COURTS, JUDGES AND JUDICIAL ADMINISTRATION: A COMPLEX BUSINESS

HIS HONOUR JUDGE PHILIP MISSO*

The increasing volume of civil cases in the courts in Victoria requires courts to manage civil litigation innovatively to facilitate the just, efficient, timely and cost-effective resolution of the real issues in disputes between the parties. Effective methods of case management by specialist supervising judges with the use of alternative dispute resolution are at the forefront of the administration of civil justice in the County Court of Victoria.

I CASE MANAGEMENT

I suspect that from earliest times when communities first became sophisticated, so did the conflicts between its citizenry. Those conflicts required adjudication of some kind to avoid the chaos resulting from self-help. It is a measure of a sophisticated society that there be a rule of law which citizens are expected to obey to ensure that their communities function effectively. I often wonder when the person who was charged with the responsibility of resolving conflicts between members of his community first met with the difficulty of finding the time to give his citizens a hearing, and when the volume of conflicts led to the necessity for listing hearings on days when the resolver of the conflicts was available. I wonder whether that person understood that he had just engaged upon what today Judge Administrators refer to as case management.

I am not a student of history nor a legal philosopher. I am a Judge who sits in a very busy court, and who is part of a large organism known as the County Court of Victoria ('County Court'). It comprises 64 judges in a relatively new building in which the court rooms are of varying sizes designed for different purposes. It has a very large volume of criminal trials and civil litigation. Through the efforts of Judge Administrators and administrative support staff, lists are published every day. They specify which Judge will sit in which court and which case that Judge will hear.

In my early days at the Victorian Bar, the concept of case management was unknown. What passed for case management was a crude method of listing cases each day with a pool of judges, barely comparable to the sophistication of case management in the County Court today. However, try as Judge Administrators and administrative support staff might to find the key which unlocks the secret to a perfect system, it is clear that no perfect system exists. The variables in cases need to be considered as do the unpredictable nature of cases, for example, estimates of the time given by legal practitioners can so often be widely off the mark. Underestimates are but one of the variables which can throw careful planning out the window and create chaos, but chaos on a small scale.

I think I can say without fear of contradiction that in my time at the Victorian Bar, and now as a Judge of the County Court, I have seen almost every system of case management, which is capable of being implemented in courts and capable of being supported by administrative support staff. Although none have produced the key to unlocking the secret of the perfect system, they have provided invaluable experience for present day Judge Administrators and administrative support staff. Experience shows that if all the variables are taken into account then the listing of cases can be undertaken with a degree of predictability that a case will be reached on the date upon which it is listed.

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II THE COUNTY COURT

I need to spend a short period of time describing what the County Court is and its jurisdiction. It is a creature of statute, governed by the *County Court Act 1958* (Vic)[1] (the 'Act'). The Act gives the County Court its jurisdiction, with judges appointed to the County Court to administer its jurisdiction.[2] Comparatively judges of the Supreme Court of Victoria ('Supreme Court') are the Supreme Court, with jurisdiction being vested in the constituents of the Supreme Court.[3] The civil jurisdiction given to the County Court by section 37[4] is unlimited. The powers given to a Judge of the County Court to grant relief in a civil proceeding[5] are the same powers, as a Justice of the Supreme Court would exercise in the same civil proceeding.[6] In the year immediately preceding the publishing of this article there were approximately 5500 civil proceedings filed in the County Court. It is predicted that the number of filings will increase annually without abatement.

On average about 20 judges are allocated to the civil jurisdiction each year in the County Court. The Judge Administrators and the administrative support staff analyse the types of civil cases, which are filed in the County Court to determine how best to take a case from the date the originating process is filed to the date of trial. As I have found out, it is by no means an easy task.

The starting point to understanding how the County Court administers its civil jurisdiction is Order 34A of the *County Court Act* (the 'Rules').[7] The heading of Order 34A[8] is 'Case Management'. There is no need for me to summarise the Order except to say that the process of case management has evolved by virtue of the Judge Administrators and support staff understanding that different types of civil cases require different methods of case management. As a result, two lists were established, the Damages and Compensation List and the Commercial List.[9] A Judge appointed by the Chief Judge of the County Court heads each list.[10]

To explain how each Division of the Damages and Compensation List operates I will refer only to the Family Property Division ('Division')[11] as I am the Judge in charge of that Division. It is a Division that requires me to case manage domestic partnership disputes brought under the *Relationships Act*[12] and testator's family maintenance claims brought under Part IV of the *Administration and Probate Act*.[13] Each Division is case managed in accordance with Order 34A.[14] Rule 34A.14 (1)(a)[15] provides that the Judge in charge of the list or division 'shall have control of every proceeding in the list or the division'.[16]

Where the Judge in charge of the list or division considers that it would be appropriate, legal practitioners are informed of the business of the list or the division and how business in the list or division is to be undertaken through practice notes found on the County Court website.[17] For example, Practice Note PNCI 4-2011[18] contains information to assist legal practitioners to understand the business of the Damages and Compensation list and how that business is to be undertaken by the legal practitioners on behalf of the parties. How the supervising Judge will administer the list and the aim of the list is contained in the introduction of the corresponding practice note to the list or division in use. The purpositive function of lists and divisions in the County Court resonates throughout many of the practice notes. It is a purpose that underwrites the case management of civil cases in the County Court and is highlighted in Practice Note PNCI 4-2011:

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1 *County Court Act 1958* (Vic).
2 Ibid s 3B.
3 *Constitution Act 1975* (Vic) s 75.
4 *County Court Act 1958* (Vic) s 37.
5 Ibid s 49.
6 *Constitution Act 1975* (Vic) pt III s 85.
7 *County Court Civil Procedure Rules 2008* (Vic).
8 Ibid.
9 Ibid s 34A.02.
10 Ibid s 34A.13.
11 Ibid s 34A.04(1)(da).
12 *Relationships Act 2008* (Vic).
13 *Administration and Probate Act 1958* (Vic).
14 *County Court Civil Procedure Rules 2008* (Vic).
15 Ibid.
16 Ibid s 34A.14(1)(a).
17 County Court of Victoria, *Practice and Procedure – Practice Notes* (28 July 2012) <http://www.countycourt.vic.gov.au/civil-practice-notes>.
18 County Court of Victoria, *Practice Note PNCI 4-2011 – Damages and Compensation List* (28 November 2011) <http://www.countycourt.vic.gov.au/pdf/PNCI_4-2011_Damages%20and%20Compensation%20List.pdf>.

> The aim of the County Court in civil litigation is to list, hear and determine cases quickly and cost-effectively, consistent with the demands of justice and in particular with the requirements of the *Civil Procedure Act 2010* (Vic). At all times, the parties are expected to cooperate in the resolution of interlocutory matters so as to minimise the need for the Court's intervention prior to trial. In particular, parties are expected to respond to each other's inquiries regarding consent orders.[19]

In recent years the civil procedural requirements have been dramatically simplified for ease of understanding and ease of application. The following are the essential procedural requirements to be satisfied once the originating process has been filed and served:

- Upon the defendant filing an Appearance, the Administrative Mention procedure is triggered and parties are expected to submit consent orders setting out the interlocutory steps that each party will be required to take.[20] Template orders, setting out the ordinary interlocutory steps, have been drafted by the Judge Administrators for the use of the parties.[21]
- Once the parties have prepared consent orders based upon template orders then they are submitted to an administrative group known as the Directions Group, which is the administrative support behind each of the supervising judges of the lists and divisions. The Directions Group will then forward the orders to the supervising Judge, who will either approve or disapprove of the Orders. If approved, the Orders are signed by the supervising Judge and forwarded to the legal practitioners for the parties. If disapproved, the proceeding is referred to a directions hearing.
- If the parties fall into dispute over what Orders should be made, then they can apply to the supervising Judge for a directions hearing.[22]
- Whether the parties obtain Orders by consent or at a directions hearing, they are given a date for trial immediately based upon their estimate of its likely duration. The date for trial is determined by two factors – the first is based upon the time that the parties estimate they will complete the last interlocutory step, and the second is based upon administrative support staff assessing a date upon which there is a strong likelihood that the case will be reached by a judge sitting on that date.[23]
- If there are any other interlocutory disputes which occur between the time of the making of interlocutory orders and the date of trial, the parties may apply to the supervising Judge for a directions hearing, at which time the supervising judge will determine the matter in dispute and make what Orders are relevant and necessary.[24]

Theoretically, the process of case management demanded by Order 34A[25] and Practice Note PCNI 4-2011[26] can result in a case proceeding without the parties needing to attend before the supervising Judge at any stage. The process, which I have summarised, is undertaken by correspondence, often by e-mail, with correspondence and orders attached to the e-mails directed to the Directions Group. It is a simple and very effective means of case management, which is expeditious, cost-effective and efficient.

Additionally, due to modern case management there are many ex parte applications which are now dealt with very differently than was formerly the case. For example, an application for extension of time for the service of originating process used to be formerly undertaken by a summons supported by affidavit evidence, which required that the applicant appear before a judge.[27] It was rare that a legal practitioner would be required to make submissions by reference to the Rules,[28] and the practice commentary to these rules. Currently Judge Administrators consider that an application of this kind should now be made directly to the supervising judge who will only call upon the applicant to appear if the supervising judge considers it necessary.

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19 Ibid [1].
20 Ibid [15], [17].
21 County Court of Victoria, *Civil Court Forms* (28 July 2012) <http://www.countycourt.vic.gov.au/civil-forms>.
22 County Court of Victoria, above n 18, [25].
23 Ibid [27].
24 Ibid [30].
25 *County Court Civil Procedure Rules 2008* (Vic).
26 County Court of Victoria, above n 18.
27 Chief Judge Waldron, *2002 Consolidated Practice Note – Operation and Management of The County Court Civil Lists (Melbourne Registry)* (20 November 2002) County Court of Victoria. <http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/pn_consolidated_civil_list_melbourne.pdf>.
28 *County Court Civil Procedure Rules 2008* (Vic).

This has resulted in a significant reduction in the number of occasions when legal practitioners are required to appear at directions hearings.

Furthermore, it was commonplace that every application at a directions hearing be made by summons supported by affidavit evidence. Currently, unless there is something exceptional about the application, a summons supported by affidavit evidence is no longer required. Rather, correspondence from a party seeking an Order directed to the supervising judge and to the other party is usually a sufficient means of informing the supervising judge and the other party of what the supervising judge will be required to determine at the directions hearing. For example, if a party fails to give discovery of documents referred to in pleadings, as required by the rules.[29] The documents referred to in pleadings will often be able to be identified within the correspondence between the parties. Another example is a failure by one party to answer, or adequately answer, interrogatories. In both examples it is quite obvious that a summons supported by affidavit evidence is unnecessary unless there is something exceptional about what is otherwise a relatively straightforward application for an Order compelling better discovery and better answers to interrogatories.

III THE *CIVIL PROCEDURE ACT 2010*

Prior to 2010, the case management in the County Court was essentially driven by Order 34A.[30] The process of case management at this time was deficient in that it relied upon legal practitioners being aware of Order 34A[31] and Practice Note PNCI 5-2009.[32] Enacted in 2010, provisions in the *Civil Procedure Act*[33] ('Procedure Act') have created a different dynamic, driving the effective and timely prosecution of civil cases. The overarching purpose of the Act '… is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[34] It imposes obligations on legal practitioners to be assiduous in ensuring that a civil case commences on a justifiable footing and is prosecuted on that basis from start to finish.

Rule 47.06[35] provides power to a Judge to exercise considerable control over the manner in which a trial is conducted, similar to Part 4.2 of the Procedure Act. However, over time judges were slow to control the interlocutory steps taken by parties, and reluctant to depart from the conventional manner in which a trial was conducted. It was rare for a Judge to take such a degree of control over the manner in which a trial was conducted by taking the courageous step of limiting the time taken by each of the parties in the conduct of the case; the number and type of witnesses the parties could call, and the time taken by the parties in making submissions. Rule 47.06(3)(b)[36] contains a cautionary note that a Judge can exercise a discretion relevant to the conduct of a trial, but not to the extent that it prejudices the right of each party to a fair trial and a reasonable opportunity to adduce evidence and cross-examine witnesses.[37] Trial judges are always cautious to avoid crossing the line between justifiable control of a trial, and unnecessary interference that may result in procedural unfairness and a denial of natural justice.

It appears to me that the Procedure Act[38] goes a quantum step further than Order 47.06.[39] Section 47[40] is very extensive in providing judges with powers relevant to case management in order to meet the overarching purpose of the Procedure Act. It seems to me that what underpins the powers referred to section

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29 Ibid ss 29.01.1(3); 29.10.
30 Ibid.
31 Ibid.
32 County Court of Victoria, *Practice Note PNCI 5-2009 – Commercial List Duty Judge and Discontinuance of the Practice Court* (30 November 2009) <http://www.countycourt.vic.gov.au/pdf/PNCI_5-2009_Commercial%20List%20_and%20Practice%20Court_%202010.pdf>.
33 *Civil Procedure Act 2010* (Vic) pt 2.1 'Overarching Purpose', pt 4.2 'Case Management' and ch 5 'Appropriate Dispute Resolution'.
34 Ibid s 7(1).
35 *County Court Civil Procedure Rules 2008* (Vic).
36 Ibid.
37 Ibid s 47.06(3)(b).
38 *Civil Procedure Act 2010* (Vic).
39 *County Court Civil Procedure Rules 2008* (Vic); For analysis of the provisions of the *Civil Procedure Act 2010* (Vic) and their application, see David Bailey "Performing Civil Procedure in Victoria- Two Steps Forward and One Step Back?" (2011) 1(1) *DICTUM – Victoria Law School Journal*, 81.
40 *Civil Procedure Act 2010* (Vic).

47[41] are the opening words of section 7: 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[42] The contrast between Order 47.06[43] and the provisions of the 2010 Act is that the overarching purpose of the Procedure Act is directed to the resolution of 'the real issues' in dispute. In addition to other provisions, section 47[44] permits a supervising Judge, and indeed I would go so far as to say that it directs a supervising Judge, to determine what the real issues are; and to make interlocutory orders accordingly and during the trial undertake a level of control that maintains a focus on the real issues. The dynamic of the Procedure Act provides judges with a degree of control and discretion over the case management a trial they are presiding over. The dynamic of the Procedure Act is unlikely to reach a level of control that creates undue interference in the trial resulting in procedural unfairness and a denial of natural justice. However, as always there is undoubtedly a balance to be struck, and caution to be exercised by the trial judge.

The significant benefit of the Procedure Act is that a supervising judge is expected to be more active, if not interventionist. I think that it is inherent in the very thrust of the overarching purpose and the general provisions of the Procedure Act, that this occurs to ensure the resolution of the real issues in dispute. One obvious example of the capacity of a supervising judge to intervene is section 63 of the Procedure Act, which permits the court of its own motion to summarily dispose of a civil proceeding.[45] It is of enormous benefit to a trial judge to have the provisions of the Procedure Act as a standard by which the conduct of legal practitioners and the parties can be judged in order to progress proceedings. The presence of sanctions for non-compliance creates an imperative for the trial judge to ensure compliance, and the same imperative to legal practitioners and the parties to comply.

The Procedure Act promotes case management as paramount. It removes any doubt that if legal practitioners and the parties do not comply with procedural orders, that a supervising judge may well be less flexible in applications made just before, or at the trial, which might interfere with the trial of the proceeding. For example, filing and service of a notice of ceasing to act on the eve of the trial or on the day of the trial; applications for adjournments on the eve of the trial or on the day of the trial, and applications to make material amendments to the pleadings immediately prior to the trial or on the day of the trial which has the effect of changing the complexion of the case to be prosecuted or met. Applications for an adjournment and to amend pleadings were most often accompanied by reference to *The State of Queensland v JL Holdings Pty Ltd*,[46] that consideration should be given to whether an adjournment should be allowed or an amendment be permitted to pleadings. The High Court essentially held that case management was "not an end in itself."[47] Principles relevant to case management would be considered in determining such an application, however, such principles should not be used to prevent a party from litigating an issue which was fairly arguable when the prejudice to the other party could be compensated by an appropriate award of costs.[48]

The reliance on *JL Holdings Pty Ltd*[49] posed a dilemma for trial judges faced with an application for an adjournment or an application to amend pleadings shortly before or at trial, where the party applying for the adjournment or amendment conceded that it should pay the costs of the other party and that if the Judge did not accede to the application there would be serious prejudice to the party applying for the adjournment or amendment to the pleadings. It is a situation that I have found myself in on many occasions and caution saw me allowing the adjournment or the amendment and making an appropriate award for costs. The wind has changed. In *Aon Risk Services Australia Ltd v Australian National University*[50] the High Court disapproved of *JL Holdings Pty Ltd*.[51] It held, among other things, that there was no entitlement to amend a pleading at a

41 Ibid s 47.
42 Ibid s 7(l).
43 *County Court Civil Procedure Rules 2008* (Vic).
44 *Civil Procedure Act 2010* (Vic).
45 Ibid s 63(2)(c).
46 (1997) 189 CLR 146.
47 *The State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, [154].
48 Ibid, quoting *Sali v SPC Ltd* 116 ALR 625 , 636.
49 [2009] HCA 27 (5 August 2009).
50 (2009) 239 CLR 175.
51 (1997) 189 CLR 146.

late stage in consideration of the payment of costs.[52] Furthermore, it held that there were a number of factors to be weighed into account before an amendment would be allowed at a late stage. For example, whether there was substantial delay and wasted costs and the effect on the parties, the court and other litigants; interference with case management; weighing up the nature and importance of the amendment to the party applying to the amendment, and the stage at which the litigation had reached when the amendment was sought in the context of any explanation for the delay in applying for the amendment.[53]

The High Court's strongly stated position resonates in the provisions of the Procedure Act. The aggregate effect of the case management now employed in the County Court, the advent of a strongly stated position by the High Court, together with the Procedure Act, impress upon legal practitioners that the days of a casual approach to litigation, and the likelihood of judges in the County Court reacting in a manner consistent with *JL Holdings Pty Ltd*,[54] are over.

IV ALTERNATIVE DISPUTE RESOLUTION

The former Attorney-General, the Honourable Robert Hulls, expressed an eagerness to have the County Court and the Supreme Court embrace the concept of Alternative Dispute Resolution ('ADR'). The Department of Justice developed a business case, which established a Directorate to control the development of ADR, followed by the appointment of a Judge to the County Court to undertake ADR, and funding to develop an ADR stream within the County Court. Before the foregoing occurred, judges in the County Court were invited to attend training sessions developed by the Judicial College of Victoria in the methodology of ADR. One such session was chaired by Madame Louise Otis, formerly of the Court of Appeal of Québec. She developed a system of judicial mediation in the Court of Appeal in Québec in 1998. Its success was measured by its subsequent adoption by the Superior Court of Québec.

The Directorate sent three Victorian judges to Canada and the United States to examine the extent to which ADR was practised in Superior Courts, and with what effectiveness, to determine whether it could and should find its place in the County Court and the Supreme Court in Victoria. I was one of those three judges. I visited Montréal, Toronto and San Francisco. I spoke to Superior Court Judges in Montréal, Toronto and San Francisco and the Chief Justices of the Courts of Appeal in Québec and Ontario, and a Justice of Appeal in San Francisco. The level of sophistication of judicial mediation in those courts was impressive. Unlike Victoria, where there is a very healthy and effective private mediation industry, it was not as evident in those localities. The courts had grasped the nettle. They needed to because, for example, in Québec the delay in a civil case arriving at trial was in excess of five years. Judicial mediation became a mechanism for reducing delay. Delay, in the context of the County Court and the Supreme Court in Victoria, has drawn adverse comment from many quarters, however these delays would be regarded as acceptable in North America.

In addition to my exposure to courts in North America, in June 2010, I was sent to Pepperdine University in California along with another County Court judge to undertake an intensive course designed especially for international jurists in judicial mediation. Pepperdine University has a reputation for being at the forefront of learning and training in judicial mediation, and is home to a centre known as the Straus Institute for Dispute Resolution. The intensive course was conducted at that Institute and was chaired by Madame Louise Otis and Professor Peter Robinson, who is the head of the Institute. The course was attended by sitting judges from Canada, South America, Africa, Europe and Australia and the presenters were a mix of private practitioners who specialised in mediation, as well as retired United States Superior Court judges who had employed ADR in their courts.

My exposure to ADR brought me to employ ADR as an asset to case management. I considered it to be an integral part of case management. In September 2008 I commenced undertaking what I called Case Conferences. In the course of case managing domestic partnership disputes and testator's family maintenance

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52 *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 (5 August 2009) [96].
53 Ibid.
54 (1997) 189 CLR 146.

claims I noted that many of the cases involved modest assets. It occurred to me that to allow parties to follow the conventional interlocutory steps would not only be expensive, but potentially very time-consuming. I developed a system for conducting case conferences where the assets were less than AUD 200 000. The system was entirely voluntary. Legal practitioners were initially slow to exploit the advantages of a Judge conducting a case conference in a facility provided by the County Court, but by the beginning of 2009 the call on my time exceeded my expectations.

The typical case conference in a domestic partnership dispute involves a couple without children who had contributed to the acquisition of a home with a net value of AUD 200 000 or less. To allow the parties to follow the conventional interlocutory steps was likely to consume a significant proportion of the net asset pool in legal costs. A case conference, at a stage before the conventional interlocutory steps where followed in earnest, inevitably reduced the legal costs by a significant margin. I conducted the case conferences rather more like an intensive directions hearing at first. I had each party give a short outline of their case, from which I identified the issues, and then had the parties debate where they were at issue with each other and how they might go about bridging the gap between them. I emphasised that the parties needed to use the case conference as if it was a day in court, because any intransigence on their part would inevitably see their case go to trial where the costs were likely to be significant. I did not conduct private sessions with the parties, because the weight of opinion among judges and legal practitioners at that time was that mediation was not a judicial function and that judges should limit their function to undertaking trials.

My exposure to the training conducted by Madame Louise Otis in Australia, to the judges I spoke to in North America, and the course at Pepperdine University saw a very heavy emphasis on private sessions. The judges of the Court of Appeal and the superior courts in North America invariably undertook private sessions. In Québec they were firmly of the belief that an absence of private sessions would undermine the likelihood that the judicial mediation would succeed. I was to discover just how right they were on an occasion when I conducted a case conference at the request of two solicitors while on circuit in Bendigo. I listed the proceeding for trial. It was a domestic partnership dispute. The solicitors informed me at the commencement of the circuit that they were not ready for trial. One of them asked me to conduct 'one of those case conferences'. I did so, not intending to undertake private sessions. An impasse developed. The solicitors asked me to speak to the parties. I was very reluctant to do so. However, I went against the grain of opinion and conducted private sessions. Both parties wanted to tell me their story. I simply asked them what they thought was a fair result for each of them, and what they thought they needed to do to resolve the impasse. Each of them was prepared to give ground, but neither wanted to as each wanted the other to take the first step. Within minutes of getting the parties back together in an open session, and announcing that they were both expressing the same views about the proceeding in a global sense, the case settled. The solicitors told me that the parties greatly appreciated the effort I made because it helped them to understand the proceeding, yet I had not expressed an opinion, but had merely asked questions in a Socratic manner which drew out the strengths and weaknesses in the proceeding. I had not realised that what I had undertaken was therapeutic ADR, as it was later described to me, and that I had undertaken a private session in a manner and at a stage recommended by Madame Louise Otis, the presenters at Pepperdine University, and the judges of the Court of Appeal and the superior courts in North America.

Through 2009 and 2010 the Directorate requested judges in the County Court to conduct 300 episodes of ADR for the purpose of undertaking a productivity analysis. The target was met and the analysis undertaken. The analysis did not unequivocally point to successful ADR saving any time, because many of the cases, which were the subject of ADR would probably have settled in any event. However, there was a saving on another front, which has made the conduct of ADR in the County Court worthwhile. Sometimes the individual parties are forgotten because they become a case with a number represented by a file. Enabling parties to obtain a result which they have engineered with the assistance of their legal practitioners and supervising Judge cannot be discounted as a very worthwhile result for which a judicial resource should be directed. In most cases the legal practitioners have expressed the view that ADR is very worthwhile. I think the evidence for that is the desire of legal practitioners to conduct episodes of ADR in the Family Property division.

The Chief Justice of the Court of Appeal in Québec was firmly of the opinion that judicial mediation was very productive, at least in the Canadian experience, for the following reasons:

1. Legal practitioners and parties trust the independence of members of the judiciary.
2. A member of the judiciary appointed to undertake judicial mediation eliminates the suspicion and doubt which can surround the appointment of a private mediator who might be considered by one party or the other to be unfavourable or to have a bias.
3. When members of the judiciary speak and express views to legal practitioners, parties invariably listen and take those views on board seriously.
4. Members of the judiciary can keep the judicial mediation focused on the issues, because if a legal practitioner or a party fails or refuses to apply relevant legal reasoning, then a carefully worded question such as 'what do you think a Judge in this court would do in these circumstances?' can have the effect of realigning thinking, and it will often assist the legal practitioners in dealing with recalcitrant or difficult parties.
5. If the judicial mediation fails, then the Judge can make orders, which are a more realistic reflection of what the case requires in order to seamlessly proceed to trial. A judicial mediation is likely to expose the real issues, which the parties can agree are the issues to be taken to trial rather than a much larger volume of issues, which will take time and expose the parties to greater legal costs.

The very same approach was emphasised by Madame Louise Otis and the presenters at Pepperdine University.

I have now conducted over 200 episodes of ADR in the County Court. My experience in conducting that many episodes has convinced me that the views expressed by the Chief Justice of Québec are well founded.

ADR has been used, and is being currently used, to develop a change in practices amongst legal practitioners within the personal injury jurisdiction. One of the dominant types of case in the County Court are serious injury applications, which are applications brought under the *Transport Accident Act*[55] and the *Accident Compensation Act*[56] for the leave of a Judge to bring a common law proceeding for damages where the judge is of the opinion that the injury or injuries are serious injuries as defined under those Acts. Serious injury applications represent approximately 30 per cent of filed proceedings and approximately 70 per cent of written judgements. Approximately 70 to 80 per cent of serious injury applications succeed by leave being given to the injured party to bring a common law proceeding. Judge Sandra Davis has been central in developing a system of ADR known as 'judicial settlement conferences' through 2012 to determine whether a larger proportion of serious injury applications can be settled at a much earlier time by having the legal practitioners undertake their final preparation much earlier. The judicial settlement conferences are the subject of protocols prepared by the Judge Davis and private sessions are an integral part of the conduct of these conferences. The present system follows on from a pilot scheme which was conducted in 2011, which although not successful in terms of the volume of cases which settled it demonstrated nonetheless that legal practitioners needed to change their practices. That judges conducting the judicial settlement conferences needed to undertake a different approach themselves to expose the real issues and have the parties conduct negotiations at a level, which was likely to be productive for the parties.

[55] *Transport Accident Act1986* (Vic).
[56] *Accident Compensation Act1985* (Vic).

V CONCLUSIONS

The imperative for the County Court is to manage a very large volume of civil cases annually with a pool of judges by ensuring that legal practitioners undertake their practices in a manner which will enable the parties to undertake the necessary interlocutory steps in a cost-effective and expeditious way, and to provide the parties with a date for trial within 12 months of the originating process being filed.

A central part of case management is the introduction and employment of ADR. It seems to me that the two go together hand in glove. ADR provides an asset to the supervising judge to employ to provide the parties with expeditious access to the court, and more particularly, to a Judge.

It is readily apparent by examination of statistics in the County Court that the volume of civil litigation will increase without abatement. One answer to dealing with that increasing volume is to appoint more judges, the other alternative is to case manage that volume of cases in such a way to have legal practitioners change their practices and be more aware that mediation and court sponsored ADR, in the background of the Procedure Act[57] have created a different atmosphere within which civil cases are to be conducted now and in the future.

Thus far I am convinced that judges need to consider that their function is not limited just to conducting trials. It was readily apparent to me that the Judges in North America who engage in judicial mediation were small in number, but effective advocates of the judicial mediation and its place in the broader context of the administration of civil justice. I am one of those Judges who has the same belief, and one amongst a growing number in the County Court.

[57] *Civil Procedure Act 2010* (Vic).