SUPREME AND FEDERAL COURTS JUDGES CONFERENCE

WEDNESDAY, 23 JANUARY 2008

SYDNEY

"THE VANISHING TRIAL"

It is now just over a century since Dean Roscoe Pound disturbed the quiet equanimity, not to say complacent self-satisfaction, of the American Bar Association with his paper entitled "The Causes of Popular Dissatisfaction with the Administration of Justice". The paper was given on the evening of 29 August 1906 in St Paul, Minnesota. Pound was then Dean at the University of Nebraska. The paper caused a storm. John Wigmore, the famous evidence scholar, was present at the meeting and he described the speech and its aftermath in a paper whose title captured his view of what the paper had done. Wigmore called his paper "The Spark that Kindled the White Flame of Progress – Pound's St Paul Address of 1906"[1].

Meetings of the Conference of Chief Justices and Conference of State Court Administrators, held in Indianapolis Indiana in 2006, celebrated Pound's work and examined whether the problems Pound had identified in his 1906 speech still faced the American judicial system. The general view seemed to be that the system was no longer

---

1 (1962) 40 *American Law Review* 729 at 730.

facing problems of the same kind. Whether that is so is not a matter about which I can or should offer any view.

What has any of this to do with the subject of my paper? I am here to speak about the phenomenon of the vanishing trial. Why do I refer to the work of Roscoe Pound?

I refer to Pound's work because if we are confronted with the phenomenon of the vanishing trial, we need to ask why that is so. In particular, we have to ask whether trials are "disappearing" because there are causes for "popular dissatisfaction with the administration of justice".

Where does this notion of trials disappearing come from?

In the winter 2004 edition of the *American Bar Association Journal* "Litigation", Patrica Lee Refo, Chair of the Litigation Section of the ABA, announced that that section of the Association had undertaken a major project to consider three questions: first whether the trial was an "endangered species" in American courts, second whether the number of trials was declining and, if it was, why, and third "should we care?".

There had been a deal of debate in America, about this subject, before the ABA took up its inquiry. For example, Judge Patrick Higginbotham of the United States Court of Appeal for the Fifth Circuit, writing in 2002, had described the decline of trials as one of the most

significant changes in the American judicial system since the Nation's founding. His views were captured in an article aptly entitled "So Why Do We Call Them Trial Courts?"[2]. And a deal of academic work has now been undertaken in the United States about the subject[3].

When the ABA took up the inquiries I have described, it discovered that United States Federal Courts had tried fewer cases in 2002 than they had in 1962, despite there having been a five-fold increase in the number of civil cases instituted and more than doubling of the numbers of criminal proceedings filed. In 1962, 11.5 per cent of Federal civil cases were disposed of by trial but by 2002 only 1.8 per cent were disposed of at trial.

I do not know whether similar statistics have been gathered in Australia. But I have the clear impression that over the last 15 or 20 years, perhaps longer, the number of civil cases tried to judgment in Australia's State and Territory Supreme Courts, and in the Federal Court of Australia, either has diminished, or at least has not kept up with the increase in the number of judicial officers in those courts or the increase in the size of the population. My impression is that this is so no matter

---

2 (2002) 55 *Southern Methodist University Law Review* 1405.

3 See, for example, Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", (2004) 3 *Journal of Empirical Legal Studies* 459; Ostrom, et al, "Examining Trial Trends in State Courts: 1976-2002", (2004) 3 *Journal of Empirical Legal Studies* 757.

whether the comparison is made between raw numbers or only between the proportions of cases issued that are tried to judgment. And my further impression is that statutory modifications to rights to claim damages for accident-related injuries do not provide a complete explanation for these changes. We need to know whether these impressions are right and, if they are, why this has happened.

Let me deal with, but then put aside, one form of comparison with the United States. You will recall that I said that there had been a sharp decline in the number of criminal trials in United States Federal Courts. One very important reason for that is that plea bargaining is often the only way an accused person can have any real influence on what will happen to them. If they are convicted at trial of the offences originally alleged against them the trial judge has little discretion about what sentence will be imposed and it will be much heavier than it would have been if there had been an early guilty plea. If the accused can make some deal with the prosecutor to plead guilty to some lesser charge, the sentencing consequences can be very large. There are, therefore, very powerful reasons not to go to trial.

In Australia, the disposition of civil litigation over the last 20 years has been greatly affected by the adoption of managerial judging techniques and by an increasing emphasis upon alternative dispute resolution methods. It is tempting to conclude that those two considerations together provide a sufficient explanation for any diminution in the number of civil cases being disposed of at trial. It is

equally tempting then to assert that both the result achieved (significant diminution in the number of civil matters tried) and the means used to achieve that result (managerial judging and ADR) are marks of success which neither permit nor require any further examination[4]. The central thesis of this paper is that we must not conclude our enquiries at this point. We must dig deeper in order to understand better why fewer civil disputes are being determined by the application of judicial power. Do those reasons reveal any causes of popular dissatisfaction with the administration of justice to which we should be giving attention?

Our enquiries must begin from some basic premises. First, an essential element of the organisation and government of this society is that it should be possible to submit legal disputes to independent courts for resolution according to law. The quelling of controversies by the application of judicial power of the polity is a fundamental feature of the organisation and government of this society. Engaging that process is not to be seen as a failure. It is a defining element of the government of the society in which we live.

Secondly, most civil disputes settle. As Abraham Lincoln said to an audience of lawyers: "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how

---

4 Compare, however, the views of Professor Judith Resnick, "Managerial Judges", (1982) 96 *Harvard Law Review* 373 and Professor Owen Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073.

the nominal winner is often a real loser – in fees, expenses and waste of time." Resolution of controversies by the application of judicial power is, in that sense, the solution of last resort. And cases can be settled at any time up to and including the moment before final orders are pronounced.

Third, resolution of disputes according to law is usually best achieved with skilled and experienced representation for the parties. It is a deliberate process that takes time. It is therefore expensive. It is expensive because of the need to use skilled representatives and because the process takes time and effort.

Fourth, the amount of time and effort that must be expended is directly related to the number and type of issues that are in play. The more issues there are in a case, the longer its resolution will take. The more uncertainty there is about the content or application of the legal principles that are relevant to the dispute, the less predictable is its outcome. If the outcome is not predictable, it will often be harder to settle the dispute and its trial will be protracted.

All this being so, should not the judiciary take pride in the phenomenon of the disappearing trial?

If cases are settling because the prospect of trial is too horrid for parties to contemplate, settlement may mark the failure of the system, not its success. If cases are settling because they are managed to the point of the parties' exhaustion, the system has failed them. If cases are

settling because one party is able so to prolong and complicate the litigation as to outlast a financially weaker party, the system fails. Settlement in those circumstances is a mark of failure not success. No less importantly, are there controversies which parties are choosing not to submit to resolution by the application of judicial power, and instead resolving by other methods, because they are dissatisfied with the ways in which the judicial system is administered during and before trial? If there is a significant number of cases in which parties are dissatisfied in the manner described, there truly is popular dissatisfaction with the administration of justice.

There are some limits to what the courts can do about the questions I have identified. We need to be well aware of these limits.

First and foremost among the limits is that the courts must, of course, work within the bounds of applicable legislation. Not all legislation shortens trials. Some legislation has so many discretions built in to it that it is not always possible to predict with any confidence how the relevant discretion should be exercised. The so-called uniform Evidence Act may be thought to provide some examples of a problem of this kind. It is not always easy to see whether particular pieces of evidence should be admitted or excluded. The difficulty of making that prediction encourages litigants to "chance their arm". More than that, the piling of discretion upon discretion may encourage argument about ancillary questions of evidence and if it has that effect the trial is prolonged. Further, evidence of disputable admissibility may lie at the

fringe of what is useful. Its admission may do little more than multiply the material that must be considered in the course of the trial without adding much that is useful to the ultimate resolution of the dispute. Yet the consequential increase in the costs of the litigation may be significant.

I mention these matters as one example of limitations within which the courts must work when considering whether trials are disappearing because the prospect of trial is too horrid for parties sensibly to contemplate. Whether the uniform Evidence Act is a good example of such a limit is not the point. The relevant point is that the courts must, and do, apply the law as it is enacted. And if that leads to the prolonging of trials there is not a great deal that the courts can do.

It remains important, however, to ask why parties do not commence litigation and why parties settle litigation that has been instituted rather than go to trial. Are there cases in which resolution of a dispute by the application of judicial power is a prospect that one or other side cannot face for reasons that should not be there? Is there anything that the courts can or should be doing to address those issues?

It is convenient at this point to return to Roscoe Pound's paper. Dean Pound said that the sole purpose of his paper was diagnosis. He sought "to discover and to point out the causes of current popular

dissatisfaction" with civil as distinct from criminal justice[5]. He then analysed the causes of dissatisfaction by grouping them under four main headings:

(1) causes for dissatisfaction with any legal system,

(2) causes lying in the peculiarities of our Anglo-American legal system,

(3) causes lying in our American judicial organisation and procedure, and

(4) causes lying in the environment of our judicial administration[6].

I will not stay to examine what Pound identified as the causes for dissatisfaction with any legal system. It was here that he referred to such matters as "the inevitable difference in rate of progress between law and public opinion"[7] and "the popular assumption that the administration of justice is an easy task to which anyone is competent"[8].

---

5 (1906) 40 *American Law Review* 729 at 730.

6 (1906) 40 *American Law Review* 729 at 731.

7 (1906) 40 *American Law Review* 729 at 733.

8 (1906) 40 *American Law Review* 729 at 734.

He referred also to "popular impatience of restraint"[9]. These causes remain relevant today.

Pound identified five causes lying in the peculiarities of what he called "our Anglo-American legal system". They were:

> "(1) the individualist spirit of our common law, which agrees ill with a collectivist age,
>
> (2) the common law doctrine of contentious procedure, which turns litigation into a game,
>
> (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law,
>
> (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and
>
> (5) defects of form due to the circumstance that the bulk of our legal system is still case law."[10]

While it may be right to identify all of these considerations as still operating today, I wish to direct principal attention in this paper to the second of the causes mentioned, namely, "the common law doctrine of contentious procedure, which turns litigation into a game". It is right, however, to make special mention of the fifth matter he mentions, namely, "defects of form due to the circumstance that the bulk of our legal system is still case law". This is an observation that has now been

---

9 (1906) 40 *American Law Review* 729 at 735.

10 (1906) 40 *American Law Review* 729 at 736.

overtaken by the explosive growth in statute law. But that explosion has brought its own problems. Many of those problems stem from the complexity of the provisions and their heavy reliance upon discretionary administrative and judicial decisions. Those problems provide more than sufficient material for a separate paper and I will say no more about them now. Rather, as I say, I will concentrate on what was sometimes called the "sporting theory of justice" that turns litigation into a game.

One of the chief difficulties now facing the proper administration of civil litigation in this country is not so much the adversarial system but the way in which we are administering that adversarial system. Justice Frankfurter of the Supreme Court of the United States said[11] that "[l]itigation is the pursuit of *practical ends*, not a game of chess". There are times when we are focusing too much upon process, and too little upon those very practical ends to which the process must be directed. Paradoxically, this is a problem that emerges at its most acute in the over-managing of cases before trial. But it may also manifest itself in an equivalent paradox of under-management.

A fundamental tenet for the conduct of litigation, both civil and criminal, was stated by Smith J of the Supreme Court of Victoria in giving reasons disposing of a petition for mercy by a convicted prisoner that had been referred for hearing and determination by the Full Court of

---

11 *Indianapolis v Chase National Bank Trustee* 314 US 63 at 69 (1941).

the Supreme Court as an appeal. He pointed out[12] that "under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence". To this proposition, Barwick CJ added, on appeal to the High Court in *Ratten v The Queen*[13]:

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in-chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility."

This principal of "party autonomy" informs much of the way in which litigation is conducted today – both in the criminal courts and in the civil courts.

Of course, what I have described as managerial judging marks a significant qualification to that fundamental proposition of party autonomy. It is the ways in which that management is applied that will yield the paradoxical result that departure from what Pound identified as "the common law doctrine of contentious procedure, which turns litigation into a game" generates a popular cause for dissatisfaction with the administration of justice.

---

12 [1974] 2 VR 201 at 214.

13 (1974) 131 CLR 510 at 517.

I have referred to over-managing and under-managing cases; I have referred to a focus upon process rather than end. What do I mean?

Each of you will have an intuitive response to the assertion that a particular piece of litigation has been over-managed or under-managed. By over-managing I mean no more than that costs have been incurred unnecessarily. That is, there is "over-management" when the cost of managing the case before trial exceeds what was necessary. When I speak of "over-management" I am not referring to the level of particularity or detail at which the case is managed. That is the subject of my reference to "under-management".

Management of litigation is not an end in itself. I wonder whether that is always made apparent to the parties to particular litigation. Except in unusual cases, it will be in the interests of one side of a piece of litigation to obfuscate and delay. Usually, only one side of the record will be anxious to isolate the determinative issue in the case and have that decided quickly. The other side will have powerful reasons to avoid that being done.

In addition to whatever motives a party may have to obfuscate and delay, not all lawyers will find it expedient to reduce the number of directions hearings that are held. They are not unhappy if the case is over-managed. Each hearing will be a source of costs taken to account

when budgeted costs to be charged are compared with bills actually rendered. And leaving aside any commercial motive that a lawyer may have to avoid reduction in the number and complexity of directions hearings, many lawyers will find it hard to focus upon the place that a particular directions hearing should have in the progress of the case towards trial as distinct from whatever will be the immediate issues that may fall for consideration at that directions hearing. If both sides of the litigation are focused upon only those issues which are in play at the directions hearing, it will only be by conscious effort that the judge can bring their minds back to the ultimate ends of the litigation.

Of course there are limits to what the judge can do. The judge does not know what instructions the solicitor has or what counsel has in his or her brief. But the judge does know what the parties *say* their dispute is about. And the judge can always ask "Why?" The judge can always ask "Why does taking this step help me to decide the issues that have been raised in this matter?" And even when the parties are well represented by experienced lawyers, and the parties are in heated agreement about what is to happen, there will often be advantage in asking "Why?".

If the judge does not ask that question, there is a very real risk that the case will be under-managed. That is, there is a very real risk that the case will go to trial without the issues in the case being defined with sufficient clarity to make the trial as short and as efficient as

possible. And the interlocutory steps that are taken in such a case will inevitably be dictated by process rather than ends.

It is as well to stay a moment to consider the implications of what I have just said because analysis will reveal that this represents both the most important and the hardest aspect of the problems I am proffering for your consideration. I have said that if the real issues in a case are not identified early, interlocutory steps are dictated by process rather than the ends to which they should be directed. Take a typical commercial dispute in which the plaintiff puts its claim on several alternative bases and the defendant responds with a range of defences, some bare denials, some making positive assertions. When the case has reached this point someone will suggest that there should be discovery of documents. One side or the other will point to the fact that this will be a very long and costly exercise and the immediate reaction is to look for ways to abbreviate and truncate the task. There will be suggestions of proceeding in "waves"; there will be suggestions about limiting the scope of discovery in some way. Someone will almost inevitably come up with the great idea of performing the task electronically, thus ensuring that there is at least double if not triple handling of every document. And the costs will escalate. But the focus is solely upon the process. We have got to the end of the pleadings; now we must have discovery because that is the next step in the process. The focus is not upon the ends to which that process should be directed - the trial of the real issues between the parties.

Is discovery, in the case I have described, the disease or is it a symptom? I suspect that the better view is that it is a symptom, not the disease itself. And if that is right, treating the symptom may provide some palliative care but it provides no cure. It may be a symptom and not the disease because the cases in which there is a very large discovery task are usually, I would say inevitably, cases in which too many issues remain on the litigious table. And as if that was not problem enough, much more often than not at least one side, and often both sides, will be hoping that they can use discovery to look to widen the dispute beyond even the very large field of battle that would be identified if the case went to trial at once. And it will be in the interests of that party to roam as far and wide as possible.

How then do we better define the issues between the parties?

Identification of issues has been an enduring problem for the courts. We have tried many methods of defining issues and as each new method has been introduced, those for whom the identification of the real issues may prove embarrassing have found ways in which to obscure what is really at issue. Of course it is the parties who must finally determine what are the relevant issues between them. The judge cannot do that for them. But "Why?" remains *the* most important question the judge can ask. "Why is this in issue?" "What is this aspect of the fight all about?" "Why do you want to do this?"

None of this will make much sense to parties if trial is a dim and distant prospect. Of course parties must have sufficient time to prepare and present their cases. But what is necessary is *sufficient* time. And the parties must have their attention focused upon the fact that the matter is going to trial. Nothing does that as well as fixing a trial date.

C Northcote Parkinson observed many years ago that work expands to fill the time available. Parkinson's Law applies to litigation. If counsel are given a set time to make oral submissions, their submissions will occupy that time. If the parties have a fixed time within which to prepare a case for trial, their preparation will much more often than not occupy every one of the available days. And if a trial date is not fixed until all of the interlocutory processes have been completed, one side, at least, will do its best to find lots of reasons not to complete those processes.

Again, we must ask "Why?" Why do we allow this to happen? Have we no choice? Can we not organize the court’s resources in a way that allows fixing a trial date very soon after the litigation begins? And if that cannot be done, how soon after commencement of the proceeding can a trial date be fixed? What else can be done to avoid the application of Parkinson's Law?

Management of the case must never be confined to management of whatever interlocutory steps should be taken or whatever skirmishes break out before the trial begins. The chief focus of management must

remain upon the trial, not just upon getting to trial. That is, the focus must stay fixed upon what is to be tried and how it is to be tried. Nowhere is the importance of that simple question "Why?" more apparent than in the management of material that will be available to the parties and to the judge in the courtroom.

One of the chief causes for the prolongation of trials is the increased ability of parties and their lawyers to assemble, copy and manipulate large quantities of data. We have seen several steps towards the position in which we now stand.

There was once a time when the solicitor would choose what he or she thought to be the most relevant documents, have a copy typist copy the text of the documents, and then send those documents with some observations to counsel for an opinion. If the matter became litigious it would be the documents that the solicitor had identified that would become the central documents in the brief to counsel and the central documents at trial.

The photocopying machine put an end to that. All the documents the solicitor had were copied and sent to counsel. The moment of discriminating between what was important and what was not had moved from the solicitor's office to counsel's chambers. But still, for a time, counsel would go to court with the critically important documents set apart from the bundles that had been sent up. Over time, however, that began to fade and the multiple trolley case emerged. Larger and

larger bundles of documents were prepared and copied and sent to counsel. More and more often counsel gave the bundles to the judge. And the judges did not say, as they should have said when that was done, "Why?" "What is this that you are giving me? How is it relevant? How is it admissible?" This was seen as not modern. It seems that to ask "Why?" was seen as reverting to an age of legal formalities that had passed.

As our ability to reproduce material digitally penetrated the practice of the law we moved to the so called e-court in which computer screens proliferated. Everyone in the courtroom could now see the image of the document that was under discussion. This was a great advance, especially in public enquiries where the process was every bit as important as the ultimate report. But the consequence was that the moment of discrimination between what matters and what does not was deferred. It was deferred from counsel's chambers to at least the courtroom. And if counsel could achieve the result, some sought to defer the moment of discrimination between what was important and what was not from the courtroom to judges' chambers. If the judge did the sorting, the lawyers could say that they had done all that they could have done to put the available material before the court.

Now counsel can have everything available on a single disc or memory stick. And most of what appears on that disc or that stick might have some relevance to the issues between the parties. Some of it might even be important to the proper resolution of those issues. So

why choose between the material that can be compressed into this single record? Why not give it all to the judge and see what he or she makes of it? If it is not immediately important, it can all be described as "useful" background material. And it is all so portable.

But the relevant question is not whether this technological feat can be achieved. We know that we can store a remarkable amount of data on a computer or a memory stick, and we can make it available at the click of a mouse. We know that if we do that, everyone in the courtroom can see what the judge and the witness are looking at. And doing this is an obvious and practical recognition of the age in which we live and work. How could one possibly be against doing this?

That simple question, "Why?", remains. And it remains unanswered. What is it that we are achieving when we do this? What are we doing that assists in the application of judicial power to the quelling of a particular controversy between parties? Assembling every piece of information that has any possible relevance to the issues may be a desirable step in preparation of litigation before trial. But the real utility of that step lies in what happens *after* the material has been assembled. Assembling it all is *not* an end in itself. The material must be winnowed and analysed before it becomes of any use. And winnowing and analysing the material in court, with every party represented, must be the most expensive way in which to do it.

So why have we assembled all this material in a way that it can be deployed at the click of a mouse in the courtroom? Why have we not said to the parties that they are to bring to court only what they assert to be relevant and admissible evidence upon which they rely? And above all else, why have the issues in the case remained in a state where all of this material can be said to be relevant to what is being tried?

If there is a good reason for undertaking the expense of having every document that has been discovered in a case produced as an image file and having the whole resulting database available for access by everyone in the courtroom, then go ahead and do it. But the reason must be found in why doing this will help to decide the real issues in the case and decide those issues efficiently. It is not enough to say that we *can* do it. And it is certainly not enough to say that doing it will show how modern the particular court or judge is. The only modernity it will show is conformity to the modern trend of prolonging the trial of litigation. Prolonging the trial of litigation is a modern phenomenon, but it is not one of which any court could be proud. And if that is all we are doing by agreeing to the generation of a very large database for use in court, we have no choice except to say "No", and explain why we give that answer.

As with almost every form of human endeavour, we will make mistakes in managing litigation. If we set out to manage litigation we will look back on most cases and see at least one point where it would have been better if we had taken a course different from the course then

chosen. And it is all too easy to offer criticism from the vantage of hindsight. With hindsight there is very little litigation that could not have been managed better than it was. But we do not have that advantage and using twenty-twenty hindsight to criticise what was done would be neither right nor useful. The best that we can hope to do is make decisions that are judged to have been sensible according to the state of material that was available at the time the decision was taken.

But that is the very reason I have placed so much emphasis on asking "Why?" Asking "Why?" requires the parties to articulate a coherent reason for taking a step in the litigation. If they cannot articulate a reason, and you cannot, why take the step? Why not get on with the trial? That remains the central task of the exercise of judicial power - the quelling of controversies according to law.

Roscoe Pound spoke of "the common law doctrine of contentious procedure which turns litigation into a game". Managerial judging has as one of its purposes putting limits to the ways in which that game can be played out. But we make no advance if the focus of the game simply shifts from the interstices of the rules of court to the never-ending management of the case before trial. And we certainly make no advance if the focus of the game is allowed to become how many issues can I leave alive at trial and how much material can I assemble and leave for the judge to consider.

If these are reasons for trials vanishing then there are serious causes for popular dissatisfaction with the administration of justice. And even if, contrary to the impression that is shared by many, trials to judgment are not diminishing in number or as a proportion of issued cases, the several questions I have posed must be addressed lest there remain causes for popular dissatisfaction that are causes that should not be there.