THE COURTS AND THE FUTURE

Panel Comment: "The Courts and the Future: New Stump

Jump Ploughs to Cultivate Old Paddocks"

Paper by the Hon Richard McGarvie AC

Might I start with a few thoughts from the past.

> "If the minds of legal men are to be forever perversely directed to the past, if they will not divest themselves of old prejudices, and accept new views and ideas suited to the exigencies of the present times, the public must be content with the attempts made by laymen to improve a system which cannot longer be permitted to remain in its old and mischievous condition. The law and its administration constitutes the crying evil of the day ... The patience of society is at length exhausted and desperate remedies will be attempted in the hope of getting rid of the burden, if well considered and rational plans are not proposed by those who have made the science of law and that of legislation the subject of their special study." *London Times 24 December 1850*.
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> "Shall England watch other Nations surpass her in their legal systems? It cannot be so forever. Old men may indeed stand in the midst, and for a season stay the plague of improvement. But their night is far spent:- The day is coming, when there must be a vigorous and unsparing ... revision ... of the whole administration of justice in this country." *45 Edinburgh Review 481 (March 1827)*.
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> "There would seem to be something in the profession of the law which blinds its votaries to the defects of any system which they are called upon to administer ... The example of their fathers, the tone of their treatises from which their knowledge is derived, the authority of the judges, the very atmosphere in which they practice - all are calculated to withdraw the minds of lawyers from any endeavour to reform the law." *London Times, Editorial, 19 July 1851*.

The profession responded:

> "There is a limit to the licence to be allowed to the press; and ... we have a right to protest against the systematic defamation which the *Times*, above all other publications, delights to indulge in, whenever law and lawyers are under discussion." *1 Solicitor's Journal 1857 p.153*.
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> "For the last 250 years the complaints against the present system have been continual and unvaried yet the Court of Chancery and its machinery ... has remained nearly the same in every particular. It is obvious, therefore, that ... the supposed evils ... cannot, after all, have been very enormous, or they would not have been thus endured." *2 Legal Observer 401 (1831)*.

The delays in the Queen's Bench were shown to be a blessing in disguise:

> "What an incalculable benefit it is that in the length of time which must elapse before a cause can be decided in that court, passions have time to cool, the angry feeling that prompts to

litigation may subside, and if there are some obstinate spirits who are disposed to fight to the last, their ability to carry on the warfare is put at an end by the ruinous expense of the long-protracted contest." *2 Jurist 73 (1838).*

"The unanimous disapproval of the Judges of proposed measures for reform should not be taken too seriously, because of the direct interest which each of them must have in preserving the law ... in its present state ... an interest which inevitably blinds them to the needs of the public, for there is no task so repulsive as that of unlearning in old age the lessons of our youth." *99 Edinburgh Review April 1854 p. 574-5.*

(*Taken from E R Sunderland "The English Struggle for Procedural Reform" in (1925-6) 39 Har L R 725; see also Sir Jack Jacob, The Reform of Civil Procedure Law (1982) p.208).*

This was part of the British revolt against legal formalism and its striking characteristic is its popular origin and support. It was not lawyer led. One is amazed by the violence of the attack which the public directed and maintained for two generations through the press. It was a war not only against legal abuses but against the profession of lawyers and judges believed to be responsible for them.

After 30 years of active railing against the system by the intellectual and popular press, the Bar and solicitors grudgingly recognised that change would come and that they had better have a hand in it. But not so the judges.

The Judicature Acts of 1873 established a council of judges to enquire into the working of the new rules. A Royal Commission appointed in 1913 to investigate the causes of delay in the King's Bench observed that the council of judges had met but 3 times in 37 years to enquire into the working of the rules. The Commission charged the responsibility for delays in the administration of justice to the failure of the judges to use the power which Parliament had conferred upon them. "Assuming", wrote the Commission, "that the judges found themselves unable to accomplish anything in the way of improving the practice, we cannot but regret that they have not asked Parliament to relieve them from the duty imposed upon them by statute and to substitute some other method of considering them from time to time and securing any necessary reforms in the administration of justice". *1913 Report of the Parliamentary Commission pp.41-42.*

That long introduction is to recall that the administration of justice has long been an object of popular interest and so it ought, because nothing shapes the will to reform so much as outside scrutiny.

It also serves as a reminder that the process of litigation in the courts has a history of failing to satisfy those who use it. The judges have, I believe on this occasion, seized the initiative for reform throughout Australia and the profession has been pleased enough to follow. But differential case flow management, bookshelves and computers in the court room, merely seek to manage the present, they do not, in any fundamental way, achieve real reform of the process, nor do they look to the future.

Those who read the Victorian Bar News will be familiar with three articles by Geoffrey Gibson, a former member of the Bar and now a litigation partner in a major firm, who has been involved in a number of recent long trials in that State. The articles are entitled "The Cancer in Litigation". The headings alone will give some indication of his complaints: "Criminal trials out of control"; "Four grotesque civil cases"; "The flight from the law - equity in business"; "Discovery run riot"; "The loss of nerve (and the retreat to paranoia)"; "The false charms of modernity"; "The decline of moderation - The rise of the zealot"; "Overloading the gravy train - bring your own trolley"; "The law of the cop out".

Mr Gibson concluded that we have to get back to concentrating on hearing and deciding cases rather than concentrating on what goes on before and after; we have to control discovery, or abolish it, even if there may be a risk of short suiting some litigants; we have to get rid of our facile, lazy and wasteful fascination with paper and bulk; those retaining counsel should negotiate a fee which encourages expedition rather than dilatoriness; and above all we have to allow and required our judges to judge by hearing and

determining cases expeditiously. He concluded:

> "In my view there is general unhappiness in the profession with the way larger civil litigation is conducted. If this is right, it is time we did something about it. Otherwise the risk is that we will just drown in our own detritus, and Her Majesty's Judges will go quietly down with the rest of the ship".

There is a great deal to commend itself and to reflect upon in what Mr Gibson has said. I fear that as far as we have gone in reforming the process we are simply tightening the screws and turning the bolts. I have no particular suggestions, but if the courts could design a system as compact and efficient as that other great South Australian invention, the Hills Hoist clothes line, we would be doing well.

What is needed is some quite fundamental planning about the shape of the legal process for the future. This is not just the future next year or in 5 years, but more like 10 or 15 years.

Future planning for the courts comprises a matrix which involves:

- identifying the trends of a changing society and economy;
- developing scenarios of how the courts might function in the future;
- creating a vision for how we want the courts to function in the future; and
- adopting strategies to implement the overall plan.

For example, the Supreme Court of Virginia publishes a quarterly newsletter "Future View" which summarises trends which may affect the court including societal changes, medical developments and technology. An awareness of trends will actively affect planning for court houses, appointments to the judiciary and magistracy and the nature of court filings.

It is clear that the most fundamental change which has and which will occur which will impact upon the courts is information technology. It is easy to throw up one's hands and say that information technology is moving so fast that it is impossible to predict what is likely to happen tomorrow let alone years ahead and therefore just wait and see.

In September this year the Lord Chancellor's Department in England issued a consultation paper entitled "Resolving and Avoiding Disputes in the Information Age". It is directed towards planning post Lord Woolf, *http://www.open.gov.uk/1cd/consult/itstrat/civpre.htm*.

What the discussion paper seeks to do is to look at scenarios for the future about the whole system of justice delivery and asks the important question whether the courts are a <u>place</u> or a <u>service</u>. It emphasises that if money spent in the short and medium term on information technology is not to be wasted in the years to come long term planning is essential.

Singapore and many United States' States are similarly approaching future planning for the courts.

One thing is quite clear: although we do not know what technology will be in place a decade from now, we can be confident that the Internet will pervade our working and home lives infinitely more than it does at the present time, that telecommunications capacity will increase enormously, and that the machines will become ever easier to use. If the courts lag too far behind business and, indeed the general community, we will be able to offer them very little so far as court dispute resolution is concerned.

It is essential that those who drive criminal trials recognise that jurors now and in the future are and will be electronically educated, and will be astonished that they are expected to listen to days and weeks, and perhaps months of evidence, without access to the transcript in any form and, at best, be given paper

copies of documentary evidence. The public will expect services to be delivered through technology and our courts will have to adapt to this expectation if they are to retain respect for their process.

Most of us have had some experience of using telephone and video links for the receipt of evidence. For my own part I regard it as entirely satisfactory. It is much less disruptive for specialist witnesses and there are many other witnesses whom it is not essential to have in the court room despite some assertions to the contrary. I believe that behavioural psychologists can demonstrate that it is the way in which the evidence is spoken rather than the impression that the person creates, for example, by having thin lips or shifty eyes, which makes it possible to assess whether that witness is telling the truth or not.

There is no reason why much of the hearing cannot, in the more distant future, be conducted in this way.

The experience of some lower specialised courts and tribunals in England and the United States shows that the whole process can be performed electronically.

If one can pay all the bills at the local Post Office why not have an electronic kiosk which delivers a range of legal information and a centre for despatching documents electronically to all levels of courts.

But, at the core and heart of all this change, I believe that the judge or magistrate must do what our cultural and institutional experience and history dictates must be done - hear and determine disputes between parties - we still till in the same paddock.

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