North Queensland Law Association Annual Conference
Saturday 20 August 2005, 12 noon
Tradewinds Esplanade Hotel, Cairns

The Hon P de Jersey AC,
Chief Justice

Kaye and I are very pleased again to be with you. Continuing professional education aside, these conferences are obviously important in fostering collegiality within the North Queensland profession. They also afford me the opportunity to affirm the encouragement of the judiciary, as you work with us to discharge our important public mission. There are a number of disparate topics I wish to cover briefly this afternoon, and I may conveniently begin with the main reason we are here, continuing professional education.

CPD

The somewhat more rigorous CPD requirement which now applies has led to an apparent upsurge in attendance at events like these. But as our work is becoming more complex, and with our determination to keep abreast, I think greater attention to CPD would have been inevitable anyway.

That our work is becoming more complex can be illustrated very well by the complicated minefields established by the three pieces of personal injury legislation which apply in this State. With an active Law Reform Commission and governments not shy of change, we have to be prepared to confront a steady stream of legislation which impacts on clients' concerns. The professional associations are to be commended for their CPD programmes: so are the practitioners who lead them, including Judges and Magistrates.

The Queensland profession is comparatively large – currently there are 804 members of the Bar Association and 6,100 solicitors holding practising certificates. It is also certainly competitive, providing further incentive for honed professional skills. In early April this year I was very pleased to open a well-attended and important conference hosted by the Law Society in Brisbane on specialist accreditation.

Specialization

The Law Society, as you are aware, accredits specialists in a number of fields of law: family, immigration, personal injury, property and succession, and I am assured that accreditation is not available for the asking, but is granted only to those able to demonstrate real specialist qualification through a process of stringent examination. The Society must ensure that process is demanding, for in accrediting specialists, it holds them out to the public as specially qualified. That involves considerable responsibility.

The public benefit which should flow from specialization is obvious enough. The need for it is a reflection of the reality to which I earlier referred, that many fields of contemporary law have become potential minefields for not only novices, but also even experienced practitioners who may have fallen behind in their assimilation of changes wrought by legislation and the case law.

In preparing my remarks for that conference, I sought to learn a little of the contemporary indemnity insurance landscape. What trends have emerged over recent years? Which fields of practice account for most claims? What is the profile of the typical practitioner defaulter? To what extent do negligent solicitors default again? Does the Society monitor the quality of the work of those against whom successful claims have been brought?

I was told that at least over the last eight to nine years, about half the notifications, and claims which have been met, concerned negligence in the realms of personal injury, and cottage and commercial conveyancing. I felt the involvement of personal injuries claims unsurprising, in view of the difficulties of the legislative schemes now operating. In respect of mortgages and securities, notifications have apparently been low, but payments out have been at a high level. Of the other claims, wills and estates and family law had some prominence.

As to the source of notifications, it rested mainly with smaller firms, sole practitioners or firms with one to three solicitors, but probably not too much should be drawn from that, because the fact is that virtually all the larger national firms are insured solely through either the New South Wales or Victorian schemes.

There are, unsurprisingly, repeat offenders. Practitioners who generate multiple claims often leave practice because of what are termed the "deductible" consequences of claims – currently $7,500, with a maximum of five per policy period, with also the possibility of the Society's penalty levy of $15,000 in relation to certain statutorily barred personal injury matters and claims arising from conflict of interest.

The Society has the capacity to audit a firm which has shown a poor claims history. The Society has apparently not actively utilized that process in recent times, but may re-examine the desirability of that course in the future. I rather hope it does.

This is generally cheerless territory. The prospect of a practitioner damaging the client's interests through a lack of reasonable care is nothing but dismal. The essence of our mission being public service in abstruse arenas where the client lacks the necessary skill to do his or her own work, the notion that the supposed expert's work may be flawed is very discouraging. But humanity does not equal perfection, and like ethical dereliction, negligence will sadly, but inevitably, recur. Our challenge is to minimize the risk, and I urge you to contemplate seeking specialist accreditation in the areas in which you principally practise.

Expert witness rules

There are a number of other initiatives I wish to mention this afternoon. The first is the amendment of the Uniform Civil Procedure Rules relating to the evidence of expert witnesses. Those amended Rules commenced on 2 July 2004. The objectives are to improve the presentation of expert witness's reports, including emphasizing that the expert's obligation of impartiality is owed primarily to the court; and to streamline the judicial decision-making process, by enhancing the reliability of expert evidence. The preferred mechanism to achieve the latter objective, is the sole expert appointed by the parties or the court. While it is too early to assess comprehensively the impact of the new Rules, they are being utilized, and I believe, effectively.

The Rules have been contentious, but I believe the suggested criticisms may readily be answered. Let me run through the major of those criticisms.

One has been that the court would feel obliged to accept the sole witness's evidence. That is not so: that evidence will be tested by informed cross-examination, and it remains up to the Judge whether or not it is accepted. The parties may ask the Judge to appoint an additional expert.

Another is that the single expert may be of doubtful quality, perhaps a conservative, behind the times elder of the relevant profession, or with his or her own, difficult to uncover, ideological inclination. I respond that with careful attention to selection, that risk should be minimized. Selection by the court may be assisted by adversarial style scrutiny.

It is suggested that costs will not reduce because the parties will still retain their own experts. I respond that at least trial costs should be reduced. But as this new system takes hold, with cultural change, disputants will hopefully come to recognize the advantages and agree early on joint appointments.

Then it is said that areas which would arguably be the most obvious beneficiaries of a single expert regime – personal injury and planning and environment litigation – are excluded. That is brought about, I should say, in relation to personal injury matters, by the exclusion, from the requirement to file an application for directions under Practice Direction 2 of 2005, of claims under three statutes: the *Motor Accident Insurance Act* 1984, the *Workers Compensation and Rehabilitation Act* 2003, and the repealed *WorkCover Queensland Act* 1996. As to the Planning and Environment Court, the new Rules apply only to the Supreme Court.

With personal injury litigation, save under the *Personal Injuries Proceedings Act* 2002, it was considered undesirable to complicate the already burdensome statutory schemes. As to the Planning and Environment Court it has an already working single expert regime. Comprehensive extension of this new scheme to the Planning and Environment Court by

amendment of its Rules may be considered if the current reform proves effectual in Supreme Court proceedings.

How does the new system operate in practice? Where a dispute arises, and resolution in court would involve expert evidence on a substantial issue, approach your counterpart for a joint appointment, or in the absence of agreement, approach the court. Consider a panel of possible experts. And take particular note of Practice Direction 2 of 2005, and related amendments to the request for trial date form, Form 48. The Practice Direction provides that "as soon as it is apparent to a party that expert evidence on a substantial issue in a proceeding will be called at the trial or hearing, that party must file an application for directions. On the hearing of that application, that party must inform the court of the steps taken or to be taken to conform with these Rules."

By these means, the court will monitor and ensure compliance with Part 5, Chapter 11 of the Uniform Civil Procedure Rules.

As I have said previously, there is no doubt implementing this new regime requires a sharp change of culture, both for the courts and the profession. I am however confident that that cultural change will be forthcoming. The public expects us, quite reasonably, to refine our adversarial system as the years progress. Serious doubt about the current approach has been raised for many years now, and I believe that in deference to public expectations, we must be prepared to work laterally, and responsibly pursue new possibilities. That is precisely what we are doing.

Benchbooks

Now let me offer two examples of the court indirectly assisting the profession in the professional approach to court proceedings. In recent years, we published on the court webpage our Criminal Benchbook. It should be of considerable assistance to counsel and solicitors in criminal cases – and indeed to self-represented litigants. That Benchbook contains sample directions intended to assist in the preparation of summings up delivered for the instruction of juries at criminal trials. There is a diverse range of subjects requiring

directions covered in the work, and it is applicable to both Supreme and District Court proceedings. Have it by you during trials!

This year, work was completed on the compilation of an Equal Treatment Benchbook, a collection of resource materials intended to assist Judges to "manage matters before them in a way that is fair to all litigants and other participants irrespective of their circumstances". The circumstances covered by the book include cultural diversity, Indigenous Australians, disability, self-represented parties, children, gender and sexuality. The book has been published on the court webpage, and will also be available in hardcopy. Again, I believe you would be interested to dip into that work – its interest in fact surpasses the courtroom.

Vulnerable witness facility

We have been working to protect those who could be left vulnerable by our processes. For example, an appropriately furnished and decorated suite of rooms was developed in the District Courthouse at Brisbane for the giving of evidence by children, and other potentially vulnerable witnesses, remotely from the trial courtroom. That facility serves both the Supreme and District Courts. Attention is being given to the adequacy of similar facilities in other courthouses State-wide.

Juror support programme

Also, 1 January this year saw the commencement of a juror support programme, providing professional counselling services to jurors upon the completion of criminal trials. The level of utilization of that service, although not substantial, has been such as to confirm the desirability of its being offered. While that service is presently available only in Brisbane, consideration will be given to making similar facilities available in regional centres.

Rules Committee

I remind you, ladies and gentlemen, of the Rules Committee. As you may know, that Committee is chaired by Justice Williams of the Court of Appeal, and includes, from the Supreme Court, Mr Justice Muir, Justice Wilson and me, and the Principal Registrar, from

the District Court, Judges Robin QC and McGill SC, and from the Magistrates Court, Magistrates Gribbin and Thacker. It meets at least fortnightly out of ordinary court hours throughout the year. Its primary role is to monitor the operation of the Uniform Civil Procedure Rules. It regularly receives suggestions from Judges and members of the profession and the public concerning the more effective implementation and amendment of those progressive Rules. If you have a problem with the operation of the Rules, or a suggestion for enhancement, I ask you to raise it with either Justice Williams or me.

Commercial List

I also mention the initiative begun in the year 2002, the Commercial List. That is designed to ensure the optimal judicial management of urgent commercial cases likely to last five days or less. The list has operated effectively, under the direction of Mr Justice Muir and Mr Justice Chesterman. While it operates primarily out of Brisbane, those Judges may also sit on such cases in regional centres, and that is occurring.

Please also be astute to the electronic listing system now operating in Brisbane, where trial and hearing dates may be obtained on-line.

North Queensland

I am very pleased, indeed reassured, that you are led in this region by high calibre Judges and Magistrates, typical of the State overall, and I especially acknowledge the leadership of Justice Cullinane and Justice Jones. I am always grateful they welcome me into their jurisdictions on occasions like this and others.

The year has witnessed interesting developments in the legal culture in this part of the State.

For example, we saw the donation by the widow of the late Justice Douglas, who died in office in late 2002, of his law library now housed in Townsville, acknowledged at a ceremony at the end of last year. Last December saw the opening by the Attorney-General of stage two of the restored Mackay courthouse.

The Supreme Court Library is pursuing interesting thrusts in the region. There will be the significant address by Professor Bolton today. There will be the unveiling, shortly, of the legal heritage exhibition cabinets at Cairns courthouse, made possible by generous financial assistance from the local profession.

I was very pleased to welcome to the courthouse in Brisbane, in July, Mr Paul Martinez, to participate in the Library's oral history programme. There is a forthcoming interview programmed with Mr Hal Westaway, former partner of MacDonnells.

Also, well-known Townsville historian Dr Dorothy Gibson-Wilde is compiling a comprehensive register of legal practitioners and law firms in North Queensland over the century from 1861: the Library will publish that on-line as an interesting research resource. This is part of the Library's broader strategy to digitize Queensland's legal heritage rendering it more accessible to an interested public.

May I finally mention QPILCH, the Queensland Public Interest Law Clearing House Incorporated. This is a non-profit community-based legal service which coordinates the provision of pro bono legal services in public interest matters. It has been running for the last 3½ years. QPILCH staff assess applications for assistance from members of the public, for referral to member firms and barristers. Referrals are confined to public interest matters because they provide the greatest community benefit and maximize scarce resources. QPILCH is not a substitute for legal aid: it is an additional source of coordinated legal assistance for those who cannot afford available legal services. Its activity has been substantial. In the last year, for example, it has received as many as 171 applications. Its current source of funding is membership fees. Membership is open to practitioners, firms, and other legal organizations. I am patron of this organization, I should declare, and I am very pleased to endorse it enthusiastically. While its current thrusts have been focused on the Brisbane region, the Coordinator, Mr Tony Woodyatt, and the QPILCH Committee, are interested in expanding its activities in the regional centres. It may be, for example, that a Homeless Persons' Legal Clinic could be set up in

one or more northern centres. I raise QPILCH to encourage you, knowing your interest in pro bono work generally, to look at this as another avenue for desirable community outreach.

Conclusion

I have endeavoured to remind you this afternoon of some relevant new aspects of our judicial approach, both within the courtroom and through our interaction with the other branches of the profession. While my capacity to further your continuing professional development is limited, my involvement in ventures like this is symbolic of the judiciary's support for your own professional mission.

I will of course continue enthusiastically to support the profession State-wide, and to seek to foster its performance in the interests of those we serve.

I remain anxious to hear directly from you, should you have any concern which you feel I may be able to address. And I again thank you for your welcome, to Kaye and to me, and for your continuing interest in and support of your courts.