Why Are Cases Taking Longer Nowadays?

Being the concluding oration to the 21st Queensland Bar Practice Course given by R V Gyles QC on 28 July 1993

At a ceremony upon his retirement, Mr Justice Rogers, former Chief Judge of the Commercial Division of the Supreme Court of New South Wales, in the course of calling for a fundamental review of the process of litigation, said:

> "It is only thirteen years ago that I came to the Bench of this Court, and at that time the average case took one or two days. Any case scheduled to last for a week was regarded as being long, and anything longer was a rarity."

The position in our Courts is quite different today, and I am sure that you are experiencing the same phenomenon in this State.

You will observe that the title of this address concentrates upon causes rather than effects or remedies. If I can to some extent illuminate causes, then I believe a sounder judgment can be made as to the other issues.

Before proceeding, may I make several points.

Firstly, I do not mean to imply that long cases are necessarily a bad thing. Justice often requires that they take place. If a complex dispute has to be litigated, the apparently long route of trial is often the shortest way home.

Secondly, I will be concentrating on ordinary civil proceedings, rather than criminal proceedings or specialised Courts or Tribunals, although I believe that much of what I say will be applicable to all of these.

Thirdly, I am relying upon my own experience rather than reporting upon any statistics or systematic research.

Fourthly, it should not be assumed that I am critical of the factors which I identify which contribute to making cases longer, or of those responsible for those factors. I aim to analyse rather than judge.

Fifthly, I do not endeavour to rank or assess the relative contribution of these factors amongst themselves, or deal with them in order of ranking.

Uncertainty in the Law

Changes to the substance of the law since I was admitted to practise as a solicitor in 1961 have been considerable, and these changes have gathered particular pace over the last decade or so as a result of both legislation and judicial decision. Continual change breeds its own climate of uncertainty. Where the trend of change is towards broadly defined standards rather than a set of rules, towards the exercise of discretion to give effect to the merits of individual cases seen by the individual judge rather than the application of general rules to the facts of the particular case, and towards social policy rather than legal logic, then the uncertainty is greatly exacerbated. This is, in turn, compounded if the legislation or landmark judicial decision is expressed in complex or opaque language, or, in the case of judicial decision, is such that no clear ratio can be safely deduced by practitioners and trial judges.

The effect of this uncertainty upon litigation should not be underestimated. It is becoming increasingly difficult to advise a client as to the likely result of the trial of a civil case - either as plaintiff or defendant. Then there is the appellate process. The change in the attitude of the High Court justices to development of the law has been the subject of much recent analysis and I will do little more than give examples of the radical change in the law which has been effected by decisions of that Court over the last decade or so. It has also been my observation that a permanent Court of Appeal, particularly when drawn from those who have not been trial judges, is likely to be more adventurous in expanding the law, and the role of the appellate Court compared to the trial Court, than a rotating Full Bench system. I will be surprised if you do not observe this in your Supreme Court. I predict the same thing will happen if and when the Federal Court and the Victorian Supreme Court ultimately reorganise their appellate work in that fashion.

When it is not possible to confidently predict the outcome of a claim or defence, either as to success or as to the ultimate remedy, and it is thus not possible to describe a client's case or defence as hopeless, the great tendency, particularly where substantial sums are at stake, is to *give it a run*. This not only increases the number of cases which are litigated, it makes settlement very difficult.

Furthermore, this uncertainty as to substance, and as to a possible interventionist approach by the appellate Courts, makes many trial judges timorous in exercising their role in controlling a trial. Where discretionary or normative judgments are to be made, or where there is no confidence that the goalposts will not be moved on appeal, trial judges simply do not, and in some cases cannot, reject evidence, and feel obliged to deliver over-elaborate summings up to juries and to make unnecessary findings of fact and law in judgments.

Let me proceed to remind you of some of the significant developments in the law. In the interests of economy, I have concentrated upon decisions of the High Court, but the same tendencies are undoubtedly at work at the intermediate appellate level, particularly now that Special Leave is required for appeal to the High Court. Incidentally, I believe that this requirement has played no small part in making the High Court perceived to be more radical than hitherto. It is inevitable that under this system the justices will choose cases which provide a vehicle for developing the law as they would wish it developed. It is said that Courts have no agenda. In a narrow political sense this may be correct. However, the selection by the Court of points to be argued necessarily sets the agenda for change. Furthermore, in my view, a disproportionate percentage of cases selected by this method will be those with interesting unresolved pure questions of law at the edges of the mainstream of the law rather than those representative of the issues which arise at trial level.

One of the most fertile areas for change in the landscape has been the margin between contract and equity. The High

Court has forever changed the basis upon which contract cases are now fought.

We have seen the remarkable development of estoppel through *Legione v Hately* 152 CLR 406; *Waltons Stores Limited v Maher* 164 CLR 387; and *Commonwealth v Verwayen* 170 CLR 394. Unconscionable conduct has been put on the agenda by *Commonwealth Bank of Australia v Amadio* 151 CLR 447 and *Louth v Diprose* 175 CLR 621. *Taylor v Johnson* 151 CLR 422 can be seen as either an example of unconscionable conduct or as an expansion of the doctrine of mistake. The areas of constructive trusts and unjust enrichment have been developed in a series of decisions, including *Muschinski v Dodds* 160 CLR 583, *Pavey & Matthews Pty Limited v Paul* 162 CLR 221, *Baumgartner v Baumgartner* 164 CLR 137, *ANZ Bank v Westpac* 164 CLR 662 and *David Securities v Commonwealth Bank of Australia* 175 CLR 353, which have radically altered the law.

Fiduciary duties have been explored in *Chan v Zacharia* 154 CLR 178 and *United Dominions v Brian* 157 CLR 1. It can fairly confidently be predicted that *Hospital Products v US Surgical Corporation* 156 CLR 41 would not represent the views of the current High Court as to fiduciary relationships in a contractual setting.

Various aspects of breach are dealt with in *Anka Pty Limited v National Westminster Bank* 162 CLR 549, *Sunbird Plaza Pty Limited v Maloney* 166 CLR 245 and *Foran v Wight* 168 CLR 385. The principles behind penalties are elucidated in *Acron Pacific v Offshore Oil* 157 CLR 514 and *Amev-UDC v Austin* 162 CLR 170.

At the same time, the new remedy of Mareva injunction has been sanctioned in *Jackson v Sterling Industries* 162 CLR 612, relief against forfeiture is reviewed in *Stern v McArthur* 165 CLR 489, and the rights of third parties to the contract have been expanded in *Trident General Insurance v McNiece Bros* 165 CLR 107. To these should be added the implication of terms (*Codelfa Construction Pty Limited v State Rail Authority of New South Wales* 149 CLR 337) and rectification of contract without a concluded antecedent contract and without outward expression of continuing common intention (*Pukallus v Cameron* 56 ALJR 907).

I should also add a reference to the various statutory provisions which affect contracts. In the Commonwealth, the Trade Practices Act, the Insurance Act and the Racial Discrimination Act are examples, and each State has its own cluster of such legislation. In New South Wales, the Fair Trading Act, the Contracts Review Act and the Industrial Relations Act S.275 (formerly Industrial Arbitration Act S.88F) are among them.

Section 52 of the Trade Practices Act in particular now has a pervasive influence on civil litigation, and the profession now seems to have awakened to the significance of Sections 45-50 in relation to many commercial arrangements.

I think you will agree that it is a very dull lawyer who cannot find various defences and cross claims which might be available to what appears to be a simple breach of contract case.

Developments in the law of tort have been no less significant.

Perhaps most notably the High Court has rewritten the elements of the law of negligence by reference to a relationship of proximity, a concept which is both broad and imprecise - *Jaensch v Coffey* 155 CLR 549; *Cook v Cook* 162 CLR 376. At the same time, the growing and controversial fields of negligent mis-statement, recovery of economic loss, and the duty of care of public authorities were explored in decisions such as *Shaddock & Associates v Parramatta Council* 150 CLR 225, *Sutherland Shire Council v Heyman* 157 CLR 425, *San Sebastian v The Minister* 162 CLR 340 and *Hawkins v Clayton* 164 CLR 539. Then there was the abandonment of the traditional rules in relation to occupier's liability in favour of a general duty of care - see *Hackshaw v Shaw* 155 CLR 614, *Papatonakis v Australian Telecommunications Commission* 156 CLR 7 and *Australian Safeway Stores Pty Limited v Zaluzna* 162 CLR 479 - and the boundaries of medical (and other professional) negligence were widened in *Rogers v Whitaker* 175 CLR 479, in which established English authority was not followed.

The way in which the Court has been moving in relation both to equity and contract on the one hand and negligence on the other, whilst in one sense simplifying the law by creating broad criteria, has significantly increased uncertainty of result.

Vicarious liability was revisited in *Oceanic Crest Shipping v Pilbara Harbour Services* 160 CLR 626; questions involving independent contractors were dealt with in *Kondos v State Transport* 154 CLR 672 and *Stevens v Brodribb Sawmilling* 160 CLR 16; causation was reconsidered in *March v Stramare Pty Limited* 171 CLR 506; the consequences of joint illegal activity upon the duty of care dealt with in the difficult case of *Gala v Preston* 172 CLR 243; and systems of work examined in *McLean v Tedman* 155 CLR 306 and *Bankstown Foundry v Braistina* 160 CLR 301.

The arcane field of interstate torts was re-examined in *Breavington v Godleman* 169 CLR 41, *McKain v R W Miller* 174 CLR 1 and *Stevens v Head* 112 ALR 7. Wider conflict of laws questions were dealt with in *Voth v Manildra Flour Mills* 171 CLR 538 and *Oceanic Sunline Special Shipping v Fay* 165 CLR 197.

Some novel questions of damages have been considered or developed in cases such as *Gould v Vaggelas* 157 CLR 215, *Commonwealth v Amman* 175 CLR 64, *Gates v City Mutual* 160 CLR 1, *Van Gervan v Stenton* 175 CLR 327, *Hungerfords v Walker* 171 CLR 125 and *Baltic Shipping v Dillon* 111 ALR 289.

Decisions such as *re Cram ex parte New South Wales Colliery Proprietors* 163 CLR 117 and *re AMWU ex parte Shell* 174 CLR 345 have greatly expanded the reach of industrial tribunals into the ordinary commercial management of business in a way which is often overlooked.

The Court has had to grapple with the application of intellectual property rights to computers in *Computer Edge v Apple Computers* 161 CLR 171 and *Autodesk v Dyason* 173 CLR 330.

The Court has also clarified and extended the reach of administrative law, overruling previous High Court authority

in the process, in a series of cases including *R v Toohey* 151 CLR 170, *Kioa v West* 159 CLR 550, *BHP v NCSC* 160 CLR 492, *Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24, *ABT v Bond* 170 CLR 321, *Annetts v McCann* 170 CLR 596 and *Ainsworth v CJC* 175 CLR 564.

Some important and difficult questions of indefeasibility of Torrens title were examined in *Bahr v Nicolay (No 2)* 164 CLR 604.

No reference to the recent history of the High Court can ignore important constitutional developments such as the use of the external affairs power (and other powers) in *Commonwealth v Tasmania* 158 CLR 1 (the Dams case); the application of S.117 of the Constitution in *Street v Queensland Bar Association* 168 CLR 461; the rethinking of S.92 which has taken place in *Cole v Whitfield* 165 CLR 360 and *The Barley Marketing Board (New South Wales) v Norman* 171 CLR 182; and the implied guarantees found in *Australian Capital Television Pty Limited v Commonwealth (No 2)* 66 ALJR 695.

Last, but not least, is the decision in *Mabo (No 2)* 175 CLR 1. The shockwaves emanating from this decision were entirely predictable. Regardless of the persuasiveness or otherwise of the reasoning of the various justices, the actual decision reverses the common understanding of lawyers and laymen alike since well before Federation on a topic of paramount political, social and economic importance, extending well beyond the bounds of constitutional law and history. Whilst some exaggerated claims have been made as to its likely effect, the protestations of those who claim that it is of marginal significance are equally indefensible. Concern on the part of the mining and pastoral industries can hardly be regarded as unfounded. For better or worse, this decision, taken with *Australian Capital Television*, will stamp the High Court as it is presently constituted as a radical institution in the public mind and will undoubtedly affect the perception of the Court by litigants and their lawyers for some years.

Of course, I do not suggest that all of the foregoing judgments are revolutionary, involve broad and imprecise criteria, are concerned with social policy, or are difficult to understand and apply. I do suggest that, taken together, they bear out the thesis that there is justifiable uncertainty on the part of practitioners and trial judges - both as to the present content of the law and as to what might happen on appeal.

When comparing his time as a judge with that of his father, our Chief Judge in Equity, Mr Justice McLelland, recently said (on being sworn in as Chief Judge of the Equity Division):

> "A significant and worrying change has been a major increase in the level of uncertainty of the law. In many kinds of situation it is now much harder for people to find out where they stand legally without first having to endure the strain, delay and expense of a Court case and lawyers have to spend much of their time doing the professional equivalent of gazing into a cloudy crystal ball. One reason for this is the developing tendency for lawmakers to give to Courts wide powers to override established rules of law on grounds which are either unstated or stated only in the vaguest way. No doubt this fashion reflects a worthy desire to achieve something approaching perfect fairness in the resolution of every legal dispute. I wonder, however, whether the community can afford the cost of such a luxury and whether it may seriously damage public confidence in the objectivity of the justice system and the rule of law. This movement from principle to palm tree is a leading contributor to the twin evils of high legal costs and lengthy court delays."

I take His Honour's reference to lawmakers to include appellate Judges as well as Parliamentarians.

The Stakes Are Higher

Ten years ago, verdicts exceeding $10m were extremely rare. Nowadays, it is by no means unusual to have $100m or more at stake in a case. This reflects more than inflation. During the 1980s the size of commercial transactions in Australia took a quantum leap, and the size of transactions is a good indicator of the amount at stake in litigation. As is perhaps inevitable at a time of boom then bust, the unorthodox nature of some of the boom transactions, and the unhappy results of them in the bust, predispose to litigation.

Litigation over deals of $100m need not be more complex than over deals of $10m. However, many of the transactions over the last decade were complicated - not always for worthy reasons. Furthermore, the collapse of commercial morality in both private and public enterprises over the period has meant that many business relationships went sour, and sorting out the pieces after the breakdown of such a relationship, which may have gone on for months and years, is difficult and time-consuming.

The real point, however unfashionable it may be to make it, is that legal costs have not risen proportionately to the amounts at stake in cases, and it is thus relatively cheaper to litigate now than ever before.

Several years ago, the Registrar of the High Court demonstrated in a paper he published that counsel's fees had steadily fallen against other relevant indicia since the early days of the century, and I believe that that trend has continued since that paper was written. There is no question but that the fees customarily charged by leading counsel when I came to the Bar were higher than the fees charged by equivalent counsel now when inflation is taken into account.

The costs of litigation are part of the cost/benefit equation involved in decision-making, and if it is relatively cheaper to litigate than it used to be, there will be more litigation and it will be more thoroughly prepared and fought longer and harder than hitherto. This practical reality appears to escape the attention of so many who like to pontificate on the evils of the law in general and the legal profession in particular.

The Litigant

Another reality which often seems to escape the attention of the would-be reformer of Court lists is the fact that, by and

large, defendants (including governments) do not wish to pay out money unless and until they are obliged to do so, and quite a few cannot. This tendency is stronger in times of high interest rates. No amount of judicial cajoling or exhortation will alter it. The days when commercial litigation was conducted between solvent gentlemen genuinely wanting a quick decision by a neutral umpire, if they ever existed, are long since gone. This explains why many cases have been fought to an exhausting finish with all points being taken in recent years. Another contributing factor is that some plaintiffs can hold their financiers at bay as long as litigation continues with the promise of a pot of gold at the end of the rainbow.

I believe that a related factor is the growth of litigation by and against government instrumentalities and qangos of one sort or another. Governments, particularly the Commonwealth, have always been difficult to persuade to settle even hopeless cases or defences. The position is becoming worse. The trend towards corporatisation and the freeing of these authorities from central Public Service controls, allied to the apparently inexorable growth of the public sector, means that more and more public sector litigants are running their own litigation with public money, with precious little knowledge or experience of doing so and with no incentive to settle. One of our most experienced (and persuasive) mediators told me recently that he had the utmost difficulty in convincing the head of a large instrumentality that it was proper for such a body to settle a case without it going to verdict.

Another growing phenomenon is the use of litigation as a quasi social or political statement by special interest groups. Environmental, health, welfare, ethnic and women's lobby groups are adept users of legislation and litigation to make a point. These cases have similarities with actual or de facto class actions (such as test cases) which are also increasing in frequency, and the trend is likely to continue. Product liability, consumer protection and shareholders action come to mind. Again, because of their very nature, these cases are unlikely to settle, particularly where legal aid, pooled resources or speculative costs arrangements muffle the risks to any individual.

Some Procedural Aspects

It is ironic that the increasing length of commercial cases, noted by Rogers J, has taken place during a period of increasingly intense management of these cases by the Courts. Whilst I do not doubt that case management has its advantages, there are some consequences which I suspect are not well understood, even by the judges. The effect of it has been to significantly *front-end load* preparation of the case. The practise of having evidence reduced to written form by way of affidavit, statement or expert report; the heavy concentration on having all interlocutory aspects exhaustively sorted out before the hearing, and the numerous appearances at various types of interlocutory hearing which are entailed at which the barrister or solicitor is supposed to have an intimate knowledge of the relevant facts and law all involve considerable costs. Furthermore, my experience has been that the affidavits, statements and expert reports are often longer than is necessary, canvass much of marginal, if any, real relevance, and too often contain inadmissible and frankly prejudicial material. The other side then feels compelled to answer all of this in kind, and to raise its own rabbits out of the hat. These documents also owe as much (if not more) to lawyers as to the witness.

This has coincided with the discovery of litigation preparation as a profit centre by the larger firms of solicitors; the introduction of litigation support services by accountancy firms and others; the availability of experts in all subjects for all occasions; payment for preparation by the hour; and the development of technology such as the photocopier, the facsimile machine, the word processor and computers in all manner of applications. Briefs are now delivered by trolley.

I would suggest that in many cases the result is to involve pre-trial costs on a scale which would exceed the cost of preparation and final determination of a case of equal complexity listed for hearing on oral evidence in the normal way in ordinary Common Law list without case management. One consequence of this is that by the time of trial each side has so much invested in sunk pre-trial costs that the costs of hearing are not the incentive to the parties to settle that they once were. Another is that the process tends to lock parties and their advisers into positions taken during the case management phase.

Another procedural issue which has contributed greatly to the length of cases has been the ethos which has prevailed for many years that to actually reject inadmissible evidence or to enforce the rules of practice, procedure and pleading is out of step with modern progressive thinking. This was largely the result of the intervention of appellate Courts. One example was the view that all amendments at all stages should be permitted as adjournment and costs could cure all prejudice to the other party. The fallacies lying behind that view were exposed by Lord Griffiths in *Ketteman v Hansel Properties* [1987] 1 AC 189, and, after some hesitation, the pendulum in Australia appears to be swinging back towards finality of litigation rather than a perfect result in every case in the long run. For example, this tendency can be seen in the High Court decision in *Coulton v Holcombe* 162 CLR 1, the New South Wales Court of Appeal decisions in *Holcombe v Coulton* 17 NSWLR 71 (particularly per McHugh JA (as he then was) at 77 EG), and *SPCC v Australian Iron & Steel (No 2)* 75 LGRA 327, 28 FCR 451, and in the recent High Court decision in *Autodesk v Dyason (No 2)* 67 ALJR 270, particularly per Brennan J at 275. It is now commonly applied by judges of the Commercial Division of our Supreme Court.

Conclusion

I should repeat that, in this perhaps idiosyncratic account, I have concentrated my attention upon one consequence of the various matters to which I referred - namely, the effect upon the length of cases. I do not argue that this issue should override all others, or that the clock either can or should necessarily be turned back. I do argue that this consequence should not be overlooked or ignored either by those involved in day to day decisions affecting the process or by those who may be undertaking a more fundamental review of the process. ❑