SUPREME COURT OF QUEENSLAND

Australian Lawyers' Alliance National Conference
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Hyatt Regency Hotel, Sanctuary Cove
"Litigation as a mechanism for the enforcement of rights: 21st century issues"

The Hon Paul de Jersey AC
Chief Justice

Introduction

Major anniversaries inspire reflection on the past, and forecasts of the future.

This year's national conference takes place here at Sanctuary Cove in the sesquicentenary anniversary year of the establishment of Queensland, which occurred on 6 June 1859, with the separation of the colony of Moreton Bay, to be named Queensland, from the colony of New South Wales. Of course it was with federation that the colony became a State, on 19 January 1901. This year 2009 also marks the 50th anniversary of the re-establishment of the District Court of Queensland, and in two years time we will, in 2011, mark the 150th anniversary of the Supreme Court. We hope then to open the new metropolitan Supreme and District Courthouse.

In celebrating 150 years of good government in this State, we are conscious that the work of government includes the work of its third branch, the judiciary. The reflection the anniversary inspires has led me, this afternoon, to use the opportunity to look for a short time at the model by which the courts of law discharge their core business, litigation, and how well that model serves the enduring ideal, which is accessible justice according to law.

I appreciate that the Commonwealth Attorney-General is scheduled to speak on aspects of accessibility to justice tomorrow. Naturally enough I will be speaking from a court perspective, and especially a Queensland court perspective, though I sense the points I will raise will, by and large, share a national orientation. If the Attorney and I cover similar

subjects, our views will likely not coincide in all respects, and you may find any variation of interest.

Queensland courts

To establish a Queensland setting, I should first briefly mention our judicial landscape.

The Supreme Court of Queensland comprises 25 judges, including 6 permanent Judges of Appeal. There are resident Supreme Court Judges in Brisbane obviously, and also in Rockhampton, Townsville and Cairns. The court sits as necessary in 11 centres outside Brisbane, as far west as Mount Isa, Longreach and Roma.

The District Court, of 38 judges, sits in some 44 centres, with resident judges in 8, and the Magistrates Court, comprising 78 magistrates, sits in 106 centres, including remote places in Cape York and the Torres Strait.

The distribution of jurisdiction among the three courts has recently been reviewed: an enhancement of its rationality is in the offing.

Because of the necessary decentralization of government in Queensland, executive governments have always acknowledged the desirability of courts sitting in any substantial population centre. This means that running the court system in this State is consequently more expensive.

The basic litigation model

Courts nationwide still today, as 150 years ago in Queensland, implement the same basic litigation model. Certainly there have been many changes over the last century and a half. But courts are still there to provide the forum, not for parties seeking an arbitral award, or parties seeking a mediated resolution or other result from the consensual processes of ADR, but for litigating parties seeking judicial adjudication.

Executive governments continue to support the approach of the courts. They do that by providing the financial resources necessary to keep them running, while respecting the doctrines of the separation of powers and the independence of the judiciary.

There is indeed a presumption that legislatures will uphold a citizen's access to the courts of law, so that legislation will be construed, so far as possible, as not to limit that access (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493). Chief Justice Gleeson said as much in 2003, as had Dixon J in 1932 (*McGrath v Goldsborough Mort and Co Ltd* (1932) 47 CLR 121, 134).

The subsistence of the basic litigation model over so many years bears some testament to its perceived effectiveness.

In any re-examination of the court process, in a context where other alternate methods of dispute resolution are regularly proclaimed, it is important to acknowledge three fundamental features.

Fundamental features

The first is that the enforcement of a judgment of a court – whether criminal or civil – is backed by the coercive power of the State. The second is the circumstance that the State provides this mechanism to litigating parties at comparatively minimal expense to them: the services of the judicial officer and court staff, and access to the courthouse, are provided at virtually no cost, in that filing costs etc payable in the civil jurisdiction would go nowhere near meeting that cost. The third feature is that the courts themselves enhance the authority of their judgments by ensuring those judgments result from a wholly transparent and accountable process.

None of those features ordinarily characterizes other, non-curial methods of dispute resolution.

Transparency

The public monitors the issue of transparency in particular. As an example of that, there is currently a suggestion that the stipulation for openness should extend to the televising of court proceedings in South Australia, as in New Zealand. The issue has subsequently arisen informally in Queensland.

Televising court proceedings

This is not the occasion for any detailed examination of that possibility, although I remain unconvinced that taking that step is either necessary or desirable: my present concern is that it may imperil the integrity of the process.

What I would fear would be players in the courtroom inevitably being distracted from the main proceeding and playing up to the camera: it is the awareness it is there which would matter, however unobtrusive it may be. Also there would be risk of sensationalising the process, by short titillating clips taken out of context for airing on the six o'clock news. For locals, imagine for example the capital which could in that way have been made out of the Sica committal in the Magistrates Court in August/September this year.

Court-imposed suppression orders

Another current query concerns the extent to which courts make suppression orders. Statutes mandate closed courts in certain limited circumstances, as in terrorism trials, and limit reporting, as in child sexual abuse proceedings. Apart from statute, the occasion for court imposed suppression should be extremely rare, and I am pleased to acknowledge that is the experience in Queensland.

A suppression order was imposed by a Queensland court in recent years, early in the piece at the committal of former State Minister Gordon Nuttall. But that suppression was quickly lifted after the Magistrate entertained comprehensive submissions including from the newspaper. Another was imposed by a Magistrate concerned about vigilantism, in a child pornography case, but it was superseded by a subsequent public sentencing in the

District Court in which the name of the offender was publicized. I can recall none other. I struggle to identify sufficient bases for court imposed suppression orders.

Access to court files

In similar vein, citizens in this jurisdiction still enjoy comparatively free access to court files, which I consider integral to the accountability of our process. Privacy concerns may lead to some necessary limitation in the future, but I hope that sorry day will be quite some time off.

The right of access to files is particularly important these days, as more and more of the evidence and submissions in proceedings is presented in documentary form. More often than not, written material is not read out aloud at the court hearing. Interested members of the public should ordinarily be allowed access to that material, so that they may understand and form their own assessment of the court's sentence or other order imposed; and that is so regardless of the reasons expressed by the judicial officer. That by the way, the expression of reasons, is a feature of the court paradigm which distinguishes court proceedings from many tribunal proceedings: judicial officers invariably express reasons for their decisions, whereas tribunals do not always do so.

Courthouses

In providing the resources necessary for the functioning of this system of court adjudication, executive governments of course provide the courthouses themselves. The courthouses serve both a utilitarian and symbolic function. As to the latter, "the courthouse" has long symbolized the stability and security of the community it serves. A visit to regional Queensland well illustrates this. We see fine courthouses, in the middle of towns: focal points for government and civil enforcement.

The new metropolitan courthouse for the Supreme and District Courts in Brisbane will, I am confident, be an inspiring building which will fix public perceptions of the role of those courts on the reality, which is their being bastions of independence and objectivity in the

delivery of justice according to law. The predominantly glass external presentation of our new courthouse will signify, to the observer, the transparency of the process going on within, and accessibility. As I have said before, the existing Supreme Courthouse, which on three sides rather resembles a fortress or bunker, presents as the very antithesis of accessible twenty-first century justice.

Unfortunately there is substantial disproportion between the financial resources available to the Commonwealth and to the States for their respective courthouse constructions, and in some jurisdictions, Supreme Courts in particular are languishing in courthouses long overdue for replacement. I hope our current project in Queensland may inspire the necessary reconsideration elsewhere.

The work accomplished in these courthouses utilizes a model of potentially great value to litigants. History has shown that it is a durable, robust model which will likely remain the primary model for the determination of disputes which cannot be resolved consensually.

I turn now more directly to the question of accessibility. I have on other occasions termed limitations on access to the courts and justice as the greatest albatross besetting our system.

Access to criminal justice

Fortunately access to the criminal justice process is reasonably assured because of the availability of legal aid. No doubt a government inclined to reduce the availability of legal aid in criminal cases would reconsider, if reminded of *Dietrich v R* (1992) 177 CLR 292. The High Court there disavowed any right under the common law to legal representation in the criminal court. But it affirmed the existence of a powerful weapon in a court's own armoury when confronted with an unrepresented accused facing an unfair trial. That is the power to stay the proceeding.

Under our system, with most accused receiving legal aid, the State is funding both prosecution and defence. There is a point which should be made in this regard. In determining levels of legal aid for the defence, executive government and its agencies should seek to ensure broadly comparable treatment with the prosecution. Sometimes the legal profession has complained of disproportion between the resourcing of prosecution and the defence, from time to time going in either direction. That should not occur: each party should be provided with adequate funding. Naturally a prosecution will often cost vastly more than a defence. But each side should be adequately equipped.

Informing modern juries

There is one aspect of ensuring the right to a fair trial in contemporary times which I will now mention. It concerns the way we inform juries. It is very much in the interests of both the prosecution and defence that jurors have a clear understanding of both factual and legal issues. That is especially so in this day and age, where recent decades have witnessed the need for increasingly complex directions on some defences, notably provocation and self-defence. Various jurisdictions are examining the possible simplification of jury directions, which is a most desirable goal, but the High Court jurisprudence amounts to an extremely heavy constraint.

Critics of the modern jury system sometimes argue that jurors lack the intellectual capacity to make the increasingly complicated determinations which now arise. But empirical studies suggest it is not so much the intellectual capacities of the jurors which is problematic, but rather, the manner in which the material is presented. We are increasingly recognizing the need to reassess the way we communicate with jurors, to multiply the techniques we use to ease the jury's fact finding process. Charts, flow sheets, written summaries, video re-enactments, computer-based crime scene analysis, increasingly a feature of our approach, are movements in that direction.

We also need to be alive to the differences among the generations and age groups in the manner in which information is best assimilated. Juries increasingly include members of

generations X and Y. Whereas "baby boomers" most generally have informed themselves by listening and reading the printed word, younger citizens are generally more interested in electronic forms of communication: the internet, mobile phones etc. The prospect of best informing your subject will be enhanced if you use his or her preferred means of communication. Juries reflect a mix of ages, and so the means of communicating with them could involve a mix of techniques.

Courts are sometimes criticized, fairly or not, for being tardy in their embrace of change. When I joined the Supreme Court of Queensland in 1985, it was not the practice for trial judges to offer the jury any assistance, as to their role, the procedure or the law, until right at the end of the trial, in the summing up. In the early to mid-1990's, we adopted the practice of giving a jury a fairly comprehensive opening statement about those matters. We came to accept other things, such as jurors asking questions about the evidence during the trial: Why has X not been called as a witness? Could witness Y explain this aspect of the facts? Then the late 1990's saw the introduction of the sorts of aids to which I have already referred. In 1998 we produced a video about the process which has since been played throughout the State daily to all potential jurors before they enter the courtroom. We developed explanatory brochures, and the Juror's Handbook which is provided to jurors when summoned.

Technology

Technology raises endless possibilities. Earlier in the year our Supreme Court tried a Wickenby prosecution involving thousands of documents. Counsel, accused, judge and each juror had access to a computer: all the documents were managed and displayed electronically. The trial took five to six weeks. The trial judge is confident that the traditional approach – produce a document, tender it, pass it around the jury box, would have taken not five to six weeks, but probably some months. And this is axiomatic: a jury frustrated by time delays will probably not be a productive jury. The forthcoming trial of Dr Patel is to proceed with similar electronic support

Efficiency

The efficient presentation of a criminal trial is important to the quality of the outcome and thereby accessibility in the broad sense. One reads occasionally of jury trials going horribly wrong, and the "Sudoku trial' in New South Wales last year comes to mind. That apparently involved aberrant conduct by jurors. The challenge is to keep the attention of jurors, and that means keeping trials within sensible proportions. The expedients to which I have referred are helping ensure that in this jurisdiction, where lengthy criminal trials are a rarity.

Access to civil justice

May I pass now to the question of accessibility to the civil side of court operations?

In this arena, legal aid is generally not available, and allowing for other competing demands on the public purse, it is unlikely government sponsored legal assistance will become available for civil disputants. While in Queensland courts, "court costs" are comparatively low, it is the cost of legal representation which means an increasing band of unrepresented litigants, and the real prospect that worthwhile claims will not be identified and pursued.

It is not my objective today to inveigh against the cost of legal representation. Merit and training should be rewarded, and market forces will prevail. I will however at least voice my concern, shared with others, about the time-based calculation of remuneration in the profession, which it has been said rewards inefficiency.

But I offer no alternative today, and what I am going on to say works from current realities.

Pro bono work

The courts and the profession have to an extent worked laterally around this problem. The profession has developed a substantial and commendable pro bono commitment, in some cases organized nationally within firms, with partners dedicated to just that stream.

Another example of the pro bono initiative is the public interest law clearing houses. QPILCH, established in 2001, has morphed from its inaugural position, as a public interest referral service with one part-time staff member, to its position today, where it works through 16 full and part-time staff members who manage a wide variety of services: three referral services (public interest, Queensland Law Society and Bar schemes); three direct services (Homeless Person's Legal Clinic, Refugee Civil Law Clinic and self-representation service at the court); five student clinics; support services and a Rural Regional and Remote Project.

All of that work draws substantially on the generous effort and resources of member firms allied with QPILCH and members of the bar.

I offer some statistics as at June last year. Approximately 400 applicants for assistance had been referred to the service, with an estimated minimum value of claims exceeding $1 million – fewer than 50% of them came back, suggesting satisfaction with the assistance provided; as to the Homeless Persons' Legal Clinic, almost 1,500 clients were assisted, with claims exceeding $4.6 million; the self-represented service operating from the Supreme and District Courthouse in Brisbane assisted 86 clients in just seven months; and the other services helped more than 650 clients. Overall, this is a substantial level of utilization.

The self-represented service operating from the courthouse in Brisbane began in 2007. It is essentially a citizens' advice bureau modelled on the highly successful service which has operated from the Royal Courts of Justice in London now for many years. The initiative is called "accessCourts", and includes a free-of-charge professional advice service run by QPILCH, in conjunction with a network of trained volunteers who assist persons involved in court proceedings through the process. The system has the financial support of the Queensland government. It is the first of its kind in Australia, and maybe the first such service ever outside the United Kingdom. The year 2008-09 saw 213 disputants

utilizing this service in the Trial Division of the Supreme Court and in the District Court, and 17 in the Court of Appeal. They were given some 477 appointments with QPILCH staff.

Other court responses

Yet for all this, access to the courts on the civil side, nationwide, remains substantially limited.

Queensland Courts have responded in various other ways – removing procedural complexity where possible, as for example through the establishment of the Uniform Civil Procedure Rules covering all three State Courts uniformly; and ensuring the full utilization of the mechanisms of alternative dispute resolution, on the assumption this should involve the parties in less expense.

Queensland courts regularly order that cases be subject to mediation, externally to the court, at the expense of the parties. The parties pay the mediator's charges. The parties often benefit from the early consensual resolution of cases which need not have proceeded to adjudication. The court lists also benefit, allowing earlier hearings for those cases which must run the full distance. I acknowledge a view that in an ideal world, the mediation facility would be provided within the courthouse, effectively subsidized financially by the State. The other view is that taxpayers need only fund the treatment of those cases which must run the full judicial gauntlet, the cases for which the litigation paradigm was developed.

Our courts have also, importantly, acknowledged a need to progress cases, because delay is inimical to accessible justice. And so case management has been developed, though to be effective it needs comprehensive computerized backup, which is not inexpensive. Judges have subjected themselves to protocols ensuring the timely delivery of reserved judgments.

These responses are well-established and working well. What more needs to be done, however, to streamline the process of civil litigation, in order to enhance accessibility – by reducing cost, eradicating delay and enhancing the reliability of outcomes?

Future possible joint court-profession responses

The reality is that much civil litigation, and especially commercial litigation, is too cumbersome and too expensive. The concern is not however confined to commercial litigation. For example, it led the Queensland government in recent years to enact legislation, in the personal injuries area, to erect hurdles and barriers to litigation, maximizing the prospect of mediated resolutions. It also led in Queensland to expansion of the purview of tribunals, based on an ideal of less expensive, less formal, more expeditious outcomes, sometimes with lawyers excluded from the process. Whether those objectives are being achieved remains moot, although a tribunal may develop a relevant expertise worth upholding.

It is however a concern that a government should have felt constrained to turn its back, even to that extent, on the traditional adjudicative approach. Doing so betrayed dissatisfaction with the extent to which courts were ensuring that consensual modes of dispute resolution were first explored, and dissatisfaction with the degree of rigour attending the court process. Especially in the latter regard, the dissatisfaction was substantially warranted: how frequently time-tables for the completion of procedural steps were breached, without substantial sanction; how frequently trials were adjourned, for one party's neglect – and often that party's lawyer's, for the quid pro quo of a costs order which may or may not have been satisfied.

The legal profession shares some of the responsibility for that position, in not actively progressing cases, taking unnecessarily elaborate and expensive steps in litigation, failing rigorously to confine issues to the directly relevant, and allowing trials to become unduly protracted exercises. The need for increasingly marked judicial intervention, which has for some years been acknowledged by the courts, is becoming more acute.

Speaking of the cost and scope of contemporary litigation inevitably draws one to the disclosure or discovery of documents, an aspect of litigation which long ago came to stigmatize, most unflatteringly, the civil law process in the United States.

Queensland's direct relevance test for the disclosure of documents has worked well in limiting disclosure, bringing it within manageable limits. We dropped the *Peruvian Guano* test in this jurisdiction more than a decade ago.

But there remain cases where the scope of disclosure is still mammoth. That must justify early judicial intervention to impose limits, and to supervise the presentation of the necessary documentation: filing the documents electronically, for example, and in a way which will facilitate rather than hinder their being analysed.

The Federal Court Practice Note 17, issued in January this year, on "the use of technology and the management of discovery and conduct of litigation", illustrates means by which judges may limit disclosure.

Judges and legal representatives have a joint obligation to keep litigation within manageable proportions. As my colleague Justice John Byrne has pointed out, "there are many reasons why trials are taking longer, including legislation like s 52 of the *Trade Practices Act 1974* and its counterparts in Fair Trading Acts; proliferation of records available to be explored and that quite a few barristers practise defensively, despite immunity from suit in the conduct of litigation, and without bearing in mind that, as Mason CJ has said:

> "The 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 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 by barristers of this independent judgment in the conduct and management of a case."

I mention the setting of timetables, possibly limiting the time allocated for cross-examination, and the like, as approaches which may increasingly need to be taken. Other limitations might be contemplated, for example as to the number of witnesses who may be called on an issue. As time goes on, the rules of court may well have to be amended to ensure the necessary backing for judges persuaded to follow such courses.

Queensland has a "single expert" regime. It was introduced in the year 2004 to address suggestions of partisanship, and to streamline judicial decision-making on the basis that in difficult areas, it is hindered rather than helped by a proliferation of competing expert views. The new system has worked comparatively well. I expect this trend will continue, and extend in this State to the taking of expert evidence concurrently, a feature which has worked very well in the Supreme Court of New South Wales. The object is more efficient litigation leading to the most reliable result.

As we journey through this developing landscape, judges will be focusing more intently on how they can most efficiently utilize limited court time. Governments and the public will be watching to ensure they do. Note the public interest in the annually published ROGS data, by the Productivity Commission.

Judges will be anxious to ensure that the cases which can settle are compromised early in the piece. They will be concerned to confine the trials which are necessary to issues of principal relevance. Increasingly, barristers will find themselves discarding the merely arguable, and confining themselves to what have traditionally been selected out at the "best" points.

General

We jointly participate in a regime available to litigants at the general expense of the taxpayer. While some of that expense is recouped through court fees, the majority is not. Hence the query sometimes voiced, why parties to especially lengthy proceedings should not contribute more substantially to the cost of running the court. A better way to approach this, I suggest, is to ensure that where a proceeding runs to trial, the trial is conducted with maximum efficiency, with the evidence limited to the immediately relevant issues, with the documentation confined and managed electronically, and with the exercise of economy in the selection of witnesses. Ensuring that sort of approach is a joint mission of counsel and judge, but if counsel passes up the opportunity to cooperate in that way, then it may be expected that the judge will become more interventionist and controlling.

Well, you may be asking, what has all of this to do with the accessibility of justice? The answer is that "accessibility" is not established once a litigant enters through the courtroom door. Equally important is the quality of the process to which the litigant gains access.

The stipulation for justice according to law is not satisfied if the accused in the criminal court is subject to a jury not appropriately enlightened about an otherwise difficult or puzzling legal or factual landscape. Neither is the stipulation satisfied if a civil litigant is beset with the fruitless ventilation of marginally relevant issues, the disclosure and inspection at great expense of mountains of documents of which a handful may be helpful, and other sources of undue expense and delay.

Now as I have made clear, I am upholding rather than condemning the traditional litigation model, civil and criminal. It is the model which has withstood rigorous testing, monitoring and continuing assessment over many decades. It provides a good way of dealing with those cases which must proceed to adjudication, whereupon the "successful" party, whether it be the Crown, the plaintiff or the defendant, becomes the beneficiary of the coercive power of the State to aid in the enforcement of the rights thereby established.

Conclusion

Courts of law must remain the primary adjudicators of disputes between citizens, and between citizen and State, where the dispute cannot be resolved consensually. The courts have been established and equipped on that basis. They exercise the judicial power of the State, independently and incorruptibly. The citizens expect them to fulfil that role.

Over the decades the courts have embraced desirable change. But the model for court adjudication rightly remains basically as it stood many decades ago.

The challenge to increase the accessibility of justice according to law will not be met by abandoning that robust and enduring model, but by persisting with gradual and incremental refinement appropriate to meet contemporary conditions.

That course posits substantial cooperation between the courts and the legal profession, for they must jointly recognize that a vibrant and responsive judicial system is essential for the identification and vindication of rights, both criminal and civil, and ultimately, the right of access to the adjudication of a court of law in accordance with that court's constitutional charter and the judge's or magistrate's sworn duty.