



## NATIONAL AUSTRALIAN INSURANCE LAW ASSOCIATION CONFERENCE

### HAMILTON ISLAND

17 – 19 SEPTEMBER 2008

### DISPUTE RESOLUTION IN THE 21<sup>ST</sup> CENTURY

#### MEDIATE OR LITIGATE?

**The Hon Justice Peter McClellan  
Chief Judge at Common Law  
Supreme Court of New South Wales**

When I was a relatively young barrister I was engaged by a client who had migrated to Australia in the early 1950s. I will call him Mr Smith. He came from modest origins and set up a business growing fruit and vegetables which he marketed to the public from a road side stall. The business grew and became a significant retail shop. Unfortunately, as the city developed the local road authority decided to include part of his land in a major road widening. It meant that his business had to close.

Faced with this threat he commenced proceedings for an injunction to restrain the authority from taking his land. He failed at trial but I was able to successfully argue in the Court of Appeal that the matter should be returned to the trial judge for the resolution of further issues. This happened. He again lost and another appeal was filed. These processes occupied more than 2 years during which time he kept trading.

Shortly before the new appeal was to be heard he came with his solicitor for a conference. The position was now hopeless and I advised him that our best course was to negotiate as much time as possible before his business must close. He looked downcast. On the way to the lift with his solicitor I am told that in a distressed



voice he exclaimed “I do not understand. I have given you all this money. Have you not been paying the right people?”

I shall return to Mr Smith’s experience later.

Insurance and the law have a shared history. As western economies developed and business became more sophisticated the insurance industry responded by providing mechanisms for the sharing of risks. But as with any commercial endeavour problems arose. With time the law developed processes to resolve the inevitable disputes between the insurer and the insured. However the courts have not always been able to provide the dispute resolution processes desired by the industry. And at times the process of dispute resolution by judges has failed to meet the needs of the general community.

The first records of insurance in England emerge from disputes in the courts of Admiralty in 1547.<sup>1</sup> During the 16<sup>th</sup> century competing jurisdictions fought for the right to determine insurance disputes. Although a body of commissioners, consisting of merchants and civilians was appointed, the courts of Admiralty and the common law exercised concurrent jurisdiction over these matters.<sup>2</sup> In 1601, the commission was given statutory authority and formed the first commercial tribunal of its type established in England.<sup>3</sup> The decisions were sometimes in conflict. The common law lawyers insisted that judgments of the commission were no bar to initiating

---

<sup>1</sup> Sir William Holdsworth, “A History of English Law: Volume VIII” (1936), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 283, citing *Broke c. Maynard*, *Select Pleas of the Admiralty* (S.S.).

<sup>2</sup> Sir William Holdsworth, “A History of English Law: Volume VIII” (1936), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 288.

<sup>3</sup> Sir William Holdsworth, “A History of English Law: Volume VIII” (1936), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 289.



proceedings in the common law courts.<sup>4</sup> Holdsworth notes that “the natural result was that, during the sixteenth and seventeenth centuries, the law of insurance was in a very backward state. Neither in the court of Admiralty in the earlier part of this period, nor in the courts of common law and equity in the latter part, were any very general or certain rules evolved.”<sup>5</sup>

Early communities tended to rely on primitive forms of arbitration for the resolution of disputes. In early England, justice was achieved at public meetings, which are known to have occurred during the 8<sup>th</sup> century.<sup>6</sup> These meetings were largely informal, and as records were not kept our knowledge of what occurred during them is limited. Although the meetings could not be said to resemble courts of law, it is possible to see the beginnings of our adversarial system of justice.

A unified English nation was not established until the 10<sup>th</sup> century. The earliest forms of justice did not constitute a system of law, but provided self-help methods, utilising retribution and included the forcible removal of property. Private warfare between individuals and feuding between families was a cost to the entire community.

However “the suppression of private force by investing the community at large with a greater force required a degree of social organisation which it must have taken countless dark and forgotten centuries to achieve.”<sup>7</sup>

---

<sup>4</sup> Sir William Holdsworth, *“A History of English Law: Volume VIII”* (1936), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 290.

<sup>5</sup> Sir William Holdsworth, *“A History of English Law: Volume VIII”* (1936), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 290.

<sup>6</sup> JH Baker, *“An Introduction to English Legal History”* (2002), 4<sup>th</sup> Ed, Butterworths LexisNexis, London at 4.

<sup>7</sup> JH Baker, *“An Introduction to English Legal History”* (2002), 4<sup>th</sup> Ed, Butterworths LexisNexis, London at 4.



Although the early English kings wrote many statutes during the 11<sup>th</sup> century, disputes were generally still governed by unwritten custom rather than settled law.<sup>8</sup> During this time, a body of rules was developed to limit the individual's ability to seek redress privately; for example early Anglo-Saxon law rarely recognised a defence of killing in self-defence.<sup>9</sup> Eventually a system developed where individuals were forbidden from taking any retributive action without sanction from the court. Persons found guilty of doing so were liable to lose the goods they had taken, and to pay a double fine.<sup>10</sup>

By the time of the Norman invasion in 1066, the English had developed a moderately sophisticated system of justice, administered by the local villages and boroughs. One of the most notable additions brought by the Normans was the infamous "trial by battle", which allowed parties to settle their disputes by combat.<sup>11</sup> In true heroic fashion, the trial was instigated by a champion, each chosen by the disputants, throwing down a gauntlet.<sup>12</sup> During this period, the Church began to encourage the payment of "blood-money" in lieu of battle to regain honour.<sup>13</sup> The use of the ordeal was prohibited by the Church in 1215, after much debate as to whether it was legitimate to involve God in the administration of human affairs.<sup>14</sup> Trial by battle was virtually obsolete at the end of the 13<sup>th</sup> century, although it was not formally

---

<sup>8</sup> JH Baker, *"An Introduction to English Legal History"* (2002), 4<sup>th</sup> Ed, Butterworths LexisNexis, London at 3.

<sup>9</sup> Sir William Holdsworth, *"A History of English Law: Volume II"* (1936), 4<sup>th</sup> Ed, Methuen & Co Ltd, London at 100.

<sup>10</sup> Sir William Holdsworth, *"A History of English Law: Volume II"* (1936), 4<sup>th</sup> Ed, Methuen & Co Ltd, London at 100.

<sup>11</sup> P Parkinson, *"Tradition and Change in Australian Law"* (2005), 3<sup>rd</sup> Ed, Thomson Lawbook Co, Sydney at 64.

<sup>12</sup> P Parkinson, *"Tradition and Change in Australian Law"* (2005), 3<sup>rd</sup> Ed, Thomson Lawbook Co, Sydney at 64.

<sup>13</sup> JH Baker, *"An Introduction to English Legal History"* (2002), 4<sup>th</sup> Ed, Butterworths LexisNexis, London at 3.

<sup>14</sup> JH Baker, *"An Introduction to English Legal History"* (2002), 4<sup>th</sup> Ed, Butterworths LexisNexis, London at 5.



abolished until the 19<sup>th</sup> century.<sup>15</sup> Despite this, many of the customs associated with these early practices, in particular the use of oaths for witness testimony, were adopted by the common law.

The development of civil litigation did not occur in a vacuum. Whilst lawyers praise the development of the common law system, it is important to recognise the equal significance of arbitration. Commercial arbitration was revived by European merchants in the Middle Ages.<sup>16</sup> From 1000 to 1300 AD trade between nations soared and led to the creation of commercial tribunals held at annual fairs which travelled throughout Western Europe. Parties were keen to avoid the local courts for fear of bias or formality, and accordingly turned to self-regulation, where panels of 4 or 5 merchants who attended the fair determined disputes between members. The rules and customs applied by these panels became known as the “law merchant”. Enforcement of arbitration decisions was made possible by the threat of expulsion from the fairs, which were the largest trading schemes operating in Europe.<sup>17</sup> Sir Ninian Stephen notes, “the needs of merchants called for a speedy system of justice and one that applied principles well recognised by merchants throughout the trading world of the day; arbitration and the law merchant were means of meeting those needs.”<sup>18</sup> Echoes of these sentiments can be heard today.

---

<sup>15</sup> Sir William Holdsworth, *“A History of English Law: Volume I”* (1938), 6<sup>th</sup> Ed, Methuen & Co Ltd, London at 309.

<sup>16</sup> K Stone, *“Arbitration”* in DS Clark (ed), *“Encyclopaedia of Law and Society”* (2007).

<sup>17</sup> RE Stewart, *“Arbitration and insurance without the common law”* (2004) 11(3) *ARIAS-US Quarterly* 5 at 7.

<sup>18</sup> The Honourable Sir Ninian Stephen, *“Yf by theyr good dyscretions”* (1991) 26(7) *Australian Law News* 42 at 44.



Early business communities were largely left to regulate the conduct of their members and establish norms of acceptable behaviour.<sup>19</sup> Craft guilds operating in early Europe were responsible for setting standards of conduct and for enforcing contracts and imposing fines and suspensions from trade in the event of a breach.<sup>20</sup> In the 12<sup>th</sup> century, the Weavers Guild was granted a Royal Charter by King Henry I, giving the guild the authority to arbitrate disputes between its members, and also a small criminal jurisdiction for “small transgressions on the part of members, their households and employees”.<sup>21</sup>

As the business of the courts increased, the mechanisms for delivering justice became increasingly complex. The system of writs developed whereby the plaintiff wrote to the defendant stating the nature of the complaint and the remedy sought. These writs were complex in both nature and number; during the reign of King Edward I (1272-1307) there were over 400 types of writ in existence.<sup>22</sup> The complicated nature of proceedings gave rise to a primitive legal profession, apprenticeship schools and legal texts.

During the 14<sup>th</sup> century growth in trade and commerce had developed to such an extent that the travelling fairs were replaced by permanent markets known as “Staple Towns”.<sup>23</sup> These markets continued to apply the law merchant, and operated with the aim of advancing trade by resolving disputes as quickly and cheaply as possible.

---

<sup>19</sup> K Stone, “Arbitration” in DS Clark (ed), *“Encyclopaedia of Law and Society”* (2007).

<sup>20</sup> K Stone, “Arbitration” in DS Clark (ed), *“Encyclopaedia of Law and Society”* (2007).

<sup>21</sup> The Honourable Sir Ninian Stephen, *“Yf by their good dyscretions”* (1991) 26(7) *Australian Law News* 42 at 42.

<sup>22</sup> P Parkinson, *“Tradition and Change in Australian Law”* (2005), 3<sup>rd</sup> Ed, Thomson Lawbook Co, Sydney at 69.

<sup>23</sup> RE Stewart, *“Arbitration and insurance without the common law”* (2004) 11(3) *ARIAS-US Quarterly* 5 at 8.



It was about this time that the insurance industry began to thrive, developing wholly independently of the common law. The merchants developed an ingenious system of mandatory insurance policies, with standard clauses that did not need to be settled between the parties. This was particularly suited to the time, as moveable-type-printers had not yet been invented. The system saved parties the trouble of writing out policies in full.<sup>24</sup> The law merchant developed its own system of resolving insurance disputes, with arbitrators chosen from the merchant body, applying the standard customs and practices.<sup>25</sup> In focusing on advancing trade, insurance policies were construed “for the benefit of trade, and for the insured”.<sup>26</sup>

Whilst the English merchants were relatively late in adopting arbitration, they were not left to govern themselves for very long.<sup>27</sup> During the 15<sup>th</sup> century, the Royal Courts were keen to acquire jurisdiction over trade matters. As the Staple Towns diminished, the merchants had no choice but to seek redress through the courts and over time, the law merchant became imbedded in the general law.<sup>28</sup> The Court of Admiralty, established in the mid 1300s, eventually acquired jurisdiction over shipping and piracy matters, and assumed further power under the reign of Queen Elizabeth 1, with the Court being granted additional jurisdiction over international contracts and insurance.<sup>29</sup>

---

<sup>24</sup> RE Stewart, “*Arbitration and insurance without the common law*” (2004) 11(3) *ARIAS-US Quarterly* 5 at 9.

<sup>25</sup> RE Stewart, “*Arbitration and insurance without the common law*” (2004) 11(3) *ARIAS-US Quarterly* 5 at 9.

<sup>26</sup> RE Stewart, “*Arbitration and insurance without the common law*” (2004) 11(3) *ARIAS-US Quarterly* 5 at 9.

<sup>27</sup> The Honourable Sir Ninian Stephen, “*Yf by theyr good dyscretions*” (1991) 26(7) *Australian Law News* 42 at 45.

<sup>28</sup> RE Stewart, “*Arbitration and insurance without the common law*” (2004) 11(3) *ARIAS-US Quarterly* 5 at 10.

<sup>29</sup> The Honourable Sir Ninian Stephen, “*Yf by theyr good dyscretions*” (1991) 26(7) *Australian Law News* 42 at 45.



Civil litigation increased significantly during this period. Brown notes that “on the eve of the civil wars in 1640, the amount of litigation in the central courts in Westminster was perhaps 14 times greater than it had been in the 1490s, and this trend appears to have been matched by no less dramatic increases in the amounts of business in local borough tribunals and the ecclesiastical courts.”<sup>30</sup> By this time the social elite had raised concerns about the threat of litigation, which was seen to lead to a loss of Christian values and neighbourliness.<sup>31</sup> However it is possible that these concerns were masking more serious concerns about the ability of the common man to challenge the elite. Litigation was supported by lower relative costs, and lawyers’ willingness to provide services on credit.<sup>32</sup>

An Act of the British Parliament formally approved arbitration in 1698.<sup>33</sup> By this time the rigidities of the common law had again pushed commercial trade disputes, particularly international disputes, away from the courts, which were seen to be too slow to accommodate commercial needs.<sup>34</sup> Nevertheless the courts endeavoured to control the use of arbitration. Under the 1698 Act, the court was empowered to order the parties to arbitrate their dispute, with threats of contempt for those who failed to do so.<sup>35</sup>

The rate of litigation slowed in the late 17<sup>th</sup> and 18<sup>th</sup> centuries. Cases in the King’s Bench and Court of Common Pleas dropped by two thirds, and those in the High

---

<sup>30</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 30.

<sup>31</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 31.

<sup>32</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 33.

<sup>33</sup> R Merkin, *“Arbitration Law”* (2004) Informa Legal Publishing, London at 3.

<sup>34</sup> Sir William Holdsworth, *“A History of English Law: Volume VI”* (1937), 2<sup>nd</sup> Ed, Methuen & Co Ltd, London at 635.

<sup>35</sup> R Merkin, *“Arbitration Law”* (2004) Informa Legal Publishing, London at 5.



Court of Chancery dropped by 75%.<sup>36</sup> The industrial age of the 18<sup>th</sup> century was accompanied by specialisation in the law courts, particularly in the areas of admiralty and equity. Although this was a period of economic prosperity, parties were deterred by the spiralling cost and complexity of litigation in the courts.<sup>37</sup>

By the 19<sup>th</sup> century, the legal system had developed to the point where it was considered “cumbersome and arbitrary”.<sup>38</sup> During the 1850s, perhaps in an effort to save costs, parties in the United Kingdom could elect to have their matter tried by a judge alone.<sup>39</sup> At the conclusion of the First World War, civil juries were only retained for slander and libel cases.<sup>40</sup>

As society became more sophisticated, business transactions increased in specialisation and number. Disputes derived from commerce and trade increasingly burdened the courts, which were expected to master both the law and the difficult circumstances in which the disputes arose. Resort to the courts to resolve disputes between commercial parties was increasingly unsuited to modern day business relationships, which were enduring. “Agreeing to arbitration could enhance one’s reputation for being fair-minded or, in the case of a merchant, demonstrate a credit so secure as to be above needing to scrape the last penny from a client or partner.”<sup>41</sup> LM Friedman refers to a “golden age of contract” which he laments as

<sup>36</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 34.

<sup>37</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 35-36.

<sup>38</sup> P Parkinson, *“Tradition and Change in Australian Law”* (2005), 3<sup>rd</sup> Ed, Thomson Lawbook Co, Sydney at 71.

<sup>39</sup> C Menkel-Meadow, *“Is the adversary system really dead? Dilemmas of legal ethics as legal institutions and roles evolve”*, in J Holder, C O’Cinneide, M Freeman (eds) *“Current Legal Problems 2004”* (2005), Oxford University Press, London at 97.

<sup>40</sup> C Menkel-Meadow, *“Is the adversary system really dead? Dilemmas of legal ethics as legal institutions and roles evolve”*, in J Holder, C O’Cinneide, M Freeman (eds) *“Current Legal Problems 2004”* (2005), Oxford University Press, London at 97.

<sup>41</sup> W Priest, S Roach Anleu (ed), *“Litigation: Past and Present”* (2004) UNSW Press, Sydney at 54.



“miraculously brief”.<sup>42</sup> The stock-standard business contracts avoided courts, and matters that were determined by judges tended to arise from unusual circumstances and were subject to the whim of the individual judge. Nevertheless, the courts were reluctant to lose their prominence as the supreme adjudicator of all disputes. Sir Ninian Stephen notes that during this time “there seems to have been a degree of hostility towards arbitration on the part of the courts, a sense that the jurisdiction of the courts was being impaired by this instance of private-enterprise justice.” However, arbitration remained popular and withstood judicial hostility so that from 1854 arbitration could no longer be said to be “in any sense a covert rival to litigation. Instead it is an acknowledged alternative.”<sup>43</sup>

The development of tort law, combined with the increasing sophistication of business and industry led to a surge in litigation in the 19<sup>th</sup> century. The law of torts developed at a significant rate. Negligence recognised a standard of “reasonableness” rather than absolute liability and did not unduly interfere with the benefits that the new innovations, employment and enterprises delivered to society at large. An explosion in personal injury cases in America came from the development of the railways, and the corresponding rise in crossing accidents.

The 20<sup>th</sup> century saw an increase in the specialisation of legal practice and the development and growth of large multinational law firms. These law firms are characterised by their size and have enduring relationships with large corporate clients. In America the number of firms with four or more lawyers grew from 15 in

---

<sup>42</sup> LM Friedman, *“A History Of American Law”* (2005), 3<sup>rd</sup> Ed, Simon & Schuster, New York at 405.

<sup>43</sup> The Honourable Sir Ninian Stephen, *“Yf by theyr good dyscretions”* (1991) 26(7) *Australian Law News* 42 at 46.



1872 to well over 1,000 in 1924.<sup>44</sup> These firms focussed on the delivery of corporate services to clients rather than litigation before the courts. By 1900, it was said that “the great corporate lawyers of the day drew their reputations more from their abilities in the conference room and facility in drafting documents than from their persuasiveness before the courts.”<sup>45</sup> Even when law firms began to grow, there was no interest in litigation. There was a “prevailing attitude among the corporate establishment; that it was not nice to sue.”<sup>46</sup> It is possible that this also reflected an attitude on the part of commercial parties to seek redress through other means.

It was not until the “golden age” of the 1960s that the American law firms began to thrive.<sup>47</sup> In 1968, the largest American law firm had 169 lawyers and the total number of lawyers employed by the largest twenty firms was 2,568.<sup>48</sup> By 1979, the top twenty firms employed a total of 4,681 lawyers, and the average number of lawyers employed by each of the firms had increased by 82 percent.<sup>49</sup> By 1988, it was estimated that 35,000 lawyers were employed at 115 firms with more than 200 lawyers, with a total of 105,000 lawyers working in 2,000 firms with more than 20

---

<sup>44</sup> M Galanter and T Palay, “The public service implications of evolving firm size and structure” in R Katzmann (ed), “The Law Firm and The Public Good” (1995), Brookings Institution Governance Institute, Washington at 22.

<sup>45</sup> M Galanter and T Palay, “The public service implications of evolving firm size and structure” in R Katzmann (ed), “The Law Firm and The Public Good” (1995), Brookings Institution Governance Institute, Washington at 21, citing R Swaine, “The cravath firm and its predecessors, 1819-1947: Vol I” (1946) Ad Press, New York at 371.

<sup>46</sup> M Galanter and T Palay, “The public service implications of evolving firm size and structure” in R Katzmann (ed), “The Law Firm and The Public Good” (1995), Brookings Institution Governance Institute, Washington at 26.

<sup>47</sup> M Galanter and T Palay, “The public service implications of evolving firm size and structure” in R Katzmann (ed), “The Law Firm and The Public Good” (1995), Brookings Institution Governance Institute, Washington at 20.

<sup>48</sup> M Galanter, “Mega-law and mega-lawyering in the contemporary United States” from R Dingwall and P Lewis (ed), “The Sociology of the Professionals: Doctors, Lawyers and Others” (1983) The Macmillan Press, London at 153-154.

<sup>49</sup> M Galanter, “Mega-law and mega-lawyering in the contemporary United States” from R Dingwall and P Lewis (ed), “The Sociology of the Professionals: Doctors, Lawyers and Others” (1983) The Macmillan Press, London at 153-154.



lawyers.<sup>50</sup> By the 1980s, the true “multicity” law firms had developed; the twenty largest law firms in 1987 had 99 branches across the US.<sup>51</sup> During this time, lawyers turned to promoting the “business of law”.

Since the 1970s, there has been an increase in corporate litigation, in addition to the growth of in-house legal departments.<sup>52</sup> Contemporary large law firms have developed sophisticated litigation practices, which have had a substantial impact on the practice of law. These law firms continue to grow. The managing partner of a very large global firm has predicted the rise of 1,000 partner law firms through the merger of US and UK firms.<sup>53</sup>

Insurance has played a significant part in the growth of litigation. As Chief Justice Spigelman commented in 2002,

“There seems little doubt that the attitude of judges has been determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages and costs awarded to an injured plaintiff. Judges may have proven more reluctant to make findings of

---

<sup>50</sup> M Galanter and T Palay, “*The public sector implications of firm size and structure*” in R Katzmann (ed), “*The Law Firm and The Public Good*” (1995), Brookings Institution Governance Institute, Washington at 28.

<sup>51</sup> M Galanter and T Palay, “*The public sector implications of firm size and structure*” in R Katzmann (ed), “*The Law Firm and The Public Good*” (1995), Brookings Institution Governance Institute, Washington at 29.

<sup>52</sup> M Galanter and T Palay, “*The public sector implications of firm size and structure*” in R Katzmann (ed), “*The Law Firm and The Public Good*” (1995), Brookings Institution Governance Institute, Washington at 30.

<sup>53</sup> M Herman, “*David Morley: the rise of the 1,000-partner law firm*”, Times Online, 22 October 2007 <<http://business.timesonline.co.uk/tol/business/law/article2717335.ece>> (accessed 30 July 2008).



negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home.”<sup>54</sup>

The 1980s brought a strong public reaction in America to what was seen to be excessive litigation. Lawyers were depicted as “ambulance chasers” that preyed on emotionally weak plaintiffs. In 1991, Justice Warren E. Burger, former Chief Justice of the United States Supreme Court commented that American society was “drowning in litigation”. He noted that “suits against hospitals and doctors, which went up 300-fold since the 1970’s, increased doctors’ medical premiums more than 30-fold for some. We have more lawyers per 100,000 people than any other society in the world. We have almost three times as many lawyers per capita as Britain, with whom we share the common law system... The United States stands alone as the glorifier of lawyers and litigation.”<sup>55</sup> The American experience certainly took litigation to extremes: in 2000, there was 1 lawyer for every 267 American citizens; in Australia there was one lawyer for every 700.<sup>56</sup>

Whilst the American experience may have been more extreme than that which occurred in Australia, there is no doubt that a strong public resentment against the legal profession developed. This public resentment reached a peak in New South Wales in 2001-2002 and led to the expansive tort reforms through the *Health Care Liability Act 2001* (NSW) and the *Civil Liability Act 2002* (NSW). In his second reading speech, the then premier Bob Carr stated that the “reforms were vital to the

---

<sup>54</sup> The Honourable Chief Justice James Spigelman, “*Negligence: the last outpost of the welfare state*” (2002) 76 *Australian Law Journal* 432 at 433.

<sup>55</sup> The Honourable Justice Warren E. Burger, “*Too Many Lawyers: Too Many Suits*”, *The New York Times*, 12 May 1991 at 12.

<sup>56</sup> The Honourable Michael Kirby, “*Litigation, past and present: Book review*” (2004) <[http://www.highcourt.gov.au/speeches/kirbyj/kirbyj\\_br03.html](http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_br03.html)>, accessed 31 July 2008.



survival of our community... the approach of the courts to public liability is unsustainable... We need our roads and schools to operate free from unrealistic standards—standards imposed by the courts with hindsight and with no regard for the cost to the community.”<sup>57</sup>

A concern developed that the prospect of litigation was a real threat to doctors, especially those in ‘high risk’ specialities such as gynaecology and obstetrics, and concerns that many may be forced out of the profession due to the rise in insurance premiums.<sup>58</sup> The Medical Defence Association of Victoria’s subscription rate for obstetrics and gynaecology was \$100 in 1980. By 2001 this had risen to \$35,530, and significantly increased the following year to \$58,500.<sup>59</sup>

In 1985 Professor Clive Schmitthoff delivered a paper in which he identified an increasing reluctance in Americans to take their disputes to the courts.<sup>60</sup> The trend, confirmed by other studies, has become known as the “vanishing trial”.<sup>61</sup> Between 1962 and 2002, the number of civil trials in the United States dropped by more than 20 percent, despite the number of dispositions increasing by more than 5 times.<sup>62</sup>

Whilst the rate of dispositions carried through to trial was 11.5 percent in 1962, this figure had dropped to 1.8 percent in 2002. The drop in civil trials was recent and

<sup>57</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, Civil Liability Bill, 2085 (Bob Carr, Premier).

<sup>58</sup> K Clarke, “*Litigation: A threat to obstetric practice?*”(2002) 9 *Journal of Law and Medicine* 303 at 303 and 308. The author cites many newspaper articles reflecting this fear, for example, D Cameron, “Soaring costs forcing obstetricians out” *Sydney Morning Herald*, 29 March 1993 and N Wilson, “Litigation threat kills patients, says doctor”, *The Age* (Melbourne). 29 August 1995.

<sup>59</sup> J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.

<sup>60</sup> C M Schmitthoff, “*Extrajudicial dispute settlement*”, paper delivered to the Forum International at The Hague in July 1985, reproduced in C J Cheng. “*Clive M Schmitthoff’s Select Essays on International Trade Law*” (1988) Kluwer Academic Publishers, The Netherlands at 637.

<sup>61</sup> M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459.

<sup>62</sup> M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 461.



steep, with the number of federal trials dropping by more than sixty percent from 1985 to 2002.<sup>63</sup> A similar trend has been noticed in the state courts, with the trend recently accelerating.<sup>64</sup>

In 1962, the first year for which data is available, trials commonly involved contract or tort disputes. However today, fewer cases in these areas are going to trial. In 1962, torts cases accounted for 55 percent of all civil trials and 81 percent of jury trials. In 2002, torts cases accounted for just 23.4 percent of all civil trials and 26 percent of jury trials.<sup>65</sup> The report notes that “where once 1 in 6 (16.5 percent) tort cases went to trial, this has dropped steadily so that now only 1 in 46 (2.2 percent) do.”<sup>66</sup>

Contract disputes represented almost 20 percent of all civil trials in 1962, with the great majority of these (almost 75 percent) being heard by judge alone. In 2002, contracts disputes represented 15.3 percent of all civil trials, with a majority (53 percent) being heard before a jury.

In 2005, David Spencer of Macquarie University posed the question, “Are we experiencing a ‘vanishing trial phenomenon’ in New South Wales?”<sup>67</sup> Spencer analysed data from the District Court of New South Wales and found that given the variations in the data from year to year, it was “difficult to discern any stable pattern in the number of trials as a percentage of disposals”.<sup>68</sup> In 1990, disposals by hearing accounted for 34% (3,028) of all hearings. In 2003 this had dropped to just 13%

---

<sup>63</sup> M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 461.

<sup>64</sup> M Galanter, “*The hundred-year decline of trials and the thirty years war*” (2005) 57 *Stanford Law Review* 1255 at 1260.

<sup>65</sup> M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 466.

<sup>66</sup> M Galanter, “*The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*”, (2004) 1 *Journal of Empirical Legal Studies* 459 at 466.

<sup>67</sup> D Spencer, “*Litigation: The vanishing trial phenomenon*” (2005) 43(8) *Law Society Journal* 58.

<sup>68</sup> D Spencer, “*Litigation: The vanishing trial phenomenon*” (2005) 43(8) *Law Society Journal* 58.



(1,021) but had again risen to 22% (1,148) in 2004. This figure remained steady in 2005 however rose to 33% (1,251) in 2006.<sup>69</sup> Accordingly, the author could find no conclusive evidence that the phenomenon was occurring in the District Court, and suggested that a possible explanation could be found in the fact that the District Court was better at managing its case load than the US Federal Courts, with the median time taken to trial averaging 11 to 14 months. In such circumstances, Spencer argued that the time period “probably would not act as a significant disincentive for litigants to proceed to trial, and therefore may have no bearing on the slight downturn in trials in the court.”<sup>70</sup>

The statistics from the Supreme Court of New South Wales are also inconclusive. This is largely due to the significant statutory intervention affecting an individual’s right to sue in the courts. The latest annual review issued by the Supreme Court indicates that since 2004, the proportion of cases heard has risen whilst the proportion of settled cases has fallen.<sup>71</sup> However recent experience indicates that with a change in the pre-trial management processes the rate of settlement of the more complex civil trials has risen markedly. All of these trials listed for hearing so far this year have settled.

In December 2003, the Section of Litigation of the American Bar Association held a symposium to determine the cause and consequences of the trend of the vanishing trial. The Association identified that one of the significant driving factors is cost.<sup>72</sup>

There is a feeling in the community that the trial process is too long and expensive.

---

<sup>69</sup> District Court of New South Wales, *Annual Review 2005* at 19; District Court of New South Wales, *Annual Review 2006* at 20.

<sup>70</sup> D Spencer, “*Litigation: The vanishing trial phenomenon*” (2005) 43(8) *Law Society Journal* 58.

<sup>71</sup> Supreme Court of New South Wales, *Annual Review 2006 (2007)* at 25.

<sup>72</sup> PL Refo, “*Opening Statement: Trial Rescue*” (2004) 30(3) *Litigation* at 3.



This includes the significant time and expense in coming to a hearing in addition to the trial itself. Sir Ninian Stephen has commented that these common complaints sound “remarkably like the views of merchants echoed down the ages”.<sup>73</sup>

Over 90% of actions commenced in England settle prior to trial.<sup>74</sup> A study conducted in 2006 referred to an “apparent avoidance of litigation” in England and Wales.<sup>75</sup> The English authors noted that it is “more probable that courts are not being brought cases to try rather than the courts simply trying fewer cases.”<sup>76</sup> It is possible that English parties are avoiding the courts completely. It is important to determine why this may be so.

Arbitration rather than litigation in the courts is widely adopted by the construction, shipping and commodities industries.<sup>77</sup> Commercial parties can also choose from a range of resolution procedures. Whilst mediation and arbitration remain very popular, independent expert appraisal, where an expert provides an expert opinion on a disputed issue of fact or law, is increasingly utilised.<sup>78</sup> The American insurance industry has effectively used mediation for some time.<sup>79</sup> Writing in 2000, Michael Mills, partner at the then Freehill Hollingdale & Page, noted that the Australian

---

<sup>73</sup> The Honourable Sir Ninian Stephen, “*Yf by their good dyscretions*” (1991) 26(7) *Australian Law News* 42 at 46.

<sup>74</sup> Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, “*Alternative Dispute Resolution: An English Viewpoint*”, delivered in India on 29 March 2008.

<sup>75</sup> R Dingwall and E Cloatre, “*Vanishing Trials? An English Perspective*” (2006) *Journal of Dispute Resolution* 51 at 62.

<sup>76</sup> R Dingwall and E Cloatre, “*Vanishing Trials? An English Perspective*” (2006) *Journal of Dispute Resolution* 51 at 62.

<sup>77</sup> H Astor and C Chinkin, “*Dispute Resolution in Australia*” (2002), 2<sup>nd</sup> Ed, LexisNexis Butterworths, Chatswood at 298.

<sup>78</sup> H Astor and C Chinkin, “*Dispute Resolution in Australia*” (2002), 2<sup>nd</sup> Ed, LexisNexis Butterworths, Chatswood at 292.

<sup>79</sup> M Mills, “*Mediation of Insurance Disputes – Or, Insurers: Mediate Now, Litigate Later!*” (2000) 11 *Alternative Dispute Resolution Journal* 54 at 57.



*“insurance industry has not yet been involved in ADR and mediation to the same extent.”<sup>80</sup>*

This appears to be changing. The Insurance Ombudsman Service is an independent national dispute resolution body which was established in 1991. The Service provides a number of channels, including an adjudicator for less complex matters, an insurance panel and a referee, through which disputes may be settled between an insurance company and the consumer. The Service is free for consumers, and can make determinations of up to \$280,000, which are binding on the insurance company but not the consumer. In 2006, the Service reported a 30% increase in the number of disputes between consumers and general insurance providers which went to internal dispute resolution from the previous year.<sup>81</sup>

Medical negligence presents particular problems. In one survey of patients, 41% indicated that they might not have taken legal action if their doctor had responded to the initial complaint.<sup>82</sup> In my own experience plaintiffs who have been injured, on occasions severely, have told me that they would not have sued if the true position had been explained and the doctor had apologised. This situation has been addressed by the *Civil Liability Act 2002* (NSW) which provides that an apology does not constitute an admission as to fault or liability.<sup>83</sup> There may be financial advantages in adopting alternative dispute resolution in conjunction with more

---

<sup>80</sup> M Mills, *“Mediation of Insurance Disputes – Or, Insurers: Mediate Now, Litigate Later!”* (2000) 11 *Alternative Dispute Resolution Journal* 54 at 58.

<sup>81</sup> Insurance Ombudsman Service, *Annual Report 2006* at 10.

<sup>82</sup> R Travers, *“Litigation and the medical indemnity crisis”* (2004) 12 *Journal of Law and Medicine* 178 at 179, citing C Vincent et al, *“Why do people sue doctors? A study of patients and relatives taking action”* (1994) 343 *Lancet* 1609.

<sup>83</sup> s 69 *Civil Procedure Act 2002* (NSW).



traditional methods. In the decade to 2001, legal defence costs paid by Australian medical defence organisations were between 25% and 50% of damages paid.<sup>84</sup>

A different approach by doctors, hospitals and insurance providers in the United States has already had a direct impact on the number of medical malpractice claims. Doctors are now encouraged to apologise and provide explanations to their patients and to offer fair compensation upfront. As a result, hospitals in the United States are reporting decreases in claims and savings in legal costs. A study by the University of Michigan Health System reported a drop in existing claims from 262 in August 2001 to 83 in August 2007 as a result of full disclosure.<sup>85</sup> The NHS Litigation Authority in the United Kingdom has also issued guidelines promoting the use of apologies to patients.<sup>86</sup> In addition, a joint venture between the NHS, the Department of Health, the Lord Chancellor's Board and other legal organisations have formed a "Clinical Disputes Forum" to find alternative and less adversarial methods of resolving medical disputes.<sup>87</sup> In the year following the introduction of the NHS guidelines, legal defence costs dropped from 13% of damages paid to 10%.<sup>88</sup> These costs are significantly below those incurred in Australia listed above.

Traditionally, Australian medical defence organisations were mutual funds which provided members with assistance on a discretionary basis. Accordingly,

---

<sup>84</sup> R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 180, citing G Harrex et al, "Medical indemnity in Australia", paper presented to the Institute of Actuaries of Australia XIII General Insurance Seminar, 25-28 November 2001.

<sup>85</sup> K Sack, "Doctors say 'I'm sorry' before 'See you in court'", *The New York Times Online*, 18 May 2008 <<http://www.nytimes.com/2008/05/18/us/18apology.html>>, last accessed 19 August 2008.

<sup>86</sup> R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 182.

<sup>87</sup> R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 183.

<sup>88</sup> R Travers, "Litigation and the medical indemnity crisis" (2004) 12 *Journal of Law and Medicine* 178 at 180.



subscriptions, rather than premiums were paid and the relationship was not governed by a contract of insurance.<sup>89</sup> However these funds tended to operate as professional interest bodies, and were “inclined to treat litigation by a patient claiming to have suffered a medical injury as an attack on the professional character or interest of the member involved, rather than as a claim for compensation for injuries which may have been caused by poor treatment. What drove their response to claims was the perceived need to defend the medical profession from attack.”<sup>90</sup> This approach was directly opposed to that which a professional negligence insurer would have taken.<sup>91</sup> Following the collapse of United Medical Protection in 2002, legislative reforms dictated that medical indemnity insurance could only be offered as an insurance product.<sup>92</sup>

The insurance industry’s acceptance of ADR mechanisms is not surprising. Given that the business of an insurance company requires the resolution of insurance claims, any minimisation of the transaction costs will be encouraged. Mediation allows an insurance company to potentially reduce cost, maintain client relationships, protect confidentiality and avoid binding precedents.

All of these developments reflect the changing perspectives and expectations of those who require an independent person to assist in the resolution of a dispute or the vindication of a right. Nevertheless, our adversary system of trial within the courts

---

<sup>89</sup> J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.

<sup>90</sup> R Travers, “*Litigation and the medical indemnity crisis*” (2004) 12 *Journal of Law and Medicine* 178 at 180.

<sup>91</sup> R Travers, “*Litigation and the medical indemnity crisis*” (2004) 12 *Journal of Law and Medicine* 178 at 180.

<sup>92</sup> J Burdon, “*Medical Indemnity Insurance 2006*”, paper presented at the Australian College of Legal Medicine’s Annual Scientific Meeting held in Melbourne, 14-15 October 2006.



remains. But it is not without criticism. Two forces are at work. As the standard of living in the community has risen the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has in real terms reduced over the last 30 years the same is not true of our system of justice. The result as Sir Anthony Mason commented has been an “erosion of faith”<sup>93</sup> in the adversarial system. In a paper titled “The Future of Adversarial Justice”, Sir Anthony commented “The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”<sup>94</sup>

Many judges, practitioners and users of the court system have acknowledged the burdens imposed on parties by the cost of litigation. It is thought, probably correctly, that many disputes settle before judgment because of a fear that the costs of judicial resolution will be excessive. It is equally common to learn of cases where the parties have been unable to compromise and the ultimate cost of the proceedings exceeds the amount at stake. The dispute evolves into a dispute about the costs in which the sum originally at stake is of lesser significance. In practical terms once litigation has commenced both parties must agree before the proceedings can be brought to an end. The litigation process becomes for many an unmanageable, and ultimately an unsatisfactory experience.

---

<sup>93</sup> Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17<sup>th</sup> AIJA annual conference on 6-8 August 1999.

<sup>94</sup> Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17<sup>th</sup> AIJA annual conference on 6-8 August 1999.



There are other issues. The adversarial system allows the parties control of the litigation. The well resourced litigant can use those resources to complicate the litigation using pre-trial processes to escalate the costs of all parties. Problems may emerge from burdensome discovery or obfuscation of the true issues. If the assumption is that the litigation process is designed to elicit the truth, an assumption which I venture the lay person makes, a system which allows either the plaintiff or the defendant to withhold relevant information or their account of relevant events until the trial is replete with opportunities for abuse. We used to call it “trial by ambush.” Expert evidence raises critical concerns. As our knowledge in all areas of learning has expanded and the expansion in the latter part of the 20<sup>th</sup> century has been unparalleled in human history, litigants have increasingly been advised to engage experts, sometimes multiple experts, to assist in the resolution of their disputes. The multiplication of experts has not only come as a response to the expansion of knowledge but out of the concern that the judicial decision maker requires an “education” if he or she is to fairly resolve the dispute. Experts are costly and the time taken in a conventional trial to resolve their differences can be significant.

The first response by the courts from which many others flow has been for the judges to take control of the litigation. We refer to it as case management. Initially perceived as an unacceptable intrusion into the adversarial system it is now almost universally adopted. But it must be utilised with care. Not every case is appropriate for intensive management. Many will be more efficiently managed by experienced litigators without intervention by the court. However, experience demonstrates that many cases benefit from the hand of a judge whose intervention can confine the cost



by reducing the issues and ensuring that only matters really in dispute are litigated. A judge's intervention may also be necessary to ensure that the weaker party is not required to forgo a trial because the litigation process is manipulated by the stronger. To ensure management is effective judges with the necessary skill and relevant experience must be tasked with the pre-trial management function.

As well as ensuring that the litigation is confined to resolving the issues which matter judges must also accept the obligation of managing the trial itself. This may require the use of cost orders to discipline the issues to be resolved and control the time taken to debate those issues in the courtroom. Although spoken of on many occasions the stopwatch approach to trials is rarely used. The parties are generally allowed to estimate the time for the trial and courts in most cases accommodate their schedules to allow the parties the time which they request. This is no longer acceptable. The courts must acknowledge a role in the management of court time and require the parties to accept the obligation of managing the trial to conclude within the available time. This approach has more commonly been adopted by appellate courts and must be accepted by trial courts if there is to be a genuine attempt to confine the costs of litigation.

The quality of judicial decision-making has been called into question when the evidence of experts is involved. The judges are not the subject of the criticism. The concern is with the integrity of the evidence upon which they are required to adjudicate.<sup>95</sup> The abolition of the jury as the decision-maker in civil trials means that there is now a reasoned judgment from a judicial officer. Those reasons will disclose

---

<sup>95</sup> M Nothling, "Expert Medical Evidence: The Australian Medical Association's Position", available from: <http://www.aija.org.au/info/expert/Nothling.pdf>, viewed 28 June 2006, at 1.



the impact upon the judge of the evidence of individuals, including the experts, and the part their evidence has played in the resolution of the problem. It provides a capacity in the parties and others to judge whether the judge's reasoning is sound and assess whether the judge has misunderstood or been misled by the evidence. Those with special knowledge of areas of learning critical to the decision are able to assess whether "the science" applied by the judge is consistent with that accepted by leaders in the particular field. If the judge has got it wrong members of the profession can identify the error. Any error has the potential to erode confidence in the judicial process. Repeated errors will lead to considerable disquiet.

Both because of the cost to the parties of the receipt and scrutiny of expert evidence and because of questions about its integrity, many professional bodies have expressed concern about whether our conventional approach to expert evidence is acceptable. The concerns are widespread. Many highly qualified professional people will quite simply not accept a retainer to give evidence in court.

In response to these concerns, a number of changes have been made to the procedures in the Common Law Division of the Supreme Court in New South Wales. In particular changes have been made to the way expert evidence is dealt with in civil litigation. The aim of the changes has been to enhance the integrity and reliability of expert evidence.

The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, powers in the court to control the number of experts and the manner of the giving of their evidence. The amended rules allow the court to confine the number of experts called and to refuse to allow an expert to give



evidence on particular issues. They also allow the judge to order the sequence for the giving of evidence and require the defendant to call lay or expert evidence in what would otherwise be the plaintiff's case.

The use of single joint experts in the UK following the Woolf Reforms<sup>96</sup> has been controversial. They have been described as “arguably the most significant and controversial recommendation of Lord Woolf's Report concerning expert evidence.”<sup>97</sup> Single experts, agreed by the parties and appointed by the court have been extensively and successfully used in the New South Wales Land and Environment Court for more than four years. They are now widely used in the Family Court where although initially controversial, they are now widely accepted.

The amended rules provide for parties' single experts to be used in the Supreme Court. The Court may order at any stage of proceedings that an expert be engaged jointly by the parties.<sup>98</sup> A “parties' single expert”, is engaged and selected by agreement of the parties.<sup>99</sup> The parties take the initiative. The selection of the expert by the parties is integral to the concept of the joint expert witness.<sup>100</sup> The amended rules also preserve the role of the “court-appointed expert” who is the court's witness and different from the “parties' single expert”.

Where a parties' single expert has been called in relation to an issue, the rules prohibit the parties from adducing further expert evidence on that issue, unless with the leave of the court. The rules provide a similar control in respect of the evidence

---

<sup>96</sup> “Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales”, July 1996.

<sup>97</sup> “Expert Witnesses”, NSWLRC Report 100 at [4.16].

<sup>98</sup> *UCPR* r 31.37(1).

<sup>99</sup> *UCPR* r 31.37(2).

<sup>100</sup> “Expert Witnesses”, NSWLRC Report 100 at [7.57].



of a court-appointed expert in relation to an issue. The rules provide a presumption in favour of one expert per issue.

Perhaps the most significant change in relation to expert evidence is the use of the concurrent method of hearing their evidence.

How does it work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many courts, the experts are required to meet to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a short point document which incorporates a summary of the matters upon which they are agreed, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a directed discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. In 2006 I sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he



had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner.<sup>101</sup> The issues required evidence from other general practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened, the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in 1½ days discussed in a structured and cooperative manner the issues which fell within their expertise. They had previously conferenced together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least 5 days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the USA, the others sitting at the bar table in the courtroom. Their evidence took one day. The doctors were effectively able to distil the cardiac issue to one question which was identified by them and although they held different views, their respective positions on the question were clearly stated. The reports to me indicate that the process was welcomed by the cardiologists and the parties' advocates.

I have been a lawyer for in excess of 35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the

---

<sup>101</sup> *Halverson v Dobler* [2006] NSWSC 1307.



discussion between four doctors – all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question.

Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If one of us suffered a traumatic injury on our way home this afternoon which required hospitalisation and the possibility of major surgery to save our lives a team of doctors would come together to make the decision whether or not to operate. There would be a surgeon, anaesthetist, physician, maybe a cardiologist, neurologist or one of the many specialities which might have a professional understanding of our problems. They would meet, discuss the situation and the senior person would ultimately decide whether the operation should take place. It would be a discussion in which everyone's views were put forward, analysed and debated. The hospital would not set up a court case. If this is the conventional decision-making process of professional people, why should it not also be the method adopted in the courtroom.

The change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to the views of the other expert or experts. Because they must answer to a professional colleague rather than an opposing advocate, they readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. The process is significantly more efficient than conventional methods. Evidence which may have required a



number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would otherwise have been required.

I have had cases where eight witnesses gave evidence at the one time. I know of one case where there were twelve. There have been many cases where four experts have given evidence together. As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you have the expert's views expressed in his or her own words. There are also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am often asked whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion of attention from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure



than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

Notwithstanding our limited success in the past courts recognise that they must continue to develop practices and encourage procedures which meet community expectations. Although alternative dispute resolution mechanisms are important and will be increasingly utilised they are and must be recognised as part of a comprehensive structure underpinned by the courts. Unless that underpinning is itself built on secure foundations a distrust will emerge between individuals, corporations, contracting parties and the ordinary person for whom the courts presently provide an avenue to redress perceived wrongs. There will be impacts upon the efficiency of commercial transactions. There will be a loss of confidence between members of the community in their ordinary dealings. A fundamental quality



of our system of justice has been the confidence invested in it by both the powerful and the weak in our society. Should this be replaced by a pervasive sense of injustice the ethical structure of the community is threatened. A compromised system of justice becomes fertile ground for “smart” business practices and corrupt dealings. So much is plain from Mr Smith’s response to his solicitor.

\*\*\*\*\*