THE FUTURE OF LITIGATION – A QUEENSLAND PERSPECTIVE*

by John H. Byrne+

Attempt at Prediction

Let me burden you with a few ideas of what the near future holds for litigation in Queensland; and, if my predictions should prove to be accurate, what that means for barristers. My focus will be on resolution of disputes in the Supreme Court.

Last Few Years

To see where we might be going, it is worth reflecting on changes in litigious practice in the last 15 years or so, and what has prompted them. As examples:

- Case Management was introduced. This gave judges greater say over how the interlocutory phase would be managed and how the trial, if there were one, would be fought out. Judges began to decide things the advocates used to sort out: for example, whether evidence would be in writing;[1] and whether experts would confer.[2] Evidence of witnesses was to be in statements delivered well before trial:[3] to diminish the chances of surprise, shorten the hearing time and promote earlier, better informed compromise.
- The Peruvian Guano test[4] was abandoned. Only directly relevant documents had to be disclosed.[5]
- Interrogatories were to be delivered by leave only.[6]
- The Rules of Court were amended to provide for court-ordered referrals to mediation and case appraisal, even against the wishes of the parties.[7]
- The payment into court regime was extended to more classes of case by new "offer to settle" procedures.[8]
- The "single expert" rule[9] was introduced.[10]

And when the *Uniform Civil Procedure Rules 1999* arrived a decade ago, Rule 5 declared that their purpose was to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".

---

* An address to the Queensland Bar Association Conference, 7 March 2009.
+ Senior Judge Administrator, Supreme Court of Queensland.
1 *Uniform Civil Procedure Rules 1999* rr 295, 390 – 393.
2 *Uniform Civil Procedure Rules 1999* r 429B.
3 *Uniform Civil Procedure Rules 1999* rr 367(3)(j), 427, 429.
4 *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55.
5 *Uniform Civil Procedure Rules 1999* r 211(1)(b).
6 *Uniform Civil Procedure Rules 1999* r 229 – 230.
7 *Uniform Civil Procedure Rules 1999* r 323, 334.
8 *Uniform Civil Procedure Rules 1999* rr 352 – 365.
9 *Uniform Civil Procedure Rules 1999* r 423(b).
10 To a less than rapturous reception from the Bar.

These were initiatives of judges, through the Litigation Reform Commission and Rules committees. Driving them was a perception that, too often, our procedures were not delivering affordable justice.

Quest for Affordable Justice

Litigation was, in many cases, too expensive – for the litigants, and for the public who paid the operating costs of courts. Some work that lawyers were doing was not necessary to the just resolution of the dispute. Both public and private costs were commonly out of reasonable proportion to what was at stake.

There were two main objectives in the changes to the Rules of Court:

- Reducing the work the lawyers could do;[11]
- Fostering early, informed compromise. The ADR and offer to compromise initiatives were related to this. Of course, the law has always favoured compromise: "[a]s a means of resolution of civil contention litigation is certainly preferable to personal violence. But it is not intrinsically a desirable activity".[12]

Dissatisfaction with the way our adversarial system functioned was shared by politicians, who also saw litigation as frequently neither efficient nor cost-effective. So we got the *Personal Injuries Proceedings Act 2002*, the *Motor Accident Insurance Act 1994* and the *WorkCover Queensland Act 1996*.[13] The Parliament was anxious to divert insurers' money away from lawyers to the injured, and to minimise the delay and expense that prolonged litigation involved. Disputes were to be resolved quickly. Our politicians could see that litigation exemplifies Parkinson's Law[14] in operation.[15]

Early settlement was encouraged through sharing information before the parties conferred, discouraging prosecution of smaller claims, and by making it harder to start a court case. The parties would benefit. So would the public. Court waiting lists would contract. Fewer cases would be tried.

This was not all.

Judicial work shifted to Tribunals: for example, the monetary jurisdiction of the Small Claims Tribunal increased, as did the range of disputes within its jurisdiction.[16] Cases that used to be decided in courts were to be disposed of in tribunals because they are

---

[11] Although having them prepare witness statements was often an unduly expensive exercise, resulting in a highly crafted product.
[12] *The Ampthill Peerage Case* [1977] AC 547, 575 per Lord Simon of Glaisdale.
[13] Now repealed. See: *Workers Compensation and Rehabilitation Act 2003*.
[14] C. Northcote Parkinson, *Parkinson's Law: The Pursuit of Progress* (1962).
[15] For references to Parkinson's Law in operation see: Murray Gleeson, 'Managing Justice in the Australian Context' (Speech delivered at Australian Law Reform Commission Conference, Sydney, 19 May 2000) <http://www.hcourt.gov.au/speeches/cj/cj_alrc19may.htm> at 24 March 2009; Murray Gleeson, 'Commentary on Paper by Lord Browne-Wilkinson' (Speech delivered at Supreme Court of New South Wales Judges' Conference, Sydney, 11 September 1998). <http://www.hcourt.gov.au/speeches/cj/cj_cj2.htm> at 24 March 2009.
[16] See: *W & T Enterprises (Q) P/L v KO Taylor, Referee, Small Claims Tribunal & Ors* [2005] QSC 360, [1] – [2].

thought to deliver generally acceptable outcomes more quickly, cheaply and with less technicality. In some tribunals, lawyers are not allowed:[17] so influential is the perception that lawyers impede affordable justice.

Against this background, it should come as no surprise that governments were in no mood to provide legal aid for civil cases. However, the State Government supported self-represented litigants through financial assistance to the *Access Courts*[18] program and in other ways. And local government funded the appointment of a registrar to mediate in planning disputes.

Foretelling

The concerns and pressures that prompted judicial and political decisions to promote early, informed compromise and to restrict the work that lawyers can do will not abate.

What, then, might happen?

ADR Promoted

First, government will, I expect, continue to support alternatives to litigation. Substantial savings can be achieved through reducing the need for more judges, courthouses and support staff. That prospect will be attractive to government. So probably more will be done to encourage court-supervised ADR.

The success of Registrar mediation in the planning area should lead to extension of such a service to other courts. There is nothing new in such a development. Federal courts and tribunals, and courts interstate, already employ staff as mediators.

It would not surprise me if there were legislative interventions to promote private dispute resolution, encouraging arbitration or "private judging".

Money

While supporting alternatives to litigation, governments will, I predict, look to defray more of the public cost of civil justice by increasing hearing fees. There might be a sliding scale, with higher rates of recovery the longer the trial proceeds.

Next, litigation funding is here to stay. But what that means is hard to assess.

Information Technology

Information technology will affect the interlocutory phase and the trial.

The ramifications of large and costly disclosure are bound to provoke attempts to control it. Where disclosure might be particularly expensive, judicial officers will

[17] Eg: *Small Claims Tribunal Act 1973* s 32(3).
[18] See: "Launch of Access Courts" <http://www.qpilch.org.au/ 01_cms/details.asp?ID=384> at 25 March 2009. See also Queensland Courts, "Advice and Support" <http://www.courts.qld.gov.au/ 4186.htm> at 25 March 2009.

intervene early, mainly to narrow the issues and to focus the exercise on records that really matter.

New procedures will emerge to manage disclosure responsibly, especially in commercial and longer cases. The Federal Court's recent Practice Note[19] exemplifies the kind of protocol that courts will develop to contain disclosure. There are too many horror stories about waste in harvesting, and dumping on the other side,[20] thousands of documents for the judges to remain passive.

Increasingly, documents will be filed electronically. E-Trials will become commonplace. A few have already concluded.

Technology will influence the way evidence is taken. More use of video conferencing can be expected. Increasingly, witnesses will not come to a courthouse. Instead, their evidence will be given through video link.

Experts

Problems with expert evidence are well known; as examples:

- Some experts are partisan.
- Experts usually base their reports on different versions of the facts. As a result, their reports frequently pass like ships in the night.
- Taking expert evidence at trial usually occupies a deal of time.

Then the hapless judge, who gets to hear conflicting opinion evidence only because she does not understand enough about the topic to decide the case properly without expert assistance, has to decide between people who do know something about it.[21]

As advances in knowledge generate new areas of expertise, the complexities will increase. Courts must confront the difficulties. We have tried joint reports; and the single expert. It is not enough. Gathering and presenting expert evidence will continue to bedevil the preparatory phase, and the trial itself, unless judges influence these things. It is unrealistic to expect the profession to take the lead.

What will be done?

- There may be greater employment of special referees, who are themselves experts, to decide on conflicts of opinion between colleagues in their disciplines;
- Single experts will continue to be used;
- The number of experts to be called on an issue will be restricted by judicial direction, if not agreement; and
- Most importantly, expert evidence will be heard concurrently.[22]

---

[19] Practice Note No. 17, *The Use of Technology in the Management of Discovery and the Conduct of Litigation*, 29 Jan 2009.
[20] Often in non-searchable form.
[21] An idea which, to those who have not grown up with it from law school days, sounds like the product of a resolution at the Mad Hatter's tea party.
[22] Two decades ago, a similar concept was labelled "hot-tubbing".

Adducing the evidence of experts at the same time is routine elsewhere. Concurrent expert evidence does impose burdens on the judge, who must spend time in supervising the procedure and in preparing for the event. The Judges are, however, familiar with the concept and appreciate that the benefits are considerable.[23] This is, I predict, a vital part of our future.[24]

Pre-trial Interrogation

Oral interrogatories may be tried. American courts are familiar with this concept: taking depositions, they call it. It could work like this: an advocate might be allowed 30 minutes, well before the trial commences, to cross-examine one or two of the principal witnesses from the other side. This preview could help the parties to settle, if nothing else.

Enhanced Judicial Involvement

There will be more judicial intervention to limit: issues agitated, number of witnesses called, scope of documents to be disclosed, and time allowed for adducing evidence. Involving the judges in controlling such things is not inherently preferable to consensus by the lawyers. Responsibly, however, we cannot continue to leave these things largely to the lawyers. After all, in many cases, one side considers that complicating the litigation is in its interests. There will be times when judicial intervention is called for to resolve the dispute proficiently.

We can expect, by amendments to rules and legislation, that courts will be expressly empowered to fashion orders to reduce the range of issues to be explored, narrowing them to those with fair prospects of success, to confine disclosure to records that really matter, to limit the number of witnesses (expert and non-expert) who may be called, and to restrict the time occupied in evidence-in-chief, cross-examination[25] and addresses.

Contracting Trials

Another concern is the increasing length of trials.

---

[23] For a discussion of concurrent expert evidence see: Peter McClellan, 'Contemporary Challenges for the Justice System – Expert Evidence' (Speech delivered at the Australian Lawyers' Alliance Medical Law Conference 2007, 20 July 2007) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mcclellan200707> at 24 March 2009; Peter McClellan, 'Concurrent Expert Evidence' (Speech delivered at the Medicine and Law Conference), Victoria, 29 November 2007 <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcclellan291107.pdf/$file/mcclellan291107.pdf> at 24 March 2009; Peter McClellan, 'Expert Evidence – Aces Up Your Sleeve?' (Speech delivered at the Industrial Relations Commission of New South Wales Annual Conference), NSW, 20 October 2006 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mcclellan201006> at 24 March 2009.

[24] Those who wish to know more about what is involved should see "Concurrent Evidence: New Methods with Experts", a DVD produced by the Australasian Institute of Judicial Administration and the Judicial Commission of New South Wales.

[25] More often than not, cross-examination does more harm than good to the cross-examiner's case. So, on average, it would be a kindness to barristers, and their clients, to ban cross-examination. But so radical a change is not on the horizon.

You might ask: if the lawyers want 10 weeks of a judge's time, why shouldn't they have it?

For one thing, judges have a responsibility to manage their resources efficiently and effectively, which means that no more effort should be committed to the case than is reasonably necessary for its just disposition.[26]

Secondly, every day a judge sits to hear one case is a day she is not hearing another: and it might be your case that is postponed. Beyond the client's interests, if you practise in the Supreme Court, or aspire to do so, you have a financial interest in other cases being confined in length of hearing to no more than the time needed for a fair trial. Almost everybody should welcome directions that result in an efficient trial, if there must be one at all.

Thirdly, longer cases require more judgment writing time. Again, obviously, a judge working in chambers is a judge not in court to hear other cases: perhaps yours.

Why commit judicial resources to shortening trials? Won't the long cases mostly settle anyway? Many a case listed for trial settles because of the imminent availability of a judge to decide it. Because we know this, more trials are listed than there are judges to hear them. But late settlements in long cases create gaps that are harder to fill, which adversely affects a court's capacity to dispose of its work.

Long cases also make judicial life less attractive; and nobody needs grumpier judges.

There are many reasons why trials are taking longer, including legislation like section 52 of the *Trade Practices Act 1974* (Cth) and its counterparts in fair trading acts;[27] proliferation of records available to be explored; and that quite a few barristers practise defensively, despite immunity from suit in the conduct of litigation,[28] and without bearing in mind that, as Mason CJ has said:

> "[T]he course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise

---

[26] See *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446, where, at 448, Lord Roskill said: "[I]n any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."

[27] *Fair Trading Act 1989* s 38.

[28] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

> by barristers of this independent judgment in the conduct and management of the case."[29]

Whatever the reasons, ever more lengthy trials must be resisted. This imperative means that judges must intervene to bring about shorter, better conducted, trials.[30]

Trial Timetables

Judges will come to insist on adherence to prescribed limits in the conduct of cases, especially at trial. At the outset of the trial at the latest, if there appears to be a risk that the estimated length could be exceeded, judges will impose a timetable that ensures that the trial finishes within the time allocated when the case was assigned trial dates.

Adjourning a case part-heard is cruel, especially to the parties whose expectations of an end to the litigation are frustrated and who confront even more expense and delay. And if you have experienced a part-heard trial, you will realise how hard it is to return to the case months later. It is no easier for the judge.

More importantly, Lord Justice Staughton's Law[31] then operates: these days, a case adjourned part-heard usually takes, on resumption, twice as long as if it had not been adjourned: new witnesses are called, additional issues are raised, and old ground is reploughed.

Moreover, cases are now being set down for hearing up to nine months in advance. If your case is adjourned part-heard, the judge might not return to it for a long time.

An adjournment part-heard inflicts misery all round.

Ramifications for Barristers

What do the predictions mean for barristers?

- Skills and capacities in negotiation and ADR processes will be no less important in future as early, informed compromise will continue to be promoted.

---

[29] *Giannarelli v Wraith* (1988) 165 CLR 543, 556. See also Lord Templeman in *Ashmore* at 453 - 454: "It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner … [T]here has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249, 280, I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result … [T]he control of the proceeding rests with the judge."

[30] I would welcome considered suggestions for abbreviating both the time a case takes to come to trial and the length of hearing once it does.

[31] Sir Christopher Staughton, "Plain English for Lawyers" (1999) 31 *Bracton Law Journal* 86, 89: "Every adjournment doubles the length of what remains".

- Your judgment will matter more as judges confine the issues to those with reasonable prospects of success and limit disclosure and the scope for other work, in the interlocutory phase as well as at trial. Discrimination in points taken, witnesses called, and so on will be more important as barristers are obliged to make choices.

- At the trial – an event which will still be a rare and generally disfavoured way of resolving disputes – advocates will need electronic document management skills.

- Skill in managing and using experts will be required, especially as taking their evidence concurrently becomes routine.