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NSW YOUNG LAWYERS
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OPENING ADDRESS

CHANGES IN CIVIL PROCESS - TOWARD A PHASED TRIAL

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All societies are in a state of constant change. The accepted norms of appropriate behaviour evolve. The rules by which we order the relationships between individuals and between individuals and institutions are constantly revisited. Changes in response to both powerful interests and the community's perceptions of fairness are introduced. In some societies change comes in response to military force. In our society although often a response to opinion polls change is disciplined by the ballot box.

The law and our legal institutions also change. Sometimes the changes are modest and may only be apparent with the benefit of hindsight. At other times the changes are obvious. Some may be controversial. Many changes come from legislation which in recent decades may have come from the considered report of a law reform body. Other changes are brought by the judges either by substantive changes to the common law or in the court process by which disputes are resolved.

Contemporary community attitudes to the law and social values are commonly revealed when judges are sentencing offenders for breaches of the criminal law.

In 1973 Judge Cameron-Smith when sentencing an offender by the name of Mackay said this:

HIS HONOUR: Mackay, you have got many factors in common with the last prisoner, a very difficult matter and of course, you are associated with the drug scene too. You are quite a capable person, you can write books which are published and which can bring in a very good source of income, but I think you have reached a stage that so many people like you reach where there is that element of false pretences or forgery, such like things as they which ultimately reflect themselves in the way you're mind operates.

You are starting to kid yourself and what you said to me in the witness box the other day is a clear indication to me that this is what is happening to you. It is about time you woke up to yourself and don't pull your own leg. You have committed many many offences. Mr Rutherford has done all he could on your behalf, but dishonesty indicated itself about ten years or so ago. You have got a schedule as long as your arm and I have taken into consideration in sentencing you those matters – forgery and uttering, and stealing – considerable sums of money involved and persistently so over quite some period of time, a lot of money involved.

Once again, of course, you are another one of those who live according to the permissive way of life; you embark on drugs, you live a life of permissiveness; people get married, divorced and they have a de facto relationship with somebody else who has been married or divorced or not married at all. And they have got children. It is like living like a lot of rabbits, as I see it. I was not much impressed by her, I might add, my note is "I am not much impressed." I think you could do a lot better. You give a lot of thought to what I have just said, not only as to drugs but also

as to the company you keep and where you live. It is not good, this business of Balmain, Glebe, Croydon and all the rest of it, suburbs are coming up in court every day and you look like a typical sample of them. It is only to be hoped that you, both mentally and physically, by the time you are discharged from gaol – I have been told you look a lot better than when you were arrested, but this of course does not surprise me because you keep proper hours and have decent food and are off drugs. I was only thanked the other day by another prisoner for sending him off to gaol because he has not felt so well for years. So perhaps some of the theorists might bear in mind what you are told in court, not enough people read carefully enough case histories."

The topics for your seminar today cover the broad spectrum of property issues. They range from the ever present problems related to government revenue raising associated with property transactions to a discussion about the development of a national electronic conveyancing system. That latter discussion, a response to the efficiencies which electronic information storage and communications have brought, is common to all areas of the law as it is to other areas of human enterprise. The developments in computer technology have underpinned efficiencies which have themselves encouraged a reconsideration of the way we do business and conduct our everyday lives.

For many years the adversary system has been accepted as the appropriate method for the disposition of legal disputes in the common law world. The adversary system assumes a court structure, funded by the State, which at a very small cost to the litigant for the use of the facilities is available to the parties for the resolution of their

dispute. The court provides both the courtroom and a judge who is tasked with ensuring that the rules are obeyed and arriving at a just decision. The parties are free to litigate as they choose without consideration of the costs to the State.

The adversary system in its purest form is counter intuitive. It is not immediately obvious, particularly to persons from cultures other than our own, that the preferred method of resolving a dispute is to facilitate a vigorous argument. The adversary system encourages the continuation of an argument which may have been ongoing for some time and the contest is inevitably influenced by the resources available to each litigant. Without discipline from the court a litigant determined upon victory and who has financial resources greater than their opponent will inevitably have an advantage. When there are no disincentives or requirements for the lawyers to confine the contest, the client, who will often be unable to impose their own judgment on the proceedings (that is why they hire the lawyer), will sometimes become embroiled in a process in which the resources they are required to fund may ultimately bear little rational relationship to the possible outcome. Our legal history is replete with reports of cases where the costs of the litigation are out of all proportion to the issues at stake.

After the world had recovered from the Depression and World War II western economies went through a period of significant growth with increasing prosperity. It was accompanied by a greater availability of insurance with the consequence that both demands on the legal system and the outcomes changed. When the risk was spread the likelihood that a judge would look favourably on a claim against an individual defendant increased. Ultimately principles by which injured persons could

recover and the victims of motorcar accidents were compensated resulted in public concern about the cost and effectiveness of litigation.

At about the same time with the increase in economic activity commercial disputes, including property disputes, increased. These disputes became more complex a phenomenon encouraged by the development of electronic information facilities ultimately resulting in a recognition that in at least some respects the adversary system as it has developed may be inappropriate for some types of litigation. Recognition of the need for change was not universal and the changes came piecemeal. Many were reluctant to accept the need to do things differently. Any constraint upon an individual's capacity to litigate a dispute as they saw fit was and remains for some unacceptable. But there is no doubt that most of the changes which have been made are now so entrenched and their wisdom sufficiently recognised that there can be no retreat.

You will all be familiar with many of the changes. The pre-trial management of proceedings by a judge or registrar, once a controversial issue, is now adopted in most courts dealing with cases of any complexity. The process is assisted in many courts by the designation of a judge or judges as case managers responsible for particular types of disputes commonly managed in designated lists. In some courts, but not in the Supreme Court, an individual docket system is used. The pre-trial processes involve early identification of issues, close supervision of discovery and interrogatories and exploration of the prospects of settlement with a capacity in the court to require the parties to mediate.

Notwithstanding the changes which have been made there are still many problems. Complex commercial cases present particular difficulties which have recently been discussed by Justice Sackville and Justice Allsop. (see, eg, Justice R Sackville, "Expert Evidence in the Managerial Age", Paper presented at the Forensic Accounting Conference, Sydney, 14 March 2008; Justice R Sackville, "Mega-litigation: Towards a New Approach", Paper presented at the Supreme Court of New South Wales Annual Conference, New South Wales, 17-19 August 2007; Justice J Allsop, "The Judicial Disposition of Competition Cases" Paper presented at the 7th Annual University of South Australia Trade Practices Workshop, Adelaide, 17 October 2009.) There have been suggestions that it may be necessary for some trials to be conducted by more than one judge. Discovery remains a difficult issue. Because of the volume of written communications which the internet has encouraged discovery in a contemporary commercial dispute will commonly involve vastly more individual communications than 30 years ago. Chief Justice Keane recently suggested that a procedure which requires the parties to identify the key documents at an early stage in their case (limited to a small number) may be worth considering. The civil procedure rules in the United Kingdom provide for a two-limbed discovery regime. Standard discovery, which is available as of right, requires parties to exchange documents upon which they rely, as well as any materially adverse documents. Extra discovery covers documents of less direct relevance and is available only by court order.

Expert evidence has been the source of many controversies. There have been significant responses by the courts to those controversies. Courts now seek to confine the number of experts, both single and court appointed, who give evidence in

a case. It is common for there to be pre-trial discussions between experts with the purpose of eliminating issues that are not in dispute, leaving the court to resolve only the matters in respect of which there is a genuine contest. In a number of courts where there are multiple experts on any issue they give their evidence concurrently. This change has brought efficiencies and increased integrity in the expert evidence processes. However, it is not a panacea and in a process which encourages a contest from which there are winners and losers there will always be a tendency for distortion.

I recently attended a meeting in Canberra convened by the Commonwealth Government to consider the future of commonwealth criminal law. The discussion expanded to include a range of issues relevant to criminal law in general, including the criminal trial process. The conference coincided with the preparation of a draft report by a committee I was chairing for the NSW Attorney-General which had been looking at issues in relation to lengthy criminal trials and practical methods of alleviating identified problems.

As the discussion in Canberra developed it became apparent that the participants, who were persons with an interest in criminal justice across a broad spectrum, identified two aspirations for our justice system which had broad support in the general community. One was that truth should be the objective of the system, both criminal and civil. The other was a demand for increased efficiency in the trial process. These aspirations are not easily achieved and may prove difficult to reconcile. That difficulty is greater in a criminal trial under our present form of the adversary system.

The litigants involved in a civil dispute, if they believe themselves to be in the right, and not all do, will also expect the court to reach the “true answer”. It will be otherwise if they are in the wrong when their aim will be to achieve a favourable distortion. There will be occasions where ambiguity in the law or a party’s knowledge of the relevant facts, which may be honest or mistaken, may mean that both parties genuinely believe they are in the right. Any party who believes that they are in the right will lose faith in the justice system if the court cannot identify the “true answer” to the problem. Our objective must always be to ensure that the system we provide optimises the prospect of arriving at the “true answer.”

In the Common Law Division of the Supreme Court we have already implemented the changes in the adversary system which are now the norm in most common law courts. But in some important respects we have gone further.

The conventional approach to a civil trial assumes that an expert will be retained by a party and briefed with that party’s version of the facts. They may be told that an accident occurred in a particular way or particular advice was given or that equipment operated in a particular manner. They may be asked to assume facts which will ultimately inform a decision as to the quantum of damages. In many cases the factual material will involve an assertion by the expert’s client that he or she took particular action, either of their own initiative, or in response to the situation in which they found themselves. It is of course common place to find that the other party or parties to litigation give a different account of the same events. The opinion of an expert may change and in many cases should change, sometimes significantly,

depending upon the account of the events which they have been given. In a conventional trial the plaintiff will call his or her factual evidence followed by the evidence of experts they have retained. The plaintiff's case will close with strict rules applied which avoid "splitting their case" and which confine the right to call evidence in reply. Although the process and the rules which guide it have the objective of efficiency they reinforce the expectation that a dispute can be best resolved through conflict. Because an expert is retained by one party and called in that party's case they are inevitably identified as the expert of that party. This can lead to an irresistible inclination to support their client. By including the expert as a witness in one party's case the process reinforces the perception that lay and expert witnesses work together as a team to advance the case of one party and do what they can to destroy the case of the others.

In the Common Law Division of the Supreme Court concurrent evidence, unless there is a good reason to do otherwise, will be used in all cases where multiple experts give evidence. However, we have now recognised that in many cases the decision making process would benefit from further change. Both because of its efficiency and the prospect of real change in an expert's perception of their role in the trial process we have changed the order in which evidence is given. Unless for any reason it will be inappropriate in a particular case all of the factual evidence is now received in advance of any expert being called. If the case is one of any complexity the factual evidence may be followed by a short break, perhaps a couple of days, it may be longer, during which the experts will have an opportunity to review the transcript. This will enable them to understand the extent to which the relevant factual accounts are consistent and where they diverge. It ensures that the experts

are able to give their evidence with a clear understanding of the facts which are accepted and those in dispute. The process eliminates the guesswork and enables the controversy to be refined. It encourages the experts to cooperate with each other in assisting the judge to arrive at the correct conclusion. We called it a “phased trial.”

There have been many suggestions for further reform of the expert evidence process in the courtroom. Many professional bodies have urged the adoption of an accreditation process for experts. Some have suggested that courts should maintain lists of acceptable experts and only persons on those lists can be asked by litigants to give evidence in the courtroom. Others have suggested that rather than the parties being free to engage an expert all experts must be engaged and paid by the court, the fees being collected from the litigants as part of the fees to be paid to the court for providing its facilities. In Japan in a professional negligence case the court itself appoints experts from lists drawn up by leading universities. In France, courts maintain lists of individuals who have qualified as court experts. Professionals in various disciplines apply to be entered onto these lists. To be eligible for entry, the individual must apply and satisfy the court not only as to his or her expertise, but also his or her good character and standing. Despite modest remuneration, the position of court-appointed expert is highly sought after in France (McKillop, “The Position of Accused Persons Under the Common Law System in Australia (More Particularly in NSW) and the Civil Law System in France” (2003) 26 *University of New South Wales Law Journal* 515). No doubt an appointment considerably enhances the professional standing of that person.

My purpose in raising these matters this morning is to encourage you to reflect upon the appropriateness of our accepted methods for resolving disputes. The growth of mediation in its various forms makes plain that our conventional processes may not be appropriate in many cases. For many years in some jurisdictions commercial disputes have been resolved in courts designated for that purpose or through arbitration processes. In NSW building disputes of any significance are commonly resolved either by arbitration or by referees appointed by the court because of their expertise in the area of dispute. The purpose is to ensure so far as possible that the process is efficient and achieves a decision which the parties will respect being provided by someone with a real understanding of their area of disputation. The community accepts this approach to the resolution of commercial disputes and there is no reason why they could not be adapted for the resolution of disputes in other areas. Professional negligence disputes involving property, or, for that matter, any dispute involving accusations of incompetence by a professional will be amenable to resolution by a tribunal comprised of or at least having direct access to experts in the field from which the dispute arises.

The obligation upon all of us is to continually re-examine our dispute resolution processes to ensure that they meet the expectations of the community. Both the demand for efficiency in the utilisation of public and private resources and the expectation of a “true answer” require a constant re-evaluation of our methods. This cannot be achieved by courts alone. There must be a cooperative effort between the courts, the legal profession and others, including professional bodies, who are essential to the dispute resolution process.

As has happened in the past suggested changes may not be immediately embraced by all who are involved. However, once the change has been made and implemented it is common to find that in a short time it is accepted and often visited by the comment “why didn’t we do it earlier?”

Justice Ipp tells the story of the introduction of case management in the Supreme Court in WA. Apparently it was met with a hostile response from the profession. One practitioner lamented its effect on his capacity to support his wife and children. The lamenting speaker had in mind the loss of revenue derived from the receding opportunities for pre-trial mentions and interlocutory processes which previously ensured a constant revenue stream for the practitioner’s firm. Opposition to case management has mostly passed into history, although the rage is maintained by a few (See, eg, Justice Byrne, “Promoting the Efficient, Thorough and Ethical Resolution of Commercial Disputes: A Judicial Perspective”, Speech presented at the LexisNexis Commercial Litigation Conference, Melbourne, 20 April 2005).

There is a responsibility on us all, judges and legal practitioners alike, to ensure that we provide dispute resolution processes which meet contemporary demands.

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