A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia

JOHN FAULKS

This paper discusses the principles and practical benefits of utilising less adversarial processes in resolving legal disputes by judicial determination. The author draws upon the experience of the Family Court of Australia in establishing its Less Adversarial Trial Program, specifically in disputes involving separated parents and their children. The author identifies a number of salient features of less adversarial processes including: the judicial settling of issues; attendance of expert witnesses; the early identification, definition and restriction of evidence; and greater judicial control of finalisation procedures. The author concludes that in the future there will be an inevitable greater utilisation of less adversarial process in court procedures in civil law matters.

THE process by which the Family Court of Australia ('the Family Court') now conducts trials relating to children has received widespread publicity and a number of lectures have been given about the way such trials proceed.[1] My purpose today is not to outline those procedures again, but rather to draw on the experience of the Family Court in suggesting that there are certain principles associated with a Less Adversarial Trial ('LAT') which might be common to such procedures in whatever jurisdiction they may be implemented.

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* Deputy Chief Justice of the Family Court of Australia. This paper was first presented at the AIJA conference *Non-Adversarial Justice: Implications for the Legal System and Society* (Melbourne, 4-7 May 2010). The assistance of Chris McDermott, Senior Legal Associate to Deputy Chief Justice Faulks, in the preparation of this article is gratefully acknowledged.

1. For a discussion about the development of the less adversarial trial within the Family Court, see P Rose, 'The Road to Less Adversarial Trials and Beyond' (2007) 21 *Australian Journal of Family Law* 232.

WHERE WE HAVE COME FROM: BECOMING LESS ADVERSARIAL

The adversarial trial, which is the quintessential development of the common law, has served English-speaking peoples for centuries. It is reasonable to question why in the 21st century we should now contemplate that this should be abandoned in favour of some other process. I do not favour the abandonment of many of the principles developed over the many years by superior judicial minds. Nor do I advocate the abandonment of the commitment to doing justice to all, with the accoutrements of what that necessarily entails, and the principles of natural justice. No one, so far as I am aware (apart from some politicians who believe that tribunals, presumably staffed by non-legal minds, will effectively replace courts at every opportunity), believes that the system should be radically altered to do away with the safeguards that have been developed over the centuries since a Norman named William landed on a dull beach in southern England to ensure that justice was done to the litigants before the Court.

I wish to postulate that the process of development, which I would label 'evolution', of the civil trial system is inevitable. To adopt a quotation of Sir Charles Darwin:

> I have called this principle, by which each slight variation, if useful, is preserved, by the term of Natural Selection.[2]

Change has occurred to the civil trial and will continue to occur, I hope, by accretion, rather than dramatically. This change should manifest itself in ways which will enable the proper assessment of change, to ensure that change is made to improve the system rather than simply occur for its own sake.

THE WISDOM OF JUDGES: CONVERGENCE

I was reminded of the wisdom and prescience of the Honourable Geoffrey Davies, formerly a Judge of Appeal in the Court of Appeal in Queensland, as outlined in an article from 2000. His Honour spoke widely and persuasively about the phenomenon of 'convergence'. What his Honour meant by this term was that:

> Over the past few decades common law systems have grown, almost imperceptibly, to look more like civil law systems (and more like one another).... At the same time civil law systems have come to look more like common law systems. Those trends will, I think, continue at an accelerating pace. Convergence is occurring, arguably, in at least four areas: in the sources of law and judicial method; in substantive law; in procedural law; and, at least possibly, but by no means certainly, in the constitutional position of the judiciary which I shall call judicial structure.[3]

2. C Darwin, *On the Origin of Species by Means of Natural Selection: Or the Preservation of Favoured Races in the Struggle for Life* (London: John Murray, 1859).
3. GL Davies, 'Justice in the 21st Century' (2000) 10 *Journal of Judicial Administration* 50, 51.

His Honour characterised the two systems (common law and civil law) as follows:

> The adversarial model was premised on the assumption that civil litigation was essentially a private matter. The parties were left to conduct proceedings as they saw fit and according to their own timetable. The judge assumed a passive role, intervening like an umpire only if a non-delinquent party sought the imposition of sanctions. The responsibility was upon the parties alone to identify the issues in dispute, and it was for the party making an assertion to prove it, without assistance from his or her opponent. The judge, being the impartial arbiter, was left with the job of determining the contest according to what was presented to her or him. The judge could not transgress beyond the issues and evidence presented by the parties. All steps in the action were intended to lead up to a climactic trial. It was the trial to which all attention was directed. Orality was an essential characteristic.... The inquisitorial model was premised on judicial conduct of the processes of evidence gathering and presentation, the parties' powers being extremely limited in both respects. The pace of litigation was also controlled by the court which would ordinarily conduct a number of hearings at which it would make both procedural and substantive decisions. Oral evidence and submissions were of less importance than in the adversarial tradition.[4]

Mr Davies also explored and examined the reasons why this convergence is occurring particularly in relation to changes to the adversarial system with which he and we are more familiar. He commented about the increasing trends towards the incorporation and legislation of concepts of reasonableness, fairness and conscionableness,[5] and examined how judges of the 21st century will need to consider themselves in their roles as judges and to explain those roles to the public at large.

THE FAMILY COURT'S LESS ADVERSARIAL TRIAL

It is hard to avoid the conclusion that Mr Davies's reasoning influenced the thinking of the judges of the Family Court as they developed what has now become known as the LAT. The development occurred in recognition of the fact that children's matters should more appropriately be dealt with other than by a formal adversarial trial. The Full Court of the Family Court neatly summarised its position in the following quotation from *Truman & Truman*:

> The Family Court has recognised for some time that the traditional adversarial model of litigation is not well-suited to assisting families to resolve their disputes, especially those involving children. The statutory obligation to regard the welfare of children as the paramount consideration has always been understood to require a judge to take a more active role in Family Court proceedings than would be appropriate in other areas of litigation. The changes brought about by the LAT process not only authorise but positively encourage judges to depart further still from the adversarial model.[6]

4. Ibid 53–4.
5. Ibid 57.
6. *Truman & Truman* (2008) 216 FLR 365, 370 (Bryant CJ, Kay & Thackray JJ).

The history of this consideration (that children's matters should more appropriately be dealt with other than by a formal adversarial trial) and its implicit support from dicta of the justices of the High Court of Australia,[7] have been explored in other places and I do not propose to repeat that provenance here.[8] It should also be noted that the Attorney-General, the Honourable Robert McClelland, has observed that:

> This trend towards more efficiency and a less adversarial system is clearly already underway. Indeed, much of the reform has been driven by the courts themselves.[9]

The Attorney-General has also commented that:

> More than ever before, it is imperative we have a well-functioning justice system better equipped to assist people when they most need assistance, advice and guidance.[10]

THE FAMILY COURT AND ALTERNATIVE DISPUTE RESOLUTION

The Family Court has been, since its inception, involved in extra-curial alternative dispute resolution processes. It has always mandated a conciliation process in financial matters between parties and has, until changes were made under the then Attorney-General (2006) maintained in the Court in-house counselling and mediation in relation to children. Moreover, the Family Court has been zealous in its concern to ensure that in appropriate cases parties are referred to external agencies offering these services.

Although these processes of alternative dispute resolution are arguably less adversarial in their concept and in their function, this paper is not about these initiatives in the Family Court but rather about the conduct of the proceedings before a judge in contested proceedings.[11]

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7. See, eg, the views of Wilson J as expressed in *Re JRL; ex parte CJL* (1986) 161 CLR 342, 362–3; *M v M* (1988) 166 CLR 69, 76. See, also, comments by the Full Court of the Family Court of Australia in *In re P (a Child); Separate Representative* (1993) FLC 92-376.
8. See, eg, D Bryant, 'The Future of the Family Court' (Third Annual Austin Asche Oration, 23 Nov 2004) 11.
9. Hon R McClelland, Attorney-General, 'Launch of the National Dispute Resolution Advisory Council (NADRAC) – Report on Alternative Dispute Resolution in the Civil Justice System' (4 Nov 2009 <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches> (accessed 16 Sep 2010).
10. Hon R McClelland, Attorney-General, 'Second Reading Speech: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009' (22 Jun 2009) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_ArchivedSpeeches2009> (accessed 16 Sep 2010).
11. Judges of the Family Court have from time to time conducted judicial settlement conferences which involve essentially the judge operating as a conciliator or mediator usually in circumstances where, for whatever reason, the judge has become unable to continue to deal with a matter. This process does not enjoy the unqualified support of all of the judges of the Family Court and is only undertaken in circumstances where the judge is willing and able to conduct the conference

The LAT has now been operating in the Family Court either in its pilot mode or in its legislated form since March 2004. It began life as a pilot program with the consent of the parties under the title of the Children's Cases Program. That Program was evaluated upon its completion and led to recommendations to the Howard Government which in turn resulted in legislative change for children's cases before the Family Law Courts by the insertion of Division 12A of Part VII into the Family Law Act 1975 (Cth) in May 2006 (pursuant to amendments by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)). The Family Court itself has developed a model for the LAT.[12] It is from that model that I draw certain conclusions for the purposes of this paper.

ESSENTIAL FEATURES OF A LESS ADVERSARIAL PROCESS

My hypothesis is that there are certain factors evident in the LAT which in a different form may have application to other courts. To the extent that other courts are considering changes to their procedures, it may be helpful for them to draw from the experience of the Family Court.

An examination of the process, however, suggests to me that the following elements are critical to the concept of the creation of less adversarial process or perhaps the minimisation of areas of conflict between parties. I list these and will then expand upon them:

Features of a less adversarial process

The features of a less adversarial process include:

- The judicial settling of issues:
- The attendance of an expert[13] to provide assistance about certain technical elements to reduce the possibility of dispute between the parties at the settling of issues;
- An opportunity for the parties themselves, depending upon the nature of the dispute, to address the Court about what it is that they seek from the proceedings;

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and the parties consent. The ultimate conclusion of such a process if it were to be successful would be the making of orders by consent.

12. For a comprehensive review of the changes made by the Family Court to its procedures in the conduct of trials, see M Harrison, 'Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings' (Family Court of Australia, April 2007) <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/FCOA_pr_Finding_Better_Way> (accessed 16 Sep 2010).
13. In the Family Court, a Family Consultant, usually a psychologist or person qualified in the social welfare field.

- The judicial identification of the evidence required to address the issues identified. This should be carried out in conjunction with the lawyers of the litigants (and the litigants themselves in appropriate cases);
- The defining of the evidence and the restriction of the evidence required to finalise the proceedings between the parties. This may further require the appointment, where appropriate, of a single expert witness preferably in conjunction with, and with the consent of, the parties;
- The finalisation of the proceedings should not necessarily be a single climactic event;
- The judge should retain control of the finalisation procedure. This includes the order in which witnesses are called and to some greater or lesser extent the nature of the evidence to be given orally or the extent of cross-examination.[14]

BUT I OBJECT! WHAT OF EVIDENCE?

It would probably be hard to find a lawyer in this country engaged in litigation who does not carry a certain fondness for the technical and arcane provisions of what are now the Evidence Acts of the Commonwealth and States together with the common law provisions which have been enshrined in successive versions of *Cross on Evidence*. There seems to be stronger adherences to the strict laws of evidence in some regions or geographical locations within Australia than in others. It would be rare for a trial to be conducted without there being some objection taken to some part of the material sought to be put before the Court.

At the heart of all rules of evidence, at least in theory, is the proposition that only reliable information should be put before the Court (particularly if that involves a jury) and that such evidence or information in a broader sense should only be presented in a fair way. Those basic propositions have not, of course, prevented lawyers over the centuries from refining the principles upon which reliability and fairness could be established to the extent that evidence has become a finely-tuned and technical art form.

The hearsay rule alone occupies many pages of the current edition of *Cross on Evidence* and involves at least 16 provisions in the Evidence Act 1995 (Cth).[15] All of these provisions are designed one way or the other to provide both reliability in the information supplied to the Court and fairness in the way in which it is presented.

Other rules of evidence have been modified over the years to take account of modern business practices. The need to tender the original of the document has

14. Judges are able to exercise these 'options' pursuant to the Family Law Act 1975 (Cth) Pt VII, Div 12A.
15. See Evidence Act 1995 (Cth) pt 3.2, ss 59–75.

been substantially modified because of the technology available to ensure that copies may be as reliable, if not more reliable, than the original.

Improvements in technology now mean it is rarely the case that it could be said in relation to evidence that 'a picture never lies'. Almost invariably photographs are capable of adjustment – in some cases of radical adjustment.[16] This paper is not to be a discussion of the rules of evidence but it is important to mention those matters as a foundation for what follows.[17]

It is unlikely that there has ever been a trial conducted in which all of the rules of evidence have been strictly and correctly adhered to. Frequently, it is not in the interests of the parties, let alone the judge or a jury for all of those rules to be slavishly conformed to. Commonsense, fairness, the cost of appeals and the general desire to get on with the dispute and finalise it are all factors which militate against a totally religious adherence to the rules of evidence.

What that means, however, is that for some years now courts have not committed themselves to the rigid formalities associated with an adversarial trial conducted exclusively in accordance with the rules of evidence. It is into that context that I place the elements that I have set out above as a suggestion for ways in which the courts of the common law and English-speaking world might evolve.

JUDICIAL SETTLING OF ISSUES

In common law courts, the system of pleadings was designed in all its original elaborateness to confine the dispute between the parties to those facts which were genuinely in dispute and not the broader range of matters which may populate the rhetoric and the attitudes of the parties in their contest with each other. I do not propose to review the history of pleadings, but it is perhaps sufficient to say that almost all courts have abandoned the formalities of the rigid pleadings of the 19th century and have moved towards systems which enable a genuine closing of issues between the parties.

The advantage I suggest to you in having a judge finalising and settling the issues is that the judge herself or himself has an opportunity to become apprised of the nature of the dispute between the parties and to give an indication at an early point what sort of evidence may be required to finalise the issues in dispute.

16. A certain ex-politician from Queensland recently having had this happen to her!
17. For a discussion about the rules of evidence in a less adversarial trial, see P Cronin, 'Evidence in a Less Adversarial Trial' (Paper presented to the Law Institute of Victoria, Melbourne, July 2008); P Fitzgerald & M Fernando, 'Has the Less Adversarial Trial Process Abolished the Rules of Evidence?' (2009) 20(3) *Australian Family Lawyer* 25.

FIRST DAY OF THE LESS ADVERSARIAL TRIAL

In the Family Court, this process occurs at what is known as the 'First Day' of trial in which the parties have an opportunity to address the judge themselves. This is a process which is peculiarly appropriate to the Family Court because of the distinctly personal nature of the dispute between the parties. It enables the parties in such cases to express in their own words what they want from the proceedings and in many cases what they regard as being in their children's best interests. The inclusion of this process in the First Day of Trial was to some extent serendipitous. The Family Court judges have found that giving the parties an opportunity to speak directly to the judge has served to elicit admissions and concessions which would not ordinarily have been made by lawyers whose principal job (appropriately in the adversarial system) is to be the champions of the clients.

It would not be appropriate for this exchange to occur, one would think, in high level commercial disputes between corporations. Nevertheless in many other disputes either civil (or perhaps even criminal) the opportunity for the parties to be able to address the Court directly may have the same sort of felicitous effect it has in the Family Court.

There are cases in which it becomes obvious at an early point that some issues might be effectively addressed for the parties by the early intervention of expert assistance. In the Family Court, this occurs when a Family Consultant who is present during the proceedings is able to make comments on the practicability of the proposals of each of the parties for their children.

I envisage that in a number of other disputes in other courts it would be equally feasible, for example, for a valuer or an accountant to be present to provide particular information about some aspect of a dispute between the parties which might otherwise be proceeding on inaccurately conceived perceptions or on a direct misunderstanding of technical matters.

IDENTIFICATION OF ISSUES

At the conclusion of the First Day of Trial a judge should, in consultation with the lawyers and where appropriate the parties themselves, have reached a clear understanding of the way in which the matter should proceed. The issues to be resolved should be identified in succinct written form and they should form the boundaries within which the parties and their lawyers are obliged to operate in the finalisation of the dispute between the parties. This necessarily involves in the process which I am suggesting that implicit in the determination of issues is also a restriction as to the evidence that will be provided to the Court.

EXPERT WITNESSES AND OTHER WITNESSES

The Family Court regularly commissions expert reports and, as a result of that identification of issues process, such a report will be focused on the matters genuinely in dispute rather than dealing in a generalised way with all matters that might have been in dispute. In addition, the evidence the parties themselves will give, either on their own account or through witnesses, can be confined to those matters which genuinely will advance the resolution of the issues rather than to provide background or corroborative support. The process also enables the identification of the need for experts in particular areas and where appropriate the appointment (in the Family Courts at least) of a Single Expert Witness to undertake a particular task.

The concept of a Single Expert Witness was introduced into the Family Court over significant opposition from the profession and it would be fair to say there is still by no means a whole-hearted acceptance of the concept. The appointment of a Single Expert Witness carries with it the potential for at least three fees to be generated rather than one. If for whatever reason one party dislikes the result of the Single Expert Witness's report or evidence, he or she may seek permission to engage an adversarial witness and the other party may then wish to engage a further adversarial witness to counteract the effect of the first departure.

Interestingly, although the process has been operating in the Family Court now for four years the number of additional Expert Witnesses either as shadows or as adversarial witnesses has not been great. I cannot confirm precisely the number of matters in which this has occurred and, in some respects, it would be inappropriate to do so. The nature and complexity of the matters will dictate different practices for different events and that which might be appropriate in a deeply complicated commercial action in the Family Court may genuinely require the assistance of adversarial witnesses to arrive at the truth. On the other hand, in children matters, particularly those investigating the relationship between the parents and the children it would probably be inappropriate to have more than one witness – if that can be avoided, particularly as it may have an adverse effect on a child's best interests.

The question is not whether only Single Expert Witnesses should be allowed but rather why such a process should not enure for the benefit of the parties in most events or in some. Choice is an element in the less adversarial process but it is choice of the process likely to minimise areas of dispute and maximise potential areas of resolution which should be a pathway available on every occasion.

SINGLE CLIMATIC EVENT?

It follows from the nature of the process that I have discussed above that the trial might not in itself be a single climactic event. The traditional civil trial always carried with it the trappings associated with a major event. It was something that was to be looked forward to in a sense or prepared for. It was the opportunity for a litigant to have his or her day in court. Unfortunately, 'the day in court' frequently became the days and in some cases the weeks or the months or worse the years of litigation. The unconscionable nature of some forms of litigation was dramatically reviewed by Charles Dickens in *Bleak House*. There have been many more 'bleak houses' since that time and the process of commercial litigation in particular has moved to a legal equivalent of the 'war to end all wars', the First World War. If we kill enough of the other side (figuratively, of course) then eventually we will succeed because we have more troops then they do or more guns or more something – but not necessarily more justice.

The Family Court has found that the time taken in finalisation has been reduced by the methods set out above. It is somewhat difficult to analyse precisely how much time ultimately has been saved because necessarily there will be a number of attendances at court in preparation for the final days of the trial. However, to some extent the precise time saved, although important, is not the entire objective.

What is important overall is that the process should be one in which the parties at the end feel that their dispute has been resolved not simply by what the lawyers said was the dispute. It might be also that there is at least a possibility that the parties can continue to do business together or continue to cooperate in parenting the children or continue to be neighbours effectively or to participate in society in effective ways. The possibility of these things occurring is reduced significantly if the parties have been able to fire broadsides at each other, rather than act as snipers. In fact, destruction ought not to be the objective but rather a proper and principled consideration of the genuine matters in dispute.

CONTROL OF THE TRIAL

Finally, the traditional role of an adversarial judge has been to listen to the evidence as presented by the parties. This, in its turn, required and enabled the parties to define the dispute, to define the evidence and for the judge to provide independent and fair determinations about only the matters put before her or him by the parties.

The next generation and less adversarial processes

It is a relevant observation, at least of my experience, with Generation Y that they are extremely direct in their approach to life. This is not a criticism necessarily, but it is my experience that Generation Y knows what they want, and generally,

they know how to get it. In many respects, a less adversarial process will be a more suitable dispute resolution process for what will be the next generation of clients before the various civil courts. Generation Y litigants will be able to directly and succinctly identify their issues and perhaps identify innovative pathways for resolving their disputes. I am not advocating trial by text message, or having Facebook or YouTube submissions, all of which might be an interesting and entertaining experiment. However, in my opinion, where litigants from Generation Y cannot agree and have disputes requiring judicial determination of issues, both lawyers and judges will inevitably need to 'get with the program' and identify suitable methodology for resolving disputes which caters for this particular generation's needs.

THE INTERVENTIONIST (INTERFERING?) JUDGE

Judges have become significantly more interventionist in their approach. It is now relatively common in all courts for judges to intervene in cross-examination if it is being conducted inappropriately,[18] and it is increasingly common for judges to insist that there should be some control over proceedings.[19]

It would be fair to say that Part VII Division 12A of the Family Law Act 1975 (Cth) is not everyone's cup of tea.[20] There are those that think it represents the clarion call of the Four Horsemen of the Apocalypse, that the world as we know it, certainly in legal terms, is rapidly coming to an end. On the other hand, what Division 12A provides is an opportunity for a consideration of the process before the Court in accordance with those fundamental principles which I identified previously of fairness and justice and reliability. It also permits (what in some cases is crucial to an earlier determination of the dispute) the ordering of witnesses in a way that would be most effective to bring about the conclusion required. It is also important to note that the Court may decide to apply one or more of the excluded provisions of the Evidence Act 1995 (Cth) in children's matters where the Court is satisfied that there are exceptional circumstances and taking into account the importance of the evidence, the nature and subject matter of the proceedings, the probative value of the evidence and the powers of the Court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.[21]

Again, this is not something that would apply necessarily in every case, in every court, in every country, in relation to all forms of dispute. The important thing it seems to me is that there should be choice and in any case an opportunity to choose

18. See, eg, P Johnson, 'Controlling Unreasonable Cross-examination' (2009) 21 *Judicial Officers' Bulletin* 29.
19. See, eg, R Sackville, 'Mega-Litigation: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.
20. See, eg, J Fogarty, 'Family Court of Australia – Into a Brave New World' (2009) 20(3) *Australian Family Lawyer* 1.
21. See Family Law Act 1975 (Cth) s 69ZT(3).

a less adversarial approach rather than to choose one which necessarily or which might heighten the level of antagonism between the parties.

If His Honour Geoffrey Davies is correct, and I suspect he is, and there is a growing convergence between the civil law systems and the adversarial system, the processes that I have identified will occur sooner rather than later. We, as lawyers and jurists and pioneers of justice, cannot, as Leonard Cohen would have put it, be as 'stubborn as those garbage bags that time cannot decay',[22] and not accept, at a minimum, the need to review how justice might be effectively delivered. I suggest to you that it is more likely than not (even if not beyond reasonable doubt) that the movement towards a less adversarial process will occur in some form or another in a court near you opening soon.[23] It is, after all, a natural selection.

22. Leonard Cohen, 'Democracy', from the album *The Future* (1992).
23. The lyrics of Bob Dylan from the song 'The Times They Are A-changin", seem apposite:
    Your old road is rapidly agin,
    Please get out of the new one,
    If you can't lend your hand,
    For the times they are a-changin'.