

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
10 YEAR ANNIVERSARY OF THE CIVIL PROCEDURE ACT
‘AFTER THE CIVIL PROCEDURE ACT’
18 FEBRUARY 2015*

1. Good afternoon. I am delighted to welcome you to the Banco court today and speak at a conference celebrating such an important anniversary. I would first like to respectfully acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora Nation, and pay my respects to their elders, both past and present.

2. Before I begin, I must thank Ms Kumar and Associate Professor Legg for their work in organising this event. Everything for this conference seems to have fallen into place with ease and speed. If only I could organise my own anniversaries with equal competence and success.

3. Today I have been set the task of speaking about “After the Civil Procedure Act”. Now perhaps it is just my age, but to me, the passage of the *Civil Procedure Act*¹ doesn’t seem so long ago. To me, therefore, talking about “After the Civil Procedure Act” means talking about what happens after the present. What is next in civil litigation, after a decade of settling into the landscape carved by the *Civil Procedure Act*? I will try and answer this question after first giving my musings on what the past, before the *Civil Procedure Act*, was like and where we are now.

4. Now you would think to discuss all this, I would need at least two qualities. First, an ability to remember what it was like before the *Civil Procedure Act* and secondly, clairvoyant powers to predict what it will be like in the future. I am happy to concede that I don’t have clairvoyant powers. I am less thrilled to admit just *how long* before the *Civil Procedure Act* I actually *can* remember.

* I express my thanks to my researcher, Miss Madeline Hall, for her assistance in the preparation of this paper.

¹ 2005 (NSW) (*Civil Procedure Act*).

I am also afraid my powers of recollection may more resemble an imagining of the past and remembering of the future than the other way around.² I'm afraid, however, that you will just have to bear with these limitations in my capabilities.

THE NOT-SO-GOOD OLD DAYS AND THE SHIFT TO THE PRESENT

5. So to begin with those infamously famed "good old days". Usually, I dislike talking about the "good old days", because they weren't necessarily so good. As I remember it, before the *Civil Procedure Act*, civil litigation had a strong laissez faire flavour. Juries were not rare creatures. Judges would not manage matters. Fax machines were (just) in existence and briefs did not arrive in removalist vans. Now of course, juries are a strange endangered species. Judges do (or certainly should) manage matters. Fax machines are in existence (but again, only just), and briefs, whilst maybe not arriving in removalist vans, are definitely couriered in a convoy of trolleys. Often it seems they are delivered by a team of paralegals, no doubt gaining invaluable experience in managing time pressures, muscle spasms and the bitumen craters at the corner of Elizabeth and Phillip St.

6. Back then, before the *Civil Procedure Act*, trials were full of surprises. This was often engineered by the calling of unforeseen witnesses, or the unforeseen evidence of foreseen witnesses. Or, my personal favourite, unforeseen evidence of unforeseen witnesses. In the equity division, affidavits were read out aloud, sometimes occupying two or three days of a hearing. Incidentally, such a practice was a great advantage to a busy barrister as it gave you time to prepare the brief. I am also told that at some time, which I don't remember, appeals commenced with the reading aloud of the appeal book (please note the singular).³ Given one appeal I sat on last year had 13,261 pages of appeal books, I am obviously relieved that such a practice has ended.

² Historian Sir Thomas Lamier, quoted in John Doyle, 'Imagining the past, remembering the future: The demise of civil litigation' (2012) 86 *Australian Law Journal* 240 (Doyle), 241.

³ John Hamilton, 'Thirty years of civil procedure reform in Australia: A personal reminiscence' (2005) 26 *Australian Bar Review* 258,259

7. These colourful, yet I assure you entirely truthful, recollections prompt me to ask: despite the titanic shifts from that past to the immediate present, to what do we owe the continual presence of civil litigation? How, after decades of change and changes a decade ago, are we still here with an amount of civil litigation which has earned us the title of the litigation capital of the nation.⁴ Is it because of the enactment of a single piece of legislation that civil litigation has withstood time? Or, is the CPA the Cumulative Peak of Activity, from a more drawn out campaign? A legislative embodiment of what individual judges were doing or beginning to do but which, through enactment, received a legitimacy which gave a needed priority, consistency and emphasis on the issue of case management?⁵

8. Of these competing accounts, I would probably opt for the latter's take on the role the *Civil Procedure Act* has played in the survival and shaping of civil litigation, from the past to the present. My reasons are largely because of those past imaginings of mine. I recall rumblings of change as early as the 1970s. Then, Justice Gyles QC, who at the time was the Master in Equity, developed a curious but firm belief that cases should move along. To practitioners' horror, that is what he sought to do.

9. Then there was Justice Andrew Rogers QC, the Chief Judge of the Commercial Division. In the late 1980s he caused real horror with his insistence that parties identify the real issues, ditch superlatives, and, perhaps worst of all, comply with directions. The advantage was if you did as he asked, you got a quick hearing. The ultimate sanction was you'd be thrown out of the list and would languish in the common law division for an indefinite period of time. These perks or perils could be yours, all depending on whether you had the strength to endure the pace he demanded litigation proceed.

⁴ Nicola Berkovic, 'NSW outstrips other superior courts as litigation capital of the nation', *The Australian* (Australia), 30 January 2015.

⁵ Such a characterisation is expressed by Ronald Sackville in 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5, 13 (where case management was already described as an article of faith), and later in, 'The future of case management in litigation' (2009) 18 *Journal of Judicial Administration* 211, 217.

10. In the 1990s real concern, from my perspective at least mostly in the commercial area, surfaced that clients would be lost unless matters were dealt with more promptly and efficiently. This, at least in part, is what set in train the reform movements that culminated with the enactment of the *Civil Procedure Act*.

TODAY'S CRIPPLED CIVIL LITIGATION CARICATURE

11. If I am correct in ascribing the role I have to the *Civil Procedure Act*, in getting us to where we are now, that still leaves the question, well where is that? The present story, depending on who you read, seems to be either glum or morbid.

12. Of course, gloomy prognoses of civil litigation are by no means new.⁶ One publication in 2012, which I would particularly like to focus on, has declared the end of civil litigation as we know it.⁷ Like all evil fictional characters, in these gloom and doom works, civil litigation's demise is portrayed as inevitable, needed and caused by its inherent features.⁸ The criticisms can fairly safely be whittled down to three regulars: delay, complexity and expense.⁹ It is said that these problems are so bad that while "[t]he existing system has been a good one... its time is coming to an end". It has also been said that "[t]here is no point in tinkering with the present system and its problems...[when]...[i]t is time for a fresh start".¹⁰

13. I feel comments that the "existing system *has* been a good one" must be treated with a degree of caution. For such statements imply the issues of delay, complexity and expense either did not always exist, or were never so bad. Now as my earlier foray into the past has shown, this is not the case.

⁶ For examples over time see Gerard Brennan, 'Key Issues in Judicial Administration' (1997) 6 *Journal of Judicial Administration* 138, 139, Geoffrey Davies, 'Civil justice reform: why we need to question some basic assumptions' (2006) 25 *Civil Justice Quarterly* 32 (Davies), 2 and more recently Doyle, 240.

⁷ Doyle, 240.

⁸ See for example Davies, 2 and Doyle, 243.

⁹ See generally Bobette Wolski, 'Reform of the Civil Justice System Two Decades Past-Implications for the Legal Profession and for Law Teachers' (2009) 21 *Bond Law Review* 3, 192 and specifically Doyle, 243-244.

¹⁰ Doyle, 247-248.

To illustrate it further however, I will briefly indulge in quoting several comments that have been made throughout the ages with respect to civil litigation procedure.

14. I challenge you to pin point when the following comments were stated. On the question of delay, it has been said that those with lawsuits are miserable, “since they come to the end of their lives long before they attain the rights they lay claim to”.¹¹ Another commentator has bleakly noted that “[d]eath, or...poverty and misery overwhelm both parties” in the law.¹² Cynically one commentator described, justice, with as little delay as possible to be, “...in practice...rather [more] desirable than possible”.¹³ On legal costs, litigants have said it would be hard to imagine the devastation felt when receiving the legal bill¹⁴ and that they were “like a jail sentence”.¹⁵ These comments were made in a time period spanning from 1534 to 1995. Yet, I’m sure they sound as much to you, as they do to me, as something you could read in tomorrow’s newspaper.¹⁶

15. I mention all these anecdotes to simply show, what history so often shows, which is that the developments we are facing today, are not necessarily bigger, larger or worse than ever before. They are probably just different. For this reason alone, I think claims that our current civil litigation procedure is incapable of coping with current problems, because they are worse than ever, needs to be met with a degree of scepticism.

16. A quick reflection on the effect of technology also illustrates the fact that the problems the system is facing today are simply different, not out-of-control

¹¹ Francois Rabelais, *Gargantua* (1534).

¹² Letter from William Beckwith to Sir Samuel Romilly, London, 1810 (‘On the necessity of an immediate enquiry into the causes of delay in Chancery proceedings, and of arrears of appeals’) <<http://galenet.galegroup.com/servlet/MOML?dd=0&locID=lcl&d1=19006082400&srchtp=b&c=3&SU=UK&df=f&d2=4&docNum=F3704876611&b0=litigation+and+slow+and+expensive+and+complex&h2=1&vrsn=1.0&b1=0X&d6=4&d3=4&ste=10&stp=DateAscend&d4=0.33&n=10&d5=d6>> (Beckwith), 14.

¹³ Beckwith, 7.

¹⁴ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report No 75, (1995) (ALRC Report), pars 2.5, J Byrne Submission 8.

¹⁵ ALRC Report, pars 2.5, V Law Submission 3.

¹⁶ For more antiquated complaints see also Shaunnagh Dorsett, ‘Procedural innovation: The First Supreme Court Rules of New South Wales and New Zealand’ (2011) 35 *Australian Bar Review* 128 (Dorsett), 137 ff [44] and Rubenstein, ‘Law Reform’ (1899) 107 *Law Times* 528.

enlarged versions of pre-existing ones. The advent of technology has received a fair amount of criticism, for crippling civil litigation with “snow drifts”¹⁷ of emails and tonnes of tweets.¹⁸ No doubt many junior lawyers fantasise about matters before computers, which did not involve months of reviewing discovered emails. However, the fact remains, that while technology may be responsible for increasing court material, it also has the capacity to significantly speed up otherwise time consuming tasks, at a fraction of the price.¹⁹ I will return to the issue of voluminous material being put before the courts later.

17. Of course, even if the complaints are not getting worse, it is true that broadly speaking, the same complaints about civil litigation have been made for centuries. Understandably, this leads to claims that the system is inherently flawed and we must start from scratch.²⁰ I think such a diagnosis is in great danger of throwing the baby out with the bathwater. Moreover, I actually take comfort in the knowledge that, rather than always working, throughout time the system has been tested and pressured and then moulded and developed, to respond to the changing needs of society. What is more, it is not difficult to discern from the history of complaints a not too slight line of improvement. I am also relieved that in our day and age, unlike the real case which Dickens’ *Jarndyce v Jarndyce* was based on, we have not heard of a matter lasting for 117 years.²¹ Encouragement and confidence, rather than disheartening and doubt, should be drawn from the history of civil litigation, particularly the decade before and after the *Civil Procedure Act*. Time has shown that, “...for

¹⁷ Doyle, 240.

¹⁸ Tweets have already become important documents in litigation, being the subject of interrogatories (*South Australia v Milisits* [2013] SASC 189 and *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288) and defamation lawsuits (*Buswell v Carles (No 2)* [2013] WASC 54 and *Crosby v Kelly* [2013] FCA 1343).

¹⁹ One practicing lawyer has recounted an instance where he had to arrange for four sets of subpoena documents totalling 3,000 pages to be photocopied and produced. The cost was \$11,000. Later a second tranche of 7,000 subpoena documents were converted and distributed electronically. The cost was \$1,000 (Philippe Gray, ‘Letters-A brave new (paperless) world’ (2014) 52 *Law Society Journal* 4, 8).

²⁰ Doyle, 245.

²¹ Dicken’s fictional case of *Jarndyce v Jarndyce* is believed to be based on the actual case of *Jennens v Jennens* which commenced in 1798 and was not abandoned until 1915 (117 years later) (Patrick Polden, ‘Stranger than Fiction? The Jennens Inheritance in Fact and Fiction Part 1: The Jennens Fortune in the Courts’ (2003) 32 *Common Law World Review* 211).

all its apparent defects, [the civil justice system] is capable of rapid and far-reaching change.”²²

18. I, for one, therefore am disinclined to agree with the alleged fact that the problems with civil litigation are larger than ever, and inherently insurmountable.²³ However, my rejection of the demise theory of civil litigation should not be seen as a rosy endorsement of the present situation. Somewhat embarrassingly, there was a time when the English civil system in the eighteen and nineteen hundreds was described as the “perfection of reason”.²⁴ Equal care today must be taken that the present is not described as one in which we have ‘arrived’. We are not yet close to describing the law, as Blackstone somewhat prematurely did, as a system with “solid foundations...[a] harmonious concurrence of its several parts...[with] elegant proportions...”²⁵

19. I would therefore conclude that, at present, it is wrong to depict civil litigation as an evil caricature. Not all is lost, yet admittedly, not all is achieved.

MOVING FORWARD AFTER THE CIVIL PROCEDURE ACT

20. Emboldened by such a cold reading of the present, I will now dabble in discussing what civil litigation will or could look like in the future. I know towards the end of this afternoon a panel, far more wise and competent than I, will specifically discuss civil procedure reform for the future. I will therefore keep my comments brief.

21. I think the real challenge as we move forward a decade, after the *Civil Procedure Act*, will be in realising the ideal balance and proportion between the inherently competing considerations of justice, efficiency and economy.

²² Ronald Sackville, ‘Reforming the Civil Justice System: The Case for a Considered Approach’ in Helen Stacy and Michael Lavarch (eds), *Beyond the Adversarial System*, (The Federation Press, 1999) 34, 52.

²³ Doyle, 245.

²⁴ Dillon, ‘Bentham’s Influence in the Reforms of the Nineteenth Century’ in *Select Essays in Anglo-American Legal History* (1907), Vol I, 494 quoted in Jack Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (Sweet & Maxwell, 1982), 206.

²⁵ Ibid.

Thanks to the *Civil Procedure Act*, these are now agreed upon and entrenched cornerstones of case management. However, I am particularly concerned that there is a potential, in this new case-management-conscious environment, to over manage a matter, rendering it astonishingly quick, yet unbearably expensive.²⁶ In light of this, I think there are three short points that should be kept in mind for any future reform. They are: first, case management is not a one way judicial street; second, costs that are out of sight of court should not be out of the mind of the court; and in terms of reform generally, less is more.

22. To briefly touch on the first point, that case management is not a one way judicial street. Prior to the *Civil Procedure Act*, Lord Woolf stated in his Access to Justice report that, “[u]ltimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court.”²⁷ I would suggest that the *Civil Procedure Act* has been invaluable in effecting this shift. However, in the current climate, I fear there is a danger of forgetting that emphasis still needs to be placed on practitioners and their role in case management.

23. It may seem trite to point out that effective civil procedure cannot be achieved by a judge alone. However, the reality of what this means should be spelt out. That is, in a judicial system that is just, quick and cheap, there are very few Harvey Spectors and Danny Cranes. As exciting as it may be to adopt a ‘strong line’, there is a distinction between protecting a client’s interests and being unnecessarily adversarial. Lawyers must identify the relevant issues, facts or materials and then place the irrelevant ones firmly to the side. Drawing such distinctions is, as one judge of the Supreme Court had cause to

²⁶ See UK empirical evidence that civil procedural reforms post-Woolf have led to increased costs in Tim Parks, ‘The Civil Procedure Rules Ten Years On: The Practitioners’ Perspective’ in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 435, 449. For evidence from empirical studies of the individual docket system in the US Federal Court showing reduced delay but increases in cost see Davies and Chief Justice Allsop, ‘Judicial case management and the problem of costs’ (Speech delivered at the Lord Dyson Lecture Herbert Smith Freehills Sydney, 9 September 2014) <http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20140909#_ftnref9>.

²⁷ Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996), 14 (emphasis added).

comment recently, “[o]ne of the most important tasks of lawyers engaged in litigation...”²⁸ Regrettably, the same judge noted that experience over 40 years showed that, increasingly, it was is not being done.²⁹ It certainly is still not being done overseas post the *Mitchell* decision,³⁰ where litigants in the United Kingdom have been taking unnecessary issue with another party’s trivial defaults and delays.³¹

24. It is beyond doubt that judicial officers have a high degree of responsibility for ensuring civil litigation is conducted appropriately. However, it cannot be forgotten that often the most time and money can be saved, and justice achieved, by the parties taking appropriately conciliatory stances on issues, particularly interlocutory ones, before they even reach court.³² Much time could also be saved if the practice of exhibiting to the court everything on the file, regardless of its relevance, was promptly eradicated.³³

25. However, this emphasis on the symbiotic responsibilities of case management must be balanced with the second point I wish to make. That is, it must be ensured that, in attempts to streamline and simplify court appearances and case management, preparatory tasks and the costs of doing them, are not simply shifted outside the sight of court and onto the parties, as if by doing so the costs magically disappear. Overall, and in the long run, such a practice will not make the system more just, quick or cheap. This is what I mean when I say that costs which are out of the sight of the court should not be out of the mind of the court when case managing.

26. Witness statements provide an example of this dilemma. They have enormous potential to clarify issues early on and lessen court time taken in

²⁸ *Harris v Villacare Pty Ltd* [2012] NSWSC 452 at [47] (R S Hulme J) in the context of the production of unnecessary material before the court.

²⁹ *Ibid.*

³⁰ *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795.

³¹ See for instance *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm) and *Lakatamia Shipping Company Ltd v Nobu Su Ltd* [2014] EWHC 275 (Comm).

³² See *Ken Tugrul v Tarrants Financial Consultants Pty Limited ACN 086 674 179 (No 5)* [2014] NSWSC 437 where an application for security of costs was filed without prior correspondence with the opposing lawyers.

³³ See also *ibid* at [76].

the leading and adducing of evidence. However, by placing their preparation solely with the parties, the statements can end up reading more like position papers prepared by lawyers than the actual evidence of the witness. Time too is then often spent on interlocutory disputes; each party defending their carefully worded (and often legally complex and obfuscating) 'witness' statement.³⁴ Similar criticisms have been made about expert witnesses whose reports "...conceal anything that might be to the disadvantage of their clients", rather than narrowing issues down.³⁵ With the advent of companies solely designed to assist experts in producing reports, the potential for these to be unduly complex is still a concern.

27. These problems can again be resolved by a greater and renewed emphasis on the responsibilities of parties to manage matters appropriately. It also shows though, how careful consideration needs to be given as to what tasks are in fact necessary for the preparation and conduct of a hearing. For example, in some instances, the utility of preparing witness statements will either be negligible or inefficient, compared to simply leading the evidence orally in court. The same may be said of written submissions. Consideration of the necessity or desirability of, what have become standard preparatory tasks, is a new aspect of case management, which can be focused upon and improved for the better. With such a focus, the tendency to incur 'front-end' heavy preparatory costs could be limited to the point of proportionate utility. Moreover a better balance could be struck between preserving the oral traditions of civil litigation, against the pitfalls of undue reliance on written materials.

28. This new aspect may be summarised as a search for individualised, rather than formalised, case management. This will of course require effort and thought, from both sides of the bench, in order to resist slipping into the ease

³⁴ For an earlier but balanced article on the benefits and weaknesses of both oral and written evidence see Young and Curtis, 'Oral or written evidence?' (1997) 71 *Australian Law Journal* 459.

³⁵ Ruth McColl, 'What is happening in Australia in terms of addressing issues concerning the way civil litigation is conducted?' (Paper presented at 'Civil Litigation in Crisis-What Crisis?' Conference, Auckland New Zealand, 22 February 2008) 16.

of well-trodden tracks. As was identified by an earlier President of the NSW Supreme Court of Appeal:

“It is all too easy for those whose lives are daily engaged in the administration of rules to overlook the fact that they exist and are designed, not as an end in themselves but as a means to the end of the attainment of justice. There is no necessary justice in the inflexible and unthinking application of rules for neatness’ sake...”³⁶

29. This need for individual case management brings me to my last, more general point. That is, when it comes to reform and rule making, less is more. It is important that courts maintain a degree of flexibility, or as the Australian Law Reform Commission termed it, a “loose rein”.³⁷ In my view, which I have expressed previously, our rules and their current detail and length are sufficiently robust and adequate. This is despite some Victorian sentiment suggesting the contrary.³⁸

30. Suffice to say, if substantive law is what is secreted through the gaps of procedure,³⁹ we must take care to not block those gaps with overly proscriptive and specific rules. It would be a pity to return to the not so distant times when procedural points, such as whether proceedings had been commenced in the common law or equitable jurisdiction of the court, were valued over the substantive legal arguments of the case.⁴⁰ Overly proscriptive rules also run a greater risk of being perceived as in place merely for the discipline of practitioners, or for the protection of courts from inefficient

³⁶ *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 11 ACLR 326 at 330 (Kirby P). Although in dissent, see *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516, 526-27 (Gummow and Hayne JJ) for approval of the tenor of Kirby P’s comments.

³⁷ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.21].

³⁸ See *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [17] and my comments in ‘Duties to the Court, Duties of the Court’ (Speech delivered at the Law Society Planning Conference Bowral, 14 November 2014) <http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m670001I771019/bathurst_20141114.pdf>.

³⁹ Henry Maine, quoted in Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1954) 1.

⁴⁰ See for instance *Ellison v Kirk* [1834] NSWSupC 109 concerning a writ of fi fa – execution after judgment on legal action for debt or damages discussed in Dorsett, 146. For a historical example of how broader rule-making powers can lead to more progressive civil procedure reforms see the comparison of reforms in the NSW and New Zealand colonies to those in England during the 1820s in Dorsett, 131 and 134.

litigants. This is rather than as they should be perceived, which is, a tool to ensure issues are defined in an orderly way and parties can adequately prepare their case for trial.⁴¹

CONCLUDING REMARKS

31. Bearing all this in mind, I will now conclude my foray into fortune telling and answer the question I first posed: what is next in civil litigation procedure after the *Civil Procedure Act*? If an individualised, flexible approach, relying on both practitioners and the judiciary is adopted, I would say the benefits of adversarialism could be retained, yet inherent weaknesses in the system diminished. Crucially, the optimal balance between 'just', 'quick' and 'cheap' could be achieved. With that prediction, I am now more than happy to stop talking, sit down and wait and see if my predictions have any merit.

⁴¹ *Quinlan v Rothwell* [2002] 1 Qd R 647 at [29] (Thomas JA).