"LITIGATION TOWARDS 2000"
Australian Insurance Law Association
Luncheon 12.30pm

Tattersall s Club, Brisbane
Wednesday 2 December 1998

Chief Justice Paul de Jersey

The words, "The New Millennium", have become cliché-ic We are asked to re-examine almost everything we do on the ground of the third millennium - as if the world may otherwise collapse. I doubt that will occur, although aspects of our sophisticated world are remarkably fragile. But one illustration is the so-called "millennium bug": a possibility which consumes millions of dollars of everyone s money, not to mention human effort and anxiety, and is, essentially, a piece of humbug. The material manifestations of this world 2000 years on are remarkably brittle. I have been describing the year 2000 as "at least a convenient point in time" for the individual and the institution to reconsider the effectiveness of what they do; and there certainly is a lot of that going on. Consistently, you have, today, asked me to comment on trends in litigation as we approach the year 2000, especially from the insurance point of view.

Let me begin with an acknowledgement that there is still a great predictability, certainty, assurance about litigation in Australia not necessarily marked in some other international experience. That comforting assurance derives from the roots of our civil law system, in basically judge made law, with generally responsible legislators endeavouring not to trespass unduly into areas where limits are already well and properly established. The position in some other parts of the world is quite different.

Indeed, a commonly expressed concern with our public is that the local jurisprudence may come to embrace outlandish US experience in the area of so-called compensation. Mr Justice Thomas wrote an article about this in "Proctor", and as many as eight years ago was able to give these macabre examples (1990 - 10 Proctor 8):

> "A New York gentleman ... was stung by a wasp when sitting outdoors at his country club. He suffered a serious reaction from anaphylactic shock, sued the club for negligently allowing unaccompanied wasps into the grounds, and collected $1.5million in damages ... A passenger on an aeroplane took a rise out of his fellow passengers by declaring that the aircraft was going to crash. One of the passengers thereby suffered severe emotional distress.

> She successfully sued the airline for damages and obtained an award more than sufficient to settle any jagged nerves ... A New York man, tired of living, decided to end it all by leaping into the path of a subway train. The train driver was exceptionally alert and managed to stop without killing the gentleman although it was impossible to avoid hitting and injuring him. The attempted suicide then sued the railway company. What do you think happened? A British journalist, upon hearing of this law suit, assumed it must be based on some fancy cause of action, such as frustration of the plaintiff s democratic right to make away with himself. He was quite surprised to discover that the claim was actually for damages for personal injuries, and even more surprised to hear that the plaintiff won the case and was awarded $600,000."

People who have to pay insurance premiums, together with others altruistically minded, read about these trends and worry: will this become a feature of the Australian compensation landscape?

Legal systems can suffer immensely because of particular experiences which are then seen to typify the system. Those sorts of examples illustrate the point. So did the O.J. Simpson experience. The manner of the Simpson trial, aspects of which resembled an "experiment" in Los Angeles law, reflected very badly on the US system generally. Many consequently saw that system as more interested in external perception than justice within the courtroom. Similarly disturbing was the flamboyant Gucci murder trial in Milan, in which Maurizio Gucci s widow was recently convicted, along with others, leading to a number of statements she would no doubt consider profound aphorisms, including that "truth is the daughter of time".

Our convicted accused in the criminal courts tend not to be so flamboyant, although we have had our own share of memorable players. The Queensland media tends, fortunately, largely to have resisted the temptation of unduly sensationalising local outrages, and for that it is to be commended.

My point, however, is that so far as we query general trends in litigation, it is, I think, based more on international experience than our own. And as I opened, there is still a predictability, certainty, assurance about litigation in Australia which is generally not matched in the US at least.

What distinguishes us from the US? Principally, I believe, although opinions on this may differ, it is the system of contingency fees which prevails there, together with the Australian practice of awarding costs against plaintiffs who fail. The latter is a powerful disincentive against litigating frivolous or speculative claims. As to the former, contingency fees, I should say at once that I have no problem with what we call speculative fee arrangements, and they can be beneficial in enhancing access

to justice. Contingency fees on the American model are another matter. On that approach, the lawyer may siphon off large tracts of the fruits of the action. There is the inevitable temptation to pursue doubtful claims because of potentially large financial rewards, and a substantial temptation not only to pursue them, but to embellish what merit they naturally carry.

My reading suggests that this has been a substantial contributor to the notoriously litigious nature of American society. I have previously expressed considerable reservation about introducing a system of contingency fees here, if based on the American model, and I would remain concerned. They are now in fact outlawed by s.48D of the Civil Justice Reform Act.

It is sometimes suggested that the elected judges of some of the State courts of the US inject a political flavour, and also that the absence of an adequate system of social security for the disabled encourages litigation over disabilities, but I cannot comment on an informed basis on those matters.

What is clear, however, is that US awards of damages can be ridiculously inflated. That and other factors have led to real problems with insurance. The level of premiums in the United States is apparently very high. In Australia, and I speak especially of Queensland, we still have the safeguards of the costs discretion and the absence of contingency fee entitlements on the American model. These features, together with the limitation in civil actions on the right to jury trial, substantially distinguish the systems.

I think it unlikely that over, say, the next two decades anyway, the Australian legal system will, for the extent and nature of its litigation, come anywhere near resembling its US counterpart.

I have not mentioned to this point the significance of the Workers Compensation Scheme. While that scheme remains healthy, it also may operate as a disincentive to speculative litigation over injuries sustained through accidents at work. There are rumblings from time to time about the State s scheme, and I will not comment on that. Neither will I broach the possibility of a no-fault compensation scheme, also mentioned from time to time, but that would of course, if introduced in Queensland, carry wide ramifications for compensation litigation generally.

May I refer finally in this respect to a development within the legal profession which will impact to some extent on future litigation. With the availability of advertising, solicitors are becoming more entrepreneurial, attracting clients no doubt often also under the "no-win no-fee" banner. One notes the trend towards solicitors advertising the possibility of class actions for compensation when such things as power cuts occur. These features will impact to some extent on the system, but its foundation in appropriate conservatism will I think always keep our system distant from the US experience.

What particular substantial development in future litigation do I foresee? The US Vice President recently observed, according to the Bulletin magazine, that "the average home today contains more computing power than all of NASA did when John Glenn made (his) first flight 36 years ago". The world s fastest computer, Blue Pacific, can apparently make 3.9 trillion calculations a second. It is 40 times more powerful than the computer which helped launch Glenn in 1962. It contains more than 25 trillion transistors. In 1962, the then state-of-the-art IBM 7030 had a mere 18 (Bulletin, 15 November, page 18). Technological advance is beginning to affect the courts operations quite remarkably.

This is where I think we will see major changes over the next few years. One would be foolish to forecast them. The changes which have occurred so far are so innovative as to defy further reliable forecast. One of the most remarkable we have experienced in Queensland is "real time" reporting, to this stage used only occasionally, in large complex cases, where the reporter produces a transcript of evidence almost immediately available in electronic form on screens before judge and counsel. This is fascinating when one realises that only about 15 years ago, all transcripts were done by pen writers. Another is computer based crime scene simulation. The capacity to walk a jury around a crime scene, through a house, along alleyways - stopping from time to time for closer inspection - all on screens within the courtroom, is invaluable, both with respect to the economic use of resources and also to enhance appreciation of the relevant facts.

Another modern approach worthy of particular mention is reduction of paper records in cases - voluminous documentation, including exhibits, pleadings, submissions, and as it accrues, evidence - into CD-rom format.

We were ready with this in a civil damages trial of mammoth scope set to occur earlier in the year. Due to start on a Monday, that case settled the preceding Friday! We are of course doing all the more obvious and predictable things. We have a court web page which displays interesting information about the court and includes the daily law list; we use document viewers; we take evidence by videolink, where the witness is in a remote place, and sometimes for reasons of convenience even with local witnesses; we sometimes take evidence by telephone; parties can now view the callover list via Themis, and use an e-mail facility to arrange listings. We hope to expand this eventually to obviate callovers in person, with the whole of the listing process proceeding electronically.

There are some other matters I mention as highly likely electronic developments within the next few years. I have no doubt that Queensland unreported Supreme Court judgments will soon find their way onto the Internet - as frankly should have occurred years ago. Financial resources permitting, we will reach the point of conducting appeals more fully electronically, with Judges and counsel armed with laptops displaying the relevant documents and evidence in electronic form. The Council of Chief Justices is developing a pilot "electronic appeal book", which has

already been used effectively in Western Australia and Victoria. There is even now capacity in some parts of the world to call up, on an appeal, a visual image of the witness giving the evidence at trial. I also foresee facilities for full electronic filing of documents, also to my mind overdue.

The move is very much to what we call the paperless court, and that is a good thing. When I refer to paperless courts, I should emphasise - and not only for the protection of judicial positions, in which I have an interest - that they will necessarily always be run by people. We hear talk of virtual reality courts. But there are discretions to be exercised in the judicial process. Machines cannot form fine evaluative judgments, exercise discretions, exhibit compassion, for both victim and accused. And that is the evil of grid sentencing and three strikes laws. They remove the capacity to exercise a discretion which takes account of all relevant circumstances. Courts so limited remain courts of law, certainly, but their ability to deliver "justice", albeit according to law, is seriously inhibited if not removed. Paperless courts certainly, but courts still led by people.

I note now the descriptive reference of a commentator last year to the style of presentation of two major cases in the Supreme Court of Victoria, the Estate Mortgage case which was computerised, and the Pyramid Building Society case done in the old fashioned way.

> "On the first floor, the court is wading knee deep through the paper trail ... Every time a document is mentioned there s a mad scurry as everyone rifles through shelves and leafs through pages looking for the right piece of paper. Downstairs ... the atmosphere is strangely serene for a court ploughing its way through more than 30,000 documents ... The only sound punctuating the drone of the presenter is the occasional click of a mouse button. " (K Derkley, "Netting the Paper Deluge" (1997) 71 Law Institute Journal 8-9).

Appeals alone consume an immense amount of paper, sometimes in my own experience unnecessarily copied and included in records. There is great benefit possible through reducing or eliminating the paper. Of course, as the technology becomes more pronounced in the courtrooms, Judges will have to develop new skills, as will advocates and solicitors. And there will also be an effect on the Executive which will have adequately to fund these developments.

There is an interesting and relevant trend to which I will now refer. Although the rate of lodgment of writs in the Supreme Court remains high, the number of cases proceeding through trial to judgment appears to be falling. Last year, the total number of originating documents lodged in the court was 5,219, including 2,870 writs. Of those, only 70 went to judgment. That contrasts with the position three years ago, when 112 went to judgment. There appears to be a progressive decrease. It probably reflects the increasing interest of disputants and the legal profession in the mechanisms of alternative dispute resolution - mediation, case

appraisal and the like. The decrease is certainly not a response to any inability in the court to handle the cases. We are now able to offer very early trial dates - within three months of readiness for most cases, and frequently much more quickly than that. There is also no delay these days for giving of judgment: the Judges have voluntarily adopted and adhered to a protocol requiring judgment in all but exceptional cases within three months of the conclusion of a hearing. As I have suggested, the progressive reduction in the number of cases going to trial corresponds with a progressive increase in the number going to alternative dispute resolution. Last year more than 200 cases were referred to ADR, by contrast again with only 95 three years ago. And of those cases sent off to ADR, well over one-half were thereby resolved.

Acknowledging the benefits of mediation and like processes - frequently leading to consensual resolution, the speed of the process, often less expensive, the preservation of relationships between the parties, the facilitation of continuing commercial relationships, and so on - this is a worthwhile trend in the public interest, and will likely develop further: that is, more mediation and less adjudication.

As you probably know, we are becoming increasingly managerial in our approach to the litigation in the court. Gone are the days when cases slept undisturbed in the lists for years. That is obviously not in the interests of the parties or the public who fund the courts. We actively explore the prospect of resolution of cases short of trial, and the judges and the registry case managers are always alert to the desirability of having parties agree upon what we might call a "dispute resolution plan". Such a plan, adopted by agreement or imposed by court order, will ordinarily involve a series of timed and structured steps designed to effect early and complete disclosure of each party s case, and then attract the best mix of dispute resolution "tools" to the case. What are these tools? There is a variety of course, including mediation, appraisal, arbitration, settlement conferences, conferences between experts, an absent resolution, summary judgment, the use of the construction summons, the trial of specific issues, and as necessary, the trial of the action.

I raise these points now because technology greatly facilitates these processes. The more refined and advanced our technology within the court, the better we become able to recognise the cases which should be referred to mediation and the like, the more refined our "dispute resolution plans"; and the better we are able to track assiduously the cases which remain within the court system to ensure that they do not go to sleep.

There needs to be a more expansive approach to the funding of the legal system. I have commented elsewhere on the inadequacy of legal aid, and more relevantly to the present, on the inappropriateness, for the courts, of current Treasury models for determining what funds should be allocated to particular entities and enterprises. So-called "output budgeting" currently favoured by the Treasury,

where the question of productivity regulates the amount provided, is inappropriate to determining what is needed by courts of law with the broad charter of delivering justice according to law, and where "outputs", if relevant, cannot be foreseen with any reasonable degree of accuracy. And how difficult it is to define appropriate benchmarks for the measurement of performance in this area. But this is a large subject into which I will not venture further today.

The Executive would however be appallingly wrong to ignore the importance of liberally funding the technology necessary for the progressive development of the courts. The potential consequent economies should be more than adequate compensation, and the resultant enhancement of justice is a benefit not lightly to be foregone.

Like the Angel of the Lord, I say, in conclusion, "Fear not". My tidings will not bring "great joy", but they will I hope have offered some reassurance. We are, I believe, quite unlikely to replicate here the more outlandish aspects of the US approach: our respective systems are sufficiently different to avoid that. The real key to future economic, but progressive, development of our system of litigation lies, I am firmly convinced, in the full exploitation of modern technology.

And for what it is worth, I should inform you that the text of this address will shortly be available on the Internet!

I wish you all a very happy Christmas and prosperous 1999.