Queensland Law Society Practice Symposium
Hilton Hotel, Brisbane
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Closing comments: "The Practice of Law: where to from here?"

The Hon P de Jersey AC,
Chief Justice

Appropriately for the end of today's sessions, I am to speak about "the practice of law: where to from here?" What a wonderfully broad topic. When I am engaged for these occasions, I usually ask for a topic, and the host courteously obliges with something so general that even I could not be accused of irrelevance – whatever I say.

This topic invites me to engage in forecasting, which is by nature perilous. If we accept, however, as the historians admonish, that the future is informed by the past and the present, then based on trends which have emerged, future challenges can be identified with reasonable confidence. But I acknowledge some diffidence, because you already have spent so much of today dealing with just this topic – in various ways.

I will nevertheless focus this evening for a short time on the profession.

Our Queensland profession has ridden through great changes in recent years, structurally of course, but more relevantly this evening, in what we do and how we do it.

Half a century ago, a practitioner could come close to a general command of most areas of the law. As it was said, if you did not know the law, at least you knew where to look for it. That this is no longer feasible can be demonstrated even by reference to the extent of law-making pre and post, say, 1950.

In the first half of the 20th century, High Court decisions accounted for 81 volumes of the Commonwealth Law Reports. The second half produced half as many again, 125 volumes. From 1900 to 1950, the Queensland Parliament enacted 46 bound volumes of statutes. The period 1951 to 2000 produced 82 bound volumes.

This expansion has identified completely new, or novel, legal principles; new areas of law; and maze-like by-ways in established avenues for relief. Areas of law virtually unknown or unexplored 50 years ago now command daily attention, intellectual property law being a prime example.

The drug culture now infects a lot of crime. Terrorism crime is on our present agendas. Modern science throws up remarkable issues – for example, as arose here a couple of years ago, the artificial insemination of a woman after the death of a male partner. The work of the courts in our increasingly complex society will become even more demanding, and correspondingly, what is expected of the profession.

Mind you, in some respects the contemporary practice of the law is simpler than it was 50 years ago. I saw a good example of this recently during the Rules Committee's review of the *Supreme Court Act* 1995, an Act which consolidated many long-standing procedural provisions. In days gone by, the practitioner had to come to grips with statutory provisions like s 98(1), a provision intended simply to confirm that in a process of execution, a sheriff might take possession of banknotes. How did the legislature secure that result? Reading this provision requires the lung capacity of an underwater swimmer or a flautist. Please stop me when you've had enough, or you think I have. Here goes:

> "**98.(1)** By virtue of any writ of fieri-facias to be sued out of the Supreme Court or any precept in pursuance thereof the sheriff or other officer having the execution thereof may and shall seize and take any money or banknote or notes of any banking society or company established in Queensland or elsewhere and any cheques bills of exchange promissory notes bonds specialties or other securities for money belonging to the person against whose effects such writ of fieri-facias shall be sued out and may and shall pay or deliver to the party suing out such execution any money or banknotes which shall be so seized or a sufficient part thereof and may and shall hold any such cheques bills of exchange promissory notes bonds specialties or other securities for money as a security or securities for the amount by such writ of fieri-facias directed to be levied or so much thereof as shall not have been otherwise levied and raised and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby if and when the time of payment thereof shall have arrived

> and the payment to such sheriff or other officer by the party liable on any such cheque bill of exchange promissory note bond specialty or other security with or without suit or the recovery and levying execution against the party so liable shall discharge the party to the extent of such payment or of such recovery and levy in execution as the case may be from the party's liability on any such cheque bill of exchange promissory note bond specialty or other security and such sheriff and other officer may and shall pay over to the party suing out such writ the money so to be recovered or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied and if after satisfaction of the amount so to be levied together with sheriff's poundage and expenses any surplus shall remain in the hands of such sheriff or other officer the same shall be paid to the party against whom such writ shall be so issued."

You will be pleased to hear that the Rules Committee determined that the provision should be repealed in its entirety as it serves no worthwhile purpose.

It has been necessary for the shape of professional practice to change or evolve to accommodate development of the legal landscape. It is now inconceivable that any practitioner could command the whole field.

While I was at the bar 1971-1985, there was still a general belief that expertise in arcane, and if that suggests just ancient mysteries, then newly intricate fields as well – that that expertise dwelt substantially only with members of the bar. By the late 1970's, that was clearly not the case. I knew of solicitors whose appreciation of the nuances of the most difficult concepts of international financing, for example, was unsurpassed – by anyone. While the barristers were presenting as generalists, firms of solicitors were establishing and nurturing cadres of distinct specialists. That is not to say there were not still, and there are still, highly talented barristers who can quickly assimilate the relevant literature and apply a lateral evaluation. But for all that, specialization came to characterize the solicitors branch more evidently than the bar.

One marked aspect of this process of evolution has indeed been the emergence of the specialist, qualified to present himself or herself as acutely attuned to the intricacies of what are sometimes particularly difficult and demanding fields.

Another aspect of the shape of professional practice which has in recent years been subject to considerable change concerns not what we do, but how we do it.

When the courts embraced ADR 25 years ago, the profession – after some early forgivable resistance – soon came on board and developed new skills, with mediation, for example, taking a place alongside adjudication. Each branch of the profession now boasts substantial numbers of practitioners who display particular talent in that art.

I remain concerned at the fall-off in trial adjudication, albeit a world-wide phenomenon. My concern may in the end amount to no more than judicial self-indulgence. If consensual resolutions are being achieved, with less acrimony, perhaps continuing relationships, and importantly, less expensively, and justly, then the courts could not reasonably complain on a 'protect our territory' basis. But are we completely confident those ideals of ADR are being achieved?

Over the same period, courts have come pro-actively to "manage" cases, and as better software becomes available, that will I believe, and I hope, actually intensify, in the interests of litigants. This will impose, inevitably, further pressures on litigation lawyers.

Another obvious example of change in the way we do things, and in an area allowing for the development of high level skills, concerns technology. Fifty years ago, IT was unknown or virtually so. Now any professional must have at least basic computing skills. And lawyers must be astute to the potential significance, in commercial litigation especially, of things like the insufficiently considered e-mail.

The capacity for really "smart" servicing of a client's needs will increase if the practitioner is IT savvy. Perhaps unsurprisingly, it is the larger firms, with well-developed IT capacities, which tend to make most use of our courts' electronic set down facility. I suspect the

larger firms prepare a lot of their litigation electronically now, even though we cannot yet in the courts offer e-trials in the full sense.

It may seem a little strange to identify technology as a field where human specialization can produce markedly better results for the client. Is it not simply a matter of leaving the machines to do their work? The answer is 'no' – much depends on the programming, and that is where the human intellect still apparently matters. One has only to read the wiz-kid Richard Suskind's published columns to realize the extraordinary conveniences opened up by this mark of the late 20th, and present, centuries. And the new generation is arming itself accordingly. My current Associate's adjunct degree, for example, is not in Arts, but in IT.

A marked feature of the present litigation landscape is the extent of self-representation. Asked to forecast, I would say this trend will continue and increase. There is no realistic likelihood governments will make any substantial legal aid funding available for civil cases. With facilities like the Internet, and an increased focus on individual rights, people are probably now more concerned to identify and assert causes of action which previously would not have been agitated. The absence of legal aid is not the only explanation for self-representation. In a misguided way, some litigants able to afford legal representation refuse to have it because of distrust of lawyers. Others will terminate the retainers of lawyers on the ground they can conduct the matter more effectively themselves.

These cases pose large challenges for the courts, and for lawyers representing opposing parties. The challenge for the Judge is to assist the unrepresented party only so far as will not reasonably engender in the represented party a view that he or she is the victim of unfair discrimination. The challenge for the opposing lawyer is to cooperate courteously and fairly with the unrepresented party, because without reasonable cooperation litigation may become absurdly distended, expensive and generally unmanageable – but at the same time realizing that he or she may have to subject the unrepresented party to searching and confronting cross-examination.

Another unfortunate feature of these cases is that the unrepresented party not infrequently exhibits an obsessional conviction, however irrationally based, about the absolute rightness of his or her cause. This means sensible compromise is not a realistic option, with a consequent squandering of private and public resources, not to mention angst.

Another result is a refusal on the part of the unrepresented party, if unsuccessful in the proceeding, to accept the legitimacy and authority of the judgment. Increasingly, I receive extensive missives from disappointed self-litigants who descend to a minute line by line examination of judgments given against them, seeking vainly to demonstrate the invalidity of the process and the result.

Self-litigants also give rise to difficulty with court staff, for their inability to comprehend court procedure and a reluctance to acknowledge that it is not part of the role of court officers to give legal advice. Dealing with self-litigants can absorb large amounts of Registry time, potentially eroding the time reasonably expected by represented parties. Also, it can lead to acrimony, which court officers should not have to endure.

As I say, I expect this trend – which challenges both court and profession – to continue and accentuate.

I earlier mentioned structural change. The orientation of the professional associations has in recent times become much more focused on continuing professional development, a trend warmly to be commended and embraced.

Continuing professional development is appropriately assuming a much more defined significance in modern practice, and it is not confined to the practising profession.

In January this year I attended a four day seminar at Warwick University in Coventry in the United Kingdom run by the Judicial Studies Board. Now lest you surmise I went there for

the scenery, I suggest that the Cathedral aside, Coventry does not stick in the mind as one of the most desirable spots on earth: these are the manufacturing Midlands. And despite its name, Warwick University is closer to the rather pedestrian Coventry than the captivating Warwick.

The subject of the seminar was the criminal law. Recent English reforms to the criminal law have been thorough going: abolition of the hearsay rule, the introduction of evidence of past convictions as evidence of propensity to commit the crime charged, the abolition of the double jeopardy principle etc.

It was useful to participate in substantial and well-informed discussions about those changes. I have no doubt our system will eventually have to encounter them – or at least confront lively debate as to their desirability. And we think majority verdicts a radical concept!

Attendance by Judges and recorders in such development seminars in England is effectively compulsory. In this State and nation, continuing judicial development is not compulsory. It has not been necessary to make it so. Judges regularly participate voluntarily in a wide range of educational thrusts.

Gone are the days, if they ever existed, when having gained one's qualification, one could survive professionally with an occasional top up, perhaps a periodic look at the ALJR and the ALMD; and that is so whether you are a solicitor, a barrister or a Judge. The output of legislation and case law, and the increasing intricacy of some of the problems which arise in day to day practice, plainly necessitate a much more active application to continuing development. So do personal esteem, the interests and demands of clients and the public, and the fundamentally concrete need to avoid negligence suits. As the cliché has it, "education" holds the key, although in this context we prefer, these days, the word 'development' to 'education'.

I acknowledge I presume in offering advice about the way forward, but it is expected so I will oblige.

1. First, embrace the continuing professional development program, and not just because of the aspect of compulsion. Stagnation means professional extinction.

2. Second, unless you are constrained by a necessarily generalist practice, seek to develop a particular speciality: good for the clients and good for self-esteem.

3. Third, acknowledge that IT expertise is a modern key to what the marketing arm would call "optimal service delivery". Even what Sir Walter Campbell once called the "under-privileged branch" of the profession, the judicial arm, now offers technological avenues to streamline service – electronic set-downs, e-Chambers etc: use these facilities and dismay your clients.

Those matters emerge from which I have already said. My last two points are certainly not novel, but I mention them now for the first time tonight.

4. My fourth, and as you will I am confident expect from me, is advice that you must be astute to uphold your professionalism. I have spoken repeatedly, I hope not repetitiously, about not allowing creeping commercial considerations – "billable hours", competitive tendering, the press of the marketing arm – to overwhelm traditional professionalism, that kernel of ethical commitment exhibited by unswerving honesty and balance, and extending to working for nothing for those with a reasonable cause but no means.

There is no doubt, as clients grow richer, as buildings get flasher, as graduates present as ever more accomplished, that the impact of materialism on our profession will not even be insidious.

We must together strive to ensure this remains a profession, and that it does not slide into some blank business domain where making money overrides conscientious public service.

5. There is a fifth piece of advice, which I draw from considerations like, especially, what I am told is the increasingly frequent departure from the profession of talented young graduates overworked by demanding firms. I speak of firms which mistakenly think the culture of some in the seventies, for whom "the firm" was more important than the family, let alone God, survives into the youth of the second millennium.

I am reassured that younger solicitors are expecting that reason regulate things like working hours in firms; that a fixation on maximal profits should no longer predominate; that firms look outward, beyond paying clients' files, into the community, establishing vibrant pro bono schemes for example. Firms are reacting, and some, through beneficial initiatives, proactively forestall such "radicalism".

Please realise the manifest sacrifice to the public interest involved in the premature departure from the profession of talented young practitioners because of an unnecessarily thorough-going "traditional" expectation from the employer. And beyond that, remember the primacy of the interest of those who in a familial sense depend on you.

You may say it is easy for me to express these views, but I will: "let there be balance".

Enough advice, and I thank you for patiently listening to me. My legal career now spans 25 years – not long enough to instil wisdom, but sufficient to leave a reasonable residue of worthwhile experience.

The last two matters I have mentioned this evening – maintaining genuine professionalism and fostering balance – are the questions which concern me most in our contemporary times.

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I congratulate all who have participated in today's Symposium. You will have done so, I am sure, not just to secure your CPD points, but for the fundamental purpose of continuing professional development in the real meaning of those words.