engineers, geotechnical engineers, licensed building practitioners and quantity surveyors.

The CEQL was established in May 2012 as a special case management initiative. Its key features are the prioritisation of cases with precedent value, in-person case management conferences involving the parties themselves (not just their lawyers), streamlined processes for managing expert evidence, proactive timetabling

[30] Winkelmann J, "An open letter to practitioners", 29 June 2011, p.3.
[31] Earthquake Commission "Progress and Updates: Scorecard" (claim statistics updated to 30 September 2016).
[32] Insurance Council of New Zealand "Insurers settle $19 billion Canterbury claims" (2016).
[33] See generally, Stephen Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (Speech to the Supreme and Federal Courts Judges Conference, Brisbane, 26 January 2016). This speech is published as Stephen Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016) 5 J. Civ. L.P. 190.
[34] This is apparent from a glance through the published Earthquake List, *www.courtsofnz.govt.nz/business/high-court-lists/earthquake-list-christchurch/* [Accessed 5 May 2017].
[35] 61% as at 30 September 2015. See Venning J, Chief High Court Judge "Christchurch High Court Litigation List Report as at 30 September 2015", 29 November 2015, p.1.
[36] Venning J, Chief High Court Judge "Report from the High Court 2015: The Year in Review", 17 May 2016, p.15.

practices, limited court-based settlement processes, and enhanced public reporting through an online, regularly updated, spreadsheet of all cases before the Court.

These features are analysed in Pt IV below. But first, some theory.

III. Resolution of disputes and the civil justice system

A key characteristic of civil disputes is that they may be resolved privately between the parties, by agreement or by referring the dispute to some other dispute resolution process such as arbitration. As a result, the civil justice system has a different constitutional significance to the criminal justice system. Claimants engage with it by choice, usually when attempts to resolve the dispute with the other party or parties through private methods have failed[37]; it is a party-initiated legal system.[38] This fundamental feature of the system has given rise to generations of debate about the relative normative value of public adjudication and private settlement and the proper relationship between them in the civil justice system. This section aims to summarise that debate at a high level, engaging with it only to the extent necessary to lay the foundation for analysis of the CEQL.

The normative value of public adjudication[39]

At its most basic, public adjudication is an expression of the rule of law in action. Access to the public-funded court system is fundamental to the social contract underlying democracy; it is the State's consideration for the individual's promise to live according to law.[40] Civil justice enables social stability and economic growth by providing the legal architecture for honouring contracts, protecting property rights, correcting tortious and equitable wrongs and, generally, regulating behaviour, including that of governments. While the civil law itself maps out the boundaries of acceptable social and economic behaviour, the civil justice system executes it, resolving disputes according to the law's objective standards and, in doing so, publicly reaffirming these societal norms.[41] As such, to use Waldron's words: "court hearings and arguments are aspects of law which are not optional extras: they are integral parts of how law works."[42]

The adversarial process and formal rules of evidence[43] and procedure that are characteristic of public adjudication are designed to generate an outcome that is rational and just according to law. Central to the concept of the rule of law is the notion that like cases are treated alike, and every person is treated equally before the law, regardless of any power differences between them. As such, public

[37] Hazel Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (New York: Cambridge University Press, 2010), p.5.

[38] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2670.

[39] I have borrowed this heading from D. Luban, "Settlements and the Erosion of the Public Realm" (1994–1995) 83 Geo. L.J. 2619, 2621.

[40] It is this social contract which enables us to rise above the "solitary, poor, nasty, brutish, and short" life contemplated by Hobbes. (Thomas Hobbes, *Leviathan* (1651) Pt I, Ch.13.)

[41] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.3.

[42] Jeremy Waldron, "The Concept and The Rule of Law" (Fall 2008) 43 *Georgia Law Review* 1, 6, cited in Hazel Genn, "Why the Privatisation of Civil Justice is a Rule of Law Issue" (36th F.A. Mann Lecture, Lincoln's Inn, 19 November 2012), p.20.

[43] See, for example, s.6 of New Zealand's Evidence Act 2006, which states that a fundamental purpose of the law of evidence is to secure the just determination of proceedings by, inter alia, providing for facts to be established by the application of logical rules.

adjudication is "a democratic practice — an odd moment in which individuals can oblige others to treat them as equals as they argue — in public — about alleged misbehaviour and wrongdoing."[44] Similarly, the doctrine of precedent is critical, described by Gruin as nothing less than the very embodiment of "the values of rationality, equality and justice that underpin Western society".[45]

The normative value of private settlement

In contrast, private settlement processes such as mediation are characterised by a lack of formal procedure, relying on the cornerstones of confidentiality, voluntariness and the doctrine of contract for their efficacy. At their core is a commitment to enabling disputing parties to choose the terms on which they resolve their dispute, acting in their own self-interest and in accordance with their subjective preferences. "Non-legally relevant facts", such as the parties' commercial realities or psychological needs, can be taken into account.[46] There is also the possibility of creative solutions beyond the limited range of remedies available to a court.[47] In the civil litigation context, the process tends to take place "in the shadow of the law",[48] in that both parties are guided in their settlement decision-making by the likely outcome should the matter proceed to be determined by the court,[49] and the settlement usually (but not always) involves the payment of money by the defendant(s) to the plaintiff(s).

The benefits of private settlement can include: efficiency savings for the parties and also for the justice system as a whole, on the premise that the procedural formality of public adjudication tends to consume more time and cost than private settlement processes[50]; certainty and finality through the elimination of trial risk[51] and the prospect of appeals; control, in that the parties choose the terms of resolution; an increased likelihood of compliance, on the theory that a party who chooses the terms of resolution is more likely to comply with them[52]; an increased likelihood of preservation of any ongoing relationships, on the theory that a resolution by agreement is likely to be more amicable than resolution by adjudication through the adversarial process; the satisfaction of emotional needs,

[44] Judith Resnik, "Courts: in and out of sight, site and cite" (2008) 53 *Villanova Law Review* 771, 806, cited in Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.85.

[45] Julian Gruin, "The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent" (2008) 19 A.D.R.J. 206, 206.

[46] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2685.

[47] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.81.

[48] Robert M. Mnookin and Lewis Kornhauser, "Bargaining in the shadow of the law: The case of divorce" (1979) 88 Yale L.J. 950.

[49] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2681; , "The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent" Gruin, (2008) 19 A.D.R.J. 206, 210, citing R. Posner, "An Economic Approach To Legal Procedure And Judicial Administration" (1973) 2 J.L.S. 399, 418–419 and W. Landes & R. Posner, "Adjudication as a Private Good" (1979) 8 J.L.S. 235.

[50] Jack B. Weinstein, "Comments On Owen M Fiss, Against Settlement (1984)" (2009) 78 Fordham L. Rev. 1265, 1265. This premise is, of course, debatable. Certainly, it is contingent on the circumstances of any given case. For a recent examination of this issue in the context of court-annexed alternative dispute resolution processes, see Deborah Eisenberg, "What We Know (And Need to Know) About Court-Annexed Dispute Resolution" (2016) 67 S.C.L. Rev. 245.

[51] Uncertainty inherent in the trial process, created by the availability of evidence, the unpredictability of witnesses, the individuality of judges and the general indeterminacy of legal rules. See, for example, Lawrence Boulle, Virginia Goldblatt and Phillip Green, *Mediation: Principles, Process, Practice* (New Zealand: Lexis Nexis, 2008), p.95.

[52] Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp Resol 211, 251 (expressing scepticism).

to the extent that private settlement processes such as mediation provide greater opportunities for direct conversation, confrontation, reconciliation and catharsis than court hearings[53]; and empowerment, to the extent that the flexibility and informality of private settlement processes allows the parties to the dispute more "voice" than adversarial adjudicative processes, which require representation by lawyers and can, by their formal legal nature, depersonalise, objectify, and distance the parties.[54]

At their core, private settlement processes reflect both a commitment to the Western liberal concept of the autonomous individual in a democracy but also a postmodern scepticism about the possibility of discerning objective and rational answers through the adjudicative process.[55] On this view, mediation can represent a more appropriate process for dealing with uncertainties and relativities than public adjudication.[56]

The relationship between public adjudication and private settlement

The benefits of private settlement processes are often expressed in the form of criticisms of public adjudication, and vice versa. Private settlement processes are promoted as more efficient in terms of time and cost than public adjudication, less constrained by artificial and alienating procedural formalities, more responsive to the actual needs and interests of the parties, and as having the potential to provide greater access to justice than formal adjudicative processes typically described as being "in crisis".[57] In turn, proponents of public adjudication point to the moral ambiguity of the settlement process, in that the consensual nature of the process allows for the possibility of unprincipled settlements that are no more than crude compromises of raw bargaining power.[58] Astor and Chinkin explain this further[59]:

> "… the outcome of the process may simply reflect the power relationship between the parties themselves. Where power is evenly balanced the outcome

[53] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2688.

[54] Judith Resnik, "For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 U. Miami L. Rev. 17, 183, 184; Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663.

[55] Carrie Menkel-Meadow, "The trouble with the adversary system in a postmodern, multicultural world" (1996) 38 *William and Mary Law Review* 5, 5, cited in Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.84; Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp Resol 211, 260, citing Marc Galanter & John Lande, *Private Courts and Public Authority* in 12B Stud. In L., Pol. & Soc'y 393, 412–413 (Susan S. Silbey & Austin Sarat (eds), 1992).

[56] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.84 citing Menkel-Meadow, "The trouble with the adversary system in a postmodern, multicultural world" (1996) 38 *William and Mary Law Review* 5.

[57] See, for example, Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp Resol 211, 254 and Judith Resnik, "For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 U. Miami L. Rev. 17, 173, at 183, in which Resnik invites readers to consider how frequently the word "crisis" is used in conjunction with justice systems around the world. New Zealand is no exception; the New Zealand Bar Association and the New Zealand Legal Research Foundation held a conference titled "Civil Litigation in Crisis — What Crisis" in 2008, followed by a seminar with the University of Otago Legal Issues Centre titled "Civil Litigation — Beyond the Crisis" in 2009. This "anti-litigation narrative" has been widely criticised as an insufficient basis for prioritising private settlement processes. See, for example, Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.80.

[58] Owen M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073, 1076; Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2667, citing Luban, "Settlements and the Erosion of the Public Realm" (1994–1995) 83 Geo. L.J. 2619, 2619.

[59] Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2nd edn (New South Wales: Lexis Nexis Butterworths, 2002), p.160, citing Simon Roberts, "Mediation in Family Disputes" (1983) 46 *Modern Law Review* 537, 540. Cited in Annabel Shaw, "ADR and the Rule of Law under a Modern Justice System" (LLM thesis, Victoria University of Wellington, 2016), p.23.

> may be equitable. Where it is not, mediation 'may enable one party to enforce a solution which would not have been tolerated by an even handed outsider'".

Power imbalances can be exacerbated by the informality and confidentiality of the process. Proponents of public adjudication over private settlement also point to the potential of private settlement processes to undermine the declaratory function of the law through erosion of the doctrine of precedent,[60] and argue that focussing on the dispute resolution function of the civil justice system overlooks its constitutional role not simply to maintain peace but also to give effect to our democratic ideals and dispense justice according to law.[61] So, as well as deriving their identity from the opposite process, public adjudication and private settlement are each open to legitimate criticism in comparison with the opposite process.

The civil justice system operates—and has always operated—through a combination of both processes.[62] This is true at the level of the individual case; deciding whether to settle or to proceed to trial depends on the facts, law, and psychological dynamics of any given case.[63] It is also true for the system as a whole. Different common law jurisdictions strike the balance between private settlement and public adjudication processes differently, and conceptualise the proper role of the courts differently as a consequence. Examples include: the Woolf and Jackson civil procedure reforms in the UK designed to designed to improve access to justice through, inter alia, settlement-focused pre-action protocols[64]; mandatory mediation programmes in North America which require parties to attempt to resolve their dispute through court-annexed mediation before they may proceed to trial[65]; and Australia's Civil Dispute Resolution Act 2011, which is designed to encourage parties to take "genuine steps" to resolve a dispute before commencing certain legal proceedings in the federal courts.[66] We also see it in the degree of controversy surrounding such civil justice reform, in which positions range from celebrating such reform as necessary to cure a civil justice system in crisis[67] to decrying it as an abdication of the constitutional role of the courts to provide access to justice and uphold the rule of law.[68]

But public adjudication and private settlement do more than exist in opposition to each other; their relationship is also interactive, or dialogic. Most cases settle

[60] Gruin, "The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent" (2008) 19 A.D.R.J. 206, 208, citing T. Terrell, "Rights and Wrongs in the Rush to Repose: On the Jurisprudence Dangers of Alternative Dispute Resolution" (1987) 36 Em. L.J. 541, 545.

[61] Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073, 1075.

[62] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.74.

[63] Luban, "Settlements and the Erosion of the Public Realm" (1994–1995) 83 Geo. L.J. 2619, 2620; Weinstein, "Comments On Owen M Fiss, Against Settlement (1984)" (2009) 78 Fordham L. Rev. 1265, 1270.

[64] For the UK, see also the recent report of Briggs LJ recommending reform of the structure of the civil courts: Briggs LJ, "Civil Courts Structure Review: Interim Report" (December 2015) and Briggs LJ, *Civil Courts Structure Review: Final Report* (July 2016).

[65] See, e.g. Ontario's mandatory mediation program: Rules of Civil Procedure r.24.1, RRO 1990, Regulation 194. For a recent study, see Eisenberg, "What We Know (And Need to Know) About Court-Annexed Dispute Resolution" (2016) 67 S.C.L. Rev. 245.

[66] Civil Dispute Resolution Act 2011 (Australia) s.3.

[67] Resnik "For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 U. Miami L. Rev. 17, 183, 183.

[68] See, for example, Resnik, "For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication" (2003) 58 U. Miami L. Rev. 17, 183, 189; Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.117 ("The outcome of mediation is not about *just* settlement, it is *just about settlement*.") See also Genn, "Why the Privatisation of Civil Justice is a Rule of Law Issue" (2012), likening the erosion of precedent in England to climate change. For a detailed exposition of the debate about the relationship between alternative dispute resolution and the rule of law, see Shaw, "ADR and the Rule of Law under a Modern Justice System" (2016).

before they reach trial. The judicial system would collapse if they did not. As Weinstein cheerfully puts it[69]:

> "Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers."

But a certain level of public adjudication is necessary to make private settlement possible, for two reasons. First, the background threat of judicial determination is often necessary to persuade disputing parties to negotiate settlement. (As Genn puts it: "Mediation without the credible threat of judicial determination is the sound of one hand clapping.")[70] The second reason is that, as stated above,[71] private settlement negotiations, at least in the litigation context, take place in the shadow of the law.[72] Negotiators consider the best, worst and realistic alternative to a negotiated agreement (BATNA/WATNA/RATNA analysis)[73] in order to make rational settlement decisions; in the litigation context this requires predicting the likely court outcome.[74] Paradoxically, if all cases settled, then no cases could settle because no one could identify the relevant legal principles to assess the relative merits of the parties' positions.

Thus, public adjudication and private settlement processes are held in dialogic tension with each other. They are not equivalent—the courts have a constitutional significance that private settlement does not[75]—but they are interdependent. The key question for any civil justice system is, as Genn puts it[76]:

> "[H]ow much formal justice do we need to ensure that the common law can be refreshed, that legal risk can be minimised, and that disputes can be rapidly resolved when they arise?"

A certain equilibrium is required for the system to function.[77]

[69] Weinstein, "Comments On Owen M. Fiss, Against Settlement (1984)" (2009) 78 Fordham L. Rev. 1265, 1265.
[70] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.125.
[71] See discussion above at text accompanying fn.48 above.
[72] Mnookin and Kornhauser, "Bargaining in the shadow of the law: The case of divorce" (1979) 88 Yale L.J. 950.
[73] BATNA is an acronym for "Best Alternative to a Negotiated Agreement", WATNA for "Worst Alternative to a Negotiated Agreement" and RATNA for "Realistic Alternative to a Negotiated Agreement", Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd edn (Penguin Books, 1991), p.100.
[74] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2676, 2681; Gruin, "The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent" (2008) 19 A.D.R.J. 206, 210 citing R. Posner, "An Economic Approach To Legal Procedure And Judicial Administration" (1973) 2 J.L.S. 399, 418–419; W. Landes & R. Posner, "Adjudication as a Private Good" (1979) 8 J.L.S. 235.
[75] See, for example, The Hon Sir L. Street AC, KCMG, QC, "The Language of Alternative Dispute Resolution" (1992) 66 *Australian Law Journal* 194, 194.
[76] Genn, *Judging Civil Justice (The Hamlyn Lectures 2008)* (2010), p.76.
[77] Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo. L.J. 2663, 2682.

The relationship between public adjudication and private settlement in the post-disaster context

This dialogic tension is brought into sharp relief in post-disaster legal contexts. Disasters—whether natural[78] or unnatural[79]—often result in enormous numbers of civil claims that raise similar legal and factual issues. In the usual course of the law the courts do not face the same legal issues again and again within a short period of time; typically this takes years, if not decades. (A glance at the dates of key judgments in any given area of the law reveals this.) As such, disasters can create a sort of civil justice microcosm within which the dialogic relationship between public adjudication and private settlement becomes particularly apparent.

In addition, resolution of these claims is often necessary to enable individuals and communities to begin the process of rebuilding, restoration and resurrection after a disaster.[80] It is necessary in a social and psychological sense, but also a practical, physical sense; insurance monies are usually withheld pending resolution of a dispute, preventing the cash flow required to begin rebuilding. Yet such claims stress the capacity of the justice system; it is usually physically impossible for courts to try all the claims, in terms of judicial resources (courtroom space, available judges, court staff), at least not without such substantial delays which are particularly unpalatable in that they also delay the rebuild process.[81] As such, private settlement can be a faster and cheaper process for resolving claims than public adjudication. But private settlement cannot take place where the law is unclear, and disasters often raise new issues of law, such as how certain provisions in insurance policies are to be interpreted in the special circumstances of the particular disaster.[82] Furthermore, efficiency cannot be the only guiding principle in seeking to resolve the claims. The terms of resolution must also be fair, to avoid compounding the effects of the disaster with injustice. What is the proper role of the courts in this equation?

Civil justice responses to disasters in recent memory have struck that balance in different ways. As set out in the introduction, examples include the collectivisation of claims in response to the Victorian bush fires in Australia in 2009,[83] the government establishment of the Nuclear Damage Claim Dispute Resolution Center in Japan to resolve disputes between claimants and Tokyo Electric Power Company (TEPCO), following the Fukushima Nuclear Power Plant accident in 2011,[84] the so-called "creative judicial management" approach taken by Judge Jack Weinstein in response to the Agent Orange mass tort claims in 1980 (on the premise that mass claims bear similar characteristics to disasters in comprising a vast number of civil claims that stretch the capacity of the justice

[78] Such as floods, earthquakes, hurricanes and bushfires.

[79] Such as terrorist acts or nuclear accidents. Mass torts are conceptually similar.

[80] Rubin, "Disaster Mediation: Lessons in Conflict Coordination" *Dispute Resolution Magazine* (United States, Fall 2006).

[81] Kenneth S. Abraham, "The Hurricane Katrina Insurance Claims" (2007) 93 Va. L. Rev. Brief 173, 179.

[82] A famous example is whether the Hurricane Katrina property damage in New Orleans was caused by wind or flood, which had implications for homeowner insurance policies with flood damage exclusion clauses. See, for example, *Sher v Lafayette Insurance Company* 988 So 2d 186 (La 2008), discussed in Greg G. Guidry, "The Louisiana Judiciary: In the Wake of Destruction" (2010) La. L. Rev 1145, 1171.

[83] See, for example, Carlyon, "Black Saturday bushfires: Victoria's largest class action over Kilmore East fire enters final week", *ABC News*, 11 June 2014.

[84] See, for example, Idei, "Facing Mass Nuclear Damage Claims: Challenge of the Japanese Judicial System" (2013) 35 U. Haw. L. Rev. 559.

system),[85] the special-purpose compensation fund established following the 11 September 2001 terrorist attacks in the US[86] and the mass insurance mediation schemes established in the US following Hurricane Andrew in 1992, the Florida hurricanes of 2004, Hurricane Katrina in 2005 and Storm Sandy in 2012.[87] Each of these responses faced criticisms which tracked the argumentative forms set out above, highlighting the recurrent tension between the normative values of public adjudication and private settlement and the proper role of the courts in mediating between the two.[88]

So, as New Zealand's civil justice response to the Canterbury Earthquake Sequence disaster, what approach has the CEQL taken?[89]

IV. Analysis of the Christchurch High Court earthquake list

This part of the paper describes the CEQL's process features in more detail, analysing each to identify the underlying civil justice philosophy about public adjudication, private settlement and the proper role of the courts.

The CEQL itself, and the prioritisation of cases with precedent value

When a case is filed, the Court examines it to determine whether it should be placed on the CEQL. It also works with counsel to determine cases that are urgent or have precedent value, affecting many homeowners, businesses and/or insurers.[90] Those cases are prioritised for early judgment.

Immediately, one can observe that the very establishment of the CEQL itself represents a conscious recognition of the post-disaster civil justice conditions referred to above, [91] in which the dialogic relationship between public adjudication and private settlement becomes particularly apparent and apposite. The identification and prioritisation of cases with precedent value represents a desire to foster that dialogue.

[85] See, for example, Minow, "Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies" (1997) 97 Colum. L. Rev. 2010 and Barkan, "Meet Ken Feinberg, the Master of Disasters", *Observer*, 9 March 2016.

[86] See fn.15 above.

[87] Volpe, "Post Disaster ADR Responses: Promises and Challenges" (2014) 26 Fordham Evntl. L. Rev. 95, and Rubin, "Disaster Mediation: Lessons in Conflict Coordination" *Dispute Resolution Magazine* (United States, Fall 2006).

[88] See, for example, Elizabeth Baker Murrill, "Mass Disaster Mediation: Innovative ADR, or a Lion's Den?" (2007) 7 Pepp. Disp. Resol. L.J. 401; Deborah Hensler, "A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex. L. Rev. 1587, Minow, "Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies" (1997) 97 Colum. L. Rev. 2010 and Barkan, "Meet Ken Feinberg, the Master of Disasters", *Observer*, 9 March 2016.

[89] A comprehensive comparison between the CEQL and civil justice responses to other disasters is beyond the scope of this paper. That is the next phase of this research project.

[90] Courts of New Zealand, "Purpose of the High Court Earthquake List", *www.courtsofnz.govt.nz/business/high-court-lists/earthquake-list-christchurch/* [Accessed 5 May 2017]. The descriptions of how the CEQL operates that follow are taken from this document unless otherwise indicated.

[91] Above, p.329, at heading: "The relationship between public adjudication and private settlement in the post-disaster context."

Case management conferences

A "Notice of First Case Management Conference — Earthquake List" [92] is sent to all parties as soon as a case is accepted for entry on the CEQL.[93] The purpose of this first conference is to identify the issues in dispute and produce directions about how the case will progress. These are tailored to each case, with the stated aim being to "secure the just, speedy and inexpensive determination of the proceeding".[94] A High Court Judge or Associate Judge presides.

Before the conference, the parties are required to file a comprehensive memorandum setting out certain details of the claim. The required details are the background to the claim (including the nature of the property, its technical classification,[95] which earthquakes it was damaged in and the nature of that damage), the relevant insurance policy terms, what expert investigations have taken place, the essential positions being taken by the parties, a list of issues for trial and a proposal for procedural steps such as disclosure of documents. The parties are encouraged to confer and file a joint memorandum; separate memoranda are permitted if agreement is not possible.

Most case management conferences in New Zealand are held by telephone, with the parties represented by their lawyers. In contrast, the CEQL first case management conference is held in person, and the parties themselves (the policy holders and a representative of the insurer) are expected to attend along with their lawyers. Counsel and parties are seated together, with parties often invited to contribute to the discussion. The Court states that it "expects that everyone will adopt a co-operative and constructive approach"[96] and reserves the right to make costs orders against parties whose behaviour results in the conference being a waste of time.[97]

The agenda for the conference varies with each case but, in general, for cases involving home or commercial building owners and insurers, the Court begins the conference by asking each party to state its objective from the litigation (such as a repair of the property, a rebuild of the property—whether on the same or another site—or a monetary payment) and how that relates to the terms of the insurance policy.[98]

The Court then seeks to establish a process for assessing the extent of earthquake damage to the property and the scope of any required repairs. Where one party views the property as able to be repaired and the other considers that it must be demolished and rebuilt, both options are scoped. Typically this requires the involvement of experts, usually geotechnical and structural engineers and quantity

[92] High Court of New Zealand, "Notice of First Case Management Conference — Earthquake List". This is reproduced in full as Appendix One. This document, and those in the subsequent appendices, are reproduced with the permission of the Chief High Court Judge of the High Court of New Zealand.

[93] Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016), para.37.

[94] High Court of New Zealand, "Notice of First Case Management Conference — Earthquake List", para.5.

[95] After the 2010 and 2011 earthquakes the New Zealand Department of Building and Housing developed a technical classification system for properties in Canterbury to describe how the land at the property might be expected to perform in future earthquakes. These technical classifications are used to inform engineering options for new or repaired residential foundations in Canterbury, *http://www.rebuildchristchurch.co.nz/blog/2012/5/land-information---technical-category-3--tc3* [Accessed 5 May 2017].

[96] Courts of New Zealand, "Purpose of the High Court Earthquake List", p.2.

[97] Courts of New Zealand, "Purpose of the High Court Earthquake List", p.2.

[98] Courts of New Zealand, "Purpose of the High Court Earthquake List", p.2.

surveyors, so the Court will direct a process for that to occur. (More details follow below.)

Directions are also made at the conference for the procedural steps necessary to prepare the case for trial. The Court looks out for discrete issues that can be tried swiftly as separate questions. Examples might include a legal question about policy wording that requires little or no evidence.[99] Orders will be made for discovery of documents (usually informal, to avoid unnecessary complexity and cost), any interlocutory applications, and the joinder of any additional parties.

Analysis

The stated goal of the conference as being to "secure the just, speedy and inexpensive determination of the proceeding" demonstrates a commitment to maximising the normative value of public adjudication (providing access to justice according to law) while minimising the usual time and money cost of that.[100] But the design of the conference also demonstrates a desire to create conditions conducive to private settlement. Through the formal, mandatory device of the conference, the parties are required at a very early stage to engage with the key issues and facts of the case. This is best practice in preparation for court proceedings but also sets the stage for effective mediation or bilateral settlement negotiations.[101]

The parties are also required to engage with each other, through the encouragement to confer and file a joint memorandum. It is significant that the conference is held in person (as opposed to telephone, the usual practice) and that parties themselves are required to attend; this may be the first time the parties have met and spoken face to face. It also represents a departure from the default litigation position of lawyers speaking on behalf of the parties, which is often criticised as disempowering for the parties.[102] The requirement that the parties articulate their objectives for the litigation and how that objective relates to the terms of the insurance policy acts as an immediate and early reality check on the parties' expectations, which can facilitate settlement in and of itself. This is an innovative device which addresses traditional criticisms of public adjudication as being overly "legalistic" and insufficiently targeted at the parties' real needs and interests. This face to face meeting can also flush out misunderstandings, recognising that many earthquake disputes are caused or exacerbated by miscommunication or delays caused by the overwhelming number of claims, and provide an opportunity, albeit in an oblique way, for the transformative and cathartic engagement promised by the private settlement process. For example, speaking about his experiences as a CEQL judge, Kós J recounts[103]:

> "At the first case management conference the parties and counsel must attend. We encourage the parties to speak at the conference. Sometimes the results are striking. At one conference, it was obvious the parties were not so far

[99] Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016), para.41.

[100] High Court of New Zealand, "Notice of First Case Management Conference — Earthquake List", para.5.

[101] Ira Asherman and Sandra Asherman, *The Negotiation Sourcebook*, 2nd edn (Amherst Mass: HRD Press, 2001), pp.200–202; Roger Fisher and Danny Ertel, *Getting Ready to Negotiate: The Getting to Yes Workbook* (Penguin Books, New York, 1995), pp.11 and 100; Centre for Effective Dispute Resolution "Mediation Preparation - Checklist for Lawyers" (2006), *www.cedr.com* [Accessed 5 May 2017].

[102] See text above accompanying fn.54 above.

[103] Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016), para.40.

> apart, but that the plaintiffs were very upset at the process undertaken by the insurance company. They got that issue off their chest, and it was quite emotional. The insurance company was plainly embarrassed. Their representative (and lawyer) indicated a willingness to try and work through these issues more cooperatively and try and achieve a settlement. There was quite a distinct atmosphere in the Court of mixed frustration and enthusiasm. I had a gap in my roster. Reversing the orthodox approach to filing fees I handed the Registrar a $20 note, instructed him to go and get coffee for the participants, and invited them to stay in the courtroom and negotiate after I left. Although the case did not settle that afternoon, it settled soon afterwards."

It is significant that the judge left the room while the settlement negotiations took place. This indicates an attitude that private settlement processes should remain just that—private—and that, while the conference itself may create the conditions necessary for settlement discussions to take place, it is not the role of the judge to facilitate them personally.

The procedural directions made at the conference also facilitate private settlement. Uncertainty about discrete points of law can be roadblocks to settlement, so the approach of identifying any such issues that can be tried as separate questions in advance of a full trial facilitates settlement. Setting dates for evidence calculated forwards from the case management conference instead of backwards from whatever trial date is allocated requires the parties to continue engaging with the facts of their case, which is necessary for the BATNA/WATNA/RATNA analysis required to inform settlement discussions. Setting a trial date early, at the first or second case management conference, can also reality check and focus the minds of the parties.

Having said that, these procedural steps also represent a commitment to facilitating public adjudication as quickly and as inexpensively as possible. For example, allowing informal discovery minimises unnecessary costs, the discovery process being one of the most expensive procedural steps in civil litigation.

In sum, these steps at the case management conference indicate a conscious encouragement of private settlement, while at the same time a commitment to making the adjudicative process as efficient as possible. Indeed, the Court states[104]:

> "Case management conferences are not settlement conferences. They aim to isolate issues that must be argued and have them heard as soon and as economically as possible. Of course the Court's involvement in settling scope, identifying issues, and timetabling sometimes facilitates settlement. The Court often requires parties to undertake further analysis and disclosure, including liaison among experts, that is intended to facilitate agreement on some issues and reduce the trial to its essentials."

Expert witnesses

As stated above, the extent of earthquake damage to the property and the scope of any required repairs is usually a matter for experts such as geotechnical and structural engineers, building practitioners and quantity surveyors. The Court has

[104] Courts of New Zealand, "Purpose of the High Court Earthquake List", p.2.

acknowledged that, while experts can offer significant assistance to the Court in resolving earthquake matters, their presence can also lengthen trials and compound the expense.[105]

The CEQL has a special protocol for expert conferral between experts in the same discipline.[106] Schedule 4 of the New Zealand High Court Rules[107] is a Code of Conduct for Expert Witnesses which provides, inter alia, that experts have an overriding duty to assist the Court, impartially, which takes priority over any duty to the party who engages them. The CEQL protocol begins by reminding experts of these overriding obligations to the Court and providing that the meeting between experts shall be privileged, in the nature of a "without prejudice" privilege, such that no part of the experts' discussion can be referred to at trial. It is a joint privilege, meaning that any waiver requires the consent of both parties.

The protocol then sets out a comprehensive process for the experts to follow, with practical details such as where and how they should meet, the setting of an agenda, and the requirement that lawyers not be involved in the conferral process. Each expert is required to provide his or her curriculum vitae to the parties, along with a description of any testing undertaken, and a statement of facts and assumptions upon which his or her opinion is based. The protocol also prescribes a template format for a joint report to the Court.[108] This lists the issues that have been agreed and not agreed (and the basis for each), further issues that have arisen and any further actions to be taken, such as discussions between experts or more investigations or testing. The Court also provides a Microsoft excel spreadsheet "Common cost template" for quantity surveyors to use when detailing the anticipated cost of repair and rebuild options. This document enables costings to be compared easily on a line by line basis.[109] Finally, the protocol provides that any agreements between experts do not bind the parties unless the parties expressly agree to be bound.

Analysis

The CEQL protocol for expert conferral again serves a dual purpose of streamlining the public adjudication process while also creating the conditions necessary for private settlement.

Significant time and expense at trial can be saved if the experts in each discipline confer with each other to identify areas of agreement and genuine disagreement in advance of giving their evidence, make explicit the assumptions on which their opinions are based, and present their opinions in a uniform and easily comprehensible manner (the joint report and common costs templates).[110] It also helps settlement discussions. That the discussions are privileged, do not bind the parties, and are to take place without lawyers present encourages non-adversarial

[105] Courts of New Zealand, "Purpose of the High Court Earthquake List", p.3.

[106] High Court of New Zealand "Protocols For Expert Conferral Under The High Court Earthquake List". The full protocol is reproduced in full as Appendix Two. This includes a copy of the High Court Code of Conduct for Expert Witnesses.

[107] High Court Rules 2016 Sch. 4.

[108] High Court of New Zealand "Earthquake List Pro Forma Expert Report Template". This is reproduced in full as Appendix Three.

[109] High Court of New Zealand "Common Template: Repair/Rebuild Trade Summary". This Microsoft Excel spreadsheet is reproduced in full as Appendix Four.

[110] Appendices Three and Four.

candour, prioritising the experts' professional obligations and obligations to the Court over their obligations to the party who instructs them. It increases the chances of the parties being guided to a mutually acceptable outcome, in a principled way.

Attitude to private settlement processes

The High Court of New Zealand has jurisdiction to convene a judicial settlement conference.[111] In contrast with comparable jurisdictions,[112] it has no jurisdiction to compel parties to engage in mediation or any other private settlement process. Any order to engage in mediation can only be made with the consent of the parties.[113] The High Court has no court-annexed mediation programme and will not award costs against a party in respect of an unreasonable refusal to mediate.[114] Most settlement activity in New Zealand takes place privately, either through bilateral settlement negotiations or through ad hoc mediation.[115]

Consistent with this, the CEQL makes no general provision for court-based settlement processes. It states that the Court will consider allocating a judicial settlement conference in deserving cases, where the parties so request, and where that resource can be rostered. In practice, when parties request a judicial settlement conference, they receive the following response from the CEQL case officer[116]:

> "1. I refer to counsel's joint memorandum dated today. I note the request for allocation of a settlement conference and will forward your memorandum to an Earthquake List Judge as soon as the following information is received.
>
> 2. The Judge will wish to know:
>
> a. What is the current financial gap between the parties' respective costings in relation to the earthquake damage?
>
> b. What is or are the principal items (and value of each) representing the difference between the parties' respective costings?
>
> c. Have the relevant experts confirmed that despite attempts they are unable to resolve the costing difference?

[111] High Court Rules 2016 r.7.79(1): "A Judge may, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations." A judicial settlement conference is an in-person conference between the parties, their lawyers and a judge. It is similar to mediation in that a neutral party (in this case, a judge) facilitates settlement discussions between the parties, on a confidential and without prejudice basis. This is done on the default basis that a different judge will preside at trial. A key difference between judicial settlement conferences and mediation, however, is that a judge will not caucus with the parties.

[112] For example, Ontario's mandatory mediation program (Rules of Civil Procedure r.24.1, RRO 1990, Regulation 194) or the UK's costs regime (see *Halsey v Milton Keynes General NHS Trust* [2004] 3 Costs. L.R. 393; *Dunnett v Rail Track Plc* [2002] EWCA Civ 303; [2002] 1 WLR 2434; [2002] CPLR 309; [2002] 2 All ER 850; *Burchell v Bullard* [2005] 3 Costs L.R. 507; and *Reid v Buckinghamshire Healthcare NHS Trust* unreported 28 October 2015 Senior Courts Cost Office).

[113] High Court Rules r.7.79(3).

[114] See, e.g. *BC198900 Ltd v Bhana Investments Ltd* [2015] NZHC 2787.

[115] Readers should not infer from this that alternative dispute resolution processes are undeveloped in New Zealand. New Zealand was an early adopter of alternative dispute resolution processes, especially statutory mediation schemes. Alternative dispute resolution is referred to in 191 statutes: Ministry of Business, Innovation and Employment *Dispute Resolution: Best Practice Report 2 of 2 to Joint Ministers* (March 2014), p.18, cited in Shaw, "ADR and the Rule of Law under a Modern Justice System" (2016), p.35. See further Grant Morris "Towards a History of Mediation in New Zealand's Legal System" (2013) 24 A.D.R.J. 86.

[116] Email advice from Robin Ashton, Judicial Support Advisor, Christchurch High Court, 6 May 2016. (Copy on file with author.)

d. Have counsel endeavoured to negotiate directly and, if not, why not?

e. Counsel have identified a judicial settlement conference as their preference — is there a reason that a settlement conference is preferred over mediation? If so, what?

3. The usual practice of the Court, when allocating settlement conferences, is to allocate them only when making trial directions. Are the parties ready for trial directions to be made? If so, please provide the Schedule 5 details[117] relevant to allocation of trial.

4. Please promptly confer and let me have a response on the above matters so that I can refer the request to a Judge. So long as you have conferred a single email from one of you to me (copied into all) will be sufficient."

A search of the published CEQL spreadsheet indicates that, as at 10 May 2016, only eight CEQL judicial settlement conferences had been held since 2014.[118]

Analysis

This approach reveals a clear philosophy that the Court's role is primarily that of dispensing justice by public adjudication and that, for the most part, judicial resources should be reserved for this. The CEQL has not removed judicial settlement conferences as an available resource to parties, but neither has it made them a default step in the route to trial; rather, the questions directed at parties who request a judicial settlement conference create definite hurdles for the parties to overcome should they wish to have a judge facilitate their settlement negotiations.

This is directly in line with the original message delivered by Professor Frank Sander at the 1976 Pound conference, which is often described as the "big bang" moment for the modern alternative dispute resolution movement.[119] Sander's call was to "reserve the courts for those activities which they are best suited and to avoid swamping and paralysing them with cases that do not require their unique abilities."[120]

And yet, the Court clearly is not blind to settlement processes. Speaking about the CEQL, Justice Kós stated in January 2016[121]:

> "A core aspect of the List's purpose, by encouraging early identification of issues, exchange of expert reports, caucusing of experts and exchange evidence, is to make parties face up to the strengths and weaknesses of their cases sooner than normal. When they do so, they seldom need to go to trial."

Thus, what we see is a conscious delineation of pro-settlement steps regarded as appropriate for the Court to take, and steps that are not.

[117] Schedule 5 of the High Court Rules sets out the matters for consideration at a case management conference. It is reproduced in full in the Notice of First Case Management Conference, Appendix One.

[118] Email advice from Robin Ashton, Judicial Support Advisor, Christchurch High Court, 10 May 2016, based on a preliminary search of the current published CEQL spreadsheet. (Copy on file with author.)

[119] Volpe, "Post Disaster ADR Responses: Promises and Challenges" (2014) 26 Fordham Evntl. L. Rev. 95, 103, citing Michael Moffitt, "Before the Big Bang: The Making of an ADR Pioneer" (2006) 22 Neg. J. 437.

[120] Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp Resol 211, 217. See also Richard Reuben, "ADR and the Rule of Law: Making the Connection" (2010) 16 Disp. Resol. Mag. 4, 6.

[121] Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016), para.46.

Further case management, timetabling and trial

Where a scope of works has been agreed between the parties, the Court may set a trial date at the first case management conference. In most cases, however, a further case management conference is scheduled. At this conference a trial date is set—if the case is ready—and timetable orders are made for the exchange of evidence. Typically these date forward from the date of the conference, with the plaintiff's evidence being due six weeks after the conference and defendant's evidence and any reply evidence by the plaintiffs to follow. This is in contrast to the usual practice in the High Court of dating the timetable for evidence backwards from the trial date.

Normal court practice tolerates parties postponing timetable orders if all parties consent. This is particularly common in cases where settlement discussions are progressing. In contrast, the CEQL procedure is that parties and counsel may not alter timetables set by the Court without its agreement, even if they believe they are about to settle. This includes timetables for discovery and evidence exchange. The CEQL Registry staff maintain an overview of cases and will schedule a case management conference if the case has "gone quiet".[122]

Once a trial date is set, the Court requires the parties to identify their witnesses and what they are expected to say. It sets a date for the finalisation of pleadings (meaning any subsequent amendments can only be made with the leave of the Court). A final pre-trial conference will be scheduled with the trial Judge (who may be different from the Judge presiding at the case management conferences) after evidence has been exchanged, once the parties have had sufficient time to absorb the evidence and its implications.

The scheduling of cases is "loaded" to 300%, meaning that for any given court sitting day, three cases are scheduled.[123]

Significantly, no changes have been made to the trial process itself. The process is the same as for any other High Court proceeding.

Analysis

The proactivity in setting early dates for the exchange of evidence, the inflexibility of timetable orders and the early setting of a trial date are likely to minimise costs associated with delay, particularly legal and expert costs which are typically time-based.[124] The practice of active case management whereby the court will call parties in for a conference if a case has "gone quiet" is similarly designed to prevent costly drift and maintain forward momentum towards an adjudicated outcome at minimal expense.

The "loading" of the court docket to 300 percent is a gambling exercise that represents a clear acknowledgement that: (a) most cases will settle before trial; (b) the Court can increase the chance of settlement through the very allocation of a trial date; and that (c) for those cases that do not settle, the gamble will pay off in

[122] Kós J, "Disaster and Resilience: The Canterbury earthquakes and their legal aftermath" (2016), para.43.

[123] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2015", 29 November 2015, p.8; Venning J, "Report from the High Court 2015: The Year in Review", 2016, p.6.

[124] The Court states that delay in due dates for discovery and evidence can lead to late requests for adjournments or late settlements, which hinder other cases: Courts of New Zealand, "Purpose of the High Court Earthquake List", p.3.

the sense that they will receive an earlier trial date than if cases had been scheduled back to back, thus minimising delays.

Collectively, this approach to further case management and timetabling enhances the shadow of trial,[125] creating the incentive for parties to settle.[126] Conversely, the fact that no changes have been made to the trial process itself indicates a commitment to the Court's fundamental role: to resolve disputes through an adversarial process according to the law's objective standards.

Open justice and reporting

All trials are held in public in the absence of compelling justification for privacy. The same rules apply in this respect as for general proceedings in the High Court of New Zealand. Similarly, all judgments are public; they are available on the Ministry of Justice's *Judicial Decisions Online* website,[127] through legal digests and legal databases such as LexisNexis and Westlaw, and through local law society libraries.

The CEQL takes additional steps, however, to enhance the availability and accessibility of its work. It maintains a public spreadsheet with details of all cases before the Court, listing the parties and their lawyers, summarising the facts, identifying the legal issues raised and recording key procedural milestones and the current status of each case. It identifies cases in which issues of general importance have been or will be decided, and also identifies the outcome of the case (settlement or adjudication). The spreadsheet is in Microsoft Excel format and available online.[128]

This list is updated regularly. This information goes beyond what is available on public registers; the first case management notice places the onus on parties to object to this information being reported publicly if they are concerned about this.[129]

In addition, all earthquake judgments rendered by the CEQL are kept in a special catalogue at the Christchurch Law Society Library. As such, they are more easily accessible than ordinary judgments.

Analysis

The public online spreadsheet of all cases before the Court is perhaps the most significant innovative feature of the CEQL. It represents a conscious effort to make the law as accessible as possible to both lawyers and non-lawyers, especially earthquake victims who may not have access to legal advice.

The spreadsheet helps to "feed" the dialogic relationship between public adjudication and private settlement. It effectively boosts the precedent value of public adjudication, increasing the chances that key judgments will be identified and used to inform private settlement negotiations. One of the early CEQL judges,

[125] A term used by the High Court itself: "Report from the High Court 2015", Venning J, "Report from the High Court 2015: The Year in Review", 2016, p.6.

[126] See discussion above at text accompanying fn.70.

[127] Judicial Decisions Online: *https://forms.justice.govt.nz/jdo/Search.jsp* [Accessed 5 May 2017].

[128] See *www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/earthquake-list-christchurch* [Accessed 5 May 2017].

[129] "Notice of First Case Management Conference — Earthquake List", above n.92, at [28].

Miller J, spoke in 2014 about the intention to create a body of precedent to guide settlement activity. He stated[130]:

> "The spreadsheet was intended to help here. Generally, in litigation, judgments are transparent but settlements are not. The spreadsheet allows practitioners to liaise with one another about current cases, and it allows everyone to identify any pattern of settlements."

Maintaining a special catalogue of earthquake judgments at the Christchurch Law Society Library does this also.

This reporting feature increases the chance that private settlement negotiations will take place on a principled basis, taking into account these judgments and the overall patterns of settlement. The public nature of the list, revealing the number of claims faced by each insurer and patterns of settlement, also has the potential to counteract (or at least make visible) the power advantage afforded to repeat users of private settlement processes.[131] In the Christchurch context, this rests with the insurers who deal with the same types of claims on a daily basis. They have the advantage of knowing overall claim patterns, being familiar with the negotiation or mediation process, and having the resources to defend litigated claims.[132]

Conclusion

Overall, an analysis of the CEQL in its first five years reveals that its design is informed by the debate outlined in Pt III above. It reveals a philosophical commitment to preserving the democratic and constitutional function of the Court, and to the idea that public adjudication and private settlement are fundamentally separate concepts that should be kept separate. However, it also demonstrates a recognition of the dialogic relationship between the two, and a willingness to take innovative steps to foster that dialogue. These include promoting identification of key facts and issues, encouraging cooperation and communication between disputing parties, promoting party personal engagement in the dispute resolution process, minimising the cost (time and money) of adjudicative processes and, most importantly, prioritising the role of the Court in clarifying the law to enable principled private settlement negotiations. In doing so, the CEQL seeks to maximise the realisation of the normative value of both processes, thereby facilitating the efficient but also just resolution of earthquake disputes.

One might track the genesis of these philosophical underpinnings to the Chief High Court Judge at the time of the 2010 and 2011 earthquakes, Winkelmann J. In August 2011, during the height of the Canterbury Earthquake Sequence and shortly before the establishment of the CEQL, Winkelmann J delivered a speech to a conference of the Arbitrators and Mediators Institute of New Zealand.[133] In that speech, citing theorists such as Fiss and Genn, she expressed the view that:

[130] Forrest Miller, "Reflections on the earthquake litigation" (Address to the New Zealand Insurance Law Association Conference, September 2014), p.8.

[131] Carrie Menkel-Meadow, "Do the 'Haves' Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR" (1999–2000) 15 Ohio St. J. on Disp. Resol. 19.

[132] This power advantage is counterbalanced to some extent in Christchurch by lawyers who act for multiple policy holders against the same insurer and litigation funders who pay legal costs in return for a percentage of any monies recovered.

[133] Helen Winkelmann, "ADR and the Civil Justice System" (Speech to the Arbitrators and Mediators Institute of New Zealand, Auckland, 6 August 2011).

(a) a well-functioning civil justice system is a critical feature of a society which exists under the rule of law and is a pre-condition to democracy; (b) private settlement raises concerns about coercion and manipulation by the stronger party; (c) most cases settle before trial; (d) cases settle in the shadow of the law, such that without a functional civil court system cases would not settle peacefully; and (e) a looming trial date is the main driver of settlement. She stated[134]

> "although mediation has a place alongside a system of civil justice, it can only be as a complement to that court system and not as substitute or replacement for it. Civil litigation before the courts is not dead, or dying. Adjudication of rights through the courts, whether in a full trial or in a summary form, does and should continue to remain at the heart of our system of justice."

So, how well has this approach worked in Christchurch? The next section seeks to answer that question, using the latest published statistics from the New Zealand Ministry of Justice, EQC, the Insurance Council of New Zealand, news reports and my own mediation experiences.

V. Evaluation of the Christchurch High Court earthquake list

Insurance claim statistics

The EQC, as a government-entity, reports its claims statistics. As at 30 September 2016, it reported having received 166,978 valid building insurance claims and 187,360 valid home contents insurance claims in respect of properties damaged by the Canterbury Earthquake Sequence.[135] Of these building claims (or "dwelling claims"), it reports that 99.9% are resolved, with 59% of those resolved by a cash settlement and 41% through its EQC-managed repair programme. 99.9% of the home contents claims are resolved.[136]

As for claims against private insurers, the best information about claims comes from the Insurance Council of New Zealand, based on statistics collected from its insurer members and the Ministry of Business, Innovation and Employment.[137] The Insurance Council reports that, as at 30 September 2016, it was aware of 167,593 claims against private insurers, comprising 141,360 claims in respect of domestic properties and 26,233 claims in respect of commercial properties.[138]

More helpfully, recognising that any given property can have multiple claims,[139] the Insurance Council also reports statistics based on individual properties, rather than the total number of claims. It reports that, as at 30 September 2016, its

[134] See above, p.2.

[135] Earthquake Commission "Progress and Updates: Scorecard" (Updated to 29 November 2016). It reported 73,501 further properties being assessed for land damage, 9,877 properties being assessed for increased flooding vulnerability and 9,015 properties being assessed for increased liquefaction vulnerability as at 29 November 2016.

[136] Earthquake Commission "Progress and Updates: Scorecard" (Updated to 29 November 2016).

[137] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016).

[138] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016).

[139] Such as the EQC land component, the EQC building component, the EQC home contents component, the private insurer's building and contents components and the private insurer's component for "out of scope" repairs, being repairs to items such as driveways that are covered by the private insurance policy but not the EQC insurance scheme.

members were dealing with 26,437 properties with "over cap"[140] domestic insurance claims.[141] Of these, 83% (21,859) are resolved, either through cash payments or through insurer-managed repair or rebuild programmes. A further 9% (2,461) are reported as being "in resolution", meaning the rebuild/repair is in the pricing and design process or cash settlement is pending.[142] The Insurance Council also reports that 98% of "out of scope claims"[143] have been settled (63,739) and an estimated 95% of commercial claims have been settled.[144] NZ $18.9 billion has been paid by private insurers in respect of these claims.[145]

We can see from these statistics that the majority of insurance claims have now been settled. Interestingly, the title of one press release by the Insurance Council reporting its claim statistics is "Insurers settle 20% more claims in 2015", suggesting a perception that the rate of settlement is increasing.[146]

CEQL statistics

The latest published statistics about the CEQL are in the "Christchurch Earthquake Litigation List Report As at 30 September 2016", released in November 2016.[147] It reports that, since it was established, the CEQL has processed 736 earthquake related proceedings, as follows[148]:

High Court: Total Filings and Outcomes as at 30 September 2016 (cumulative since September 2010)			
	30/9/14	**30/9/15**	**30/9/16**
Total Earthquake Cases Filed	359	437	736
Disposed by judgment	30	34	36
Discontinued	91	176	300
Total disposed	121	210	336
Total active cases	238	227	400

The CEQL has generated 36 judgments to date, covering a wide range of insurance issues, such as whether an insured has a separate insurance claim for each earthquake event,[149] how earthquake-related loss is to be proved and apportioned,[150] the meaning of an insurer's obligation to repair or rebuild to an "as

[140] "Over cap" claims are property claims where the damage exceeds the NZ$100,000 monetary cap prescribed by statute for EQC claims. Once EQC makes a "cap" payment on a claim the private insurer becomes responsible for any balance covered by the private insurance policy.

[141] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016).

[142] Insurance Council of New Zealand, "Canterbury quake insurance settlements near $19 billion" (2016).

[143] For an explanation of this term, see above n.139.

[144] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016).

[145] Insurance Council of New Zealand, "Insurers settle $19 billion Canterbury claims" (2016).

[146] Insurance Council of New Zealand, "Insurers settle 20% more claims in 2015" (press release, 1 February 2016), *www.icnz.org.nz* [Accessed 5 May 2017].

[147] Venning J, Chief High Court Judge, "Christchurch High Court Litigation List Report as at 30 September 2016", undated, p.1.

[148] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.4.

[149] *Re Earthquake commission* [2011] 3 NZLR 695; *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2012] NZHC 2954; eventually confirmed on appeal to the Supreme Court *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 12.

[150] See, for example, *C&S Kelly Properties v EQC & Southern Response Earthquake Services Ltd* [2015] NZHC 1690; *Jarden v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1427.

new" condition,[151] whether certain repair solutions are acceptable (such as "jacking and packing" foundations[152] instead of completely rebuilding them, or whether cracks can be repaired through the injection of epoxy resin),[153] and what an insurer must pay in respect of notional rebuild costs such as contractor's profit margins, unexpected items of expenditure and the fees of professionals such as architects.[154] Some judgments have been in favour of the insurer; others in favour of the insured.

The vast majority of disposals have been by settlement. The report notes that, in the year to 30 September 2016, 125 cases were settled and discontinued by the parties and only two cases required a full hearing and judgment.[155]

There are no statistics on time to hearing in the CEQL report to 30 September 2016, but the CEQL report from the year before records that the waiting time to trial (counting from the date the case is set down as being ready for hearing) was within three months (90 days) for three-day hearings and between three and nine months (90–270 days) for longer hearings. The cases which proceeded to hearing took a total of 125 days, with an average of 3.7 days per trial.[156]

Finally, the 2016 report notes that, despite the scheduling of cases to a 300% loading, no cases were adjourned for lack of a judge.

A number of conclusions can be drawn from these statistics.

First, only a very small number of cases are proceeding through to final judgment. Of the 336 cases disposed of by 30 September 2016, only 36 were disposed of by judgment (10.7%). 89.9% of disposals were discontinued, which the Court equates with private settlement.[157] Thus, the vast majority of cases settle before trial.

This statistic alone does not reveal anything unique about the CEQL. What does, however, is the fact that while the CEQL handed down 30 judgments between May 2012 (when it was established) and September 2014 (an average of 13 per year), it handed down only four more in 2015 and only two more in 2016. Thus, the *rate* of judgments has declined markedly. Conversely, the rate of cases being discontinued (settled) has increased, from 91 cases in the period to 30 September 2014, to 176 cases as at 30 September 2015, to 300 as at 30 September 2016. In other words, the number of cases resolved by discontinuance in the year to 30 September 2015 is approximately *double* that of the entire period from the commencement of the list to that point, nearly *doubling again* in the year to 30 September 2016. The rate of settlement is increasing exponentially.

Next, CEQL cases proceed to trial faster than the national average. An analysis of the waiting time to trial once the case has been set down for hearing reveals that, as at 31 December 2015, the average time to trial for CEQL cases was 280

[151] See, for example, *Turvey Trustee Ltd v Southern Response Earthquake Services Ltd* [2012] NZHC 3344 and *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675.

[152] This involves jacking floor bearers up to allow the insertion of packing on top of the foundation piles in order to bring the floor of a building back to level.

[153] *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675.

[154] *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433, with these elements of the decision essentially unchanged on appeal to the Court of Appeal and the Supreme Court: *Avonside Holdings Ltd v Southern Response Earthquake Services Lt* [2015] NZCA 483; (2014) ANZ Insurance Cases 62-040; *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110.

[155] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.3.

[156] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2015", p.3.

[157] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2015", p.3; Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.3.

days. In contrast, the average time to trial for non-CEQL cases was 325 days.[158] This is despite the fact that earthquake cases are relatively complex, as indicated by the average hearing time of 3.7 days.[159]

Finally, the fact that no cases were adjourned for lack of a judge indicates that the gambling exercise[160] of 300% loading has paid off.

These statistics provide quantitative evidence of the CEQL's success in fostering the dialogic relationship between public adjudication and private settlement in the context of the CEQL; it generated more judgments in the earlier years than in later years and more settlements in later years than in earlier years. The vast majority of cases are now settling out of court, with those cases that do require public adjudication being processed faster than the national average, thus increasing access to justice for the litigants involved.

Private settlement outcomes

What can these statistics tell us about private settlement activity? In particular, what effect is the CEQL having on the nature of private settlement outcomes, recalling that the goal of the CEQL is to facilitate not just the *efficient* but also the *just* resolution of earthquake disputes?

Not much. Private settlement being private, it is near impossible to carry out any overall examination of the nature of these settlements, including whether their terms are just.[161] Even if such an examination were undertaken, what conception of justice would one apply? Should one map how closely the terms of settlement track the parties' legal rights and entitlements? Whether like cases are being settled alike? Or is some other standard appropriate, recognising that the very point of private settlement is to allow the parties to determine their own, subjectively acceptable, version of justice?[162] Sociological research may be conducted in years to come, giving us more information about whether these settlement outcomes are just. This would be welcome, particularly given that private settlement schemes following natural disasters in comparable jurisdictions have been criticised for reflecting power imbalances.[163]

But for now, at this point in time, we can make certain observations.

First, we can draw an inference from the simple fact of settlement of these claims to the effect that by definition, given the consent-based nature of settlement, the outcome must be considered fair by all parties.

The second possible observation is that the statistics show a decline in the number of CEQL cases proceeding to trial and an increase in the number of CEQL cases being settled. The fact that public adjudication has decreased while private

[158] Analysis conducted by the Christchurch High Court Registry using Registry data and Ministry of Justice reports. Email advice dated 15 March 2017 on file with author.

[159] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2015", p.3.

[160] Refer to discussion above, p.337.

[161] Empirical researchers in other contexts have attempted to survey and interview participants to shed light on their dispute resolution experiences. See, for example, Grant Morris, "From Anecdote to Evidence: The New Zealand Commercial Mediation Market" (2016) 22(1) NZ Business Law Quarterly 10. The author is not aware of any such research in the Christchurch earthquake context.

[162] Even then parties can change their minds; a party may consider a settlement outcome just at the time of settlement but regret it later.

[163] See, for example, Murrill, "Mass Disaster Mediation: Innovative ADR, or a Lion's Den?" (2007) 7 Pepp. Disp. Resol. L.J. 401, and Hensler, "A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex. L. Rev. 1587.

settlement has increased suggests that the judgments are having an influence on settlement activity. This can only be through the elucidation of principles to guide settlement negotiations.

Next, minute though it is in the overall scheme of earthquake claims, my personal experience mediating these claims is that the CEQL judgments handed down to date are indeed influencing settlement outcomes. These mediations take place very much in the shadow of the law.

Such mediations are organised on an ad hoc basis, usually initiated by the parties' lawyers. They take place over the course of one day (sometimes longer), and often with an imminently approaching trial date. The usual attendees are the parties, their lawyers, and their respective experts, typically geotechnical and structural engineers, building practitioners and quantity surveyors. The mediation commences with each party setting out its position in an opening statement, following which an agenda of issues to be discussed is developed. This agenda typically covers such topics as whether the insurance policy responds to the loss as a matter of law (for example, whether any of the damage is pre-existing), whether the appropriate policy response is to repair or rebuild the property (which is influenced by whether it is economic to repair the property), the standard of repair required by the policy, the appropriate remediation strategy and the cost of that strategy.

These issues are then debated—the legal issues between the lawyers and the technical issues between the experts. Expert conferral will sometimes happen in the presence of the parties, which enables the parties to understand the technical issues and preview how the experts will perform in court under cross-examination. Sometimes it more usefully happens in private, depending on the personalities and conflict dynamics of the particular case.

The parties will also speak directly with each other throughout the day in various combinations, with or without their lawyers. Emotions such as anger, frustration, impatience, remorse and even grief are common, from both the policy holder(s) and representatives of the insurer. As such, the private settlement process is being used to satisfy emotional needs through face to face conversation, confrontation, reconciliation and catharsis. This should be taken into account in considering whether the outcomes are just.

The parties will carry out a BATNA/WATNA/RATNA analysis,[164] often (but not always) in private with the mediator, to identify the range of acceptable settlement outcomes. In this context the exercise is essentially a prediction of the various possible trial outcomes using the CEQL judgments as a guide. The results define the zone of possible agreement,[165] and settlement negotiations proceed from there to determine whether a mutually acceptable outcome is possible. The two most common outcomes are: (a) payment of money from the insurer to the policy holder(s) in full and final settlement of the claim; or (b) the insurer undertaking to procure and manage the required repair (or rebuilding) work itself, through its own building programme.

One phenomenon I have witnessed is that the same legal arguments on points where the law is unclear recur in separate mediations involving different parties

[164] Above fn.73.

[165] For an explanation of this negotiation term, see, for example, The Negotiation Experts "Zone of Possible Agreement", *www.negotiations.com/articles/zopa* [Accessed 5 May 2017].

and lawyers. A new judgment will then be released and have an 'ripple effect' throughout the legal community, with the legal arguments made at mediation changing immediately in response. Recent examples of this include *Jarden v Lumley General Insurance (NZ) Ltd* [2016] NZHC 2820, in which the High Court awarded costs against a homeowner couple because they "pursued arguments that lacked merit and acted frivolously in continuing [their] case"[166] and *Young v Tower Insurance Ltd* [2016] NZHC 2956, in which the High Court awarded NZ $5,000 general damages against the insurer for "major delay" in disclosing to the plaintiff an expert report about the plaintiff policy holder's property that was adverse to its position.[167] These decisions are significant because it is common for plaintiff homeowners to feel aggrieved at the way their insurer has behaved in relation to their claim, so claims for general damages are regularly made in pleadings and at mediation. The *Young* decision is the first signal from the Court that such damages might be available. Conversely, it is common for insurers to argue that a plaintiff policy holder's claim is exaggerated and unreasonable. While several decisions have awarded costs against defendant insurers, the *Jarden* decision is the first signal from the Court that costs may be awarded in the opposite direction. Each decision is used as a negotiation tool at mediation, further proof of the dialogic relationship between public adjudication and private settlement processes.

Thus, my experience is that the CEQL judgments are influencing every stage of the private settlement process. Case names are used in the same way as ancient mariners used the stars for navigation, with statements like "*Avonside*[168] means you have to include reasonable professional fees in the offer" or "*Parkin*[169] says we can offer you a jack and pack foundation repair and that's sufficient." To the extent that the CEQL judgments encapsulate law's objective standards of justice, this is an indication that private settlements arising from mediation—the mediations in which I have been involved, at least—have a principled basis.

One final observation about whether the terms of resolution are just is derived from the overall insurance claim statistics reported by EQC and the Insurance Council. The vast majority of insurance claims have now been resolved.[170] The original impetus for the establishment of the CEQL was the existence of an overwhelming number of insurance-related disputes, resolution of which was a precondition for the rebuild process to begin. The fact that most insurance claims are now resolved means that that rebuild process is now possible for most Canterbury properties.

Is this enough? It is now more than six years since the earthquakes on 4 September 2010 and 22 February 2011. There remains widespread dissatisfaction amongst Canterbury residents with the ongoing delays in resolving insurance claims and progressing the rebuild process.[171] The Insurance and Savings Ombudsman has dealt with over 1,500 earthquake-related complaints against private insurers. There have been some 20,000 complaints against EQC.[172] While

[166] *Jarden v Lumley General Insurance (NZ) Ltd* [2016] NZHC 2820 at [33].
[167] *Jarden* [2016] NZHC 2820 at [166].
[168] *Southern Response Earthquake Services Limited v Avonside Holdings Ltd* [2015] NZSC 110.
[169] *Parkin v Vero Insurance New Zealand Ltd* [2015] NZHC 1675.
[170] Would this have happened in the absence of the CEQL? We have no counterfactual.
[171] A google search using the terms "Christchurch earthquake frustration delay" generates over 100,000 results.
[172] Mark Kelly "Quake recovery faults show mediation scheme needed", *The National Business Review*, 8 April 2016.

the majority of insurance claims are settled, the remaining percentage still represents a large number of properties in absolute terms.

Further, and alarmingly, the Court now faces a "second wave" of civil claims, this time arising from poor quality or failed repairs undertaken in haste at the time of the earthquakes.[173] The number of repair cases being filed in the High Court at Christchurch began rising in early 2016. Indications from the Court and CEQL Registry staff are that this trend will continue.[174] These cases raise construction issues as well as insurance issues, and tortious issues surrounding duties of care, causation and quantification of loss. There is potential for them to have multiple defendants and/or third parties—EQC and the private insurer but also builders and construction companies, architects, the local territorial authority responsible for granting building consents, engineers and quantity surveyors. The Court has stated that these cases are likely to be more procedurally complex and raise more interlocutory issues than the claims between insurers and homeowners that have dominated the CEQL to date.[175]

VI. Recent developments

In 2016 there was a dramatic rise in the number of "regular" proceedings being filed by homeowners against insurers. In the first nine months of 2016, filings rose to the highest they had been since the inception of the CEQL in May 2012[176]; by October 2016 there had been four times more filings in 2016 than in 2015.[177] In its Report to 30 September 2016, the Court attributes this heavy influx to three factors[178]: (a) s.11 of New Zealand's Limitation Act 2010 prescribes a six-year limitation period for money claims, with time running from the date of the act or omission on which the claim is based. 4 September 2016 was the six-year anniversary of the 4 September 2010 earthquake. Although there are legal arguments that this should not be the relevant time limit for claims against insurers, and several insurers agreed to waive or defer potential limitation period defences to avoid proceedings being filed, clearly many plaintiffs sought to protect their positions by filing anyway[179]; (b) plaintiffs who have not yet achieved a settlement with their insurer may have decided to bring matters to the Court to determination; and (c) filings now include cases involving alleged defective or inadequate repairs (the "second wave" repair claims, as detailed above). In the first nine months of 2016 there were 53 cases of this nature. The Court anticipated a further influx of new proceedings before 22 February 2017, the six-year anniversary of the 22

[173] See, for example, Cecile Meier, "Survey of Canterbury quake repairs caned by critics and advocates", *New Zealand Herald*, 19 August 2015.

[174] Robin Ashton, Judicial Support Advisor, Christchurch High Court, "Presentation on the Earthquake List", Canterbury Westland Branch of the New Zealand Law Society, 13 October 2016, para.15 of notes. (Copy on file with author).

[175] "Earthquake list" (2016) 22(10) *Canterbury Tales* 6.

[176] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.1.

[177] Ashton, above n.172, Notes at [4].

[178] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.2.

[179] Analysis of CEQL filing rates reveals that the number of new CEQL proceedings filed in the five weeks leading up to the 4 September 2016 anniversary was nine times higher than the average five week period for the previous year. (Email advice from Hugh Donaldson, Deputy Registrar, Christchurch High Court, dated 21 March 2017. Copy on file with author.)

February 2011 earthquake.[180] (This influx eventuated, although not to the same extent as before the 4 September 2016 anniversary.[181])

There have also been a number of changes to the CEQL's processes.

First, a system has been devised for handling the repair cases referred to in the section above. The Court initially took the view that these cases should not be placed on the CEQL at all, as they raised building/construction issues rather than insurance issues and involved multiple parties.[182] This decision was difficult to understand, given that the resolution of these claims is as integral to the successful rebuild of Canterbury as the original claims. Repair cases are now placed on the CEQL and—for now—are case managed in the same way. They have a different internal classification, however, which enables the Registry to track the number and development of these cases. That will also enable easy identification in the event that their case management process needs to change.[183]

The second recent change to CEQL procedure is the removal of the mandatory in-person attendance requirement at the first case management conference. Speaking on 13 October 2016 at a Canterbury Westland Branch of the New Zealand Law Society seminar on the CEQL, two CEQL judges, Gendall J and Osborne AJ reported that although the intention remained to conduct first case management conferences in person, 80%–90% of first case management conferences were now being dealt with on the papers.[184] An amended notice is now sent to the parties upon the proceeding being filed. It is in the same form as that in Appendix 1 but stating in its introduction that if the parties are able to produce a joint memorandum setting out the required detail, then the Court "may well make orders on the papers in lieu of a first conference".[185] If a party requests an in-person conference then the Court will allocate one, but only 19 such conferences were held between April 2016 and December 2016, despite the highest rate of filings since the CEQL's inception in May 2012.[186] The reason for the change appears to be twofold: (a) lawyers (who by 2016 were familiar with the CEQL process and, often, each other) became able to resolve many preliminary matters by consent on a routine basis; and (b) in-person first case management conferences were consuming a huge portion of the Court's available judicial time. In December 2016, the Court's Judicial Support Adviser calculated that if an in-person first case management conference remained the default option at the current rate of filings, the Court would be booked for 12 months of scheduled judicial time dedicated solely to such conferences.[187]

While understandable, this change is regrettable. As analysed above, the in-person first case management conference was an innovative process step that had a number of benefits, including the opportunity for parties to meet face to face, the opportunity to empower the parties themselves (as opposed to their lawyers),

[180] Ashton, "Presentation on the Earthquake List", Canterbury Westland Branch of the New Zealand Law Society, 13 October 2016, para.16.

[181] Email advice from Hugh Donaldson, Deputy Registrar, Christchurch High Court, dated 21 March 2017.

[182] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2015", p. 5.

[183] Email advice from Robin Ashton, Judicial Support Advisor, Christchurch High Court, 14 December 2016. (Copy on file with author).

[184] "Earthquake list" (2016) 22(10) *Canterbury Tales* 6.

[185] "Notice of First Case Management Conference — Earthquake List" (December 2016 version), para.4. (Copy on file with author)

[186] Email advice from CEQL Judicial Support Advisor, Christchurch High Court, 14 December 2016.

[187] Email advice from CEQL Judicial Support Advisor, Christchurch High Court, 14 December 2016.

and the opportunity for the Court to reality check parties at an early stage. While some benefits can still be achieved through orders on the papers—for example, the identification of discrete points of law that can be tried separately, or the timetabling of expert conferral and evidence—those other opportunities will be lost.

Another change to CEQL procedure is a likely change in the loading of scheduled cases from 300%–400% in 2017.[188] Such a move would increase the stakes in the gambling exercise[189] but seems a reasonable response to the increase in filings, especially since the Court has now had the opportunity to discern predictable patterns in litigant behaviour and settlement rates.

Finally, the Chief High Court Judge has signalled that the Court will be allocating more time for judicial settlement conferences in 2017.[190] Such a shift blurs the conceptually elegant distinction between public adjudication and private settlement processes maintained in the first five years of the CEQL. The original approach had the philosophical appeal of keeping the two processes separate, thereby maximising the normative benefits of each—the rights-based open justice function of the Court and the efficient, interests-based function of private settlement. This sea-change might be attributable to the fact that the Chief High Court Judge changed on 1 June 2015. Winkelmann J, whose jurisprudential views on the relationship between public adjudication and private settlement were made public in her 2011 speech to the Arbitrators and Mediators Institute of New Zealand[191] and who was Chief High Court Judge at the time of the earthquakes and the inception of the CEQL, was appointed to the New Zealand Court of Appeal. The new Chief High Court Judge, Venning J, may have a different view on the proper relationship between the two processes. The more obvious explanation, however, relates to the practical realities of the resource challenge facing the Court. In October 2016 there was a seven to nine month waiting period once a case was set down for trial[192]; in December 2016 the Court was allocating trial dates "deep into 2017".[193] One can understand why the Court might seek to resolve a case through a one day judicial settlement conference instead of five to ten days of trial, especially given the recent influx of filings.

Notwithstanding these changes, Venning J, as the Chief High Court Judge, has stated[194]:

> "The High Court remains committed to provide, through a focused Earthquake List under the supervision of Judges, co-ordinated case management of all earthquake-related litigation. The List retains its focus on the structured, early identification of all relevant facts, the directed conferring and final reporting of experts, and the narrowing and resolution of issues in the light of the facts and expert evidence."

[188] "Earthquake list" (2016) 22(10) *Canterbury Tales* 6.
[189] See discussion above, p.337.
[190] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.4.
[191] Above fn.133.
[192] "Earthquake list" (2016) 22(10) *Canterbury Tales* 6.
[193] Email advice from CEQL Judicial Support Advisor, above fn.181.
[194] Venning J, "Christchurch High Court Litigation List Report as at 30 September 2016", p.5.

He has also "encouraged the profession to be imaginative and endeavour to settle as many proceedings as possible".[195]

The final recent development worth noting is that New Zealand continues to experience major earthquakes, in the Canterbury region and in other parts of the country. At the time of writing,[196] the damage caused by the 14 November 2016 magnitude 7.8 earthquake in the upper South Island and lower North Island of New Zealand is still being assessed. Describing that earthquake, GeoNet[197] has stated: "Based on our findings and in discussion with international researchers, early indications are that this is one of the most complex earthquakes ever recorded on land."[198] The energy released in two minutes during the earthquake—around 32 quadrillion joules—has been described as the equivalent of about eight million tonnes of TNT or 400 atomic bombs detonating.[199] Parts of the seabed along the coast of the upper South Island rose several metres during the earthquake; one part of the coastline rose 5.5m.[200] The extent of damage to buildings in the central business district of Wellington (New Zealand's capital city) continues to emerge,[201] with many large commercial buildings already scheduled to be demolished because of structural damage.[202] The Wellington High Court building is closed until further notice because of earthquake damage.[203] (The High Court building also houses the national law library of the New Zealand Law Society. The earthquake triggered the fire sprinklers, damaging many of the law books. Bound case law, statutes and other legal materials dating back four centuries had to be removed urgently.)[204] It remains to be seen what lessons from the CEQL might be applied to claims arising from these earthquakes.

VII. Conclusion

Natural disasters of the scale discussed in this paper have the potential to threaten the very fabric of a society. Yet when they give rise to a large number of civil claims raising similar issues, they also provide a unique opportunity to observe the dialogic interaction between public adjudication and private settlement and to facilitate the efficient yet just resolution of civil disputes by fostering that interaction.

In its first five years, the CEQL adopted innovative measures that required early identification of key facts and issues, encouraged cooperation and communication between disputing parties, lawyers and experts, promoted party engagement in the

[195] "Earthquake list" (2016) 22(10) *Canterbury Tales* 6.

[196] Early 2017.

[197] For a description of GeoNet, see above fn.1.

[198] GeoNet, "Kaikoura earthquake update: Magnitude revised" (16 November 2016), *http://info.geonet.org.nz* [Accessed 5 May 2017].

[199] Jamie Morton "Kaikoura quake: The power of 400 atom bombs", *NZ Herald*, 17 November 2016, *www.nzherald.co.nz* [Accessed 5 May 2017].

[200] Michael Daly, "'Startling' rise of 5.5 metres in piece of coastline during Kaikoura earthquake", *Fairfax media*, 21 November 2016, *www.stuff.co.nz* [Accessed 5 May 2017].

[201] Matthew Backhouse, "Extent of earthquake damage to central Wellington buildings continues to emerge", *The New Zealand Herald*, 16 November 2016.

[202] "Tuesday: Daily update on Wellington's quake affected and damaged buildings", *Fairfax media*, 24 November 2016.

[203] Ministry of Justice, "Wellington High Court update—alternative arrangements" (Update 30 November 2016), *https://justice.govt.nz/about/news-and-media/news/* [Accessed 5 May 2017].

[204] "Case law spanning four centuries urgently removed from quake affected Law Society Library", *New Zealand Law Society*, 22 November 2016, *www.lawsociety.org.nz/news-and-communications* [Accessed 5 May 2017].

dispute resolution process, minimised delays and cost associated with court processes and prioritised the role of the Court in clarifying the law in order to facilitate private settlement negotiations. It took active steps to publicise such clarifying judgments—those with precedent value—and make them easily accessible.

Would other approaches have been better? Perhaps the establishment of a mass insurance mediation scheme similar to the schemes implemented in the US after disasters like Hurricane Katrina and Storm Sandy?[205] Perhaps a greater willingness to collectivise claims?[206] Perhaps greater personal involvement by the CEQL judges in facilitating settlement negotiations, as Judge Weinstein did in the Agent Orange case? Or a systematic diverting of cases from the public adjudication process to private settlement processes, instead of leaving private settlement processes to take place in an ad hoc manner? Each of these alternative approaches would have been open to criticism for compromising the constitutional function of the court. The design of the CEQL in its first five years represents a process intentionally calibrated to maximise the normative benefits of both public adjudication and private settlement processes—charting a balanced course between the Scylla of slow, expensive litigation and the Charybdis of abdicating the Court's public role of dispensing justice according to law.

The Canterbury Earthquake Sequence forced tens of thousands of Canterbury residents into contact with the law through their insurance policies. The disputes they found themselves entangled in with their insurers prevented them from rebuilding their homes and their lives. Understood in this light, the CEQL can be seen as the New Zealand judiciary's effort to weave something fit for purpose: an innovative civil justice process that responds to the extraordinary need of the post-earthquakes Canterbury community while still upholding the rule of law. With earthquake-related claims certain to continue for years to come, New Zealand needs that weaving to continue.

[205] There have been calls for such a scheme to be established in New Zealand for future disasters. See, for example, Kelly "Quake recovery faults show mediation scheme needed", *The National Business Review*, 8 April 2016. Noted, for completeness, is the Residential Advisory Service for Property Owners that provides support to insured homeowners. Such support includes legal and technical support and facilitating meetings with insurers. The Service promises "access to decision-makers in insurance companies and EQC" and "constructive conversations to achieve results". See *www.advisory.org.nz* [Accessed 5 May 2017]. Analysis of this service is beyond the scope of this paper.

[206] To date there has been only one attempt to collectivise claims by homeowners against an insurer. The High Court declined leave for that representative action on 24 February 2016 but subsequently granted leave on 16 December 2016 in response to a reformulated claim: *Southern Response Unresolved Claims Group Suing by its Representative Cameron James Preston v Southern Response Earthquake Services Ltd* [2016] NZHC 245; *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105. See further, Miller, "Reflections on the earthquake litigation" (September 2014), p.9.

APPENDIX ONE

HIGH COURT OF NEW ZEALAND		TE KŌTI MATUA O AOTEAROA

Notice of First Case Management Conference—Earthquake List

Date:

Case Number:

Case Name:

[1] This proceeding has been placed on the Earthquake List. *It is important that parties now read this notice carefully*. Its contents have been prescribed by the Earthquake List Judges, Justice Gendall and Associate Judge Osborne.

[2] The primary purpose of the Earthquake List is to afford litigants, whose proceedings raise earthquake related issues, the opportunity to seek the appropriate remedy as swiftly as the Court's resources can reasonably permit.

[3] The types of earthquake related proceedings that will be included in the Earthquake List are determined by the Earthquake List Judges. The Earthquake List Judges may include or exclude individual cases from the Earthquake List on their own initiative or at the request of any party to an earthquake related proceeding.

First case management conference

[4] A first case management conference is to be held as follows:

Venue:	High Court, Christchurch
Date:	
Time:	
Before:	

[5] The first case management conference identifies the issues in dispute and produces directions about process. These processes must be tailored to the case. They aim to secure the just, speedy and inexpensive determination of the proceeding.

Duty to confer

[6] To prepare for the conference the parties (or their counsel) *must* confer and endeavour to agree on issues, disclosure of documents and directions.

Memoranda

[7] Not less than 10 working days before the conference the parties should file a joint memorandum under rule 7.3(4). It should address those matters set out in Schedule 5 of the High Court Rules (see below) that are relevant.

[8] If filing separately, the plaintiff(s) *must* file and serve their memorandum 10 working days before the case management conference, and the other party/parties *must* serve their memorandum 5 working days before the case management conference. Memoranda may be also filed by email.

[9] Memoranda *must* address the following topics, under these headings:

(a) **Background —**

the nature of the property, its relevant geotechnical classification, the earthquake events it was damaged in, the nature of the earthquake damage alleged, and any EQC or insurance payments received.

(b) **Policy terms —**

the relevant insurance policy terms.

(c) **Reports —**

any expert reports exchanged, and their essential findings. If there is any reason why the Court might conclude the expert may not meet the Code of Conduct for Expert Witnesses' requirement that experts must assist the Court impartially, that should be identified.

(d) **Plaintiffs' position —**

what the plaintiffs are seeking. If a monetary sum is sought in the plaintiffs' prayer for relief, an explanation should be given as to why the policy terms require payment of a cash sum. If the plaintiffs consider the defence is overreaching, it should set that out, and why.

(e) **EQC's position (if applicable) —**

what EQC's stance is. If EQC considers the claim is overreaching, it should set that out, and why.

(f) **Insurer's position —**

what the insurer's stance is, and how it says the policy responds, and, if it says it does not, why. If the insurer considers the claim is overreaching, it should set that out, and why.

(g) **Issues —**

the issues for trial in this proceeding. Counsel are required to produce a properly articulated list of the essential issues. It is most sensible that this is done in conjunction with other counsel. If consultation has not occurred before filing of the memorandum, it *must* be undertaken prior to the conference itself.

(h) **Pleadings —**

any issues identified about the pleadings in their present form.

(i) **Disclosure of documents —**

whether informal, tailored or general disclosure is sought (and in the latter two cases, why). Counsel *must* confer and endeavour to agree disclosure orders.

(j) **Track and categorisation —**

the Court will normally give Earthquake List cases costs category 2.

(k) **Directions sought —**

as with issues for trial, counsel must confer on directions sought. If consultation has not occurred before filing of the memorandum, it *must* be undertaken prior to the conference itself.

[10] Other topics may of course be addressed as well.

Bundle of key documents

[11] The parties *must* also file, with their memoranda, a small bundle of key documents (hard copy only) which will allow the Court adequate time to prepare for the conference. It should include a copy of the insurance policy.

Attendance at conference

[12] Counsel/self litigant(s) *must* attend the conference in person unless alternative arrangements are made with the Court. For first case management conferences on the Earthquake List *clients are to attend* also. If clients are unavailable a request for exception should be made to the registry. Subsequent conferences will usually be held by teleconference.

Agenda

[13] The agenda for the case management conference is based on experience in the Earthquake List, the contents of the memoranda filed (as set out in [9] above) and the items in Schedule 5. The Court attaches great importance to co-operation by parties and observance by counsel and expert witnesses of their respective obligations to the Court.

[14] The agenda varies with the case. By way of illustration, in cases involving home or commercial building owners and insurers the Court usually adopts the following practice:

(a) Each party is asked to state its objective from the litigation, whether that be repair or rebuild on site or elsewhere, or a monetary payment (and if so, how the policy provides for such a remedy, as opposed to repair or rebuild).

(b) If the parties have not agreed the extent of earthquake damage or the scope of works to replace or repair the insured property, the Court may establish a process for that to be done urgently. This exercise usually identifies the important issues. Where one party says the property is repairable and the other says that it is not, the Court usually directs that each party quantify the cost of both options. Typically a scope of works requires meetings of relevant experts, usually quantity surveyors and sometimes engineers, on site. Significant time and expense may be saved if experts in each discipline are required to report in a single document, identifying the areas of disagreement and reasons.

NB: All expert reports to the Court, and meetings of experts, must conform to the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules. The Code provides that experts have an overriding duty to assist the Court, impartially.

(c) The Court insists that each party identify the issues, including any issues of law. This must be done in the conference memoranda. Joint issues statements are encouraged. The conference will explore the issues in depth where appropriate. In particular where there are good grounds in law or fact to believe that a claim or a defence is overreaching. These should be set out in the memoranda, ahead of the conference, so that parties are not taken by surprise.

(d) Where a discrete issue arises that is of wider significance, or which may allow the parties to negotiate a fair settlement in the particular case, the Court may ask counsel whether it can be decided summarily as a separate question under High Court Rule 10.14.

(e) Discovery is not usually complex or extensive. Absent some good reason, initial disclosure, which is made when

pleadings are filed, should have included all expert reports or assessments obtained since the property was first damaged. Orders are not usually needed, but they will be made at the conference where either party is not satisfied for some sufficient reason with informal disclosure. Sometimes non-party discovery orders are also necessary.

(f) Interlocutory applications are seldom required. If they are, they must be identified at the conference. Interlocutory applications will usually need a distinct fixture outside the normal Earthquake List conference days. They may or may not be heard by one of the Earthquake List Judges.

(g) Case management conferences are not settlement conferences, but early settlement is encouraged. The processes of agreeing a scope of works and identifying issues sometimes lead to mediation or negotiations after the conference.

Directions

[15] Directions will be made at case management conferences in accordance with High Court Rule 7.2(3) (directions for the just, speedy and inexpensive determination of a proceeding).

[16] Directions usually include timetables. They may also require expert conferral and reporting (referred to earlier at [14](b)), or other matters to be completed.

[17] Directions must be complied with. If compliance proves impossible for good reason, parties may jointly agree revised directions (seeking the Court's approval) or apply unilaterally for variation. Non-compliance with Court directions may result in imposition of a stay of the proceeding, a costs order or, in extreme cases, an unless order.

Adjournment

[18] Occasionally parties wish to adjourn the first case management conference for several weeks while the scope of works (see above) is agreed, or settlement discussions are progressing. In such cases the Court may be willing to adjourn, if a joint memorandum is provided. However this course is exceptional.

[19] If it is intended to join third or additional parties and for this reason the initial conference date will be too soon, counsel may request a teleconference. Such request should be made within 5 working days of the receipt of this notice.

[20] If settlement is reached before the conference counsel should notify the Court immediately.

Setting down for trial

[21] Where a case needs a hearing and the scope of works has been agreed, or at least discussed between experts and reported on by them to the Court, a hearing date may be set at the first case management conference.

[22] In most cases, however, hearing dates are not set until a second case management conference. Typically that will occur three months after the first conference.

[23] Where a hearing date is to be set the parties must identify their witnesses and briefly explain what they are expected to say. The Court will fix the close of pleadings date, timetable the exchange of evidence, set an indicative or firm trial date, and make any other directions. Experts are normally required to confer once evidence is exchanged.

[24] It is normal in the Earthquake List to set dates for exchange of evidence beginning six weeks after the second conference. Evidence exchange will *not* be dated back from the trial date.

[25] Once the proceeding is set down for trial it is removed from the case management processes of the Earthquake List and moved to a registry case officer.

[26] A further issues or pre-trial conference will be convened with the trial Judge in a witness action, after evidence has been exchanged and parties have had sufficient time to absorb its implications.

Judicial settlement conference

[27] Parties may ask the Court to allocate a judicial settlement conference, either before or after the second conference. The Court will consider doing so in deserving cases, where that resource can be rostered.

Further information and inquiries

[28] The Court reports periodically to the profession and list users about cases on the list. It does so via a spreadsheet containing basic details about each case which is published on the Courts of New Zealand website *www.courtsofnz.govt.nz*. Most of this information is part of the formal court record which is accessible by the public. However, the spreadsheet does contain for each case a brief neutral summary of the issues, and it refers to milestones and the state of play. If parties have any concerns about this information being published, they should contact the registry.

[29] [x], who administers the list, is the primary point of contact for all inquiries. Alternatively parties may contact [y]:
[x], Judicial Support Advisor, [email address]
[y], Civil Caseflow Manager, [email address]

Schedule 5 Matters for consideration at case management conference

The presiding Judge will expect the parties at the first case management conference to have—

(a) provided initial disclosure in accordance with rule 8.4:
(b) carefully considered the pleadings and the principal documents disclosed with them:
(c) discussed and endeavoured to agree on an appropriate discovery order and the manner in which inspection will take place, in accordance with rule 8.11:
(d) discussed and endeavoured to agree on the matters for consideration listed in this schedule:
(e) filed and served a joint memorandum or separate memoranda in accordance with rules 7.3 and 8.11.

Issues

1. Resolution and refinement of the issues, and as a consequence whether the pleadings require amendment.
2. Whether additional parties should be joined.
3. Whether this proceeding has been appropriately categorised and is either an ordinary defended proceeding or a complex defended proceeding.

Discovery and other interlocutory applications

4. The scope, terms, and timetable for any discovery.
5. If any interlocutory applications have been filed or will be filed, whether they can be heard and disposed of at the case management conference.

Readiness for trial

6. Is the case sufficiently ready for a fixture date to be allocated in the near future?
7. If there are still outstanding issues, whether a further case management conference or an issues conference should be timetabled.

Fixture or hearing

8. If the proceeding is ready to go for a hearing or a trial,—
   (a) when should the close of pleadings date be?
   (b) should there be a pre-trial conference?
   (c) what is the estimated length of trial? (The Judge will estimate this by the number of witnesses and the estimate of duration of their testimony.)
   (d) what timetable is required for written briefs?

(e) is expert evidence required and, if so, what are the proposals for that evidence (including prior exchange and how the witnesses are to be heard)?
(f) are any special resources or requirements needed for the hearing?
(g) can the proceeding be placed on a short-notice list or put down as a back-up fixture?
(h) is alternative dispute resolution suitable to try to facilitate settlement prior to trial?
(i) what is the categorisation of the proceeding in relation to costs?

Other

9. Any other matters, provided that those matters have been discussed between the parties at least 5 working days before the conference.

APPENDIX TWO

Protocols for Expert Conferral under the High Court Earthquake List

1. Experts are to comply with schedule 4 of the High Court Rules.
2. The meeting of the experts shall be privileged. The privilege shall be in the nature of a "without prejudice" privilege, being a joint privilege; its waiver requiring a consent of all parties. No part of the experts' discussion should be referred to at trial unless all parties agree.
3. Prior to the experts conferring with each other:
   a. The parties should discuss, and if possible agree whether an agenda is necessary, and if so attend to agree one that helps the experts to focus on the issues that need to be discussed;
   b. Unless ordered by the Court or agreed by all parties and the experts, neither the parties nor their legal representatives may attend the experts' discussions;
   c. If legal representatives attend then they shall not normally intervene except to answer questions put to them by the experts or to provide advice about the law;
   d. The experts should establish mutually efficient arrangements proportional to the case. Discussion may be face to face, but the practicalities or the proportionality principle may require discussions to be by telephone or video conference;
   e. The expert should provide their curriculum vitae to the parties;
   f. The experts shall provide a description of testing and a statement of facts and assumptions upon which each expert's opinion is based;

g. Those instructing experts shall not instruct experts to avoid reaching agreement.

4. Experts are to jointly report:
   h. Setting out a list of issues that have been agreed including in each instance the basis of the agreement;
   i. A list of the issues that have not been agreed including in each instance the basis of disagreement;
   j. A list of any further issues that have arisen that were not included in the original agenda for discussion;
   k. A record of further action if any to be taken or recommended including as appropriately holding further discussions between experts, or the undertaking of further research or further testing.
   l. Agreements between the experts during discussions do not bind the parties unless the parties expressly agree to be bound.
5. Experts are to jointly report to the court in the form attached.

Schedule 4 Code of conduct for expert witnesses

Duty to the court

1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.

Evidence of expert witness

3. In any evidence given by an expert witness, the expert witness must—
   (a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
   (b) state the expert witness' qualifications as an expert:
   (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
   (d) state the facts and assumptions on which the opinions of the expert witness are based:
   (e) state the reasons for the opinions given by the expert witness:
   (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
   (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.

5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to confer

6. An expert witness must comply with any direction of the court to—
   (a) confer with another expert witness:
   (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:
   (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
7. In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.

APPENDIX THREE

Earthquake List Pro Forma Expert Report Template

CIV-[ ]

In the High Court of New Zealand
Christchurch Registry
Between [ ]
Plaintiff
And [ ]
Defendant

REPORT TO THE COURT BY EXPERTS
Dated [2013]

Next Event Date:
Judicial Officer:
[plaintiff's solicitors] [defendant's solicitors]

May it please the Court:
We [*experts*] now provide our report to the Court.

1 We acknowledge that we have read the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules and agree to comply with it.
2 Our respective qualifications as experts are attached.

Issue/s

3 In the minute of the High Court dated [*state*] we were asked to consider the following issues:
[*state*]

4 We confirm that the evidence and opinion which we give below concerning the issue/s is/are within our areas of expertise.
[*note: the expert must refrain from considering areas outside of his/her expertise*]

Duty to Confer

5 We confirm that we have:
(a) Conferred with each other to the extent we consider it necessary.
(b) Tried to reach agreement on matters within our respective field of expertise.

6 We confirm that in conferring with each other, we have exercised independent and professional judgment, and have not acted on the instructions or directions of any person to withhold or avoid agreement.

Evidence

7 We have proceeded on the following facts and assumptions:
[*state*]

Areas of Agreement

8 As experts, we agree to the following:
[*state*]

Areas of Disagreement

9 As experts we are unable to agree to the following:
[*state*]

10 The reason for our disagreement are as follows:
[*state*]

[*Dated*]
[*Signed by Experts*]

APPENDIX FOUR

Common Template: Repair/Rebuild Trade Summary

Section	Headings & Definitions	Interpretation notes for NZS4202:1995
•1	*Preliminaries*	*site supervision, site facilities, site access, internal and external scaffolding*
•2	*Demolition*	*repair deconstruction works*
•3	*Excavation*	*site scrape, earthworks*
•5	*Piling*	*specialist engineered deep piling*

Section	Headings & Definitions	Interpretation notes for NZS4202:1995
•6	*Concrete work*	*foundation repairs including ground re-levelling specialists*
	•7 Sprayed concrete	
	•4 Underpinning	
	•9 Reinforcing Steel	
•8	*Precast concrete*	*on & off site panels, flooring systems, columns, beams & associated propping*
•10	*Structural steel*	*opening Lintels, structural steel frames*
•12	*Brickwork*	*exterior and interior cladding including omaru stone*
•13	*Block work*	*foundations, Integral retaining walls, tanking, external / internal wall construction*
•14	*Stone masonry*	*schist stone cladding*
•15	*Metal work*	*balustrades, metal stairs*
•16	*External windows and doors*	*Include glazing, flashings and associated works, timber/aluminium/PVC*
•17	*Carpentry*	*Structural timber beams, timber, framing, linings, internal trim, preparation for cladding systems (battens), door hardware supply & install, jack and pack work to timber floors*
	•18 Laminated timber	
	•30 Plasterboard linings	
	•31 Grid suspended ceilings	
	•21 Insulating panel systems	
	•20 Proprietary partitions	
•19	*Joinery*	*Kitchen, timber stairs, in built joinery, shelving, internal doors & skylights*
•22	*Roofing*	*Roof cladding, guttering, downpipes & flashings, butynol roofing*
	•11 Mastic asphalting and similar treatments	
•23	*Plumbing and gas fitting*	*Including supply to capped services.*
•24	*Drainage*	*Including supply to capped services.*
•25	*Mechanical services / Heating & ventilation*	*Solar, heat pumps, fires, under floor heating*
*26	*Fire protection*	*Sprinklers*
•27	*Lifts and escalators*	*Plant and car supply & install*
•28	*Electrical services*	*Security systems, smoke alarms, switch boards, including mains supply connections, appliances including gas*
•29	*Solid plaster and Specialist exterior claddings*	*Plaster cladding systems, metal cladding (excludes substrate and painting)*
•32	*Tiling*	*To walls & floors including water proofing*
	•33 Terrazzo work	
•34	*Floor coverings*	*Vinyl, Timber flooring & overlay's, glued carpet*

Section	Headings & Definitions	Interpretation notes for NZS4202:1995
•35	*Painting paper hanging and Specialist finishes*	*Internal & external, textured ceilings/walls, water proof deck paint, garage floor paint*
*36	*Glazing*	*Mirrors, glass balustrades, glass shower screens, (excluding glazing to external windows/doors*
•37	*Site works*	*fences, paths, drives, outdoor swimming pool, decks, non-integral retaining walls, carports*
•38	*Included sums for miscellaneous Items*	*Indoor swimming pools, sauna, spa, detached garage*
	Builders margin	
	Documentation	*Drawings & specifications, engineering, geotech, consent fees, CWI insurance*