WILL YOU PAY MY COSTS? –

a New Zealand case study

WORLD BAR CONFERENCE
SYDNEY
APRIL 2010

Presented by
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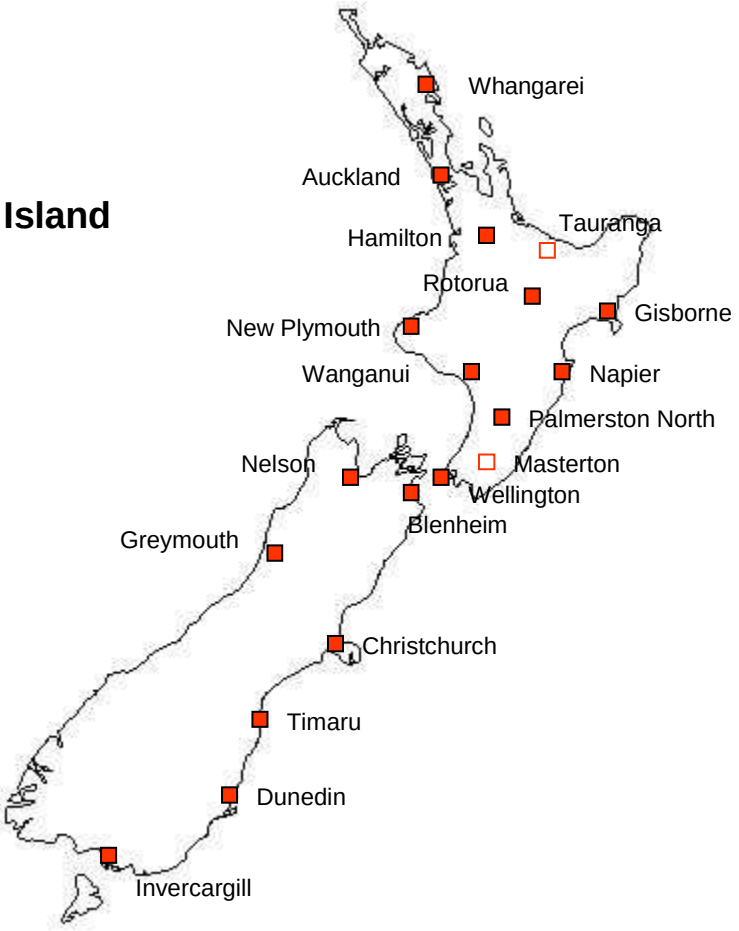
New Zealand

THE COURTS



19 High Court registries

High Court sittings

62 District Court registries

New Zealand's Population (30 June 2009)

People 4,315,800

Cattle

Dairy 3,693,800
Beef 911,300

Sheep 32,356,700

The Profession

Year	Practising Certificates issued	Barristers (Queen's Counsel and Senior Counsel)
1968	2609	44 (14)
1987	5252	162 (36)
1990	5900	285 (45)
2010	11,259	1,588 (85)

Litigation funding

1. Court proceedings (year ended 30 June 2009)

District Court

Number of civil cases managed	-	42,868

High Court

Number of civil cases managed	-	3,799

Court of Appeal

Number of criminal and civil appeals managed	-	1,277

Supreme Court

Number of criminal and civil appeals managed	-	132

Litigation funding con't

2. Legal Aid

During 2008 / 09, the Legal Services Agency paid $128.62 million to lawyers who worked on legal aid cases (up from $105.63 million in 2007 / 08). Of this –

- $71.60 million supported people charged with criminal offences
- $38.87 million supported people (other than children) in family law cases, such as domestic violence cases, child custody disputes and mental health matters
- $6.46 million supported people in civil matters, such as historic abuse cases, Parole Board hearings, and appearances before other tribunals
- $11.69 million supported groups involved in Waitangi Tribunal processes or negotiations with the Crown.

Litigation funding con't

The numbers of legal aid lawyers accepting at least one new case by law type were –

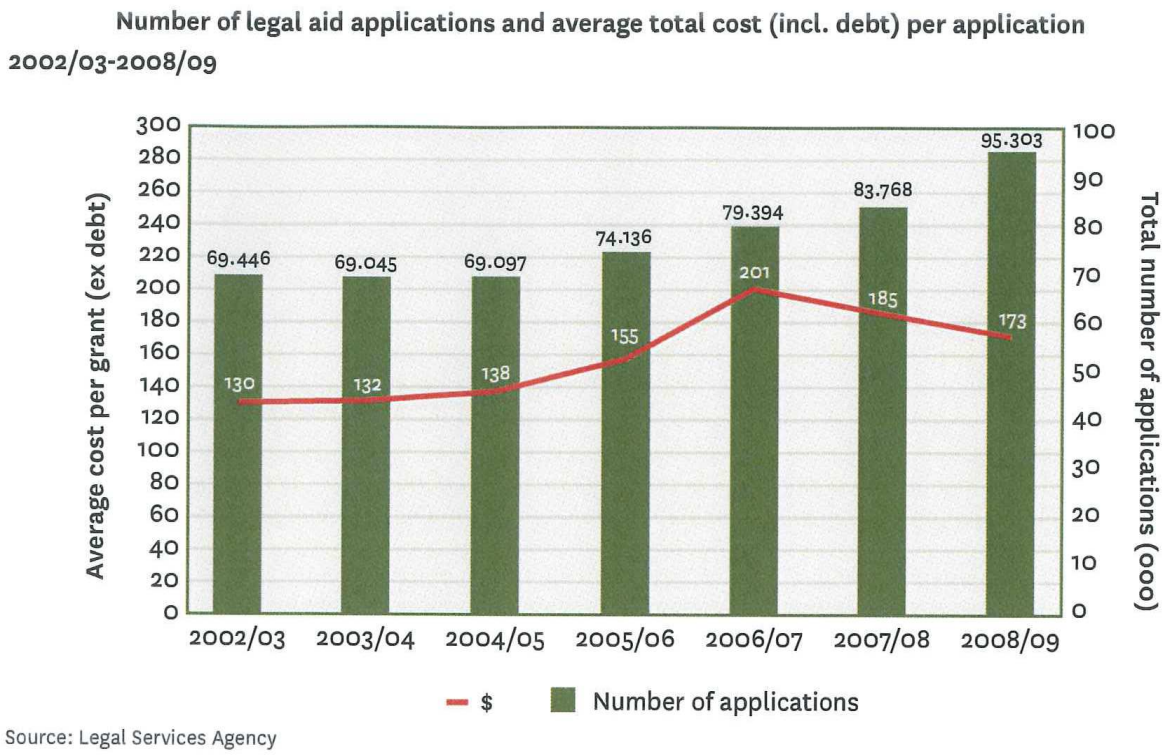
- 872 criminal legal aid lawyers
- 900 family legal aid lawyers
- 158 mental health legal aid lawyers
- 449 civil legal aid lawyers
- 32 Waitangi legal aid lawyers.

The Agency made decisions on 95,296 applications for legal aid and made 85,155 new grants of legal aid in 2008 / 09 (up 14% and 15% respectively compared with 2007 / 08).

As a result of new grants of legal aid, 64,114 individuals received legal representation services. Additional people continued to receive legal services as a result of grants made in earlier years. Other people benefited from grants of legal aid for Waitangi Tribunal matters.

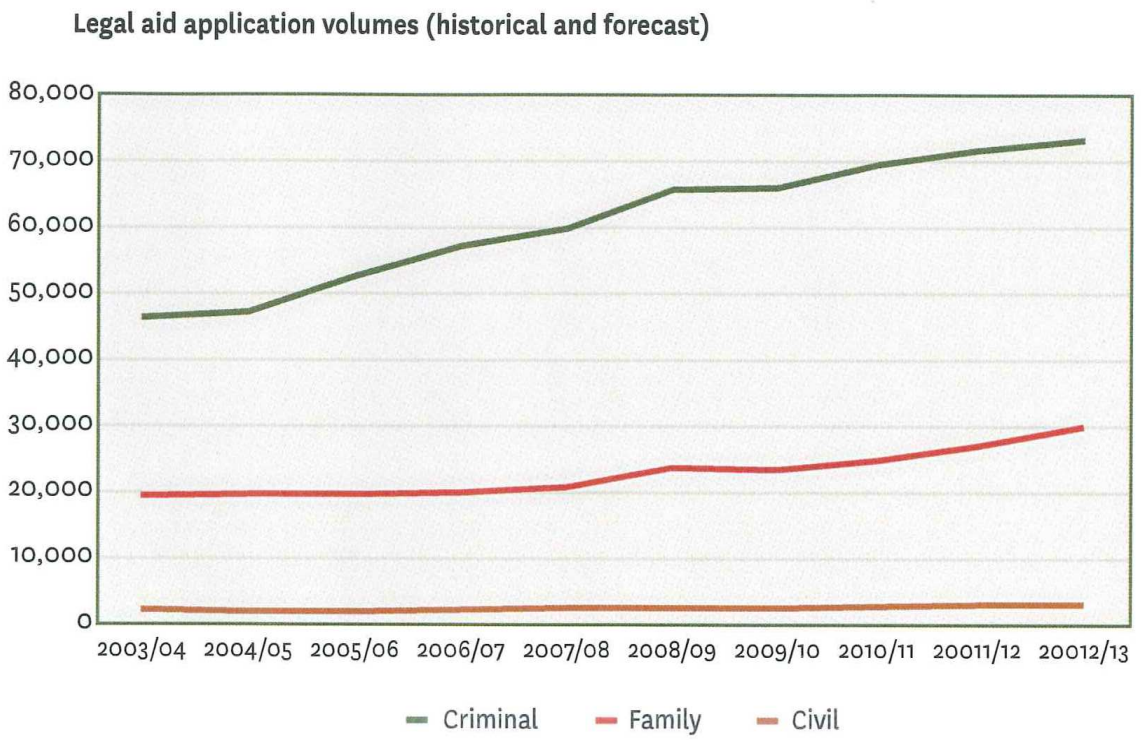
Litigation funding con't

From an administrative perspective, the position graphically is as follows -

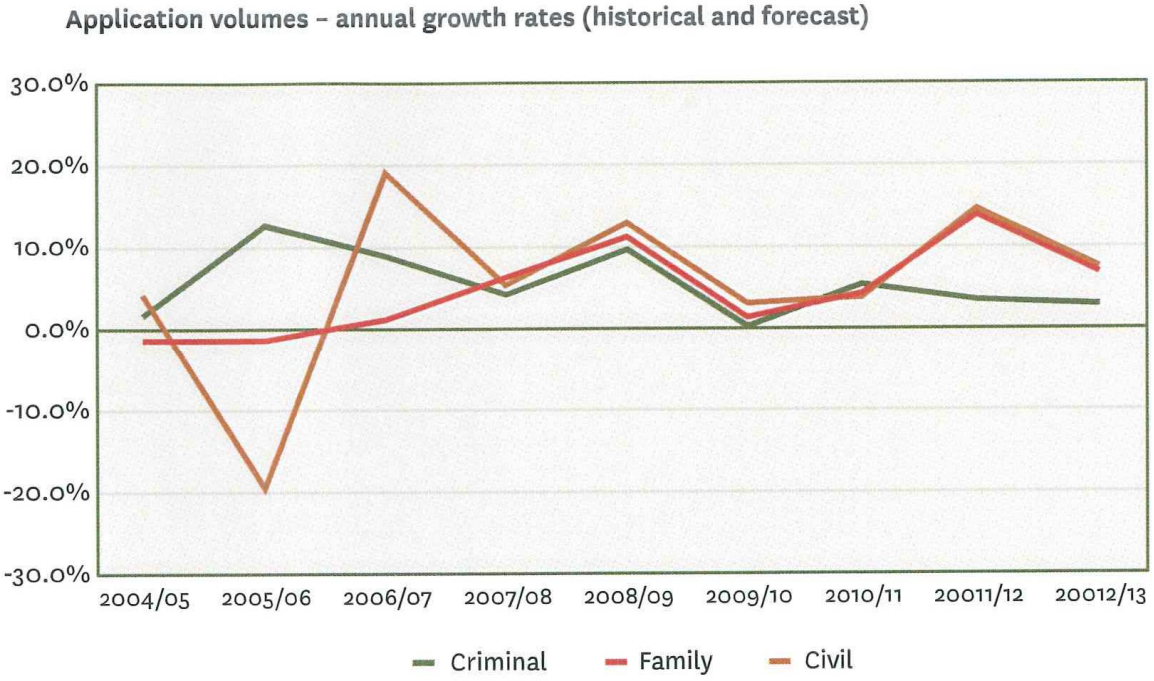


Source: Legal Services Agency

Litigation funding con't



Litigation funding con't



Source: PricewaterhouseCoopers – LSA Baseline Review

Litigation funding con't

3. Litigation funding sources

   – Quantum Litigation Funding Pty Ltd – www.quantumlitigation.co.nz

   – Ask Estate Litigation Funding – www.justask.co.nz.

“Subsidising Litigation” (Law Commission Report 2001)

“... the abolition of the torts of maintenance and champerty [was urged], and although the intuitive response to such a proposal is to favour it, more careful consideration leads in our view to a different conclusion”.

Four reasons were given –

1. “New Zealand commerce does not lack unruly corporations prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be.”

2. The Commission did not accept the view of the English Law Commission that “the factor of damage is almost *impossible* of proof.” To the contrary, the Commission thought that a successful defendant in a maintained action could recover as “special damage” from the party maintaining the proceeding.

“Subsidising Litigation” (Law Commission Report 2001) con’t

3. No great simplification of the law would be achieved by abolishing the torts while preserving the underlying public policy issues in their application to contract illegality.

4. If the torts did not exist, it would be necessary to invent a substitute like “the protean and amorphous tort of abuse of process”.

The conclusion was –

“We favour the preservation of the torts of maintenance and champerty”.

Houghton v Saunders (High Court)

The case involves a representative proceeding on behalf of a large number of shareholders as the result of the collapse of Feltex Carpets Limited. The essential allegation is that a prospectus contained untrue and misleading statements. The claim is against former Feltex directors and others associated with the share issue which took place in 2004.

One of the issues before Justice French in the High Court was an application to stay the proceeding as an abuse of process on the grounds of champerty.

A funding offer had been made by a litigation funding company called Joint Action Funding Limited. The company was incorporated by a Mr Gavigan. It was prepared to fund the entire costs of the claim on certain terms and conditions contained in its funding agreement. Predictably, these included the right for JAFL to receive a share of any damages recovered if the claim succeeded.

The defendants contended that the JAFL funding arrangement was champertous and constituted an abuse of process.

Houghton v Saunders (High Court) con't

The High Court undertook a comprehensive review of the way in which the twin concepts of maintenance and champerty had developed in the context of litigation funding, including that -

> *"in more recent years there has been a dramatic change in attitude"*.

There was a recognition that –

> *"In an age where the costs of litigation are beyond the means of many people, professional funders undoubtedly have an increasingly important role to play in ensuring that legal obligations and rights are enforced and vindicated".*

There was then a discussion about the nature of the agreement in the present case. It was conceded that –

> *"The mere fact of a champertous arrangement is not of itself sufficient to justify a stay. There must be something more ....".*

Houghton v Saunders (High Court) con't

The scope of the actual agreement in the case was then considered.

The Judge concluded –

> *"All of these factors have certainly given me pause for thought.*
> *However, after careful consideration, I have decided a stay would not be warranted".*

The formal finding was in the following terms –

> *"My conclusion is the funding agreement is champertous, but does not amount to an abuse of process such as would warrant a stay at this stage.*
> *The Court does however reserve its right to keep the funding agreement under review as the proceeding progresses".*

Saunders v Houghton (Court of Appeal)

This was an appeal from the High Court judgment of French J. It involved a number of issues concerning primarily entitlement to sue in a representative capacity and also a number of interlocutory issues which are not material in the present context.

The relevant issue was the question –

> *"What principles govern consent to the use of a litigation funder?".*

The Court said –

> *"An interlocutory appeal is not the occasion for this Court to detail the legitimate scope of litigation funding. But to decide the appeal requires that we engage with that question in general terms.*
>
> *As latecomers to the topic of representation applications involving a litigation funder New Zealand courts have the advantage of a considerable literature and jurisprudence elsewhere".*

Saunders v Houghton (Court of Appeal) con't

The Court then reviewed the history and development of acceptance of litigation funding in other jurisdictions and concluded –

> *"The pendulum has swung a good distance from Lord Denning's utter rejection of maintenance and champerty, which the Law Commission endorsed in 2001. But examination of experience elsewhere, especially in the United States, satisfies us that there is still force in the concerns there expressed. Subjection to litigation can be a heavy burden for any defendant. Lives can be put on hold for the duration of the case which, if complex, may last a long time and be punctuated by appeals. The resulting cost and anxiety can exact a heavy toll.*
>
> *Nevertheless, the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance. Access to justice is a fundamental principle of the rule of law. It can require flexibility to meet the harsh reality of the current cost to the injured party of litigation, which is often more than a would-be plaintiff can sensibly be expected to bear. The result can be a failure of justice: a plaintiff with merits can be excluded from relief against the defendant who has committed a legal wrong".*

Saunders v Houghton (Court of Appeal) con't

The Court considered later the approach to be adopted –

> *"We have concluded that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where:*
>
> *(a) the court is satisfied there is an arguable case for rights that warrant vindicating;*
>
> *(b) there is no abuse of process; and*
>
> *(c) the proposal is approved by the Court.*
>
> *We have discussed the need for proper controls, appropriate to the nature of the case and the particular funder and funding terms proposed".*

Saunders v Houghton (Court of Appeal) con't

Previously, the Court had considered appropriate protection by reference to the *Code of Conduct for the United Kingdom of the Third Party Litigation Funders' Association (2009)* and had examined the Australian experience.

A proposal was put to the Court (which the Court decided should be considered first by the High Court) in the following terms –

> *"Court supervision of litigation funding arrangements*
>
> 1. *The litigation funding agreement should be submitted to the Court for approval at the time when the litigation is commenced.*
>
> 2. *In approving the litigation funding agreement the Court may have regard to the identity of the litigation funder, including its qualifications and its prior conduct in litigation funding matters.*

Saunders v Houghton (Court of Appeal) con't

3. *There should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting in the litigation.*

4. *The lawyer acting in the litigation should be responsible for advising the named plaintiffs and members of the represented group about the merits of the case and all material developments in the case. That advice should be prepared and provided without interference by the litigation funder.*

5. *Any communications inviting people to join the represented group (i.e. "opt in" communications) should be submitted to the Court for approval before being distributed.*

Saunders v Houghton (Court of Appeal) con't

6. *Any communications between the litigation funder and members of the represented group, or potential members of the represented group, should be balanced and accurate and should not include misleading or deceptive statements. Any material breach of this requirement should lead to disqualification of the litigation funder from continuing to fund the litigation, but should not preclude the plaintiffs or represented group from pursuing the claim (including with a different litigation funder).*

7. *The litigation funder, including the directors and employees of the litigation funder, should not provide expert evidence in the litigation. Expert witnesses should be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.*

8. *The litigation funder is to certify to the Court that it has funding available to meet the costs of the litigation and to pay any order of security for costs made by the Court."*