

Northern Territory Bar Association

Civil Law Conference – 2012

It is a great honour to have been invited to present the opening address on the occasion of the inaugural Civil Law Conference conducted by the Northern Territory Bar Association. I have referred to it as the inaugural conference because I fully expect that this will be the first of many such conferences. It is a wonderful concept which must be perpetuated.

I congratulate all involved in the development of the concept and the organisation of the event which brings us to this cold location.

A conference such as this provides each of us individually, and together as a profession, with an opportunity to pause and take note of where we have been, where we are and where we may be headed. In my case the distance to where we are headed seems uncomfortably short compared with where I have been.

I arrived in the Northern Territory in 1974. When I look back at the practice of the civil law at that time I see that it was substantially different from the practice of the law today. In large measure the cases that make it to a full hearing before the Supreme Court of the Northern Territory today follow a different path and are of a different kind from those which came before our first Chief Justice, Sir William Forster in the 1970s. Whilst, in the criminal jurisdiction, the standard or usual day for Sir William would have been much the same as today, in the civil jurisdiction, the working day of his Honour would have been somewhat different.

Some of the matters which would have occupied much of the time of a Judge in the 1970s have long since disappeared from the Supreme Court lists. By way of

example, in those days his Honour had to suffer through what he wearily described as "happy family law day" each Friday. It was not until 1975 that the *Family Law Act* was passed. It was not until 1975 that no fault divorce was introduced. The introduction of the *Family Law Act* was a great step forward for Australian society and the introduction of the Family Court was a great relief for the Judges of the Supreme Court. On 31 May 1988, possibly as a bicentennial project, acting Chief Justice Nader ordered the transfer of all remaining family matters then being dealt with by the Supreme Court to the Family Court of Australia.

In the 1970s the civil hearing list was dominated by claims for damages arising out of personal injuries. The principal source of compensable personal injuries was, not surprisingly, from motor vehicle accidents. At that time, the injured person would commence proceedings for damages and head to court. Unless the matter resolved, and this would usually occur at the door of the Court, there would follow a three or four day trial, generally leading to an award of damages.

Damages claims for personal injuries arising out of the use of motor vehicles started to come to an end with the introduction of the *Motor Accidents (Compensation) Act* of 1979 which created what was then a radical scheme, abolishing common law damages for personal injuries to Territory residents arising out of a motor vehicle accident and replacing them with an entitlement to statutory benefits payable regardless of fault. An amendment to the Act in 2007 extended the abolition of common law rights to claims for damages arising out of a motor vehicle accident that occurred in the Territory to include interstate and overseas visitors. Although the litigation tail wagged for some time personal injuries cases arising out of motor vehicle accidents are almost a thing of the past.

The closest the Supreme Court of 2012 comes to those gentle, predictable actions are disputes under the *Motor Accidents (Compensation) Act*. Those disputes are narrowly focused and centre on issues such as whether an injured person meets the criteria for the compensation scheme and, if so, the extent of a particular disability. The actions rarely proceed to a hearing.

The second greatest source of personal injuries litigation in the Supreme Court was from industrial accidents. The decline in those cases commenced with the introduction of the *Work Health Act* in the mid-1980s continuing through to the present Act the *Workers Rehabilitation and Compensation Act*.

There were, of course, many other categories of personal injury claims. Some of those categories have been restricted by the provisions of the *Personal Injuries (Liabilities and Damages) Act* of 2003 which limits the liability of volunteers and good Samaritans and restricts the ability of those involved in criminal conduct to recover damages. The Act also fixes what it describes as "reasonable limits" on awards of damages.

Since the 1990s the average number of lodgements for claims for damages for personal injuries and for matters under the *Motor Accidents (Compensation) Act* has hovered around the 30 per annum mark which is a great reduction from the halcyon days. Those matters disappeared from the Court lists because, inter alia, the court system was perceived by the legislature to be too expensive and too slow with the additional undesirable result that compensation belatedly became payable in a lump sum after some years. The legislature determined that the common-law system did not provide either the fairest or the most efficient and appropriate method of compensating the injured.

Other matters that have disappeared or mostly disappeared from the Supreme Court lists include adoptions, guardianship of infant applications and Workers Compensation Appeals which were hearings de novo.

Over the last 20 years a substantial part of the work of the Court has been in civil appeals which include Justices Appeals. Another constant is the action for debt recovery of one form or another. Notwithstanding the efforts of the legislature claims for damages of various kinds continue to be lodged with the Court in significant numbers. In more recent times, the flavour of the month has been applications under the Criminal Property Forfeiture legislation. This is likely to continue at least until the application of that difficult legislation has been bedded down.

There has been a widely held perception that the civil work of the Court has declined over recent years and my research suggests the perception is not without foundation. Whilst there was an immediate decline in lodgements of approximately 33% when the jurisdiction of the Local Court was increased to \$100,000 in 1998, the figures climbed over the following years. In the last five years the figures have fluctuated between approximately 480 and 540 civil lodgements per annum. Comparing the civil lodgements for the year 2003/ 2004 with those of 2010/ 2011 there has been a 9% decrease in actual numbers.¹ It must be acknowledged that there are significant fluctuations in the number of civil lodgements from year to year and, consequently, as with other statistical exercises, one could manipulate the information to produce any desired result. However, the overall trend for the period is a gradual decline in the number of civil lodgements.

¹ Figures taken from the annual Report on Government Services and the Supreme Court statistical database.

The downward trend in civil lodgements is not confined to the Northern Territory. The Court nearest to the Northern Territory in terms of size (but, of course, not geographically or demographically) is the Tasmanian Supreme Court. That Court reports that between 2005 and 2011 its criminal lodgements increased by 18% and its civil lodgements decreased by 18%.² In a recent article in the South Australian law society magazine, *Bulletin*, complaint was made that "civil litigation in South Australia has dropped at an alarming rate since 2002/3".³ The author described a decline in civil actions in South Australia in the Supreme and District Courts of 18% over the period through to 2010. He noted for the same period a growth in such actions in New South Wales, Queensland and Western Australia and a smaller decline in Victoria.

As a matter of interest a comparison between the criminal lodgements in the Northern Territory Supreme Court in 2003/ 2004 and those of 2010/ 2011 show an increase of 32%. Again there exist fluctuations from year to year. However the overall trend over the period is of a gradual increase in criminal lodgements. Of course, and importantly for present purposes, criminal lodgements almost inevitably lead to hearings of one kind or another whereas civil matters are more likely to resolve without a hearing.

A better measure of the work of the Northern Territory Supreme Court may be seen from a comparison of the sitting days of the Court attributable to civil and criminal work. In the last four years the Supreme Court criminal sitting days have numbered 737, 884, 932 and 949 revealing a steady increase. In the same period the civil sitting days have been up and down, being the much lower figures of 325, 254, 190 and 213. What is apparent is that a higher number of

² Supreme Court of Tasmania Annual Report 2011.

³ The decline and fall of civil litigation, Bernard O'Brien, *Bulletin* (Vol 33, Issue 11, Dec 2011).

civil lodgements has led to a significantly lesser number of sitting days for the Court than the lesser number of criminal lodgements.

Civil work has not expanded as may have been expected with the increasing population and economic development of the Territory. What has certainly changed is the increase in the settlement rate of matters, probably principally due to improvements in, and availability of, alternative dispute resolution processes along with improved judicial management techniques leading to a consequent reduction in civil cases going to trial.

Where the real change has occurred in the period since the days of Forster CJ is in the manner in which civil matters have been managed by both the courts and the profession leading to a dramatic increase in settlement rates. The changes arose from increasing concern with, and criticism of, the conduct of the civil justice system, particularly in the superior courts of Australia. Criticisms focused upon the problems of delay, inefficiency and excessive or disproportionate legal costs.⁴

In the 1970s and 1980s the Court was not at all proactive in case management. It was the parties and their lawyers who exercised dominant control over the conduct of civil litigation.⁵ By way of example a matter would not be allocated a hearing date unless and until counsel for the parties had certified that various matters had been attended to and that the matter was ready for trial. The automatic procedures for dealing with interlocutory matters which are prevalent today did not exist. It was necessary to make an interlocutory application in relation to almost any relief at all. Such applications were listed for a Thursday morning and, generally speaking, the hearing of all of those applications would

⁴ Victorian Law Reform Commission: Civil Justice Review Report 14 at 10.

⁵ Victorian Law Reform Commission: Civil Justice Review Report 14 at 72.

occupy the whole of the morning. In the 1970s the hearings were conducted in the private chambers of the Judge with members of the profession waiting outside whilst those involved in a particular matter would enter the chambers and argue the matter before the Judge. It was a great social occasion but not a very productive way of dealing with routine matters.

The system has given way to the present approach which involves judicial officers being significantly more proactive in the management and control of cases. This change arises out of what Lord Woolf described as the need for "a fundamental transferring of the responsibility for the management of civil litigation from litigants and their legal advisers to the courts".⁶

One aspect of the new form of management has been the necessity for judicial officers themselves to adjust to the need for the strong management of civil matters. Judges, who had experienced the former laissez-faire management style as counsel, and then again for a period in judicial office, were sometimes less likely to embrace the new interventionist regime. I believe that, at present in the Supreme Court of the Northern Territory, all members of the bench take a stronger and more interventionist approach to the management of matters although, perhaps, some are more rigorous and interventionist than others.

There are, of course, significant constraints on the ability of a Judge to effectively manage proceedings. It remains the case, and will always be the case, that the litigants and their advisers determine the issues to be resolved by the court. They determine the grounds upon which the dispute will be argued and they decide upon the matters the court must address. It is the parties themselves who ultimately determine what evidence is available to be led and

⁶ Lord Woolf: Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995) referred to in the Victorian Law Reform Commission Report at 72.

the extent to which there will be a challenge to that evidence. The Court must deal with and resolve the case as presented by the parties.

During the lead up to a trial the information necessary to inform case management decisions is generally held by the parties, and sometimes by one only of those parties. A difficulty may arise from the fact that it will often be in the interests of one party for the proceedings to be delayed and the true issues obscured whilst the other party will be anxious to have the matter resolved quickly and upon a narrow focus. It is easy for litigation to degenerate into a tactical war with disproportionate and costly focus upon process at the expense of a just outcome.

Judicial caution must be exercised to ensure the pursuit of efficient case management does not overwhelm the pursuit of justice. Obviously it is necessary for the Judge to endeavour to allow the parties to conduct their cases as they see fit subject to appropriate constraints. A spirit of cooperation between Court and the profession is necessary to ensure the most efficient conduct of a trial.

The Courts and the profession must bear in mind the observations of Heydon J in *Aon Risk Services Australia Limited v ANU*⁷ where his Honour criticised the courts below in that particular case and the legal practitioners who appeared before those courts, observing that the case provided numerous examples of how litigation should not be conducted. His Honour memorably went on to say:

The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.

⁷ *Aon Risk Services Australia Limited v ANU* [2009] 239 CLR 175 at 229.

Modern judicial management methods are intended to avoid such criticisms and to provide mechanisms leading to the just, cost-effective and expeditious conduct of proceeding to the point of resolution of the real issues in dispute.

I expect as time goes on the Courts will be provided with, or otherwise assume, greater powers to control the conduct of litigation, for example by requiring clear definition of the necessary issues, limiting discovery, imposing time limits on the trial and limiting the number of expert reports. These ideas are not new. They have been raised by Sackville J following the C7 litigation⁸ and by others since.

In addition I expect greater emphasis to be placed upon the duty owed by legal practitioners to the Court which is the foundation of a lawyer's ethical obligation. As Warren CJ of the Victorian Supreme Court noted in a paper delivered to the annual conference of the Bar Association of Queensland in 2011⁹ that duty will increasingly require parties to litigation to adhere to a set of overarching purposes that aim to ensure the just, timely and efficient resolution of disputes. So much is necessary to ensure public confidence in the judiciary and the courts as the third arm of government.

What is readily apparent from the experience of the Northern Territory Supreme Court, and I am sure other courts around the country, is that unless the courts provide a just, trusted, respected, cost efficient and prompt dispute resolution process the role of dispute resolution will increasingly be addressed by other approaches or other bodies e.g. by systems of statutory compensation or

⁸ Quoted in Victorian Law Reform Commission: Civil Justice Review Report 14 at 74.

⁹ Warren CJ, The Duty Owed To The Court: The Overarching Purpose of Dispute Resolution in Australia. A speech delivered at the Bar Association of Queensland Annual Conference, Gold Cap Coast on 6 March 2011 and located on the website of the Supreme Court of Victoria.

resolution by statutory administrative tribunals. There are dangers to the institution of the courts and to our system of justice and government in such work being performed elsewhere. It is incumbent upon us as judicial officers and members of the legal profession to ensure we do not fail the community we serve. We must endeavour to ensure that the ever-increasing settlement rate of civil proceedings is a consequence of the efficient and cost-effective conduct of proceedings leading to just results rather than being a consequence of parties resolving issues to avoid unacceptable costs or delays.

It is in that historical setting that Practice Direction 6 was introduced in the Northern Territory.

Practice Direction 6

Practice Direction 6 was introduced by Martin CJ with effect from 01 January 2010. It arose from recommendations made by a committee chaired by Mildren J which included representatives of the Northern Territory Bar Association and the Law Society and me as a representative of the Court. A particular contributing voice on the committee was that of Alistair Wyvill SC who had personally experienced the changes then taking place in the United Kingdom.

The explanatory document which accompanied the Practice Direction explained that reforms have been underway in common law jurisdictions around the world. The major driving force was, of course, the Lord Woolf civil justice reforms in England and Wales. The thrust of those reforms have been picked up in various Australian jurisdictions. Given that our Supreme Court Rules were modelled on the Victorian Supreme Court rules the committee had reference to the Victorian Law Reform Commission's report on Civil Justice Reform (Report 14, July 2008). The first and second recommendations of the report were:

Pre-action protocols should be introduced for the purpose of setting out codes of "sensible" conduct which persons in dispute are expected to follow when there is the prospect of litigation.

The objectives of the protocols would be:

- to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement;
- to provide model precedent letters and forms;
- to provide a timeframe to the exchange of information and settlement proposals;
- to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation;
- to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.

You will find those sentiments reflected in Practice Direction No 6 of 2009.

The Practice Direction has the expressed ultimate objectives that parties will resolve disputes prior to proceedings being commenced and, where that is not possible, to support the efficient management of proceedings. It is designed to encourage meaningful discussion at an early time rather than at the court door on the day the trial is set to commence.

The Practice Direction is flexible in operation. It provides that parties to a potential dispute should follow a "reasonable procedure, suitable to their particular circumstances" which is intended to avoid litigation. The catch cry to be found in the management provisions of the Practice Direction is that any action taken must be necessary to resolve the real issues of substance in dispute between the parties justly, promptly, economically, and in proportion to the nature of the dispute.

One method of ensuring parties focus upon the essential issues is for the Court to set a hearing date at an early time. We now endeavour to do that in the process provided for in Practice Direction 6 by, at the first management conference, listing matters for a specific civil sitting of the Court. The hearing date is to be regarded as fixed or "sacrosanct" and the approach of the Judges and the Master is that the hearing dates will not be vacated save in exceptional circumstances.

It is difficult to objectively assess the success or otherwise of the Practice Direction. The logical consequence of the procedures adopted is that if the process provided is successful, and matters settle prior to commencement of proceedings, the Court will not hear of those matters at all. This necessarily means that we have no reliable way of assessing whether or not the Practice Direction has been successful and whether there are any improvements which could be made to it to assist the profession.

In recent times the Master of the Court has undertaken an informal review of the Practice Direction. As part of the review the Master wrote to all legal firms in the Territory which conduct civil proceedings and he also communicated with the Law Society. He sought general comments on the Practice Direction and, in particular, details of cases which were settled prior to the issue of proceedings. The Master reports that the response from the profession has been disappointing. Two firms advised that in their view Practice Direction 6 significantly increased costs payable by parties. No other helpful response was received.

In those circumstances the Master and I have been left with only anecdotal information obtained as a result of informal discussions held with various members of the profession. We have been informed of at least five significant

actions which have resolved in recent times as a consequence of, or at least contributed to by, the processes required by the Practice Direction.

The anecdotal evidence, sparse and informal as it is, suggests some level of success. On the other hand the Master reports having received some off the cuff comments which suggest some practitioners are unhappy with the operation of Practice Direction 6. Those remarks have not been followed up by any considered submission. This is disappointing.

For those practitioners who have reservations regarding the operation of the Practice Direction it is necessary to identify those reservations, reduce them to writing and draw them to the attention of the Master. It is not possible for us to address issues in the absence of some effort to adequately formulate the concern so that we may take advice from the profession and from the Judiciary and, if appropriate, respond in a considered and positive way.

In the process of managing civil proceedings the Master has discovered that in some cases Practice Direction 6 has not been followed. The sanctions available for failure to comply with the requirements of the Practice Direction are to be found in the power of the Court to order the payment of costs on both an ordinary and an indemnity basis and also to alter the interest provisions in an appropriate way by way of response to any such failure. It is important for the profession to note that an order may be made against a legal practitioner where it is established that the practitioner failed to take reasonable steps to ensure that the client has complied with the duties provided for under the Rules and the Practice Direction. Given the observations of the Master regarding examples of non-compliance it is likely to be just a matter of time before that sanction is visited upon a practitioner.

The Master has provided the Judges with a list of preliminary ideas for reforming Practice Direction 6. This is not the time to air those suggestions but I can indicate they involve beefing up rather than watering down the requirements of the Practice Direction. If the profession, or members of it, wish to contribute to the discussion either through formal submission or informal submission the Master and the Judges will be delighted to hear from you.

On the information available to me at this time Practice Direction 6 appears to be having some positive effect on litigation in the Northern Territory. Now that we have had a reasonable opportunity to trial the process I would like to move towards incorporating it into the Rules either in its present form or a form modified to reflect the ideas of the profession. I invite you to take constructive suggestions to the Master.

At this moment the position in the Territory seems to be that there is a moderate upward trend in criminal lodgements and a slight downward trend in civil lodgements. However, with the increasing success of alternative methods of civil dispute resolution and with more effective judicial management techniques fewer and fewer civil cases are proceeding to trial. In so far as civil work is concerned this is as it should be. Those practitioners engaged in the resolution of civil disputes, including members of the civil Bar, appear, at least to those of us on the outside, to be surviving comfortably.