Developments in Civil Litigation – The Better Resolution Group[1]

The Honourable Justice John H Byrne[2]

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[1] Too many cases still cost too much – for the parties, and for the public which bears the expense of operating Courts. And too many cases take too long to resolve.

[2] But we have a group working towards the better resolution of litigation – especially Supreme Court cases – developing practical ways of reducing complexity and cost.

[3] There are three main areas of work: examining ADR, to see what improvements might be achieved. Secondly, targeting disclosure: an exercise that commonly involves effort and expense out of reasonable proportion to the value of the exercise, as well as to what is at stake. Thirdly, considering pre-trial judicial supervision – in those cases that need such attention – mainly to narrow the scope of the contest, thereby reducing the interlocutory work lawyers do, and the time the case will occupy at a trial.

[4] In short, the quest is for affordable justice in litigious business, with practices that produce fair outcomes efficiently. We hope to put in place arrangements that will make our litigious procedures attractive enough to merit community support. For surely everybody here believes that the public deserves a dispute resolution system that citizens can actually use; rather than processes that come at a cost beyond the means of all but the wealthy or those who can shift the cost to others – as through insurance or tax deductibility of legal expenses – or who represent themselves.

[5] The group, which I convene, includes Justices Daubney, Applegarth and Alan Wilson, Judge Dorney, Magistrate Springer, the Acting Deputy Director-General of the Department of Justice and Attorney-General, Terry Ryan, the Director of Courts, Robyn Hill, the Acting Director of Courts, Julie Steel, Ashley Hill, Acting Director, Courts Information Services Branch; and from the profession, John McKenna SC (nominee of the Bar Association of Queensland), Robyn Martin, State Senior Deputy Crown Solicitor (nominee of the State Crown Solicitor), Justin McDonnell (nominee of the Queensland Law Society), as well as Jo Sherman, who has particular expertise in document management.[3]

[6] We value the contributions of practitioners, which is why I am here. I want you to know what the group is doing, and to encourage you to contribute.

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1 A paper presented at the Bar Association of Queensland Conference, 6 March 2010.

2 Senior Judge Administrator, Supreme Court of Queensland.

3 Others are assisting the group, especially by their perspectives on what is happening in lawyers' offices, including Associate Professor Sheryl Jackson, Heidi Schweikert, David North SC, Tony Deane, Rocco Russo, Peta Stilgoe, Andrew Harris and Andrew Shute.

[7] Justice Alan Wilson chairs the ADR sub-group. They consider that:

- A trial should be seen as something that happens after ADR processes are exhausted;
- Courts, because of their constitutional function in a representative democracy, must not be seen merely as providers in a market for dispute resolution services;
- The UCPR contain sufficient encouragement to consider ADR processes and, where necessary, to compel them;
- Although the use of private mediators works satisfactorily, it would be helpful for court officers – but not judges – to act as mediators or ADR facilitators, especially where the amounts at stake make the cost of engaging private mediators inappropriate;
- ADR is most effective when used in combination with supervision of cases by the Court. Powers the Court might deploy include informal case management: e.g. when parties, the lawyers and a Court official meet to discuss achieving early resolution. Case conferencing might involve identification of issues, fix timetables, conduct short costs benefits analyses to decide, for example, whether a step justifies its costs, and limit examination and cross-examination.

[8] Justice Applegarth's sub-group is focused on documents and litigation.[4]

[9] Frequently, disclosure involves expense that is out of reasonable proportion to its benefits, despite the "directly relevant" [5] test.

[10] The way documents are managed often impedes the just, expeditious resolution of the real issues, at a minimum of expense. Too many documents are assembled in hard-copy, electronic form or both. This causes excessive cost and undue delay.

[11] Justice Applegarth's sub-group has considered the reasons for such large-scale, often unrewarding,[6] activity. Collating and reviewing the documents – tasks often carried out by junior lawyers or para-legals – frequently inhibit sensible, early resolution.

[12] The problem has become more acute recently with so much information stored electronically. And sometimes lawyers search not only in original formats – such as email – but also through archived or deleted data, metadata, data held on PCs, laptops, mobile phones, and data that requires the use of specific software to access it.

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4 See his article *"The Devil is in the Documents"*, Hearsay, Issue 40: March 2010 at http://www.hearsay.org.au/index.php?option=com_content&task=view&id=681&Itemid=203

5 UCPR 211 (1)(b).

6 Unrewarding in the sense of involving trouble and expense that does not produce results that could warrant it. I am not suggesting that disclosure, as it is practised, is unremunerative.

[13] Throughout the common law world, new practices are being developed to manage records effectively. These efforts are driven by the belief that a lot of disclosure now being done involves unjustifiable costs.

[14] What ideas are being considered?

[15] The Directions power[7] probably suffices to sustain new practices. So Rule changes are not a priority. Rule changes can achieve efficiencies. Forbidding interrogatories except by leave exemplifies that; but not always. Substitution of "directly relevant" for the *Peruvian Guano* touchstone seems not to have had a major impact on the burdens of disclosure, for a number of reasons. Sometimes a litigant is content to over-disclose: to slow down the litigation or to swamp the other side with material, forcing significant expense to be incurred. Sometimes, the lawyer wants to search through the client's documents to make sure that nothing has been overlooked. Having done that, the additional expense of delivering the documents to the other side is often insubstantial in the scale of things.

[16] What else might be done?

[17] The focus might be on early identification and exchange of critical documents – those likely to have a substantial effect on resolution of the dispute, either at an ADR process or at trial. Rather than casting the net wide for all potentially relevant documents, the focus could instead be on early identification, and exchange, of critical documents. Or protocols might limit the extent of the search, for the sake of proportionality.

[18] Disclosure is not just a solicitor's problem. Barristers are occasionally diverted from more useful work by being immersed in the exercise. And barristers need to be concerned about wasteful disclosure for another reason: the cost deters people from litigating.

[19] With e-trials now taking place in the Supreme Court, it is timely to re-examine disclosure.[8]

[20] Judicial case management is the concern of the third sub-group, considering such issues as:

- management of pleadings: particularly to deal with prolixity;
- expert evidence: including taking expert evidence concurrently;
- timing of ADR;
- using a facilitator to assist the parties in compromising interlocutory disputes; or to preside at a conclave to ensure meaningful exchange of expert opinion;

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7 UCPR 367(1)-(5).

8 E-trials typically reduce the cost and length of trials. In the new building, 14 courts will be equipped for them.

- closer judicial supervision, in cases that deserve it, perhaps through early identification of the trial judge, who may assume greater management of the interlocutory phase.

[21] Justice Daubney's sub-group likes the idea of a manual to guide the conduct of complex cases, perhaps modelled on the manual used in England's Commercial Court. Such a manual would describe the practices usually to be adopted and state the Court's expectations of the lawyers in the conduct of the litigation through its various phases.

[22] Practitioners occasionally suggest that more effective case management can be achieved by greater judicial supervision of the interlocutory phases and, through pre-trial directions, the course of events at trial.

[23] Three things need to be borne in mind about that idea.

[24] First, in the Supreme Court, fewer than 3% of civil cases filed are determined by a judgment after a trial. About a third do not survive default judgment. So judicial involvement that is too early or too extensive wastes resources: scarce judge time; and money.

[25] Secondly, we over-list, setting down more cases per day than there are judges to hear them. Experience shows that there will be last minute settlements. Over-listing maximises throughput, enabling cases to be disposed of more quickly. But it does mean that the identity of the trial judge may well not be known before the day of trial.[9]

[26] Thirdly, there is no spare judge time. So committing more judicial effort to pre-trial management means that something else has to give: there might be fewer judge hours committed to the Applications jurisdiction or to Crime, as examples. That should only be done if the return justifies the commitment: in particular, where that would enhance the chances of settlement or else reduce the number of days needed for a trial.

[27] Judicial intervention should also be no greater than is necessary to achieve the fair and efficient resolution of the dispute. Unproductive directions hearings, for example, merely run up unnecessary costs.

[28] Judicial case management needs to be targeted, in a timely way, to those cases that need it. How are they to be recognised?

[29] The Court's Supervised Cases List is for those cases that require a trial lasting more than five days. This six days trigger is arbitrary. If there are better ways of identifying those cases that merit judicial supervision, I would like to hear your suggestions.

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[9] For cases not on the commercial and supervised case lists at any rate.

[30] It is not always the apparent complexity of the case suggested by the issues or the nature and extent of the evidence that reveals whether a case needs supervision. A complicated case run by able lawyers who have an eye to efficiency may not need much management.[10] Other cases, which on their face look to be straightforward, might call for supervision because the lawyers struggle to run the case sensibly.

[31] Reducing the length of trials remains an imperative: not just because of the wasted expense and effort of needlessly protracted trials. Every day a judge sits in court to hear one case is a day she is not hearing another. So, within existing judicial resources, the best way of increasing the just disposition of litigious business is by decreasing the length of trials. Then more cases can be set down. And everybody knows that the assignment of an early trial date is a spur to compromise.

[32] More efficiently conducted cases cost less: for the parties and, no less importantly, the public which pays the considerable expense of operating the courts. True it is that, overall, lawyers will earn less in a case that has cost-effective interlocutory phases and an efficiently conducted trial than they would otherwise. But barristers' incomes are not seriously at risk if the cost per case is reduced. If litigation is quicker and cheaper, there will be more litigants. A system that provides a fair result at reasonable cost will attract other litigants: in particular, those who at the moment cannot pay their own costs, let alone those of the other side if the case is lost.

[33] From the group's perspective, this Conference is an opportunity to hear your ideas for improving litigation. The Supreme Court is our primary focus because that is where the more complex cases are mostly brought. But with the enhanced monetary jurisdictions of the District Court and Magistrates Courts that will come with implementation of the Moynihan Review[11] recommendations, those Courts – especially the Brisbane District Court – inevitably will also be looking for better ways of determining more complicated cases.

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10 At least not beyond directions that limit the time for examination and cross-examination of witnesses and for taking expect evidence concurrently.

11 Hon Martin Moynihan AO, QC, *Review of the civil and criminal justice system in Queensland*, 2008.