UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

CLE SEMINAR

LITIGATION MASTER CLASS

25 March 2015

Opening commentary by Justice Geoff Lindsay, Supreme Court of NSW

INTRODUCTION

1. This year is the 10th anniversary of the enactment of the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW, with their strong focus on case management principles.

2. It is also the 20th anniversary of the enactment of the *Evidence Act* 1995 NSW, characterised by a new regime of "codified" rules of evidence.

3. Each anniversary should remind lawyers of the central importance adjectival law (evidence, practice and procedure) plays in the determination of substantive law rights.

4. For a trial lawyer, the distinction between "adjectival law" and "substantive law" can, at times, seem an illusion. At times, so it is.

5. A trial lawyer is bound to think about legal rights and obligations in terms of curial remedies, and how to get them. That requires an "action based" view of the law, an understanding of available "causes of action", rules governing the joinder of parties, rules governing the admission or exclusion of evidence, and the practice of particular courts bearing upon each of those topics. Action based jurisprudence lends itself to talk about interconnection between "rights" and "remedies".

6. With the demise of civil jury trials, the rise of modern textbooks (largely displacing old-style practice books), and increasing dependence upon universities for the provision of basic legal education, there has been a long term drift away from action based jurisprudence - and a commensurate embrace of more abstract, "scientific" statements of the law in terms of "principles" to be applied by judges, and other decision makers, bound to publish formal reasons for their decisions.

7. These developments have been accentuated by comparatively recent emphasis on “case management principles”, “alternative dispute resolution” procedures that are now an integral part of judicial case management, and the courts’ increasing insistence that evidence and submissions be presented in written form, filed and served before the commencement of any hearing.

8. In many ways, the law has moved beyond the mere abolition of civil jury trials, increasingly moving towards abolition of “trials” as once known. Court procedures and judicial decision making have moved closer towards an administrative style of decision making, with directions hearings before “trial”, the possibility of staggered hearings, and the ever present possibility of adjournments at the end of a hearing to enable submissions to be prepared in writing, even if subsequently presented orally. A “trial” is now a variable concept, not a fixture in legal thought. It depends on what a judge and parties make of it in a process of conversation between bench and bar.

9. One needs, constantly, to remember that the way disputes were once resolved is not necessarily the way they are now resolved.

SEMINAR TOPICS

10. The papers to be delivered at today’s seminar highlight the point in three very different areas:

    a) an understanding of “hearsay”, what it is and how the rule against hearsay can be circumvented, are foundational to a trial lawyer’s craft.

    b) legislation governing “proportional liability” has the potential to shift the dynamic of a court case fundamentally.

    c) “class actions”, more directly, affect the constitution of court proceedings and, incidentally, the nature of “causes of action” open to litigation.

11. Each topic, in its own way, represents a departure from the model of a common law jury trial that still informs much of our thinking about “rules of evidence”. Courts now, generally, “manage” the litigation process in a way not ordinarily done when a common law action was required to be determined by a jury, on a date certain, with witnesses personally present, virtually all evidence and submissions oral, and all parties affected by the proceedings in court. The absence of one or more affected parties necessitates a change in perspective.

12. The more “managed” the litigation process becomes, the less overtly adversarial it can be. That is because parties have to accommodate a decision-maker, over an indefinite period of time, rather than in a once-for-all formal hearing.

13. Things have changed, and are changing still. Yet, for all the changes that have occurred, it is still necessary to take bearings from some basic generalisations about the "trial" process, such as it is.

Identify the Purpose Served by Proceedings

14. Chief amongst these is the importance of determining the **purpose** served by court proceedings. That purpose will, more likely than not, drive everybody's conduct of the proceedings.

15. Most, but not all, court proceedings are still, at least in formal terms, adversarial in character.

16. If proceedings are **not** adversarial, an advocate must be on guard not to betray adversarial intent. One sees that, particularly, in protective (*parens patriae*) proceedings, for example.

17. If proceedings **are** overtly adversarial, a court's focus is likely to be more precisely on identification of orders sought from it, a statement of questions in dispute, and a process for determining the admissibility of evidence. These things are critical to a judge's thinking, if not to the thought processes of advocates.

Fundamental Principles Underlying "Rules of Evidence"

18. In adversarial proceedings, **underlying most "rules of evidence" are generally three questions that bear upon the admissibility of evidence**:

    a) **Is the particular piece of evidence under review "relevant" to a fact in issue?**

    b) **Is it "probative" of a fact in issue?**

    c) **What *are* in "the facts in issue"?**

Identification of "Facts in Issue"

19. Although it remains critically important to have well crafted pleadings to fall back on, in many cases identification of "the issues" and, incidentally, "the facts in issue", depends on the availability of a written outline of submissions, supplemented by a chronology.

20. This reflects not only formal demands of judges, but also the practical reality that the nature and ambit of disputes rarely appear as clearly in formal pleadings as they do in written submissions.

21. As much attention should be given to the preparation of written submissions as to the preparation of pleadings.

Taking objections to Evidence

22. If learning about pleadings has been pushed, even marginally, into the background, so too has the science of taking objections to evidence. Where evidence is to be adduced in the form of an affidavit there is often little to be gained from a plethora of detailed objections to its admissibility.

23. Leaving aside the costs, delays and irritations caused by the process of objections being foreshadowed, taken and ruled upon, formal objections to evidence not uncommonly recede in importance when bench and bar form **a consensus** about **the object of the proceedings** and **the real questions in dispute**.

Always check the Jurisdiction and Rules of Court governing proceedings

24. Knowledge of the jurisdiction invoked in proceedings, and rules of practice and procedure governing proceedings, needs to be sought after if proceedings are to be conducted efficiently.

25. For the most part, answers to questions bearing upon how proceedings are to be constituted or conducted can be found in current practice books or texts. However, it always pays to check whether, and how, "well known" rules apply to the particular case.

26. Rules of court can change. An example of this can be found in the development of "class actions" at the expense, procedurally, of an old style "representative action".

27. Part 8 rule 13(1) of the *Supreme Court Rules* 1970 NSW – the subject of consideration by the High Court of Australia in *Carnie v Esanda Finance Corporation Limited* (1995) 182 CLR 398 and by Young J at (1996) 38 NSWLR 465 – has been repealed, and replaced by an ostensibly broader legislative regime in the *Civil Procedure Act* 2005 NSW, Part 10 (sections 155-184), and ancillary provisions of the *Uniform Civil Procedure Rules* 2005 NSW.

28. There may be occasions when a form of "representative order" falling short of a "class action" is required, but not catered for by any current legislation. In those cases, equity may still fill the gap: *John v Rees* [1970] Ch 345 at 369-374; *Ahmed v Chowdery* [2012] NSWSC 1452 at [25] *et seq.* Old learning is not to be despised.

CONCLUSION

29. Questions about the dynamics of trial practice can only be addressed constructively if there is a common understanding of adjectival law (relating to evidence, practice and procedure) as well as the framework for decision established by substantive law principles.

GCL
25 March 2015 (Revised)