SUPREME COURT OF QUEENSLAND

Australian Insurance Law Association and Queensland Law Society Insurance Intensive
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"Insurers and the judiciary: arm's length or not?" *

The Hon Paul de Jersey AC
Chief Justice

The 1998 film "A Civil Action" starring John Travolta brought many legal issues into the public domain, particularly those relating to access to justice in civil courts, albeit in an American context.

Those legitimate claimants ended up exhausted, frustrated and with very little to show. They were denied their right to an efficient determination of their rights, because the curial proceeding was essentially manipulated by others more interested in their own material reward.

The film highlighted two broad issues I will discuss today, issues of particular relevance to insurers. They are the social utility of funded proceedings, and the financial risks assumed by entities funding litigation.

It is an undeniable fact that insurers today substantially facilitate access to justice in the civil courts. Insurers stand behind parties in much civil litigation, indemnify parties being sued and make the pursuit of claims by victims financially worthwhile.

By these means, insurers fulfil an important public function, fostering civil justice by providing access to justice for some otherwise unable to afford it.

The community's preoccupation with criminal justice cannot obscure the significance of civil justice. The leading UK civil proceduralist Sir Jack Jacob, in his 1987 Hamlyn

*I have been substantially assisted in the preparation of this address by my Associate, Mr Leonid Sheptooha.

Lectures entitled "The Fabric of English Justice", went so far as to assert that "the system of civil justice is of transcendent importance…for the people of every country."[1]

Legal philosophers from Aristotle to John Rawls have recognised the crucial importance of civil justice. Central to their writings is the notion that "the administration of justice should be accessible to those involved in conflict."[2]

This point was emphasised by the Law Council of Australia in its 2008-09 Annual Report:

> Ensuring access to justice for all Australians has been a goal of the Law Council for decades…The provision of justice to the Australian community is fundamental to the acceptance of the rule of law and to the stability of the community at large.[3]

This stipulation is important, if obvious. But obvious also is our failure to secure that ideal. There is, has always been, and maybe always will be, substantial limitation on access to justice according to law on the civil side. I have on other occasions termed limitations on access to the civil courts the greatest albatross besetting our court system.

Fortunately, access to the criminal justice process is reasonably assured because of the general availability of legal aid. On the civil side, the story is quite different. Legal aid is generally not available in the civil arena, and allowing for other competing demands on the public purse, it is unlikely government sponsored legal assistance will ever become generally available for civil disputants who lack sufficient financial means.

In Queensland courts, actual "court costs", filing fees and the like, are comparatively low. It is the cost of legal representation which ensures an increasing band of unrepresented litigants, and the real prospect that worthwhile claims may not be identified and pursued. It

[1] Lord Justice Jackson, 2009. *Preliminary Report- Civil Litigation Costs Review*, 41.
[2] Lord Justice Jackson, 2009. *Preliminary Report- Civil Litigation Costs Review*, 40.
[3] Law Council of Australia, *Annual Report 2008-09*, p.9.

is an unfortunate reality that only the well-heeled financially can afford to fund the litigation of their civil claims.

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.

QPILCH is another example of the pro bono initiative. The Queensland government has additionally financially supported a citizens' advice bureau in the metropolitan courts, dispensing legal advice free of charge to unrepresented potential litigants. We have also introduced a court network of voluntary guides based on a very successful Victorian model.

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

Hence my acknowledgement today of the important role of insurers in facilitating access to justice in the civil arena. Insurers are commercially motivated, but they actually fill an important public role for that reason.

As a sidenote, let me remind you of a historical twist. There is a general rule of practice which forbids reference during a jury trial to the existence of a defendant's insurance.[4] The perceived danger is that if a jury knows a defendant is insured, the jurors will subconsciously be more inclined to be generous to the plaintiff. Such a rule does not operate in a trial before a judge sitting alone, though in the 1938 case of *Carpenter v Ebblewhite*,[5] Lord Justice Slesser suggested that the rule of practice may not be limited to jury trials and that the fact of insurance should perhaps not be disclosed even to a judge

[4] Derrington and Ashton, 2005. *The Law of Liability Insurance (2nd ed)*, p.1258.
[5] [1939] 1 KB 347.

sitting alone. That view was rejected out of hand in 1943 in *Harman v Crilly*;[6] it is axiomatic that the judicial mind is impervious to prejudice!

The existence of insurance is generally never mentioned in litigation over insured claims even before a Judge sitting alone. On one view, this sits oddly with its obvious social utility, though in real terms it is irrelevant to the determination of fault and its extent. And I note that we no longer have jury trials for insurance type work in this jurisdiction.

The reason why Judges should not be told about the existence of insurance, in contemporary times, is not a real risk of prejudice, but perceptions of the possibility of prejudice, which similarly explains why offers to settle remain sealed until consideration of costs orders arises. In these times, we are much more sensitive than previously to the way people perceive things.

That frolic completed, I turn more directly to an issue of particular relevance to insurers, the efficient conduct of litigation, and that will be the major thrust of this address.

Insurers have an obviously high interest in the economic and generally efficient conduct of the litigation in which they are involved, especially in relation to cost.

We all recall how, about 7 years ago, the financial concerns of insurance companies sparked major national tort law reform. Among the reasons advanced was the allegedly overly generous levels of damages awards. Whether that be right or wrong, the way courts operate can have a serious impact on the insurance industry.

Inefficiency in litigation could lead to insurers avoiding court proceedings altogether, and seeking resolution through other less reliable mechanisms. Excessive cost in court proceedings could translate into higher premiums, and even lead to the complete

[6] [1943] 1 KB 168.

unavailability of insurance. Such unavailability, though for other reasons, was, those few years ago, impacting on the staging of important community events.

For all these reasons, the courts must be, and are, astute to the need for a court system which, on the civil side, runs optimally.

The reality is that much civil litigation, especially commercial litigation, is too cumbersome and 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, thus 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.

It is 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. Such dissatisfaction emphasises the pressing need for Courts to be proactive in ensuring litigation is conducted efficiently.

The need for efficiencies in the contemporary approach to litigation goes without saying.

Parties in the Federal Court, for example, are now legislatively admonished to conduct proceedings and related negotiations so as to facilitate the "just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible."[7] This is the overarching purpose of the Civil Practice and Procedure Provisions in the Federal Court of Australia Act.

[7] Sections 37M and 37N *Federal Court of Australia Act* 1976 (Cth).

Queensland's effective Uniform Civil Procedure Rules similarly provide that the overriding obligation of the parties and the court is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."[8] A party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.[9]

In its Civil Justice Review Report in 2008, the Victorian Law Reform Commission recommended the overriding obligations should also saddle insurers. In its view:

> The overriding obligations should be owed by the parties, lawyers and their legal practices and any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in civil proceeding.

One of the most fundamental ways of improving access to justice and court efficiency is to address the cost of dispute resolution.

This point was made in the UK by Lord Justice Jackson in his recent Civil Litigation Costs Review Preliminary Report, emphasising that promoting access to justice "includes, so far as is possible, conducting litigation at a proportionate cost."[10]

Chief Justice Spigelman is one of many others who have addressed this issue, remarking that "the principal focus of attention for those of us involved in the administration of justice must now be the costs of the process", that is, "the overall costs imposed upon the parties by the entire process of dispute resolution."[11]

Queensland courts have acknowledged the need to progress cases, because delay and high cost are inimical to accessible justice. Thus, case management has been developed, though to be effective it needs comprehensive computerized backup, which is not

[8] Section 5(1) *Uniform Civil procedure Rules* 1999 (Qld).
[9] Section 5(3) *Uniform Civil procedure Rules* 1999 (Qld).
[10] Lord Justice Jackson, (2009). *Preliminary Report- Civil Litigation Costs Review*, 21.
[11] Lancken, S and Johnson, C. 2009. *Common Ground on Access to Justice Reforms*, 43

inexpensive. Furthermore, Judges have subjected themselves to protocols ensuring the timely delivery of reserved judgments.

These responses are well-established and working well. What more can Courts do to enhance efficiency, particularly in insurance-based proceedings?

Given the role of insurers in facilitating access to justice, Courts must be responsive, recognising insurers' prime interest in litigation efficiency. The streamlining of insurance-based litigation is of public benefit: apart from anything else, it bears in the end on premium levels.

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, 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.

It surprises me that some jurisdictions retain that test. A virtually unlimited disclosure obligation is a recipe for waste. Also, it brings the system into disrepute. I am pleased that Queensland took that progressive step, and so long ago.

But there remain many cases involving insurers where the scope of disclosure, even allowing for the direct relevance test, is still mammoth. That warrants 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 of 2009, on "the use of technology and the management of discovery and conduct of litigation", illustrates means by which judges may limit disclosure.

We must strive to limit evidence to the immediately relevant issues, with the documentation confined and managed electronically, and with the exercise of economy in the selection of witnesses. The setting of timetables, possibly limiting the time allocated for cross-examination, and the like, are approaches which may increasingly need to be taken. Ensuring this sort of approach is a joint mission of counsel and judge and in a broader sense, that of insurers as well, for they are the source of instructions.

Judges are as a matter of course anxious to ensure that the cases which can settle are compromised early in the piece. They are also concerned to confine the trials which are necessary, to issues of principal relevance.

As time goes on, the rules of court may have to be amended to ensure the necessary backing for judges persuaded to follow such courses.

I briefly mention Queensland's "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 here to the more regular taking of expert evidence concurrently, a feature which has worked very well in the Supreme Court of New South Wales. To the extent it has occurred in Queensland, the Judges have considered it a success. The object is more efficient litigation leading to the most reliable outcome.

The broad issue in all these areas is of course accessibility to civil justice. "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 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 only a handful may be helpful, and other sources of undue expense and delay.

In this context, it may interest you to know that my colleague Justice Byrne, the Senior Judge Administrator, convenes a group of judicial officers, administrators and practitioners committed to achieving the better resolution of civil cases.

Among the matters being pursued are enhanced court supervised ADR, to facilitate earlier, informed compromises; a regime for the cost effective management of disclosure, with particular attention to confining disclosure to records that actually matter, and developing protocols for e-disclosure; experts, including single experts, the determination of complex disagreements between experts by another expert in the discipline functioning as a special referee, and the taking of evidence of experts concurrently; timely judicial intervention, in those cases which need it, to narrow the issues in dispute, limit the work to be done in the interlocutory phase and reduce the court time taken if the case must be resolved by trial; and the use of technology to secure efficiencies through e-trials. You may expect to see refinements introduced over the next 12 to 18 months resulting from the work of that group.

Now I acknowledge that many of these themes have been around for a long time. But they must not slip from our radars. A seismic shift occurred in the late 1980s with our Supreme Court's embrace of ADR. That culled our lists substantially over the next few years to the point where a proceeding ready for trial could be allocated hearing dates within 3 months of readiness. That remains the position. Our challenge now is different. It is to keep trials within manageable proportions. And it is to that end that we need continually to monitor the application to our process of the range of mechanisms being considered by Justice Byrne's committee.

I turn now to a different subject, the identification of insurers as litigation funders, with some of the consequences and possible consequences of that.

Over the last 20 years, the Courts have adopted a more liberal attitude to litigation funding, leading to an in-principle sanction by the High Court in 2006 in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. Mason P had observed in the Court of Appeal:[12] "These changes in attitude to funders have been influenced by concerns about access to justice and heightened awareness of the cost of litigation."

The majority in the High Court implicitly endorsed Mason P's further observation[13] that "[p]ublic policy now recognizes that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation".

The respective roles of litigation funders and insurers are comparable given that:

- both enter into tripartite contractual relations with the funded client or insured and their lawyers;
- both assume day to day role responsibility for the provision of instructions to the lawyers with the carriage of the matter;
- both pay for the conduct of the litigation; and
- both bear any adverse costs orders.[14]

Because of those similarities, it is unsurprising there have been calls for presently recommended litigation funding rules to apply to insurers as well.

One suggestion is that disclosure by all litigation funders, including insurers, of their funding or insurance arrangements, should be made mandatory. This suggests another

[12] (2005) 63 NSWLR 203 [at 226].
[13] (2005) 63 NSWLR 203 [at 227].

issue: should Courts have the power to order that the funder put up security for costs in an appropriate case?

The disclosure to the Court, and parties, of funding arrangements, finds precedent in the United States Federal Rules of Civil Procedure,[15] which require mandatory disclosure of applicable insurance policies at the commencement of proceedings.

As I said earlier, the fact of insurance has always been considered irrelevant to a court's determination. It is, on the other hand, highly relevant to a claimant, who will want to recover the "fruits" of the litigation, rather than be left with a pile of papers and the solicitor's account.

There is currently no specific provision in the UCPR allowing pre-proceeding disclosure of insurance documentation. This is not to say that disclosure cannot be ordered in a current proceeding, as *Company Solutions (Aust) Pty Ltd v Keppel Cairncross Shipyard Ltd (in liq)*[16] illustrates. Justice Douglas determined that it was in the interests of justice, and that special circumstances existed[17] sufficient to support an order that an insurance policy be disclosed.

The decision indicates that disclosure may be ordered to enable a litigant to determine the important question whether going further will be useful or simply a waste of time. A comparable recent English decision is *Harcourt v FEF Griffin* [2007] EWHC 1500 (QB) where it was held [at 19] that "disclosure of insurance details may be ordered where a claimant is able to demonstrate some real basis for suggesting that the disclosure is necessary in order to determine whether further litigation will be useful."[18]

[14] Simon Dluzniak, 2009. *Litigation Funding and Insurance*, p.4.
[15] Rule 26(a)(1)(d).
[16] [2004] QSC 379.
[17] See rule 223(4)(a) *Uniform Civil Procedure Rules* 1999 (Qld).
[18] Simon Dluzniak, 2009. *Litigation Funding and Insurance*, p.8.

In *Company Solutions*, Douglas J said:[19]

> The situation here is that neither Company Solutions nor Mr Pavlic now know whether it is worth pursuing Keppel Cairncross further. It may be true that they can prosecute their claims to finality and then discover whether any judgment against Keppel Cairncross is valuable. It was also submitted that they could fund the liquidators to test whether the policy covered the company's liability. Neither solution is commercially realistic where the parties do not know whether it is worth pursuing a claim based on the policy.
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> [10] That seems to me to create special circumstances where the interests of justice require such an order [for disclosure] and where the overriding philosophy of the rules suggests that the order would facilitate the just and expeditious resolution of the real issues in the proceedings at a minimum of expense….
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> As Pincus JA said in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd*:[20]
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> The former inflexible approach to applications for further discovery … is no longer necessarily appropriate, under the current disclosure system, and because of the notions expressed in rule 5 of the Uniform Civil Procedure Rules. If it appeared, for example, that an order for further disclosure would be likely to 'facilitate the just and expeditious resolution of the real issues', that would enable and perhaps require the making of such an order.

There may one day be a call for rules of Court authorising disclosure in advance of the commencement of any proceeding, although such a facility may need legislative backing. Pre-action disclosure was introduced in the UK as part of Lord Woolf's reforms, though the fact of insurance would be irrelevant in the usual case. There would need to be special provision for the disclosure of the fact of any insurance. An avenue for that disclosure would be welcomed by potential claimants but not necessarily by potentially liable insurers.

On the other hand, legislation like the *Personal Injuries Proceedings Act* 2002 (Qld) establishes a regime for pre-proceeding disclosure of relevant documentation (see s.9 for example), which is a desirable thing, and of potentially considerable utility for insurers- and for claimants through facilitating early resolution. One may wonder aloud whether

[19] *Company Solutions (Aust) Pty Ltd and Keppel Cairncross Shipyard Ltd (in liq)* [2004] QSC 379 [at 9-10].
[20] [2001] 1 Qd R 276, 283 [at 10].

procedural rules of court might not usefully contain a mechanism for pre-proceeding disclosure generally. (At present, we have gone only so far as to permit the delivery of interrogatories to explore whether the recipient "would be an appropriate party to a proposed proceeding"[21]; apart from the established auxiliary equitable jurisdiction to order disclosure of documents by a non-party (*Pacific Century Production Pty Ltd v Netafim Australia Pty Ltd*[22]), under which, for example, such orders are made pre-proceeding in defamation cases[23]).

There is also the possibility that where a proceeding is on-foot disclosure of details of insurance support, as with litigation funding, may be mandated, and as mentioned, that insurers could be required to furnish security for costs. It may be difficult to resist such calls, acknowledging the identity of the insurer with the proceeding. Insurers need to be alive to these possibilities.

I have acknowledged the important part played by insurers in enhancing the accessibility of civil justice, increasingly recognised as a fundamental right.

In his recent Civil Litigation Costs Review Preliminary Report, Lord Justice Jackson noted that "the accessibility of civil courts… is implicit in all human rights jurisprudence." This is made explicit in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.[24] For an example closer to home, the Australian Capital Territory Court of Appeal recently held that section 21 of the Human Rights Act 2004 (ACT) is the source, under Territory law, of the right to a fair trial and means "that there is now a **positive right to a fair trial** rather than the right not to be tried unfairly as the common law provides."[25]

[21] See rule 229 *Uniform Civil Procedure Rules* 1999 (Qld).
[22] [2004] 2 Qd R 422 [at 423].
[23] *Re Pyne* [1997] 1 Qd R 326.
[24] Lord Justice Jackson, 2009. *Preliminary Report- Civil Litigation Costs Review*, 40.
[25] *R v Griffin* [2007] ACTCA 6 [at 4].

In the 2008 Hamlyn Lectures, Professor Dame Hazel Genn, Dean of the Faculty of Laws, University College London, remarked on the high public significance of the civil justice system. She said:

> [T]he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinised and limited…In this way, the civil courts publicly re-affirm norms and behavioural standards for private citizens, businesses and public bodies.

That summarizes why we must maintain and refine the civil justice system. It behoves courts, legal practitioners, and their savvy clients, to do their best to make sure the system works as well as it possibly can.

Practitioners bear a substantial responsibility in this. They, with the courts, must be active in efforts to keep litigation within manageable proportions. As my colleague Justice 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.

Recent Australian litigation of mammoth proportion has re-ignited calls for parties to such litigation to pay for it, to pay, that is, the real cost. The better course, I suggest, is for the courts, the profession and the litigants, to pay real and not merely token attention to the sorts of considerations I have covered this morning.

Then, one day, insurers in particular, in facilitating litigation, will be reassured to note that it occurs only where necessary, is limited to the ventilation of only demonstrably relevant issues, and is conducted without delay and at a minimum of expense. The goal may be considered an ideal, but it is, with the invocation of some lateral thinking and cultural change, attainable.