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JUDICIAL INTERVENTION AND CASEFLOW MANAGEMENT

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1. The scope for judicial intervention in the management of litigation, especially in its pre-trial phase, has expanded greatly in the last 30 years. Common law courts, at least, traditionally allowed the parties to dictate not only the forensic battlefield but the pace at which the adversaries will advance towards their battle. However, change is afoot.

2. First, judges have recognised that the judicial system is a public resource that must be managed so as to ensure that the right of the public to have access to a court to resolve their disputes is not empty rhetoric. Secondly, the availability of evidence has expanded exponentially. That has increased the potential for trials, and pre-trial disputes, to lengthen greatly. Thirdly, legislation has increased the rights and liabilities that parties to disputes can litigate. In a recent speech the Chief Justice of South Australia, the Hon John Doyle AC, attributed the increasing complexity of litigation mainly to the impact of statute law. He said that statute law "is always well intentioned"[1]. He could have added that the road to hell is paved with similar sentiments.

3. Courts must hear and decide each dispute, whether criminal or civil, impartially on their merits according to law. That is the hallmark of a civilised society that exists under the rule of law. Case management is a valuable mechanism that is

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[1] "*Imagining the past, remembering the future*", 8th Gerard Brennan Lecture, 24 June 2011, Bond University, Queensland

evolving as a means of identifying what the Court must decide to resolve a dispute and how it can do so as quickly, inexpensively and efficiently as possible, while ensuring that justice is done according to law.

4. Case management is both a flexible tool and a continuing experiment. Every dispute is different.

5. The law's delay has been a lament of societies for centuries. So too has the cost of justice, not just to the parties but to the community. Until recently, courts using the common law tradition have been reluctant to intervene actively in the conduct of litigation. A reader of Charles Dickens' *Bleak House* might have come away with the idea that parties who asked the courts to solve their dispute embarked on a complex, costly and almost interminable voyage into unchartered waters.

TODAY'S PROBLEMS

6. But that was written over a century before the photocopier began its inexorable influence on the size of commercial, and much other, litigation. Today, almost all litigation involves the use of one or more inventions or innovations made in the last 20 years such as electronically stored information from mobile or cell phone records, social media, communications on Facebook, email, Twitter, contents of computer discs or servers, internet searches, DNA and other scientific evidence.

7. The impact of these developments has resulted in longer and longer trials that proceed only after more and more detailed consideration of the expanded evidentiary resource base.

8. The courts provide a civilized society's last resort to its citizens in order to resolve both criminal and civil disputes. As times change, the way in which the courts deal with disputes also change. Chief Justice Doyle suggested last month that our current, Australian common law, system of civil litigation, with a trial

concentrating on orality of evidence and submissions, will be displaced by information technology. He continued:

> "Other fundamentals have brought about a situation in which the system is strangling itself."[2]

9. The Chief Justice contemplated developing a system where claims in very simple form were commenced at a central registry and then they would be classified as, in effect, first, default judgment claims, secondly, simple or thirdly, complex claims. He lamented that the present system was beyond being tinkered with and that we required a fresh start.

10. I am somewhat more optimistic. What we must acknowledge is that no other decision-making body in modern society is expected to deal with the volume and scale of material that modern litigation imposes upon judges. Corporate boards, ministerial cabinets and parliaments act on accurately distilled or synthesised accounts of the completing considerations relevant to the decisions they are required to make.

11. Of course, complete transparency is essential to judicial decision-making. That, ordinarily, requires courts to give reasons to justify any substantive exercise of their powers to determine the rights of litigants before them[3]. The issue which must be addressed is how can courts discharge their characteristic and fundamental function of quelling controversies on less, but more focused, material while maintaining the community's confidence that not only has justice been done, but it can manifestly be seen to have been done.

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2 "*Imagining the past, remembering the future*", 8th Gerard Brennan Lecture, 24 June 2011, Bond University, Queensland

3 cf: *Wainohu v New South Wales* [2011] HCA 24 at [44], [54]-[58] per French CJ and Kiefel J, [92], [94] per Gummow, Hayne, Crennan and Bell JJ, [147] per Heydon J (dissenting)

THE SIMPLE TRUTH

12. The reality which must be grasped, is that, at its heart, every dispute that is litigated has one or a few central, and generally, simple elements. Stripped to its essential characteristics, a dispute, whether criminal or civil, is that one party – the prosecution or plaintiff – complains that the other party did, or failed to do, something that amounts to a legal wrong.

13. The procedural law of evidence identifies the material that is, or may be, relevant to a court in order to decide if the substantive wrong has been proved. The procedural law operates with the substantive law that created or recognised the alleged legal wrong. As more and more evidence that is potentially available and relevant is created because of modern technology, the courts have to address how to focus the use of that material. In addition, more and more statutory crimes and causes of action have been created as legislative responses to perceived inadequacies of older common law or statutory ones.

WHERE TO FROM HERE?

14. If courts are to retain their accessibility and relevance to the public they must, first, devise, and revise mechanisms to crystallise the real issues that need resolution in each dispute and, secondly, formulate an efficient and affordable pathway to enable those issues to be litigated justly according to law. I want to raise some ideas that have been used by judges in Australia and others that, perhaps, we should think about using to achieve these ends.

15. Ever since 1215, the common law has been moulded by the promise in *Magna Carta* that the Courts would not seek, delay or deny justice to anyone[4]. Today, we cannot let the way in which society has developed, both because of much more extensive statutory regulation and also because of the greater availability of paper

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[4] Then in c. 40: since the re-enactment in 1297 (*Magna Carta* : 25 Edw I) it is c. 29: see the history in *R v McConnell* (1985) 2 NSWLR 269 at 272F-273C per Moore DCJ

and electronic records, negate that fundamental tenet of any system of justice worthy of respect.

16. I now turn to discuss some means of managing cases and will then survey some of the ways courts organise their pre-trial procedures in which those means could be implemented.

SOME METHODS OF CASE MANAGEMENT

17. Judicial development of active case management in Australia has been supported by legislative change and a recent decision of the High Court of Australia[5]. Ordinarily, unless a statute makes a contrary provision, every court has an implied power to do what is *necessary* in the interests of justice to ensure a fair trial in the proceedings before it. Once a trial has commenced, the judge will be able to exercise considerable procedural powers to regulate the course of the trial. But by then the case may have taken a very long time to come to trial because of overly complex and, perhaps, unnecessary preparatory steps and the burden of many other cases in the Court list awaiting trial.

1. Issue identification

18. Experience in writing judgments suggests that, frequently, the parties have lost sight of the real dispute between them. It is buried in a morass of complex, long pleadings or, worse still, additionally, a great deal of evidentiary material. Very often, the most apparently complex cases distil down to one or a few critical documents or conversations, despite the mountain of other material that the parties tender or adduce into evidence by witnesses.

19. One early remedy that had an effect was used by the Lord Keeper in England in 1596. He ordered that a pleading 120 pages long be removed from the file because it was about eight times longer than it need have been. He ordered that

[5] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175

the pleader be taken to the Fleet prison. His Lordship then ordered that on the next Saturday the Warden of the Fleet bring the pleader into Westminster Hall at 10 a.m. and then and there cut a hole in the midst of the pleading and place it over the pleader's head so that it would hang over his shoulders with the written side outwards. The Warden had to lead the pleader around Westminster Hall while the three courts were sitting and display him "bare headed and bare faced" and then be returned to the Fleet prison until he had paid a £10 fine – a huge sum in those days[6]. Sir Robert Megarry said that the general present day ignorance of this case among both pleaders and laypersons "… is much to be deplored"[7].

20. Early identification of the real issues can streamline the conduct of a case. By making each party identify what must be proved to succeed, the judge can then begin to craft orders to focus the preparation of the case on those issues. Of course, this does not always result in a narrowing of the dispute. And, in any event, the judge may have to spend considerable time before and during an initial directions hearing to elucidate the issues.

2. Orders about presentation of the evidence

21. Over the last 30 years many courts have made orders in civil litigation that each party's witnesses give evidence in chief by affidavit or statements that the witness adopts as true in the box. Initially, this method was seen as saving court time and giving the opposing party full notice of the evidence. However, the attraction of this way of adducing evidence has diminished in Australia.

22. First, the document is invariably drafted by lawyers, not the witness. The selection of the words is carefully crafted to advance or preserve the party's case. Now usually junior lawyers do this work. Their grasp of relevance and admissibility is limited and often their work is driven by the extraneous and time

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6 *Mylward v Weldon*: Bailii citation number: [1595] EWHC Ch 1; also inaccurately referred to as *Milward v Weldon* (1565) Tothill 102 [21 ER 136]: see R E Megarry, *Miscellany at Law* (Stevens & Sons Ltd : London) at 41

7 Megarry op. cit. at 41

wasting considerations of the fees earned by time billing, copying of one or more folders of annexures or exhibits to the affidavit or statement and the fear of being sued by their client if they leave some tidbit out and the case is later lost. Secondly, the witness has no chance to establish himself or herself in the box before being cross-examined, often to the effect that the reason wording was in the affidavit or statement was because the lawyer said that it had to be so expressed rather than as the witness testified it should have been.

23. More recently, judges have returned to the use of oral evidence in chief based on the earlier provision of an outline of the evidence the witness is expected to give. Cross-examination is not allowed on the outline without leave, but if the witness departs from it in chief, the other party can object to the new matter and, again, leave to adduce it will be needed. This method has the advantage that the judge hears the witness tell his or her story while referring to any necessary documents. Generally, this method limits the material adduced, since the judge can indicate if it appears to be unnecessary. This is far preferable to requiring one to wade through a vast amount of written and documentary evidence prepared by lawyers.

3. Documentary disclosure and discovery

24. Discovery is a perennial problem. It has now become even larger with electronically stored information. Just how much of this material is important for the proper conduct of litigation is difficult to assess. It is rare that a "smoking gun" will be discovered, but possible nonetheless. Some alternatives to full discovery can be useful.

25. For example, orders can be made for the parties to exchange their witness outlines and all significant documents that support or undermine each of their cases – i.e. the kind of documents that the chief executive of a large enterprise would need to give the board so that it could assess whether to risk the shareholders' money on the litigation. Because the outlines and documents must be exchanged, neither side knows in advance of the exchange if the other is aware of a critical fact or

document supporting the other's case. This is an incentive to transparency, since a failure to disclose the fact or document not only creates the appearance, or confirms the reality, that the non-disclosing party has something to hide, but also will warrant orders for that party to make more extensive disclosure.

26. In May 2011, the Australian Law Reform Commission released a report *Managing Discovery: Discovery of Documents in Federal Courts*[8]. The report recommended that Rules of Court be made for the parties to prepare a practical discovery plan setting out the matters on which they agree and disagree, including steps that are relevant to searching and accessing electronically stored data. The Commission recommended that judicial education bodies develop and maintain a continuing judicial education program dealing with management of the discovery process in the Federal Court of Australia. That would include the ability to appraise what is necessary for discovery including evaluating discovery plans. It also recommended that the Court's registrars be trained and equipped to hear applications in relation to discovery and that the Court be given power to refer discovery questions and issues to a referee. Another recommendation suggested that legislation give the Court power to order that the party requesting discovery pay in advance, or provide security, for the costs of the other to comply. A more controversial recommendation was for legislative action to permit orders for pre-trial oral examinations about discovery. In addition, the Commission recommended that lawyers' professional bodies should engage in continuing legal education in relation to these new discovery proposals.

4. Time limits for evidence and oral submission

27. In some cases it can be appropriate to specify in advance how long each party will be allowed to examine in chief or cross-examine or make oral submissions. This is particularly useful in urgent cases and ones in which the costs of the parties are likely to become greater than what is at stake, unless some control is exercised.

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[8] ALRC 115

5. Structuring outlines of submissions

28. How often do the parties' written and oral submissions pass like ships in the night? One remedy that is effective, at least in the case of written submissions, is to require the parties to agree on their common structure: i.e. the issues to be covered and the order in which the submissions will follow. This enables the judge to put the written submissions side by side to follow what each party wrote on a particular point, rather than searching through an unstructured morass. It makes the task of giving reasons easier.

6. Alternative dispute resolution and case management conferences

29. All registrars of the Federal Court of Australia have been formally accredited as mediators. The Court has power to refer any civil proceedings to mediation under s 53A of the *Federal Court of Australia Act 1976* (Cth). In recent years the registrars have developed considerable skill in mediating. This has been recognised by the legal profession and regular litigants (such as government departments or agencies, financial institutions, insurers and protection & indemnity (P&I) clubs).

30. If the parties do not do so, judges can raise the opportunity to mediate during directions hearings when it appears appropriate. In some areas of the Federal Court's jurisdiction, mediation is used at the parties' request quite frequently. For example, this occurs for cargo claims in Admiralty. The real parties to those disputes are, of course, the cargo insurer of the plaintiff and the P&I club of the defendant. Frequently those professional litigants will seek directions to progress the matter through pleadings to discovery and then, by consent, seek an order for mediation before the Admiralty and maritime registrars. This is because the industry participants have developed confidence in the registrars and, concomitantly, the settlement rate is high.

31. In addition, where mediation does not resolve the proceedings, the Court can make orders that, while the parties are with the mediating registrar, if they consent, he or she convene a case management conference with them to devise directions for the next state of the litigation. If there is no consent to the same registrar continuing with that case management conference, another registrar can conduct it while the parties are at the Court for the mediation.

7. Concurrent expert evidence

32. Expert evidence can be baffling, especially when the experts are cross-examined, sometimes weeks or months apart. Often there appears to be a chasm between them the size of Victoria Falls. The cross-examination picks at almost every assumption before going to pick at each opinion.

33. The reality is that much of the apparent dispute between experts is their disagreement with the assumptions the other has been asked to make. Often each expert will agree, if asked to make those assumptions, with the opinions expressed by his or her professional colleague.

34. Australia has pioneered the technique of concurrent expert evidence. It is also referred to as the "hot tub"[9]. The way concurrent evidence generally works, though individual judges or tribunals may have their own variants, is that after each expert has prepared his or her report, there is a pre-trial order that they confer together, without lawyers, to prepare a joint report on the matters about which they agree and those on which they disagree, giving short reasons as to why they disagree. Sometimes this process will identify that the experts agree on everything that each has said in his or her reports, on the basis that the opposing expert accepts the assumptions which the other has used. Thus, the role of the expert evidence is finished, and the question resolves into one of dry fact proved by lay witnesses or other evidence. That was my experience in a previous case

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[9] see also: S Rares, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues* (2010) 10(2) The Judicial Review 171

where I ordered the experts to prepare a joint report: *Australasian Performing Right Association Ltd v Monster Communications Pty Ltd*[10].

35. On most other occasions, the range of difference between the experts, which had been apparently vast if one put their two reports side by side, reduces to a narrow point or points of principle. In *Strong Wise Ltd v Esso Australia Resources Pty Ltd*[11] I explained the way in which I had taken concurrent expert evidence from groups of experts in different fields.

36. Another forensic benefit from the preparation of joint expert reports before the trial is that counsel can be made aware of any relevant factual issues that are contentious between the experts. This can focus and narrow the need for cross-examination of lay witnesses because the joint reports may show that some factual differences do not matter.

8. Statutory reinforcement of case management powers

37. Recently the Australian Parliament amended the *Federal Court of Australia Act* to provide, in Part VB, a statutory underpinning of the Court's powers in civil litigation. The Act now states that the overarching purpose of its and the Court's Rules' civil practice and procedure provisions is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. That purpose includes the following objectives:

- the just determination of all civil proceedings;
- the efficient use of the Court's available judicial and administrative resources;
- the disposal of the Court's overall caseload efficiently and in a timely manner; as well as

[10] (2006) 71 IPR 212; [2006] FCA 1806

[11] (2010) 185 FCR 149 at 175-176 [93]-[97]; [2010] 2 Lloyd's Rep 555 at 571-572; [2010] FCA 240

- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute[12].

38. The Act imposes separate statutory duties on each of the parties and their lawyers to conduct the proceedings consistently with the overarching purpose[13]. And, the Court is given specific power to:

- require things to be done;
- set time limits, including for completing the whole or part of a proceeding;
- limit the number of witnesses and documents;
- order written submissions;
- limit the length of both written and oral submissions[14].

39. The High Court of Australia has reinforced the power of the Courts to exercise significantly more control over civil litigation than may have been customary in former times. In *Aon Risk Services Australia Ltd v Australian National University*[15] Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

> "A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.
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> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy[16]. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings."

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12 s 37M
13 s 37N
14 s 37P
15 (2009) 239 CLR 175 at 217 [112]-[113]
16 Jolowicz, *On Civil Procedure* (2000), p 79

9. The individual docket system

40. Each first instance civil proceeding that is filed in the Federal Court of Australia is docketed – allocated – to an individual judge who will hold a first directions hearing within a few weeks of the filing[17]. That judge will make all procedural directions and manage the case for a hearing that he or she will conduct.

41. The underlying principle of the docket system is that once allocated to a particular judge, the case remains with that judge from commencement to disposition. This enables the judge to become familiar with the issues, to help the parties refine them, to ensure that the case is properly managed so that it will be presented at trial in the way it most likely to achieve an efficient presentation of the real issues in dispute and to ensure their speedy determination. In addition, the individual judge managing the case will be able to, where appropriate, suggest or order mediation. The Court also has the facility to order a case management conference, that is, a less formal form of directions hearing in which the judge and the parties sit around a table and seek to deal with the procedural management of the case generally or in respect of particular issues.

42. The docket system operates by the Registry allocating each new matter to a judge in strict rotation as it is filed. Where the matter is urgent it is referred initially to the duty judge if it has just been filed or the docket judge is not then available to deal with it. Soon after, it will be added to the docket of the judge who would have received it in the ordinary course. A second exception is where the matter falls within the scope of one of the specialist panels or the Admiralty and maritime national arrangement. In the larger registries, particularly New South Wales and Victoria, several panels in speciality areas have been established.

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[17] The docket judge is the next judge in rotation of those in the registry at the time of filing.

Judges with expertise in those areas are assigned by the Chief Justice to the panels [18].

43. One criticism of the docket system made from time to time is that a judge may appear to have formed views about the merits as he or she manages the interlocutory processes. That has not been the experience of the Court. It certainly was not the view of the legal profession when I was in practice and people spoke to me on such matters less cautiously than they do now.

44. The docket system can impose some extra costs early in a proceeding because it is being actively managed by a judge. The counterpoise is that, hopefully, the parties get to the real issues and a trial, or resolution, faster and with less overall expense. The system imposes an extra work burden on the judge in the initial phases, but this is more than compensated for by the saving in time and the increased focus that this produces.

10. Specialised lists and prescriptive procedural directions

45. Some courts in Australia, such as a number of State Supreme Courts, use specialised lists for particular classes of matter, where proceedings are managed by a list judge or a registrar or other court official at the pre-trial stage. Similarly, some courts prescribe compulsory procedural directions for the preparation of a case for hearing. Both these methods contemplate that all matters in the list or the court will be prepared in a consistent manner.

46. The drawback, from the judge's perspective, is that each of us thinks and works differently. In a docket system, the judge can craft directions that will enable the case to be presented in a way that best suits the judge's method of assimilating material and, ultimately, writing or giving reasons for his or her decision.

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[18] In the larger registries (Sydney, Melbourne and Brisbane) judges can be allocated to a number of specialist panels, such for cases involving Patents, Taxation, Admiralty, Competition, Corporations or Industrial/Labour law issues. Where there are panels, cases falling within a panel's area are docketed to the next judge in rotation who is on the panel.

CONCLUSION

47. Of course, the efficiency of all of the possible ways of managing pre-trial matters depends on the size of the Court, the number of judges or others responsible for implementing any system and the workload of the Court, including the number and nature of matters filed in it. But, we do not live in a perfect world and as Parkinson's Law states:

> "Work expands so as to fill the time available for its completion."[19]

48. The realisation that case management can arm the courts with an effective tool to shape and control litigation before them, offers an important opportunity to reflect on a range of possible solutions to the law's delay. Doing justice according to law lies at the heart of the judicial function. Interminable proceedings, overburdened with prolix pleadings and physical or electronic mountains of documents do not, at first, or second, blush seem intuitively compatible with doing justice. Judges can get lost in the morass and not see the wood for the trees. To mix metaphors, case management can force the parties to cut to the quick. If they do, the real dispute will be easier to identify, and the material that assists in its determination more contained. Those features will conduce to more judicial time being available to solve that dispute and others and the likelihood that the judge will see the wood, despite the necessary presence of trees.

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[19] C Northcote Parkinson : *The Economist* 19 November 1955