

**Salvos Legal Lecture Series
Sydney - 9 November 2013**

Shall ye be heard? Legal representation in civil claims¹

Justice François Kunc

Thank you for the opportunity of speaking to you today.

No one familiar with the administration of justice in New South Wales could be anything but deeply impressed by both the idea which underpins Salvos Legal and how it has been brought into practical reality through Salvos Legal Humanitarian. A commercial and property law firm which directs its profits to provide more than \$8,000,000 per annum in free legal services to people in need is a model which bears both close examination and, I suggest, repetition. I would also like to acknowledge the very valuable work of the National Pro Bono Resource Centre.

I will be speaking about the question of legal representation in civil claims, which I hope will be of interest to all of you, but perhaps particularly to those involved in humanitarian legal work.

Justice Michael McHugh once said in argument “A lack of understanding of legal history is a misfortune, not a privilege”². One of my purposes today is to demonstrate that the issues which I will discuss are far from new. It is appropriate that I begin with some reference to the deep historical precedent for the work of Salvos Legal Humanitarian.

¹ A paper by the Honourable Justice François Kunc of the Supreme Court of NSW in the Salvos Legal Lecture Series, Sydney on 9 November 2013. Justice Kunc gratefully acknowledges the assistance of Nita Rao BA, LLB (Hons) in the preparation of this paper.

² *Rich and Silbermann v CGU Insurance Limited* [2004] HCA Trans 366.

Most of you will be aware that the founder of The Salvation Army was William Booth, who became its first general. In 1890 he published a book, really a manifesto, entitled *In Darkest England and the Way Out*³. Deeply moved by the plight of the vast English underclass, the collateral damage of the Industrial Revolution, and motivated by the most muscular of Christian principles, Booth set out his practical plans for how The Salvation Army would help. The book became a best seller and was last reprinted in 2006.

Booth's prescience is breathtaking. After setting out a number of concrete proposals for the most desperate in society, many of which we would today recognise as the foundations of the modern social welfare state, Booth turns his attention to how The Salvation Army can assist those who he refers to as "decent working people". His proposals include better public housing, model suburbs, what he calls a "poor man's bank" which "will extend to the lower middle class and the working population the advantage of the credit system" and which we might call micro credit, a department to gather social welfare statistics, a marriage advice bureau and a low cost seaside resort.

But the most important of his proposals to be recalled today appears in the section entitled "The Poor Man's Lawyer". Booth says this:

"There are no means in London, so far as my knowledge goes, by which the poor and needy can obtain any legal assistance in the very depressions and difficulties from which they must, in consequence of their poverty and associations, be continually suffering.

While the "well to do" classes can fall back upon skilful friends for direction, or avail themselves of the learning and experience of the legal profession, the poor man has literally no one qualified to counsel him on such matters."

Fascinatingly, Booth urges mediation as the first resort:

³ (March 1996) Project Gutenberg <http://www.gutenberg.org/ebooks/475>.

“In carrying out this purpose it will be no part of our plan to encourage legal proceedings in others, or to have recourse to them ourselves. All resort to law would be avoided either in counsel or practice, unless absolutely necessary. But where manifest injustice and wrong are perpetrated, and every other method of obtaining reparation fails, we shall avail ourselves of the assistance the law affords.”

Furthermore, Booth did not limit his legal aid scheme to criminal matters. His list of topics which what he calls his Advice Bureau will deal with includes administration of estates, bankruptcies, bills of exchange, compensation for accident or loss of employment, breach of contracts, infringement of copyrights, landlord and tenant, mortgages, partnerships, probates, trustees and trusts.

In short, Booth clearly understood that people needed advice and representation in civil claims. He is no doubt gazing down approvingly at the work of Salvos Legal Humanitarian today.

My interest in the question of legal representation in civil claims or, perhaps to be more precise, the consequences of the lack of legal representation in civil claims, began as an entirely practical one. As a judge sitting in the Equity Division of the Supreme Court my work is entirely civil, with the possible exception of the occasional contempt action. In my first fortnight on the bench I was confronted with litigants in person in complex civil matters. That has continued. Some of those matters involved some or all of the evidence being given other than in English, which raised challenges that could provide the subject of another paper.

Some of them had never had a lawyer and were trying to formulate and run their cases from scratch. That tended to produce a situation that was impossible for them and for everyone else. However, I also encountered another class of unrepresented litigant, namely people who had had lawyers formulate their cases and assist them in the preparation of evidence, but who then found themselves running their own cases because they had run out of money to pay their lawyers. While far from ideal, I found that the system, or more practically me, was much better able to cope in trying to deliver a just outcome to such litigants.

This experience gave rise to what is perhaps a rather obvious anecdotal observation: that in an environment where funds for legal aid are in short supply, it might be better in civil cases to focus on the formulation and preparation of cases rather than necessarily representation in court as an economically and legally efficient way of expending a scarce public resource. That is my view.

However, the next question which arose, and which I propose to address, is whether that kind of allocation can be given a principled basis by reference to the common law. My argument today is that such a principled justification can be found through a comparison of the public policy and law in relation to a fair trial in criminal proceedings and the public policy and law in relation to the doctrine of abuse of process, which is generally deployed in the context of civil proceedings.

*Dietrich v The Queen*⁴ (“Dietrich”) established that there was no common law right to state funded legal representation in criminal trials. However, when a stay of criminal proceedings is ordered pending the accused obtaining legal representation (see, for example, *The Queen v Chaouk*⁵), the public policy interest which is given primacy is the notion of a fair trial.

On the other hand, the common law does not so much speak of a right to a fair trial in civil proceedings, but does require procedural fairness. I am not suggesting that the idea of a fair trial plays no part in the civil law. However, fair trial and procedural fairness are not co-extensive. Representation is a significant feature of fair trial jurisprudence, but is less prominent in procedural fairness. At least in criminal cases there is often a real question whether there can be a fair trial without legal representation, but procedural fairness can be afforded in the absence of representation.

It has never been suggested that there is a common law right to state funded legal representation in civil litigation. Unlike in the criminal sphere, there do not appear to have been any attempts to obtain stays of civil actions for want of legal

⁴ (1992) 177 CLR 292

⁵ [2013] VSC 48 and [2013] VSCA 99

representation that have resulted in considered judgments. Rather, the law which allows proceedings to be stayed as an abuse of process recognises the public policy interest that neither the state's resources nor those of opposing litigants should be wasted by hopeless proceedings. My argument is that such a distinction supports the notion that in a civil context resources should be directed to assisting the unrepresented to determine whether they have a claim and in formulating and preparing it, rather than in its actual conduct.

The title of my paper comes from the traditional proclamation for the opening of a court that "all persons having business before this honourable court draw nigh and give your attendance and you shall be heard". My researches have been unable to determine when it was first used, but it is obviously of ancient lineage.

Statements of the right of litigants to access to a court are frequently made, although interestingly without the citation of supporting authority. Thus, in *Attorney-General v Ebert*⁶ (a vexatious litigant case) Lord Justice Brook observed that "it goes without saying that every citizen has a right of access to a court ... at common law". In Australia, Justice Deane observed in *Oceanic Sunline Shipping Company Inc v Fay*⁷ that "it is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances".

In our system, the right of access to the courts is apparently so obvious that little or no authority can or need be stated in support of it. However, every lawyer in this hall will appreciate the difference between having a right of access and the effective exercise of that right.

The fundamental interest of the state in the administration of both criminal and civil justice has always been the same: the maintenance of public order by prohibiting, or at least obviating the need for, the recourse to self- help. Nevertheless, the DNA of our institutions of justice has always had a different emphasis in the attitude to the

⁶ [2002] 2 All ER 789, 798 [36]

⁷ (1988) 165 CLR 197, 252

administration of criminal and civil justice almost as fundamental as the difference between the XX and the XY configuration of chromosomes.

The economics of justice have changed very little in hundreds of years, with the administration of civil justice always having something more of the flavour of what we today call private interest. So much is demonstrated by recalling the analysis of Adam Smith in his famous 1776 work *An Inquiry into the Nature and Causes of the Wealth of Nations*.⁸ In Book 5, Chapter 1 concerning the expenses of the sovereign or commonwealth Smith identifies the still unchanged position of legal economics:

Justice, however, never was in reality administered gratis in any country. Lawyers and attorneys, at least, must always be paid by the parties; and, if they were not, they would perform their duties still worse than they actually perform it. Fees annually paid to lawyers and attorneys amount, in every court, to a much greater sum than the salaries of the judges. The circumstances of those salaries being paid by the Crown can no-where much diminish the necessary expense of a lawsuit. It was not so much to diminish the expense, as to prevent the corruption of justice, that the judges were prohibited from receiving any present or fee from the parties.”

However, having said that, Smith recognised that there was a private enterprise element to the administration of civil justice when he observed later in the same book:

“The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognisance of many suits which are not originally intended to fall under its jurisdiction. ... In consequence of such fictions it came, in many cases, to depend altogether upon the parties before what court they would choose to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could.”

⁸ (October 2013) <http://www.econlibr.org/library/Smith/smWN.html>

So it was that for centuries the salaries of English judges were not their only source of income. They collected a great deal from the fees paid by litigants in civil cases. This economically rationalist approach found its way to New South Wales. Judge Barron Field, who arrived in the colony in 1817, had a regular salary of £800, which was increased to about £2,000 per annum by his share of the civil court filing fees. It was the *New South Wales Act* of 1823 that brought this to an end by declaring that official salaries were to be “in lieu of all fees and emoluments whatever”.⁹ You will be relieved to know that remains the case today.

The point I am trying to make by this hopefully diverting excursion into the early history of legal economics is to justify the proposition that the administration of the civil law has necessarily always had a private character which the administration of the criminal law did not. That ultimately came to be reflected in one way in the difference between the emphasis in the criminal law on notions of a fair trial whereas the civil law came to be far more concerned with ideas of abuse of process and not wasting time and money.

I will now turn to the principle of fair trial.

Publicly funded legal aid was established for the purpose of preserving the principle of fair trial in Australian courtrooms. A central tenet of the principle of fair trial is the ‘right’ of legal representation or access to legal advice. Australian cases have frequently emphasised the centrality of legal representation to the principle of fair trial. But the principle of fair trial and the ‘right’ to legal representation has developed in the context of the criminal, not the civil, law.

In *McInnis v The Queen*,¹⁰ Barwick CJ and Mason J said in obiter that there is no common law right for an accused to be provided with counsel at the public’s expense.¹¹ There is also no absolute right to legal aid.¹² The appeal turned on whether there was a miscarriage of justice because the trial judge refused to grant

⁹ Alex C Castles, *An Australian Legal History*, (The Law Book Company, 1982) 109, 149-150.

¹⁰ (1979) 143 CLR 575

¹¹ *Ibid* 579.

¹² *Ibid*.

an adjournment sought by an unrepresented accused so that he could obtain the services of counsel.¹³ Legal aid had already been refused. Ultimately their Honours (with Murphy J dissenting) decided that refusing to grant the adjournment did not amount to a miscarriage of justice. However, their Honours did not conclude whether there exists a right to state funded counsel and it had no bearing on their Honours' refusal to grant special leave to appeal.

Conversely, in *Dietrich* Mason CJ and McHugh J, citing *Jago v District Court*¹⁴ affirmed the notion that the right of an accused to a fair trial is a fundamental element of our criminal justice system.¹⁵ Their Honours acknowledged that there is no exhaustive list of the attributes of a fair trial. International instruments and jurisprudence from other countries are unable to provide guidance because of a lack of specificity in the case of the former or the existence of specific rights not enshrined by our Constitution in the case of the latter.¹⁶

Mason CJ and McHugh J noted that the key challenges facing unrepresented litigants are (inter alia) insufficient legal knowledge and skills and the inability to assess dispassionately and to present their case in the same manner as counsel.¹⁷ However their Honours maintained that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has the right to the provision of counsel at public expense.¹⁸ Rather, the real question should be "whether the trial is fair if the accused is forced to be unrepresented?"¹⁹

Their Honours clarified that the lack of provision of counsel at public expense **does not** automatically render a trial unfair. However, in general, trials where an accused is unrepresented are more likely than not to be unfair save for exceptional circumstances.

¹³ *Ibid* 577.

¹⁴ *Jago v. District Court of NSW* (1989), 168 CLR 23, 29 (Mason CJ); 56 (Deane J); 72 (Toohey J). 75 (Gaudron J).

¹⁵ *Dietrich*, 299.

¹⁶ *Ibid* 300. Discussion of the European Convention of Human Rights art. 6, 5th amendment of Bill of Rights.

¹⁷ *Ibid* 302.

¹⁸ *Ibid*.

¹⁹ *Ibid* 311

The High Court acknowledged that it was not their role to make determinations on the state's distribution of legal aid. Yet, their Honours envisaged the effect of *Dietrich* as perhaps "requir[ing] no more than a re-ordering of the priorities according to which legal aid funds are presently allocated".²⁰ Today that assessment seems optimistic. It is important to note that in *Dietrich* Dawson J followed *Mclnnis* in stating that an accused has no right to counsel at public expense.²¹ His Honour and Brennan J agreed to the grant of special of leave but otherwise dissented. Gaudron J resolved to overrule *Mclnnis*.²²

Whilst in *Dietrich* the High Court held that in general it is necessary for an accused to be legally represented to ensure a fair trial, other cases have clarified that where legal aid is available to fund such representation this will only extend to provide an accused with a legal representative, regardless of whether that person is one of the accused's choice. In *Attorney General for NSW v Milat*,²³ the New South Wales Legal Aid Commission was unable to fund the counsel of the accused's choice and he argued that the trial should be stayed. The Court of Criminal Appeal said "it is not required by the decision in *Dietrich*, and would be inconsistent with it ... to embark upon a detailed exercise of assessing the relative degrees of competence and experience of lawyers potentially available to act for an accused person".²⁴ Their Honours stated that the "principle in *Dietrich* turns upon whether legal representation is unavailable to an indigent accused".²⁵ However, their Honours did add that "it may well be that, in a given case, if the only representation available to an accused is manifestly inadequate to the task, it would be appropriate to regard the accused as being, for practical purposes, unrepresented".²⁶

Likewise in *R v Chaouk*,²⁷ the Victorian Court of Appeal, citing *Victoria Legal Aid v Beljajev*²⁸, said that "it is not for the Court to undertake a detailed analysis of the

²⁰ *Dietrich* 312.

²¹ (1992) 177CLR 292.

²² *Ibid.*, 371-4. Brian Fitzgerald, *International Human Rights and the High Court* (1994) 1 James Cook University Law Review 85, 1 JCULR 85.

²³ (1995) 37 NSWLR 370

²⁴ *A-G (NSW) v Milat* 37 NSWLR 370, 375.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ [2013] VSCA 99.

²⁸ [1999] 3 VR 764, 777 [37]- [38]

competence of counsel and solicitors offered by legal aid compared to the competence of counsel and solicitors of the accused's choice".²⁹

Ultimately, access to legal representation is crucial in allowing an accused a fair trial in criminal proceedings. However, this 'right' will only extend to that which the state can reasonably fund.

It is clear from *Dietrich* that the finding that there is no right to state funded legal representation would extend to civil claims as well. In civil cases it is arguably less obvious that the just resolution of a dispute would be threatened without the presence of a state funded legal representative. The real threat in the civil sphere is not the absence of counsel at trial, but the danger of wasting limited resources on funding and then taking up court time with hopeless, vexatious or querulous claims that amount to abuses of process.

In *Moti v R*³⁰ the High Court referred to the decision of *Williams v Spautz*,³¹ where two propositions of public policy were articulated with respect to the use of the court's resources. The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by the state and citizen alike. Secondly, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.

Part of preserving the integrity of the court and its processes is ensuring that litigants do not bring vexatious claims that abuse the processes of the Court; are instituted to harass or annoy, to cause delay or detriment or for another wrongful purpose; are pursued without reasonable ground; or are conducted in a way so as to harass, annoy, cause delay or detriment, or achieve another wrongful purpose.³² Section 8 of the *Vexatious Proceedings Act 2008* (NSW) gives power to the Court to declare a

²⁹ [2013] VSCA 99, at [26].

³⁰ (2011) 243 CLR 456.

³¹ (1992) 174 CLR 509.

³² s 6 of the *Vexatious Proceedings Act 2008* (NSW); These characteristics that define a vexatious claim were set out by his Honour, Roden J in *Attorney-General v Wentworth* (1988) 14 NSWLR 481.

person to be vexatious. However, the Court has an inherent jurisdiction to protect itself from abuses of its process. In the Supreme Court, that power is reflected in, but not circumscribed by the Rules of Court.

The different approach to the entitlement to legal representation between criminal and civil proceedings also appears in the United States. The right to fair trial in both criminal and civil proceedings is protected by a broader reading of the 5th, 6th and 14th amendments, which enshrine the right to due process, fair trial and the protection of civil rights, respectively.³³ The Supreme Court in the landmark case of *Gideon v Wainwright*³⁴ established that the right to a state funded counsel is essential to a fair trial. In *Gideon*, the plaintiff was wrongly accused of breaking and entering. At trial he appeared without an attorney and requested the trial judge for one to be provided because he could not afford one. The trial judge refused. The court unanimously held that “the adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”.³⁵ *Gideon v Wainwright* is authority for the right to representation in all felony prosecutions in both State and Federal courts in the United States.

In *Lassiter v Department of Social Services*³⁶, the US Supreme Court discussed whether this right to counsel as protected by the 6th amendment extended to civil matters as well. And so, the “Civil Gideon” movement gained momentum throughout legal academic circles. The right to counsel in civil claims came to be referred to by some as the “great white whale” of American humanitarian law.

In *Lassiter*, the plaintiff was an unfit mother with a criminal history whose son was taken away from her by the Department of Social Services. Ms Lassiter was convicted of murder and the Department of Social Services petitioned to terminate her parental and custody rights over her son. Ms Lassiter was unrepresented in the family proceedings. The Supreme Court said that there is a “presumption” that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be

³³ The Bill of Rights (US 1791)

³⁴ 372 US 335 (1963).

³⁵ *Gideon v Wainwright* 372 US (1963), at pp343-345.

³⁶ 452 US 18 (1981).

deprived of his physical liberty”.³⁷ The result of this presumption is that it is unlikely that the right to state funded counsel will ever extend towards civil claims notwithstanding cries from the American Bar Association, members of the judiciary and prominent academics.³⁸

A similar dichotomy exists in the UK and Europe. Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* prescribes a right to a fair trial. It provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

However, Article 6(3) adds “everyone charged with a *criminal* offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing, *or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require* (emphases added).

There is no similar guarantee in civil proceedings.

So it appears that across various legal systems the same answer recurs. The public policy interest in a fair trial in criminal matters will support something close to a right to state funded legal representation. That interest does not extend to civil proceedings. There the state will provide the forum for dispute resolution but does not have the same interest in ensuring its effective use. As I have sought to demonstrate from an appeal to history, the state has always viewed civil litigation differently by reference to its primarily private character. However, the public policy interest which is engaged in civil claims is to ensure that the resources of both the public justice system and opposing litigants are not wasted by hopeless or poorly conceived claims. This is protected by the doctrine of abuse of process.

³⁷ *Lassiter*, 452 US at pp 26-27.

³⁸ Benjamin J Barton, *Against Civil Gideon (and for Pro Se Court Reform)*; 62 Fla L Rev 1227 (2010), p 1270.

My point remains that the same consideration provides the principled justification to deploy legal aid resources (public or private) to provide assistance to otherwise unrepresented litigants in identifying, formulating and preparing civil claims. If those resources are limited, then this is where they are best spent. If there is no viable cause of action, then the litigant should be told so, although experience teaches that not everyone will necessarily accept that salutary advice.

The practical utility of the course I propose is ultimately demonstrated by what happens in court. The need for a judge to both be and be seen to be impartial means the judge cannot “enter the arena”. In civil claims this has the result that he or she cannot treat a hearing as an occasion to assist an unrepresented litigant in identifying whether or not they have a cause of action or how they might prove it. However, if the litigant has had a lawyer prepare their pleadings and assist with the preparation of the evidence, a judge can, without entering the arena, ensure the litigant has a fair opportunity to put that case and have their claim determined. It is not unheard of for a litigant in that position to succeed against legally represented opponents.

I have confined my discussion today to matters of principle. There are, of course, large questions of how much government and private legal aid is or should be available for civil claims and how and by whom it should be delivered. Particularly in the context of the Australian Government Productivity Commission’s current inquiry into Australia’s system of civil dispute resolution, I hope those questions will be matters of substantial and informed public debate. Nevertheless, I am sure you will understand why, in concluding my remarks today, I do no more than refer to them and otherwise withdraw into judicial, and judicious, silence.