QUEENSLAND LAW SOCIETY INC
CONTINUING LEGAL EDUCATION
PERSONAL INJURIES CONFERENCE
"HAS MEDIATION ECLIPSED LITIGATION, AND IS THE STATUTORY MINEFIELD STILL WORTH NEGOTIATING – AND BY THE WAY, WHAT'S HAPPENING WITH THE COMMON LAW"
Friday 31 May 2002, 9.45am
Sheraton Hotel – Gold Coast

The Hon P de Jersey AC
Chief Justice

In a paper delivered some twelve years ago, I rather sententiously observed ADR was "a remarkable phenomenon"[1]. While also prosaic, the tag was accurate. Twelve years on, ADR remains so: remarkable for shifting the orientation of parties in dispute from adjudication to consensual resolution; remarkable for its freeing-up court lists, leaving courts better able to render speedy adjudication in cases which must go to trial; remarkable for its effect in re-crafting the practices and talents of many lawyers.

But has resort to the mechanisms of ADR gone too far? I believe not, though it is a question worth pondering, as are some related practical issues: have the procedural wrinkles in processing contemporary damages claims led to a preference for informal mediation as a convenient or expedient, if imperfect solution? Insofar as mediated solutions reflect likely court awards, is the whole system flawed, and fairly condemned as munificent? Will it survive without further substantial legislative intervention?

Before turning to those questions, I suggest we remind ourselves of some of the background to what has become here the most used of these mechanisms, that is, mediation. If litigation has been "eclipsed", then the victor carries a good pedigree.

The nature of mediation

We tend to regard ADR as a recent phenomenon. While true of local experience, with the approach bedding down from only the late 1980's, it drew on ancient practices. Going back even a little way, to 1850, we see Abraham Lincoln, a self-confessed "unaccomplished" lawyer[2], in a lecture to prospective lawyers, extolling the lawyer's role as "peacemaker":

> "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."[3]

But many centuries earlier than the nineteenth had witnessed "ADR" in various manifestations. For example, Japanese, Chinese and Indian societies utilized elders or adjudicators to counsel aggrieved parties towards mutually satisfactory resolutions.[4] Aspects of modern court-initiated settlement conferences resemble Scandinavian conciliation techniques, based on the expectation that "community norms could be brought to bear to help resolve disputes"[5], and English and Scottish pre-trial conference practice of the early nineteenth century, designed to define and confine the contentious issues.[6] While those procedures may not have been as comprehensive as today's offerings enshrined in our *Uniform Civil Procedure Rules*, lawyers long ago apparently realised the advantages of avoiding a court battle with its associated cost and delay.

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[1] "Alternative Dispute Resolution: Why all the Fuss?" AIJA Ninth Annual Conference, Melbourne, 18-19 August 1990 p.1.
[2] "I am not an accomplished lawyer" cited in Abraham Lincoln's Notes for a Law Lecture from www.showcase.netine.net/web/creative/lincoln/speeches/lawlect.htm visited 24/04/02. It is interesting to note that this excerpt is taken from his notes for a law lecture, although it is not known if the lecture was ever delivered!
[3] Ibid.
[4] "What is Mediation or "Alternative Dispute Resolution"?" from www.emotionalintelligence.co.uk/eq/text/mediation.html visited 25/04/02 p.1.
[5] Menkel-Meadow, C "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" 33 *UCLA L Rev* 485 at 490

The term "mediation" has in recent years been defined *ad nauseum*. I am inclined to reject one of our own practitioner's descriptions as "litigation for the feeble-minded"[7]! Chameleon like, this flexible concept defies a definition which will always apply.[8] It is an adaptable process, save that it should always be dedicated to early resolution. That said, I accept this definition as useful:

> "…the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop opinions, consider alternatives, and reach consensual settlement that will accommodate their needs."[9]

When ADR first attracted the support of Judges in this country, in the mid to late 1980's, the profession was – it might fairly be said – sceptical. The mind-set was firmly towards litigation. In most instances, the so-called pre-trial "compulsory conference" had become perfunctory, farcical. Many more claims ran to judgment. With growing public interest in ADR – to unclog court lists, reduce costs and delay – and reduce acrimony, the profession accepted the challenge: but it meant learning new skills. The embrace of mediation in particular, was naturally matched by a retreat from litigation.

Just as judges do not make law, they do not resolve disputes, rather, they adjudicate upon them.[10] While litigation is popularly criticised – not always accurately, as costly, lengthy and complicated, mediation in Queensland is still seen, after more than a decade, and fortunately, as a good alternative in many

[6] Ibid p 485.
[7] RF King-Scott, *Preparing and Conducting Alternative Dispute Resolution – a Guide for Personal Injury Lawyers* paper presented at a Plaintiff Lawyers Association Conference p.1.
[8] P Tucker, "Judges as Mediators: A Chapter III Prohibition?" May 2000 *Australasian Dispute Resolution Journal* 84 at 85.
[9] J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, quoted in A Zilinakas, "The Training of Mediators – Is it Necessary? (1995) 6 *ADRJ* 58 at 60.
[10] Mr Justice PW Young, "ADR: a generic, holistic concept", 76 *ALJ* 213 at 213.

cases - less costly than litigation, more expeditious, confidential and touted as more "mutually satisfying" than litigation.[11]

That is not to say that mediation does not spawn its own suggested problems - complaints of parties being pressured into settlements, of actual exclusion from the decision-making process, of not being made aware that larger awards may have been given by the court, of overlooking the need to provide for possibly increasing disability, and of not appreciating solicitors' costs and statutory refunds would be deducted from the settlement award.[12] I will later mention some other possible problems, but I will say now that it would be most unsatisfactory were such problems to become endemic. In sanctioning, indeed encouraging, resort to these mechanisms, with mediations, for example, often being carried out by practitioners who are court accredited mediators, the Court expects the process to be carried through with the highest professionalism. The Court's supervisory jurisdiction ultimately extends to practitioners working in that environment also.

Mediation is largely antithetical to the adversarial approach lawyers traditionally adopted in the resolution of their client disputes. [13] The lawyer representing a client at a mediation is more of a facilitator. But the lawyer must nevertheless be astute to promote his or her client's interest. The interest, however, is directed towards consensual resolution, so compromise is the pervading spirit. The parties consequently tend to use more of their own initiative, not simply referring the whole issue to the lawyer. A party should be prepared to participate fully, with an open mind and an appreciation of the other party's position. I can understand that some lawyers find the mediation process difficult –the traditional adversarial stance and an attitude of "my client is right" are simply not conducive

[11] "What is Mediation or "Alternative Dispute Resolution"?" from ww.emotionalintelligence.co.uk/eq/text/mediation.html visited 25/04/02 at 3.
[12] M Behm "A Risk Perspective of Managing a Mediated Matter", 19(11) *Proctor* 27.

to effective mediation. The lawyer must rather, as I have said, assist the client to a solution which reflects the client's legal rights and be otherwise reasonable, while being careful to ensure the client fully understands what is going on, and is not pressured into compromise.[14]

The extent of mediation

What do the statistics show as to the popularity of mediation? It is certainly popular with the practitioners, who plainly not only encourage the mediation of their clients' disputes, but are themselves keen to act as mediators. This data is drawn from the Supreme Court Annual reports:

Year	95/96	96/97	97/98	98/99	99/00	00/01	01/02
Approval of new mediators	97	30	34	21	23	24	21

To the end of the last reporting period, 30 June 2001, there were 250 Supreme Court accredited mediators. The conclusion one reasonably draws is that practitioners are enthusiastic about acting as mediators: they have embraced the new "culture", a culture directed not towards confrontation but consensual resolution. (Before the court accredits a mediator, the applicant must have completed an approved training course.)

The popularity of mediation cannot reliably be discerned just from court statistics, for the obvious reason that many claims are no doubt, by some form of mediation or other, brought to resolution without any recourse to the court. But the Supreme Court figures nevertheless suggest the medium is popular.

[13] CP Stevenson, *Legal Issues Arising form Pitfalls of Attending Mediation*, paper presented at the Law Society of Western Australia's seminar "Mediation and Pretrial Conference – What is it All About? Held on 24 May 2002, Perth p.4
[14] Ibid p 13.

Year	95/96	96/97	97/98	98/99	99/00	00/01	01/02 [15]
Consent to mediation by parties themselves	17	166	195	198	214	253	198
Court-ordered mediations	59	120	122	106	81	74	37
Total referrals to mediation	76	286	317	304	295	327	235
Percentage court-ordered mediations	77%	42%	38%	35%	27%	23%	19%

We see that the parties themselves are more frequently approaching the Court for mediation, without the Court itself having to make the order without consent. Party-initiated requests for mediation have substantially increased since the introduction into the *Supreme Court of Queensland Act* 1991 of the provisions relating to ADR, while the percentage of Court-ordered mediations has substantially deceased. Parties seem to be more willing to take matters into their own hands. One must also note, however, that orders made under various provisions of the *UCPR* may require disputing parties to attempt mediation as a pre-requisite to the allocation of a trial date.[16] In personal injuries litigation, though not a mandatory requirement under r 553 of the *UCPR*, mediation or the like is implicitly encouraged.

The United States of America may always be relied upon to provide an extreme example of everything – even, it seems, ADR, with a Judge organising several days of cocktail partying and country-club dining to foster Counsel's mutual consideration of a complex case.[17] Inclinations and budgets aside, the present

[15] From Supreme Court database material during the period of 1 July 2001 to 31 March 2002.
[16] See rules 469 and 553 of the *Uniform Civil Procedure Rules* 1999.
[17] Reported in Kritzer, "The Judge's Role in Pretrial Case Processing: Assessing the Need for Change", 66 *Judicature* 28 (1982).

pro-active preparedness of the parties in this State to mediate, renders resort to such extreme measures unnecessary.

What have been the reported outcomes?

Year	95/96	96/97	97/98	98/99	99/00	00/01	01/02 [18]
Total number of cases referred to mediation (by the courts and initiated by parties) and finalised	27	184	322	279	280	300	229
Settled	15	74	154	142	184	207	147
Not settled	12	110	168	137	96	93	82
Not settled at time of publication of annual report but subsequently settled	2	93	N/a	N/a	N/a	N/a	N/a
Percentage settled out of total referred	56%	40%	48%	51%	66%	69%	64%

It will be seen the settlement rate is reasonably high, bearing in mind these were cases otherwise destined for trial. One hope the settlements were secured much earlier than used to apply, with "court door" settlements a frequent feature of the civil sittings of the courts over earlier decades.

Suncorp-Metway has kindly provided - courtesy of Mr Peter Eardley – this detail of the mediation etc of its claims, from which you may note the growing incidence of successful mediation.

[18] From Supreme Court database material during the period of 1 July 2001 to 31 March 2002.

Type of Conference	Litigated?	Settled?	97/98	98/99	99/00	00/01	01/year to date
Informal	Y	Y	1223	876	629	627	494
Informal	Y	N	304	358	291	446	299
Informal	N	Y	1223	382	399	355	295
Informal	N	N	28	97	234	279	132
Mediation	Y	Y	51	61	60	109	122
Mediation	Y	N	20	18	28	68	67
Mediation	N	Y	0	0	0	1	13
Mediation	N	N	0	0	0	0	19
Total No. of Claims finalised			6548	6722	7333	5124	4824

You may be interested to see this comparative table of ADR practices across the Australian and New Zealand jurisdictions, compiled for the Council of Chief Justices (in 1999):

Policy and Practice	Federal Court	Family Court	ACT	NSW	NT	QLD	SA	VIC	TAS	WA	NZ
1. Important or enlarged role in litigation process	Y	Y		Y		Y I	Y	Y	Y	Y	Y I
2. Integrated role in litigation process	Y	Y		Y	Y	Y	Y	Y	Y	Y	UC
3. Separate from traditional Court processes			Y I			NS					
4. To be provided at no cost to parties		Y	Y	Y	Y	NS	Y		Y	Y	
5. To be provided at parties' expense or at some cost	Y			Y		Y		NS			UC
6. Appeals should be mediated	Y	NS		NS	NS	NS	NS	NS	UC	Y	NS
7. Only by Consent			Y	Y	NS						
8. May be ordered without consent	Y	Y				Y	Y (P)	Y	UC	Y	UC
9. Mediators must be approved by Court and properly qualified	Y	Y I	Y GA	Y	Y	Y	Y I	Y I	UC	Y	UC
10. Available any time	Y	Y	Y	Y	Y	Y	Y	NS	Y	Y	Y

during litigation process			I	I							
11. Penalty for non-attendance or failure to participate	NS	NS		NS	Y	Y I	NS	NS	UC	Y	NS
12. Mediator protection and immunity	Y	Y	Y	Y	UC	Y	Y	Y I	UC	Y	UC
13. Confidential	Y	Y	Y I	Y	Y	Y	Y	Y I	Y	Y	UC
14. Properly designed and constructed accommodation to be provided	Y	Y I		Y			Y		Y	Y	

Legend:

- Y = Yes
- I = Implied
- NS = Not Stated
- NP = No Policy or Practice
- UC = Under Consideration
- (P) = But policy is not to refer unless all parties consent
- GA = Government Accredited

The growing popularity of mediation in Queensland led to controls applicable to mediations under the auspices of the court being refined through the *UCPR*.

It is generally accepted most personal injuries matters will respond well to mediation. Some will not – if, for example, an insurer needs a court determination to act as a precedent[19], or the claimant has an unshakeably grand, ill-founded idea of what he or she should recover, or, where a claimant is being dishonest and refuses to budge. But those cases should be rare.

The mediation procedure

What is the procedure for formal mediation? The mediator must be appointed – by referring order, or simply by agreement of the parties.[20] A referring order must specify the mediator, include enough information about the dispute to enable the mediator to understand the dispute, set a time limit on the mediation, indicate how the mediator is to be informed of the appointment, and require the parties, if the mediation is not completed within 3 months of the date of the referring order, to provide a report to the Registrar explaining the circumstances of the delay.[21] The order must also deal with the costs of the mediation.[22] The parties themselves must act "reasonably and genuinely" in the mediation and assist the mediator to complete the mediation within the prescribed period.[23] Of course, if the mediation is unsuccessful, the dispute may proceed to trial, in which event no inference adverse to any party will be drawn at trial from the failure of the mediation.[24]

As I mentioned earlier, the *UCPR* provide that a party may, after receiving a statement of loss and damage, request the other parties to engage in a conference to attempt settlement. If a party unreasonably refuses such a

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[19] Op. cit pp 2-3.
[20] See r 323 *UCPR*.
[21] Rule 323 *UCPR*.
[22] Rule 323(2) *UCPR*.
[23] Rule 325 *UCPR*.
[24] Rule 332 *UCPR*.

request, the Court may among other things order the parties to conduct a mediation.[25] In such a case, trial dates would not be allocated unless the mediation had taken place (rule 469).

Unduly elaborate and too expensive?

The cost of mediation is of some concern. I believe one of the large perceived advantages of the ADR models first introduced here was their reduced expense. The notion was that a satisfactory solution could be achieved early, and at much less cost. With formal mediations, the parties must bear the cost of the mediator, as well as their lawyer's costs. In an ideal State-sponsored, dispute resolution system, with mediations conducted under the auspices of the court, the State would bear the mediator's costs, as it does the Judge's, and the table earlier shown indicates support for this view. The State funded court system derives its own benefit, in that its lists are culled. Plainly, however, one could not be sanguine about change in that respect, where legal aid cannot even meet reasonable demands. But in this context, it behoves mediators to levy moderate changes, and the court maintains interest in this.

My anxiety is that with lawyers understandably concerned about professional liability, some processes run the risk of over-elaborateness and excessive cost, especially regrettable should the mediation fail. Resort to ADR was encouraged by the Court in the State, not as a measure for reducing court lists, but to accelerate settlements, most of which were occurring at the Court door – for reasons of tactical brinkmanship, often, and where the compulsory settlement conferences were not genuinely proceeding. We were seeking to remind the profession, and litigants, of the advantages of comprehensively exploring the prospect of settlement at an early stage. The intention was never to interpolate, post-claim and possibly pre-trial, another elaborate expensive step.

[25] Rule 553 *UCPR*.

I am not suggesting unduly elaborate or expensive mediations have become the norm, but having heard of some such instances, it is timely to remind of the need for moderation – both in determining the scope of mediations, and in the levels of fees charged.

Complicated legislative regimes

The *WorkCover (Queensland)Act* 1986 and the *Motor Accident Insurance Act* 1994 have set up regimes based on full early exploration of claims and attempts to settle them short of litigation. The objective is laudable. The means prescribed for its achievement are not wholly so. The elaborateness of these regimes has been criticized: and they are not easy to comprehend in all their detail, as the extent of procedural type litigation suggests. As Mr Peter Eardley pointed out in detail at this conference last year[26], both Acts are vulnerable to substantial criticism.

I will briefly mention two cases which illustrate some of the difficulties. The first is *Williams & FAI Insurance Company Limited v Mistearl Pty Ltd and Kingsley*[27] and its companion case, *Bonser v Melnacis*[28]. Each concerned injuries arising from a motor vehicle accident sustained during the course of the plaintiff's employment, where the injured employee sued the driver. The compulsory third party insurer then sought to join WorkCover so that it could pursue a claim for contribution. The Court of Appeal ruled that the WorkCover legislation had destroyed the

[26] Law Society CLE – Personal Injuries Residential July 2001 : Case Law Issues

[27] Unreported, HC of Australia, 4 May 2001 – matter no. B19 of 2000. The respondent's action against the applicants arose out of a motor vehicle accident in the course of her employment when she was struck by the first applicant who was reversing her motor vehicle. The second applicant was the licensed insurer of the motor vehicle. The respondent sued the applicants for damages for personal injuries. On 7 June 1999 the second applicant issued a third party notice claiming indemnity or contribution from the respondent's employer, relying upon section 6(c) of the *Law Reform Act* 1995. The applicants/defendants then applied to the Court of Appeal for a stay of proceedings between them and the respondent/plaintiff pending in the Maroochydore District Court, until the determination of their application to the High Court for special leave to appeal against the judgment of Court of Appeal given on 8 February 2000.

[28] [2000] QCA 13. The plaintiff suffered personal injuries when struck by a motor vehicle driven by the first defendant on 9 September 1997. He commenced an action against the first defendant driver and also the second defendant licensed insurer of that vehicle.

employment based cause of action thereby excluding any basis for contribution. The insurer sought, unsuccessfully, special leave to appeal to the High Court, where Kirby J said:

> "Although the point which the applicant seeks to bring to this Court, like many others that have gone before, is arguable, we are not convinced that error has been shown in the construction adopted by the Court of Appeal of Queensland or that the application, if granted, would enjoy a reasonable prospect of success. The Queensland legislation, viewed in its entirety, has its own peculiarities, in particular the provisions of the *WorkCover (Queensland) Act 1996* sections 252 and 253. These peculiarities provide additional reasons for refusing special leave."[29]

You will see those provisions operate to override all other laws, statutory or otherwise, inconsistent with that Chapter (s 252), and are proscriptive as to who may seek damages for injuries sustained in the course of employment (s 253). In each of those cases, the plaintiff had no right of action at common law against the employer, the plaintiff having chosen to receive lump sum compensation rather than sue for damages. The plaintiff had not completed the pre-litigation procedures prescribed by the Act (s 253) and consequently, had no right to sue such as would have been necessary to render applicable the tortfeasor contribution legislation. The employer "would if sued (not) have been liable."[30]

Core well-known legal issues of liability and quantum are within the easy grasp of the experienced lawyer. One fears the *WorkCover Act,* in five years the subject of more than 50 reported decisions alone[31], may assume a level of

[29] Second last paragraph of the transcript in *Williams & FAI Insurance Company Limited v Mistearl Pty Ltd and Kingsley* B19 of 2000, heard 4 May 2001.
[30] See *Air Services Australia v Austral Pacific* (1998) 157 ALR 125 and Kirby J's judgment in the third last paragraph of the transcript in *Williams & FAI Insurance Company Limited v Mistearl Pty Ltd and Kingsley* B19 of 2000, heard 4 May 2001.
[31] In a paper presented by Michael Grant-Taylor SC to the Australian Plaintiff Lawyers Association in May 2001, he noted that under the *WorkCover Act*, which commenced on 1 February 1997, only one or two claims had gone to trial (not on the contentious issues such as

interpretive acumen and persistence beyond the capacity of many. The necessary complexity of the reasoning in *Bonser* illustrates this, and *Bonser* is but one of many cases in which the Court has been called upon to determine the meaning of the scheme in a number of respects difficult of comprehension.

The *Motor Accident Insurance Act* has raised some problems of its own. *Vonhoff v Jondaryn Shire Council and the Nominal Defendant*[32] confronted the meaning of the *prima facie* clear word "vehicle". McGill DCJ suggested that "under s 4 of the Act, it is quite possible for a vehicle to be covered by the Act, or not covered by the Act, many times a day".[33] The plaintiff was employed by the Council in water supply and sewerage maintenance. Driving home from work, he noticed a water leak under the footpath and called over a co-worker with a bobcat to begin maintenance on the pipe. The plaintiff was injured when the crowbar he was holding hit the bobcat. The question was whether the bobcat was a "vehicle" under s 4. The Council argued the bobcat was "equipment used for the construction of works for, or maintenance of, road transport infrastructure" and, therefore, not a vehicle for the purposes of s 2 *Transport Infrastructure (Roads) Regulation* 1991. Those regulations complement the *Motor Accident Insurance Act*. The trial judge rejected the submission, concluding that because it was engaged in work on the water main underneath the footpath, it was not doing work on road transport infrastructure. The second contention involved the construction of ss 12 and 44 of the Regulation. The bobcat was covered by a "period permit" enabling the Council to use it for repair works while unregistered. Consequently, it was said, the bobcat should be exempted from the definition of "vehicle". McGill DCJ held those regulation inapplicable.

liability and contributory negligence) but that there had been over 50 reported decisions on applications brought to the Court for judicial interpretation of what the Act did or did not mean or permit.

[32] [2001] QDC 092

[33] [2001] QDC 092 at p.5

On appeal, the Court of Appeal noted uncertainty as to the interrelationship between the provisions of the *Motor Accident Insurance Act* 1994 and the *Transport Infrastructure (Roads) Regulation* 1991, suggesting it be clarified legislatively. However, after substantial reasoning and examination of the facts, the Court concluded the bobcat was not a "vehicle" within the s 4 definition. Williams JA said this:

> 'The definitions as they currently stand are cumbersome, difficult to reconcile with each other, and probably unintelligible to a lay person. Appropriate amendments to the legislation in question should result in the position being made clearer for the owners and operators of vehicles and machinery in this State."34

It is critically important that the need to insure be well understood. The Court of Appeal upheld the inapplicability of the regulations, Williams JA noting in passing that he found s 9 of the *Transport Infrastructure (Roads) Act* 1991 "unintelligible".

With the definitions of terms as simple as "vehicle" causing so much trouble, it is no wonder negotiation of the statutory "minefield" has become treacherous. Lawyers and claimants have embraced mediation. The legislature has devised ways of ensuring early resolution of those personal injury damages claims susceptible of compromise. Early resolution is strongly to be encouraged. But just as practitioners must be astute to ensure mediation remain sensible, and affordable, in scope, so the legislature should be ensuring its schemes are comprehensible in all their detail – preferably to the lay reader as well as the lawyer. Some practitioners, I fear, may need to review their approach to mediation: the legislature, for its part, needs to give consideration to revamping, meaning simplifying, this legislation, beyond the revision introduced by the *WorkCover Queensland Amendment Act* 2001.

[34] Williams JA in *Vonhoff v Jondaryan Shire Council & Anor* [2001] QCA 439 at para 18.

When last year he was appointed to the District Court, Judge Wilson noted he had, over the preceding three years, conducted more than 500 mediations[35]. It is certainly a popular approach. With most mediations in this State apparently being conducted by lawyers, there is extra reason to expect the settlements would reflect likely court awards. Those awards have recently been the subject of substantial public criticism, and this is the matter to which, in conclusion, I turn.

The "insurance debate"

It is sad reality that the pressures under which the legal profession labours these days are diverse and immense. The most recent manifestations of them, in relation to the plight of the insurance industry, appear to have come rather from left field. The temporal proximity between the HIH collapse and 11 September, and the emergent insurance problem, leaves me entirely unconvinced that the profession and the judiciary have largely contributed to that problem. The courts and the profession have been working steadily in this area for decades. It is highly significant that the insurance problem arose apparently suddenly, and so close in time to those major disasters. Yet, we lawyers are trenchantly criticized. My fear is that the criticism, being largely unjustified, will unduly erode public confidence in our work.

It does, however, seem clear that some lawyers have been too entrepreneurial, and some Judges too magnanimous. The bar on no win/no fee advertising is, in my view, a reasonable response to the former, and the appeal mechanism has always generally dealt adequately with the latter. But it remains regrettable that these errancies should be stigmatising the profession as a whole.

What is being overlooked by many is that speculative fee arrangements have meant that many worthy claims which would otherwise die for want of financial

[35] Speech given by the Hon Rod Welford, MP at the swearing in of Judge Wilson on 1 June 2001.

backing have been processed over the years, and the unworthy ones have been weeded out early. Speculative fee arrangements have served the public well.

The courts and the profession have become "whipping boys", for the present, in relation to these problems, which I believe have a lot more to do with the internal management and policies of insurance companies. The profession and the courts are of course used to criticism. Some of it involves tilts at an institution and a profession felt to be elitist. I read recently a medical specialist's complaint that Judges whose decisions are reversed on appeal cannot be sued in negligence. It is disturbing to think that a highly educated member of the public should not understand, or perhaps resent, the judicial immunity which is integral to judicial independence in turn integral to the maintenance of the rule of law. Both the courts and the profession are these days forthcoming with acknowledgement of their goal of public service, and the need to communicate and interact with their public. Suggestions of elitism are baseless. And so is much of the criticism levelled so generally at the profession because of the misdemeanours of a small few.

The other aspect of the insurance industry to which I draw attention, is the feature that significantly bad cases have not, with few exceptions, come from Queensland: they have come largely from New South Wales. The recent exception was the case of the young man who dived into the Gold Coast canal, but that jury verdict was expeditiously quashed on appeal. It would be a pity for Queenslanders if a primarily New South Wales problem led to substantial restriction on the right to sue in this State. Allowing for some necessary yielding to a national thrust, the Queensland response thus far seems appropriately restrained, and I hope it remains so.

I will continue, where appropriate, to express these views publicly. Unfortunately, some of the more unmeasured recent criticisms of the judicial process, in the context of the insurance debate, may have, to some extent, eroded public

confidence in the courts. No doubt that confidence, which is the result of decades of dedicated service, will regenerate as the people come to realise, as I confidently expect will occur, that the insurance plight has a lot more to do with business method, or lack of it, than with the judicial arm of government or the legal profession.