The Future of Adversarial Justice

Speech given by The Hon Sir Anthony Mason AC KBE
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Introduction

THE FUTURE OF ADVERSARIAL JUSTICE raises many questions, including the question – does adversarial justice have a future, more especially in the light of the growing popularity of Alternative Dispute Resolution (ADR) and in light of the suggestion that we should adopt the European 'inquisitorial' system of justice. They are the matters I shall discuss along with some of the many aspects of our adversarial system to which attention should be given.

My remarks are directed to civil justice, not to criminal justice. This limitation on the scope of my address entails looking at civil justice as if it were isolated from criminal justice, rather than looking at civil justice as an integral element in an entire system. We concentrate on the prospect of civil justice reform because we consider it more achievable than criminal justice reform, notwithstanding that the criminal justice system imposes an ever-expanding burden on the state. That system centres on the role of the jury and it is desirable that we survey jury performance and define more clearly the areas which should be the subject of jury trial.

Adversarial justice: What do we mean by it?

I take the expression 'adversarial justice' to mean a system of adjudication, such as our existing court system, in which the parties have at least the primary responsibility for presenting all aspects of their case.[1] Adversarial justice is an expression often used in opposition to the inquisitorial system which is an imprecise label given to the procedure of the European system, as applied particularly in criminal cases. That opposition has the potential to mislead, as there is a degree of commonality and convergence between the two systems.

It is a mistake to regard our system and the European system as static, having essential characteristics, which are incapable of change. Today the European system, which varies from country to country, places more emphasis on procedural fairness, giving the parties more opportunity to present their cases than was so formerly. The adversarial system, by moving to case management, begins to resemble the European system in expecting the judge to exercise more control over the litigation. Nevertheless, the defining criterion that distinguishes the two systems is the greater emphasis on procedural fairness which is characteristic of the adversarial system and leaves the parties rather than the court to determine what evidence is to be collected and led. Whether we should continue to give that greater emphasis to procedural fairness is a major question.

Associated with the difference in emphasis on procedural fairness is the greater attention we give to oral evidence with an emphasis on the importance of cross-examination. Indeed, it is a curious irony that the European system, which claims to pursue the truth, sets much less store than we do on cross-examination. On the other hand, ineffective cross-examination is a notorious thief of time in our system.

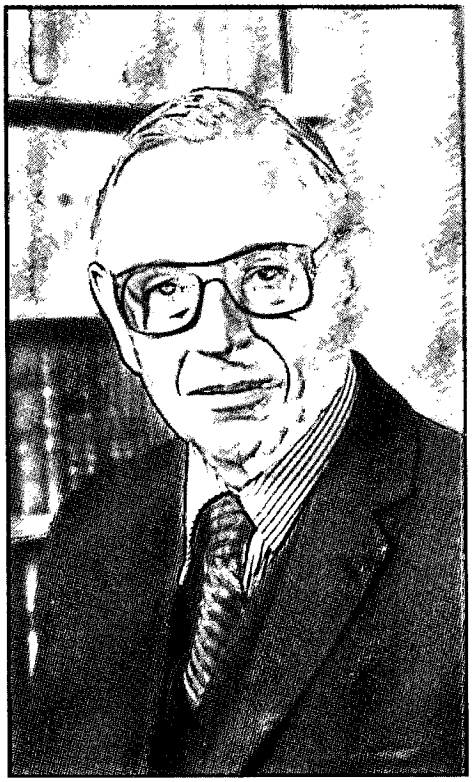
So, the contrast between the two systems has not been as stark as some commentators would have had us believe. To take one instance, the doctrine of precedent has not been applied as such in Europe. But it is an error to think that court decisions do not have significant influence on judicial reasoning in Europe. No system of justice could command public confidence if it were to ignore consistency in its decision-making and fail to respect previous decisions.

The present condition of adversarial justice

It is no exaggeration to say that there has been an erosion of faith in the virtues of adversarial justice as exemplified in the system of court adjudication. That

erosion of faith has not come about overnight. It has been developing over time. 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. The deficiencies of court adjudication have been recognised in official reports in a number of jurisdictions.[2]

At an earlier time, that recognition led to the creation of a wide range of administrative tribunals capable of delivering a more informal kind of justice. Jurisdiction was given to these tribunals rather than to the courts where that could be done without infringing the separation of powers. In some tribunals, restrictions were imposed on the right of lawyers to appear simply because lawyers were, and still are, regarded as contributing to the deficiencies of adversarial justice.[3] For the most part administrative tribunals supplemented, but did not replace, court adjudication. The growth of administrative and tribunal decision-making brought in its train a great expansion in judicial review of administrative decisions but that did not slow the growth of administrative tribunals.



Sir Anthony Mason AC KBE

Court adjudication has become more costly as court cases became more complex and the materials were more voluminous. Long running cases are now more frequent and run longer than they did even 20 years ago. At the same time, it has become apparent that inequality of resources between parties and the disparity in quality of lawyers precludes the system of court adjudication from operating with complete fairness.

The complexity of modern litigation is in large measure a reflection of the complexity of modern legislation and corporate and commercial activity. The *Income Tax Assessment Act 1997* and the *Corporations Law* are daunting in their complexity. The human mind struggles when it is forced to grapple with the labyrinthine reaches of both statutes, most notably the former. But they are not alone. The *Trade Practices Act 1974* has spawned some massive litigation. There are other regulatory statutes governing transactions and conduct, providing for a range of remedies on a variety of grounds. Mention has been made also of equitable remedies grounded in unconscionability but they play a minor part in the scheme of things. In any event, these remedies are now to be found in statutes, such as the *Trade Practices Act 1974* and the *Contracts Review Act 1980* (NSW).

Court adjudication, it should be noted, has no monopoly in complex, long-running proceedings. Tribunal proceedings, particularly proceedings relating to television licences, sometimes exhibited these very characteristics. The tribunal proceedings, which exhibited these characteristics, were conducted according to adversarial procedures.

At an international conference at Cambridge four years ago, a leading English academic lawyer lamented the absence these days of the crisp, lucid and succinct judgments of the English Court of Appeal in the days of Fletcher Moulton and Vaughan Williams LJJ. My English friend seemed to think it was just a matter of style. But the judicial inhabitants of the Court of Appeal in the last quarter of the nineteenth century were not contending with the modern corporations and tax laws, let alone laws governing trade practices, consumer protection, environmental protection, anti-discrim-ination and human rights. They were judges who wrote in an age of Arcadian legal simplicity.

My English friend, though a legal academic, was expressing a yearning often voiced by lesser mortals, such as journalists, for a simpler legal world, far removed from the sophisticated world of law and litigation as we know it today. Unfortunately, there is an inherent tension between the desire for simplicity and the complexity of modern litigious disputes. And, as Justice Sackville has noted, there is a tension between the community's insistence that litigation be less complex, expensive and dilatory and the 'Holy Grail' of individualised justice.[4]

Some of the criticisms of individualised justice come from organisations and lawyers who voice the concerns of corporate Australia. There is a tendency, which is understandable, to identify the self-interest of corporate Australia with the interest of Australians generally. A striking example is the Allen Consulting Group's report 'Avoiding a more litigious society'.[5] The criticisms of the modern doctrine of unconscionability are another example. That doctrine affords relief to an individual who suffers from a special disability, of whom unconscientious advantage is taken, by another.[6] Why a powerful financial institution should be permitted to benefit from such action defies rationality. The economic advancement of Australia does not justify such an outcome. There is no reason why Australian law should follow the example of English law in offering special protection to banks and financial institutions.[7]

The alliance between adversarial justice and ADR

With a view to remedying evident deficiencies in court adjudication, governments in Australia, as in other

common law jurisdictions, notably the United States, have promoted the virtues of ADR in its various forms. This initiative has come from, or has been supported by, government. The purpose was not only to deflect criticism of the court system and of government for failing to adequately resource the court system, but also to reduce the cost to government of financing that system.

The various forms of ADR exist independently of the court system. The independent existence of ADR presents a competitive challenge to the court system. With a view to answering that challenge, the courts (or some of them) have annexed ADR ('court annexed ADR'). This development has conjured up the vision of 'the multi-doored courthouse'[8] which may be likened to a litigious hypermarket in which the litigant, like the shopper, can find the dispute resolution mechanism of their choice.

It is a curious irony that governments and lawyers have promoted the cause of ADR in order to take pressure off court adjudication. The idea is that by persuading litigants to resort to ADR, we will enable court adjudication to meet the demands which are made upon it. The arguments deployed in favour of ADR do not assert that it is superior to court adjudication; the arguments rather claim that the varieties of ADR are worthy of consideration because they offer a range of attractions. The vision of 'the multi-doored courthouse' was designed, at least in part, to preserve court adjudication from the potential threat to its existence presented by the competition from ADR.[9]

ADR as a threat to court adjudication

In the United States ADR was initially seen as offering such a threat. That apprehension has now given way to a more mature assessment that court adjudication is bound to survive.[10]

I doubt that ADR was seen in Australia as a threat to court adjudication. It was only natural that when judges saw their system in competition with ADR that they would want to offer ADR as well. Judicial imperialism is not an entirely fictitious concept.

In the United States, court annexed ADR circumvented the threat to court adjudication. In Australia, ADR has achieved considerable acceptance in the Federal Court. Court annexed arbitration also has had a significant impact in the Common Law Division of the Supreme Court of New South Wales.[11] And mediation is certainly more widely used, even in high profile cases. Indeed, there have been some long-running cases where the parties have resorted to mediation in order to terminate the ever-enlarging burden of costs.

Whether it is right to make mediation a compulsory obligation is another question. Because the costs of mediation can become an additional burden for a party who is financially weak, I do not think it right to make mediation compulsory.

Be this as it may, although ADR has achieved success in Australia, it has not reached such a level of popularity that it presents a threat to the survival of court adjudication. It seems to me that the threat to the survival of court adjudication lies not so much in competition from ADR as in the rhetoric which accompanies ADR, including some court annexed ADR, in which the virtues of court adjudication are downplayed, and in unsubstantiated criticisms made of court adjudication.

The 'new vision' of the courts

The old vision of the courts exercising judicial power by making, on behalf of the state, binding determinations of disputes between litigants has given way, in some jurisdictions, to a new and quite different vision. Thus, the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*[12] was able to say:

> The phrase 'civil justice system' evokes in most people the image of an imposing courthouse, an austere courtroom, an adversarial trial procedure and a trial judge as the ... arbiter of rights in dispute.

The Report then said:

> Our vision for the civil justice system in the twenty first century is of a system that:
> - provides many options to litigants for dispute resolution;
> - rests within a framework managed by the courts; and
> - provides an incentive structure that rewards early settlement and results in trials being a mechanism of valued but last resort for determining disputes.

Have we come so far that we can now say that, in Australia, trials are 'a mechanism of valued but last resort'? Whatever be the position in Canada, I do not think that we can make a similar statement for Australia. Nor should we. Such a statement seems to suggest that court adjudication is simply a backstop to be invoked when all other expedients fail. That suggestion is scarcely consistent with the separation of powers and the vesting by the Australian Constitution of federal judicial power in Ch III courts. One can understand the view that other modes of dispute resolution are incidental to the exercise of judicial power, though there are difficulties in making good that proposition. But to treat court adjudication as if it is something less than the main game, in the context of Ch III courts under the Constitution, is to turn constitutional tradition on its head.

Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court.

The future of court adjudication

Quite apart from a lack of evidence to suggest that court adjudication will be eliminated or overwhelmed by ADR, there are several considerations which indicate that court adjudication will survive, even if it were not as dominant a mode of dispute resolution as it has been. First, there is the constitutional dimension to which I have just referred. The Australian Constitution entrenches the exercise of judicial power. Court adjudication is also an integral element in the constitutional framework of state government.

Secondly, it is difficult to conceive in modern

democratic society that such a society can survive without a strong integrated system of public court adjudication. The existence of such a system lies at the core of the separation of powers. Although it is possible that criminal and public law adjudication could provide the basis of such a system, a more wide-ranging system of court adjudication is not only desirable but also necessary for maintaining the rule of law. Court adjudication in civil cases is essential for the regulation of acts and transactions, in particular for the protection of commercial transactions and economic activity. The vitality of commercial life depends upon judicial enforcement of contractual rights and obligations.

How could a sufficiently public and comprehensive system of civil dispute resolution be provided otherwise by the state? The system must be public and comprehensive in its reach and must be provided by the state if the public is to have confidence in peaceful resolution of disputes instead of resorting to other means. ADR is in essence private and is offered by a range of private providers.

Another reason for predicting the survival of court civil adjudication is the increased emphasis on making it more efficient. Of the various reforms which have been adopted, case management is perhaps the most important, though the adoption of court standards has also been very important.

A final point is that the success of ADR depends upon the foundation that our system of court adjudication provides. Arbitration and mediation take place within a framework of certainty and predictability presented by the body of existing case law.

'No system of law can engender public confidence if it fails to be consistent in its decision-making and the European jurisdictions are not exceptions to that general proposition.'

Adversarial or inquisitorial justice?

The conclusion that court adjudication has a definite future does not mean that court adjudication must follow the adversarial system. The ALRC Issues Paper[13] explicitly raised the question whether we should adopt the 'inquisitorial model' and discard key elements of the 'adversarial model'. That suggestion has been made by others in the past.

There are some preliminary comments, which should be made about that suggestion. The first is that all too frequently discussion of the two systems has proceeded on the basis of stressing the contrasts and differences in the two systems, contributing to the impression that the opposition between the two systems is greater than it really is. As mentioned earlier, both systems are evolving and some degree of convergence is taking place. The integration of the United Kingdom in the European Union is contributing to that development. One element in the convergence is the practice of holding judicial exchanges (conferences) between senior English judges and senior European judges.

It is instructive to look at the European Court of Justice. Its procedures are largely European but English emphasis on procedural fairness is evident, as is recognition of the value of oral argument within strict time limits. United Kingdom and Irish counsel, as one might expect, are more effective advocates than their European counterparts.

I have already mentioned the absence of a doctrine of precedent in Europe. True it is that there is not such a doctrine. But to say that without further explanation is to risk giving a false impression. No system of law can engender public confidence if it fails to be consistent in its decision-making and the European jurisdictions are not exceptions to that general proposition. Past decisions are important and influential. Again, it is instructive to look at the decisions of the European Court of Justice where reference to earlier decisions plays an important part, though not the obsessive part, which it often plays in the common law judgment. This is an aspect of judgment writing, which deserves more attention.

The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of the truth. Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Whether European courts are effective in investigating the truth and actually finding out what is the truth is a vexed question and one which is beyond the scope of this address. Although there are those who assert that the European system is not notably successful on this score, it is probably rather more successful in this respect than the adversarial system.

The fact that the judges have more control in the European model offers the potential to redress some shortcomings in the adversarial system. To the extent that the court takes the initiative in ascertaining and finding facts, the burden on the parties and their legal representatives is reduced, particularly in the matter of costs. Because lawyers have a reduced role in the European model, inequality of competence in legal representation is less of a problem than it is in the adversarial system. That is an important consideration in an era in which participation in litigation by unrepresented persons is becoming more common.

It is significant that, in Europe, there is no substantial counterpart to the emergence of the large mega-firms that dominate legal practice in common law jurisdictions. The relative absence of such firms almost certainly testifies to the existence of a different legal culture. But the existence of that different legal culture may have its roots in, or be associated with, larger and deeper cultural differences that divide Europe from the common law world. The common law world places great emphasis on legislative supremacy, whereas Europe has a long history of bureaucratic decision-making, now carried on by the European Commission and the Council of Europe.

It would be a grave mistake to assume that transplanting the European model to Australian soil would necessarily result in a performance by that model which would be uninfluenced by our traditions, our culture and our expectations of litigation. It is at least possible, and in my view likely, that the model would take on new characteristics. It would also be a mistake to assume that the 'good' characteristics of the European model as critics of the adversarial system see them, that is the reduced role of lawyers and lower legal costs, will necessarily remain static, even in Europe. These characteristics may themselves be in process of change.

'I regard a shift to the European model as something that requires an extraordinary act of faith.'

These are not the only reasons for not adopting the European inquisitorial system. In order to service it, a much larger number of judges would be required than is required by the common law adversarial system. The cost of funding a system, which calls for a higher population of judges, would deter Australian governments from supporting a move to the European system. The fact that European judges enjoy a lower status than their common law counterparts might please our politicians but there is no guarantee that adoption of the European model would affect the status of our judges. As the European model gives judges more control of litigation, there is no reason to think that their status in the eyes of the public would decrease.

An important characteristic of the European model is that the judges are career judges. In other words, they are educated and trained specifically for service as judges. They do not enter the legal profession as a preliminary to judicial appointment. European judges take up judicial appointments at a comparatively young age, at least by our standards. This has led to some criticism in some countries, as the public becomes aware that controversial cases have been dealt with by young and apparently inexperienced judges. That has added force when criticism is made of departures from procedural fairness.

To be fair, much of the criticism of the European judiciary is associated with the inquisitorial system in its application to criminal cases. But if we are contemplating a shift to the European model in civil justice with a career judiciary, it makes little sense to make an exception for criminal cases and to continue to appoint judges from the profession to hear criminal cases. To make such an exception would mean that we would have two categories of judges. That is a recipe for disharmony, confusion and inefficiency.

A career judiciary would present a problem in education and training not only for new judges but also for the re-training of existing judges.

A move to the European model would also present a major culture shock for the legal profession and litigants. The advocate plays a lesser part in the trial than does the advocate in the common law system. Some people may say that would not be a bad thing. On the other hand, the move away from the present system would certainly disappoint expectations on the part of litigants who believe that their day in court entails the presentation of a case as shaped by their advocate, along with cross-examination of witnesses. The 'inquisitorial' procedures of immigration tribunals have been criticised on this ground.[14] Indeed, some of the resistance to the proposals in the 'Woolf Report' in England may be attributed to recommendations which, by giving the judge strong powers in relation to the calling of witnesses, notably expert witnesses, and other matters, would, if implemented, take England closer to the European model than the reformed adversarial model presently in operation in Australia.

For my part, I regard a shift to the European model as something that requires an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.

In saying that, I am far from denying that we can usefully take up some aspects of the European model. We are following that model in giving more control to the judge in the area of case management. How much further we should go will be determined in the light of further experience. For example, judges could impose limits on cross-examination. Although there are difficulties in doing so, they are not insuperable.

Nevertheless in adopting a selective approach to the

European model, we need to be cautious. Some aspects of the model which appear to be advantageous either depend for their effective operation upon characteristics of the model which we would not wish to adopt or would not migrate easily into our system. For example, the suggestion that primary responsibility for fact gathering should be assigned to the court, made by Professor Langbein,[15] would be too radical a step, involving judges in both investigation and decision-making. On the other hand, case management, which is now a feature of court procedures in Australia, though it is not a specific procedure in the European model, brings our adversarial system somewhat closer to the European model.

And, at the end of the day, if we were minded to adopt the European model, two major questions would confront us. The first is whether the constitutional concept of judicial power, which is vested by the Australian Constitution in Ch III courts, would extend to the determination of disputes according to the European model. The answer to that turns largely on the extent to which the concept of judicial power mandates common law conceptions of procedural fairness or natural justice. And there are indications in recent High Court judgments that the extent is substantial.[16]

The second major question is whether we are willing to make do with less of an emphasis on procedural fairness. Are we willing to allow the judge to decide (a) whether witnesses will be called and, if so, which witnesses and (b) to limit cross-examination that is not as significant an element in the European model as it is with us?

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It can be argued that we have gone to extreme lengths in insisting upon procedural fairness and that our insistence has led to unnecessary costs and inconvenience. But if that argument is to be carried to a convincing conclusion, it will necessitate analysis and evaluation that have not yet been undertaken.

Costs

I have one misgiving in rejecting the European model and that is about the cost to the litigant of the adversarial model. As will appear from my discussion of case management, it is not established that the reformed case managed adversarial model will significantly reduce costs to the litigant. That remains a possibility but no more than a possibility.

In order to address that problem, we need to do more to encourage use of lower level forms of dispute resolution such as small claims jurisdictions, consumer complaints tribunals and community justice agencies, outside the orthodox court system. In setting up such tribunals, we can, where it is thought appropriate, structure them in the light of the European model. In this way, we may alleviate the cost burden to the litigant and, at the same time, gain some experience in how an adapted European model would work in an Australian environment.

Case management

Judges, initially resistant to case management, have, for the most part, become converts after having experience of it. Case management has been questioned, if not criticised, on the ground that the professed benefits that it brings, in particular reduced costs, have not been conclusively demonstrated. Be that as it may, it is reasonably clear that steps which ensure that issues are clearly defined at an early stage, that early consideration is given to settlement, even by mediation, and that the case is brought on for trial and judgment expeditiously without unnecessary expense and inconvenience, will result in the efficient disposition of litigation. Case management will improve the quality of justice. That is the principal advantage now claimed for case management.

The 'single judge' or 'docket' system of case management introduced by the Federal Court is well regarded. A judge who deals with a case from beginning to end will be more efficient than a judge who comes in without prior knowledge of the case. The judge who is familiar with the case will save time and should reduce the costs otherwise payable. He or she will establish a rapport with the lawyers, who themselves will perform to the highest level of their ability when close attention is given to the case in the preliminary stages.

It is possible that the increased costs incurred in preparatory work and interlocutory hearings, including conferencing, may equal the cost savings resulting from quicker and shorter trials and from more settlements and earlier settlements.[17] Professor Zander has expressed the view that history demonstrates that lawyers are experts in ensuring that reforms do not result in lower legal costs. He asserts that the only effective way to reduce legal costs is to fix fees for legal services. That is the German expedient.[18] And it seems to have been successful.

Whether case management results in cost savings to government is likewise an unknown. The more time spent by judges in case management - and the time so spent may be quite considerable - the less time they have available for hearing and deciding contested cases.

Obviously judges can make effective use of qualified staff in case management activities and that is something that government must bear in mind in seeking to achieve the most effective use of judges. But if case management is to succeed, it must be undertaken primarily by judges. The exercise of their authority over lawyers is essential.

We must be careful to avoid 'over-management', in particular unnecessary interlocutory hearings and conferences, because they will result in an oppressive costs burden, as well as inconvenience. Techniques and procedures appropriate to complex cases should not be applied to simpler cases. Unfortunately, it is the complex 'big cases' that have dominated the debate and unduly influenced the reform agenda.[19]

At the same time we must accept that it is the judge who has control of the parties, not the plaintiff nor the parties. It is the judge who manages the timetable and who decides what has to be done in order to bring the case to trial. In controlling the litigation, the judge is asserting the authority of the court. The reputation of the court and public confidence in the administration of justice demands that cases be disposed of efficiently as well as justly. If the conduct of litigation is left to the parties, the court will not avoid blame for the delays, inconvenience and expense that result.

Although I have heard professional criticism of case management from some solicitors, my very strong impression is that there is strong professional acceptance of the Federal Court system of case management, subject to a minor qualification relating to a difference between 'pro-active' judges and some who are not. The acceptance of Federal Court case management is due to the fact that it was introduced after close consultation with interested groups most notably the legal profession. It was not a reform imposed from on high upon an uncomprehending and uninformed profession.

It is, however, imperative that judges and others who seek to extol the virtues of case management avoid the rhetoric of prompt disposition at the expense of just disposition. Over emphasis on prompt disposition will do nothing to encourage public confidence in the system. Nothing will do more damage than a belief that the justice system is in process of conversion into a production line.

The dangers presented by judicial rhetoric of this kind are also to be seen in too rigid an insistence on case management timetabling.

Compliance with case management timetabling

Some concern has been voiced over the majority decision of the High Court in *State of Queensland* v *J.L. Holdings*.[20] In that case, the primary judge refused leave to the defendants to amend their defence on one ground, though allowing leave on other grounds, after earlier amendments and interlocutory hearings, because the result in the vacation of the date for hearing estimated to take four months. Although the defence was fairly arguable, the judge considered that maintaining the date for hearing was a more pressing consideration. The High Court held (i) that a party in breach of a timetable stipulation should be entitled to pursue a fairly arguable point when any prejudice to the other side can be cured by an order for costs and (ii) that the principles of case management are not an end in themselves and are subordinate to the concept of ensuring that a party is able to properly present its case at trial. One would have thought that these principles are unexceptional. Criticism of them suggests that the critics have elevated case management to a position in which it is the paramount goal.

On the other hand it is proper that a court should not readily contemplate a departure from the stipulated timetable and should carefully consider what the consequences of such a departure would be. In *Sali* v *SPC*, the High Court said that the judge

> is entitled to consider claims by litigants in other cases awaiting hearing ... as well as the interests of the parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.[21]

There is no inconsistency between the two decisions. The criticism of *J.L.Holdings* seeks to elevate case management values to an absolute. No system with pretensions to doing justice could allow that to occur. The departure contemplated in *J.L.Holdings* is predicated on the availability of costs as an adequate recompense, though it is now accepted, and properly so, (i) that courts have been too ready to conclude that procedural failures can be made good by an order for costs[22] and (ii) that the public interest in achieving the most efficient use of court resources is a relevant consideration.

It may be that *J.L.Holdings* has been misinterpreted by some judges as an authority for excessive leniency. If so, appellate courts should ensure that the correct approach is adopted as a counter to the tendency already mentioned. There is no need for legislative intervention and it is by no means clear what the appropriate legislative intervention would be.

Case management and judicial discretion

A criticism made of case management in the United States is that it entrusts too much discretion to the judges. This has resulted in a departure from uniformity in favour of individualised procedure for particular cases.[23] Differential case management that contemplates allocation of cases to established channels has not been maintained. Judges enjoy having a judicial discretion and the more so because appeals from exercises of judicial discretion are problematic. Indeed, appellate courts are reluctant to intervene in an interlocutory matter and even more so when it is a matter of procedure.

The thinking behind the discretionary approach is that it will lead to prompt and economic disposition. So long as the exercise of discretion does not lead to unpredictability and uncertainty, it may be accepted as an element in case management. On the other hand, the United States criticism requires that we emphasise the necessity of maintaining both predictability and

certainty and that means keeping a close eye on uniformity.

One discrete aspect of case management and ADR, which calls for scrutiny, is the discretionary participation by judges in discussions, which lead to settlement. In the United States, concern has been expressed because the judge may play a coercive role in relation to settlement. That risk is all the greater because discussions of this kind are not subject to the publicity which attends court adjudication. There is no escape from the conclusion that case management and ADR enhance the part played by discretionary justice and incidentally make that exercise of discretionary justice less susceptible to public scrutiny. On the other hand, there is, I think, less of a risk that Australian judges will become 'settlement brokers'. Such a role is foreign to our judicial tradition. Even so, it is a matter that will require continuing attention.

'There must be a dedicated commitment to case management and a will to achieve the benefits which it can bring.'

Mediation

I shall confine myself to one comment about mediation. There is a case for codifying the principles according to which mediations should be conducted. Codification of principles will enable review to take place attended by public scrutiny.

Of course the new vision of the court system with its emphasis on prompt and efficient disposition does not favour review because it delays final disposition. But it is essential that we do not allow court proceedings to degenerate into private proceedings that are not subject to review and publicity. Openness and publicity have been an essential feature of our system.

Settlements

What I have said so far is not designed to criticise judicial facilitation of settlement negotiations. Settlements are to be encouraged. Most cases are settled, not adjudicated. Although that is so, settlements take place within a system of court adjudication in which the predictability of the court decision provides a reasonable framework within which a settlement can be arrived at. In a less than ideal world in which substantial court fees are payable, I have no objection to encouraging settlement by giving the parties a discount on court fees that might otherwise be payable.

Judicial attitudes

Judicial attitudes to case management and the introduction of court standards are divided. It was no secret, in England, that some judges were far from convinced of the virtues of Lord Woolf's *Access to Justice* reforms. It is also evident that some judges believe that the judge's role is that of an umpire who keeps the ring and that is all. I suspect that there are other judges who have little interest in case management, who regard it as some new-fangled device which has little to recommend it.

These attitudes must change. There must be a dedicated commitment to case management and a will to achieve the benefits which it can bring. There has been a strong judicial tendency to allow departures from procedural requirements if enforcement of compliance results in final judgment without a trial. Departures from procedural requirements must be justified. Judges should actively monitor compliance with directions and deal with lawyers who are responsible for delay, even to the point of making them responsible for costs.

Judicial attitudes are too closely geared to the trial as the ultimate goal of the adversarial system. There has been a tendency to leave questions to be determined at the trial when they could be advantageously decided in advance of the trial, thereby avoiding trial of some issues of fact. In applications for an interlocutory injunction, difficult questions of law are often left to the trial. It would be a more effective use of judicial time if they were decided at the interlocutory stage so long as they are capable of being decided on the materials then available. But if that course is to be viable, it may need the co-operation of appellate judges who are naturally reluctant to decide questions which can be left to the trial.

Judges consider that it is undesirable to decide questions of law in the abstract without having findings of fact to illuminate the question of law. Although that reluctance is understandable, in the interests of efficient resolution of the controversy between the parties it is desirable that questions of law should be answered in advance of the trial when the answer would avoid trial of unnecessary issues of fact and save expense.

The remedy of summary judgment should also be more frequently used. Justice Davies of the Queensland Court of Appeal has been a strong advocate of a more extensive use of the summary judgment procedure. That initiative merits strong support. In General *Steel Industries Inc* v *Commissioner for Railways (NSW)*,[24] Barwick CJ acknowledged that argument of an extensive kind may be necessary to convince a court that there is no reasonable cause of action and that

summary judgment should be entered. The same comment may be made about the absence of a fairly arguable defence. If entry of summary judgment depends upon the outcome of a question of law and does not depend upon a contested issue of fact, I see no reason why that question cannot be determined in summary proceedings, no matter how difficult the question of law may be. If amendment of court rules or legislative amendment is necessary to bring about this result, then that action should be taken.

In more complex and specialised litigation, where there is no disparity in the quality of the legal representation and the parties are well-resourced, there may be an advantage in separating the hearing on liability from a subsequent hearing on quantum. It has been suggested that some judges may be too reluctant to take this course even when it is convenient and economical to do so.

In less complex cases when there is a disparity in legal representation or in the resources of the parties, separation is generally inadvisable. Separation may result in unnecessary expense and a burden on witnesses who would be required to give evidence at both trials.

It is difficult to generalise. My comment is simply designed to make the point that there are some cases in which division of the hearing may be an advantageous exception to the general rule.

Judgments

I referred earlier to the decisions of the European Court of Justice. The critical question is for whom is the judgment written? For the parties, for the legal profession, for the community or for the author? Excluding the last alternative, the answer will depend on the court and the issue under consideration. The High Court judgment that makes or clarifies the law stands at one end of the spectrum. Even in the case of a High Court judgment, there is no reason to write it as if it were an article for publication in an American law review or even the *Law Quarterly Review.*

In the case of other courts, brevity in judgment is to be commended, so long as the substantial points argued are dealt with. Of course, by reason of complex facts, some judgments call for findings of fact which defy brevity. Not infrequently, exhaustive discussion of authorities is overdone, as if to convey the impression that the judicial author feels that he or she must establish his or her credentials, namely that he has undertaken a good deal of research and is therefore well qualified to decide the case. The discussion of authority is sometimes much more extensive or more impressive than the actual reasoning on which the decision ultimately turns.

The judgment is written primarily for the parties, particularly for the losing party; the judgment should explain to him why they lost. Depending upon the issue, it may also be written for the legal profession and the community. Even if written for the legal profession, it is not a legal monograph. If written for the community, the reasoning should be comprehensible by an intelligent well read lay person. The judgment is the principal means by which the courts speak to the community. That is what some judges tell us. Indeed, some judges would say that my statement should be qualified by substituting 'only means' for 'principal means'. If judges want the community to understand what they are doing, then they should write judgments suited to that end. That means writing a judgment which commentators and journalists can mediate to the public.

The short form judgment in appropriate cases has much to commend it. In other cases, the United States 'telegrammatic' style of judgment has distinct advantages. By these means unnecessary judicial labour can be eliminated.

In writing judgments and in speaking and writing outside the courtroom, judges need to remember that these days the public needs to be persuaded of the efficacy of court adjudication. The system has its critics. They include journalists, politicians and academic lawyers. Now that Attorneys General (or some of them) have declined to man the barricades, it is for the judges themselves to demonstrate the virtues of the system. In that they will be supported by the profession and some commentators. But support from the profession is discounted by the public for various reasons. Today the judges themselves are in the front line of communication. They must communicate in a way that is comprehensible to intelligent non-lawyers rather than in the language of a priestly class. They must be informative so people know the process better and what their rights are.

Judicial training

We must place more emphasis on judicial education and judicial training. Drawing from a wider field of candidates for judicial appointment makes well considered and comprehensive judicial training programmes a necessity. The need for these programmes is becoming more evident with the appointment of solicitors and academic lawyers as judges. But those who have practised as barristers would also profit from these programmes. The intellectual property lawyer appointed to the Bench may have less knowledge of criminal law than the solicitor or academic lawyer who becomes a judge.

A recently appointed judge who was a very experienced counsel and attended an introductory course for newly appointed judges told me that he derived great benefit from it, particularly that segment of the course that was directed to communication and relations with the community.

Judicial education is even more important in Australia than it is in England where the Recorder system provides prior probationary experience before permanent appointment. Subject to the obstacle presented by Ch III of the Australian Constitution, it is a course that we should consider. In its absence, judicial education becomes a matter of paramount importance.

Good work in this field has been done by the Australian Institute of Judicial Administration and the Judicial Commission of New South Wales. But more could be achieved if a National Judicial College was established. It is important that judges should have at

least a very strong input into, if not control of, judicial education, in order to protect judicial independence.

Increased emphasis on judicial education is a very small step in the direction of the European model.

Technology

Technology can play an important part in court administration and the processing of data. Electronic filing and recording is now important. Judgments are put on the internet. Libraries can make use of the internet for judgments and academic materials. Video conferencing is increasingly used for the reception of evidence and for hearings, as well as pre-trial conferences and special leave applications. Work is advancing in relation to the introduction of electronic appeal books. Use of computers is made in particular cases and inquiries that are complex or involve extensive documentation. But I doubt that technology courts will be widely used simply because some litigants will be unable to use them or to afford lawyers who can do so. Video conferencing, electronic filings and use of computers significantly reduce costs that would otherwise be incurred.

Monitoring

There is a need for continuous data collection and monitoring of court performance. This is now achievable with the use of computers. In the past there was little attention given to data collection and assessment of court performance. Without continuous data collection and monitoring of performance, the courts cannot meet legitimate demands as and when they arise. Fortunately, in the area of court performance, the old judicial attitude, which was 're-active', has been replaced by an attitude, which emphasises assessment and planning for the future.

Consultation

Allied to data collection and monitoring is the need for close consultation with users. A case in point has been the Federal Court's consultation with the profession in relation to case management. Professional input was an important element in ultimately winning professional approval of the procedures. Continuing consultation will bring to light aspects of court performance that require attention.

Tribunals

Although I have made a passing reference to tribunals in the context of costs, tribunal proceedings stand outside the principal reach of my address. Nevertheless there is one point I should make. On reflection, I think that we made the mistake in the past of moulding some tribunals too closely to the court adjudication model. There is a definite place for some tribunals to be cast in the European mould, with a departmental officer as member of the tribunal, so that the tribunal can work in conjunction with an investigating officer; in other words, there are some administrative functions in which the European model can be adapted to tribunals. I hasten to add, however, that I do not suggest that all tribunal proceedings should conform to such a model. It is a matter of tailoring a model to suit the function, which is to be discharged.

As I have foreshadowed, experience with tribunals which conform more closely to the European model would enable us to assess more accurately the possibility of making particular changes to our court system.

Conclusion

Adversarial justice has a future. But it needs to be supported and defended against irresponsible criticism and criticism which is politically expedient. The virtues of adversarial justice need to be explained to the community. And the point needs to be strongly made, by Attorneys General, if only they will do so, that very considerable improvements have been made in Australian court systems in recent years and that we are willing to make further changes once it is established that they are desirable.

1 See J. Resnik, 'Failing Faith and Adjudicatory Procedure in Decline', (1986) 53 *Uni Chicago Law Review* 494 at 505.
2 *Access to Justice Advisory Committee, Access to Justice: An Action Plan* (1994); *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995 and the *Final Report*, July 1996 (referred to as 'the Woolf Report'); *Civil Justice Review (Ontario), First Report*, March 1995,and *Final Report*, November 1996; *Report of the Canadian Bar Association Task Force on Civil Systems of Justice*, August 1996.
3 Common complaints are that lawyers waste time in technicalities, point-taking and excessive cross-examination. Whether these complaints are justified as a matter of generalisation I do not pause to inquire.
4 Justice Ronald Sackville, 'The Civil Justice System - The Processes of Change', NILEPA and ALRC Conference, Griffith University,10-11 July 1997, p. 24.
5 September 1997.
6 *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447.
7 I have in mind the House of Lords decision in *Barclays Bank PPC* v *O'Brien* [1994] 1 AC 180 and the many cases which it has spawned in which the lender can rely on a certificate given by the solicitor for the lender or the husband as to the advice he (the solicitor) has given to the wife.
8 This expression can be traced back to 1976; see Professor F.E.A. Sander, 'Varieties of Dispute Processing' (1976) FRD 111 at 131.
9 J. Resnik, 'Many Doors? Closing Doors? Dispute Resolution and Adjudication' (1995) 10 *Ohio State Journal on Dispute Resolution* 211 at 217-218.
10 ibid.
11 *Supreme Court of NSW Annual Review* 1996 at p. 12.
12 August 1996, p. 23.
13 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No. 20, April 1997, at pp 134-135.
14 See M. Gawler, 'Judicial review for immigrants should stay', *Australian Financial Review*, 25 June 1999, p. 29. Whether the claim 'that few people believe they get a fair hearing at these tribunals' is more than a reflection of the views of lawyers is an important question.
15 J. Langbein, 'The German Advantage in Civil Procedure', (1998) *Uni Chicago Law Review* 823 at 824.
16 See, for example, *Bass* v *Permanent Trustee Co Ltd* (1999) 161 ALR 399.
17 See J. Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging', (1997) 49 *Alabama Law Review* 133 at 184-188.
18 A.A.S. Zuckerman, 'Lord Woolf's Access to Justice - Plus ça change...' (1996) 59 *Modern Law Review* 793.
19 See J. Resnik, 'Failing Faith: Adjudicatory Procedure in Decline', (1986) 53 *Uni Chicago Law Review* 494 at 511.
20 (1997) 189 CLR 146.
21 *Sali* v *SPC Ltd* (1993) 116 ALR 625 at 629.
22 *Ketteman* v *Hansel Properties Ltd* [1987] AC 189 at 220; Lord Woolf, *Access to Justice: Interim Report*, Lord Chancellor's Department, London (1995) at 154.
23 J. Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging', (1997) 49 *Alabama Law Review* 133 at 195 et seq.
24 (1964) 112 CLR 125 at 130.