The 2024 Macrossan Lecture

Is the Civil Trial System Past its Use-By Date?

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I Introduction

In delivering the Gerard Brennan lecture in 2011, The Hon John Doyle AC, Chief Justice of South Australia, a person not given to exaggeration, said this: 'I believe that, during the time of the next generation of legal practitioners, those now being admitted to practice, civil litigation as we know it in the higher courts will come to an end'.[1] And he subtitled his lecture 'the demise of civil litigation'.

There is no doubt that the cost of a trial of an action in the Supreme Court, even for a successful party, is, in most cases, beyond the means of the average citizen, or even of a small company. For a losing party of average means that is almost certainly the case. And there is nearly always a risk, for either party, of doing worse by judgment than that party expects. This has been the position now for a considerable time. That is why over 95 per cent of actions commenced in the Supreme Court are resolved before judgment.[2]

I do not mean to imply by this that the cost of going to trial and judgment is the only reason for agreement before then. Of course there are other good reasons. An agreement can be moulded to achieve an outcome which both parties will accept rather than being bound by rules to a fixed result which, certainly the losing party and, in many cases, both parties may not want. It is more conducive to an amicable resumption of a former relationship between the parties, whether business or personal. Parties are more likely to feel in control of achievement of a result which they have chosen than one which is imposed on them. And some parties value the privacy of an agreed solution.

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1 Hon John Doyle AC, 'Imagining the Past, Remembering the Future: the Demise of Civil Litigation" (2013) 86 *Australian Law Journal* 240.

2 It is also, no doubt, the main cause of the rise of class actions.

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But there is no doubt that the cost of going to trial and judgment is, for many parties, the effective deterrent to proceeding. In an action in which the amount or value in dispute is less than, say, AUD1 million, costs may be a substantial proportion of that amount or value. So the system of civil litigation by trial and judgment is not working for most potential litigants. That is, no doubt, why Chief Justice Doyle said what he did.

There are two aspects of cost which are of concern. The first is that, of those cases which are resolved before judgment, a massive proportion are resolved only at or close to trial, after all pre-trial costs have been incurred. And that is, unfortunately, at a cost which most litigants cannot afford and, as it turns out, a cost which was, in large part, unnecessarily incurred.

And the second is that, of those cases which are resolved before judgment, it is likely that a substantial portion are resolved only, or principally, because the litigants, or one of them, cannot afford to proceed. There are, I think, many cases resolved by agreement in which one or both parties to the dispute would reasonably have preferred to have their dispute resolved by an independent arbiter at a reasonable cost than by agreement.

Provisions for mediation, early neutral evaluation and settlement offers already exist. But merely providing these has been insufficient to persuade parties and their lawyers to use them as early as they should to avoid unnecessary costs; and it has been insufficient to persuade judges to impose them early enough, notwithstanding their power to do so and in circumstances justifying that course. First, I propose to say why I think that is so — why I think that our system, and the way those within it operate, impede early resolution of a dispute.

Secondly, I will explain what I think should be done to change this. There are two aspects of this. The first is to show how I think that those cases which are resolved by agreement may be resolved before the majority of pre-trial costs have been incurred. And the second is to explain why I think that there are some cases which are incapable of resolution by agreement, at least initially, but amenable to early neutral evaluation, and how that may be achieved.

Thirdly, I want say why I think that the present system with respect to experts is misconceived and how radical change to that system will ensure earlier, cheaper and fairer resolution of questions requiring expertise — and consequently in many cases, earlier resolution of an action.

And finally, I want to say something about whether, and if so how, an alternative cheaper system of deciding disputes can be devised. For if it can't, our system of trial and judgment will remain effectively accessible only to persons or entities to whom the cost is not an effective deterrent. And if it remains the case that there will still be many for whom the cost of litigating to trial and judgment is an effective deterrent, it is indeed past its use-by date.

I do not propose to say anything about litigation before specialist courts such as administrative tribunals or family courts. Nor do I intend to say anything, except by analogy, about motor vehicle or industrial accident claims or other

personal injury claims, all of which are dealt with under statutory schemes, which, whatever faults they may have, seem to work reasonably well. Nor do I intend to say anything about testamentary claims. My remarks are limited to civil actions involving common law causes of action and statutory claims which constitute the bulk of litigation in the Supreme Court. And by the civil trial system referred to in the title to my lecture I mean that system set out in the *Uniform Civil Procedure Rules 1999* (Qld) ('*UCPR*').

It is plain that some of what I say cannot apply to self-represented parties.

II Why the Adversarial System, and the Way Those Within it Operate, Impedes Early Resolution of a Dispute

An analysis of actions commenced in the Supreme Court over the past decade yields two relevant percentages. The first is that, of actions commenced, more than 95 per cent are resolved without a judgment. And the second is that, while approximately one half of defended actions are listed for trial, of those which are so listed, less than 10 per cent go on to trial and judgment. That is, more than 90 per cent of those are resolved by settlement or abandonment only after most or possibly even all pre-trial costs have been incurred. And that percentage appears to be increasing over the last few years.[3]

There are three impediments to early resolution of disputes which I think can be eliminated or at least mitigated.

The first is the way in which the system requires all actions to proceed under the existing rules of court as if they are to go to trial and judgment, notwithstanding the reality that the vast majority end before then. Under the *UCPR*, alternative/additional dispute resolution ('ADR') is relatively new. It came into the *UCPR* only in 1999. And in those Rules, it appears to arise only after virtually all of the trial preparation has taken place. In other words, the system itself still assumes a likely trial and judgment with ADR operating only as a last-minute exception.

The second and third impediments are of greater concern.

The second is the tendency of lawyers, notwithstanding that they could seek ADR early in proceedings, to take every step in those proceedings, almost up to trial, before attempting to do so. An explanation for that tendency, by some lawyers, is that unless they at least proceed up to disclosure before seeking resolution by agreement, they may not uncover all of their opponent's relevant documents. And that if they proceed to settle an action before then, they leave their client unprotected, and themselves open to action by their client, if a later contention or discovered document might have changed the client's decision to settle.

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[3] I have inferred these percentages from statistics supplied to me by the Courts Performance and Reporting Unit.

The reality is that our system is one of party autonomy or, more accurately, the autonomy of the parties' lawyers, and that lawyers tend to do too much before attempting settlement. Party autonomy is a leftover from the time when the judges of fact were juries. Under such a system it never occurred to lawyers or to judges that control of the litigation process up to the time of trial, its substantive issues, its form and its speed should be other than entirely in the hands of the parties' lawyers.[4] But that mindset persists, notwithstanding the change to judge only trials, due to (1) the reluctance of lawyers to forego control of the pace and, especially, the shape of litigation, and (2) the reluctance of judges to seize that control.

As Chief Justice Doyle pointed out:

> The judge does not determine the issues that will be contested between the parties. The judge does not determine how the parties will present their respective case or defence. The judge has no significant control over the quantity or quality of evidence presented on either side, nor over the relationship between the significance of the matter at issue and the effort or resources deployed by the parties. They can commit more or less resources than the issue warrants. Often it is more.[5]

There are incentives to a litigation lawyer under our existing system to do too much, rather than too little. In theory, the more work that is done in preparation of a case, the better are the client's prospects of success; the better is the lawyer protected against later being sued by the client; and the more will the lawyer earn. And there are no disincentives. Moreover, in most cases it is difficult to judge how much is 'too much'.

While party autonomy remains the essence of our civil justice system, it will remain one in which lawyers do too much and, consequently, costs are too high. Moreover, party autonomy ensures that litigation generally proceeds at the pace of the party least inclined to bring it to trial. And it may introduce unfairness into litigation between parties of unequal bargaining power. The richer litigant may use that to its advantage, obliging the other to commit more resources than it can afford.

Although there have been some modifying changes, at least in this State,[6] it remains fundamentally correct that the parties or, more accurately their lawyers, remain substantially in control of the pace and shape of litigation. And if we are to have a system which works for the majority, that must change. In each of these respects, there must be greater judicial control, or rule control, especially in the pre-trial process, than is presently the case.

And the third impediment to early resolution of a dispute is the likely failure of lawyers, before litigation commences, and thereafter if circumstances change,

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4 J A Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) ch 18.

5 Doyle (n 1) 241.

6 I am speaking principally of the introduction of case management practices.

or the situation becomes clearer, to advise their clients realistically both of the likely result of litigation and of its likely cost.

What parties to a dispute want or, more accurately, what they need when they first approach a litigation lawyer, and continuously thereafter, may be expressed in three questions:

1. What is the likely result if the dispute goes to judgment?
2. What will it cost me to get to that result?
3. Can I get to that result, or a result approximating it, more cheaply?

Without answers to each of these questions a party has no real prospect of weighing the relative advantages and disadvantages of, on the one hand, reaching an agreed early solution and, on the other, proceeding to judgment; or, indeed, of not proceeding at all.

At present, it seems to me, they are unlikely, in most cases, to get reliable answers to any of those questions, either when they first consult their lawyer or at any subsequent time before trial or its imminence.

As to the first of these, advice about the likely result, lawyers owe a common law duty to provide this.[7] The content of that duty may depend on the level of sophistication of the client and the relevant knowledge and means of knowledge of relevant facts by the lawyer.[8] Unfortunately, there is no statutory statement of that duty, notwithstanding the existence of a statute stating lawyers' other duties. There should be such a provision. It should state that the lawyer could be deprived of her costs for giving and failing to correct unrealistic advice.

Absent such a disincentive, any such advice is quite likely to be unreliable and optimistic, at least until a trial is imminent.

In the first place, at the time when she first consults her lawyer, the client may feel that she has been wronged by her opponent.[9] The lawyer may attempt to dampen down expectations a little but, even if she does, her advice will frequently be given an optimistic interpretation by the client.[10]

Secondly, the lawyer will ordinarily hear only one side of the story and her advice will be based on that. And though she may say that there might well be a contradictory version, that might not be seen by the client as a serious qualification.

Thirdly, the client often makes it clear that she believes that her prospects of success are good, and no one likes to disappoint a patron especially where a pessimistic opinion might well lose that patron and consequently the prospect of remunerative work. I do not mean to imply here that the majority of lawyers are likely to deliberately overestimate their clients' prospects of success in order to

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7 *Levicom International Holdings BV v Linklaters (A Firm)* [2009] EWHC (Comm) 812.

8 *Phelps v Stewarts (A Firm)* [2007] EWHC 1561 (Ch).

9 I have, arbitrarily, used she and her throughout.

10 I attribute the descriptions in this and the following three paragraphs to a source which I first adopted many years ago, but which I cannot now find or recall. In my opinion they remain accurate today.

obtain or retain work. I mean rather that the pressure on the lawyer to satisfy the client is an underlying factor.

Having failed, in the first place, to give the client a realistic estimate of the prospects of success, or having failed to correct the client's overoptimistic interpretation of her opinion, the lawyer, unsurprisingly, then finds it difficult later to moderate that estimate or moderate the client's misinterpretation of it. This can and often does lead to disappointed expectations when the client is first confronted with a realistic estimate, which, in many cases, may be only at trial.

As to the second and third questions, requiring a realistic estimate of the cost of proceeding to trial and judgment, there is already an obligation upon a lawyer, on receiving instructions in any matter, to give her client an estimate of the total legal costs, if reasonably practicable and, if not reasonably practicable, a range of estimates. She is also obliged, in a litigation matter, to give an estimate of the likely party and party costs.[11] But at this early stage these are unlikely to be realistic estimates.

It is true that a lawyer must disclose any substantial change to these estimates as soon as practicable after she becomes aware of it.[12] And there is a provision that a lawyer may be deprived of her costs if she fails to disclose anything required to be disclosed.[13] Whether that means that she could be deprived of costs if she grossly underestimates the likely cost of going to trial and judgment is not clear. But I have been unable to discover any case in which a lawyer has been deprived of costs because she grossly underestimated those costs to her client.

These provisions, in my opinion, are an unsatisfactory statement of: (1) the continuing duty of a litigation lawyer to advise her client of the likely costs of an action proceeding to trial and judgment; and (2) the consequences of failure to perform that duty.

III How Resolution by Agreement May be Achieved Earlier

Ideally, of course, a dispute should be resolved before and without litigation. In the Federal Court, before they can commence or defend proceedings, the parties to a dispute must file a statement that they have taken genuine steps to resolve it.[14] While there is no evidence of whether this has any beneficial effect, it costs little to implement and may have some. I therefore think that it is worth including in our system.

On the other hand, following the *Woolf Report* in England, pre-action protocols were introduced by a practice direction under the *Civil Procedure Rules*,

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11 *Legal Profession Act 2007* (Qld) s 308.

12 Ibid s 315.

13 Ibid s 316.

14 *Civil Dispute Resolution Act 2011* (Cth).

the aim being to encourage parties to settle their dispute without the need to issue proceedings. These require the parties to exchange correspondence and information sufficient to understand each other's positions.

Whilst this is a laudable aim, it has tended to front-load costs because, it has been noted, the requirements generate time consuming and costly exchanges. Compliance has often resulted, in effect, in an early exchange of pleadings and disclosure of too much rather than too little.[15] These requirements, or, more accurately, the way that they have been implemented by lawyers, involve too much cost to be incurred too soon in a system in which, statistically, the vast majority of cases will be resolved before judgment. I would not recommend their adoption here.

This unfortunate consequence is the result of provisions intended to have limited operation being interpreted more widely by lawyers because they were stated in general terms. However there is, in my view, merit in provisions having the aim of these but stating obligations in more specific, limiting terms. In this respect, the provisions relating to personal injuries litigation are useful examples. I cannot overemphasize the importance of limiting the tendency of lawyers to do too much work; more than is warranted by the evident intent of the provisions. This tendency can be restrained only by a combination of a clear and limiting description of what is required and, where necessary, costs orders against lawyers.

In addition, I think that court-appointed mediation should be available to parties before litigation commences. A party to a dispute which may result in litigation should be able to apply to a court to appoint a mediator of that dispute. And on such an application the court should have power to impose mediation on the other parties as a condition of those parties pursuing or defending an action.

Also a question of law or a question involving expertise can and in some cases should be decided before litigation has commenced. I shall discuss those a little later.

I acknowledge that there may be some cases which are not amenable to resolution by agreement, which is not the same thing as parties or lawyers who are not so amenable or not so initially. Because there are some such cases, there should be provision for application for exception from the obligations to which I have referred and which I am about to refer.

The plaintiff's lawyer should be obliged, shortly after the filing and service of the originating process, to provide to her client costs estimates and an opinion of the likely result if the action goes to trial and judgment. And at the same time, the lawyers of any persons so served who propose to defend, should be obliged to provide the same to their clients.

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[15] Damien Byrne Hill and Maura McIntosh, 'The Civil Procedure Rules Twenty Years On; The Practitioners' Perspective' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (Oxford University Press, 2020) 3; Hazel Genn, *Solving Civil Justice Problems: What might be best?* (Scottish Consumer Council Seminar on Civil Justice, 19 January 2005).

Accordingly, I suggest that, within a short time, say 14 days, after filing and service of the originating process, each party's lawyer should be obliged to provide her client with a costs statement containing:

1. details of legal costs payable by the party to the party's lawyer up to that date; and
2. an estimate of the party's likely legal costs if the claim proceeds to trial and is determined by a judge.

I also suggest that a copy of that statement should be provided to the court.[16]

At the same time, each party's lawyer should be obliged to provide her client with a statement estimating the likely result of the action if it proceeds to trial and judgment; and provide the court with a statement that she has done that. And the lawyer should be obliged to file a sealed copy of that advice to be opened only on a question of costs.

Of course, any such estimate could state a range of possible results, explaining why that is necessary, as might be the case, for example, in damages claims. And it may be conditional if, for example, it depends on who will be believed. But again, the lawyer should explain why that is necessary.

These obligations should be enforceable and enforced against lawyers. The lawyer should have her costs, otherwise recoverable from her client, reduced if she fails to comply with these provisions. An unrealistic estimate of costs or of the likely result of the action should, in the absence of compelling reason to the contrary, be sufficient evidence of that failure. There should be provisions in the rules which provide for that enforcement.

In addition to what I have said about an application to be excepted from these obligations, there may be litigants who do not need these, or some of these. Many large corporations, for example, may have entered into satisfactory costs agreements with their lawyers and had satisfactory advice on their prospects of success. So application for exception should also apply to these cases.

At the same time, each party should be obliged to provide the other with a list (of no more than 10) of the principal documents which that party will rely on at the trial to prove her case or rebut that of her opponent; and to provide copies of any such documents if requested.[17] This should ensure that neither party is later taken by surprise by the disclosure of a significant document.

Once these obligations have been complied with, or the time for performing them has expired, mediation should automatically occur. By that I mean that mediation should occur without the necessity of a court order. There would, of course, need to be provisions for how the mediator is selected and how the mediation should proceed.

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16 Cf *Motor Accident Insurance Act 1994* (Qld) s 51B(6)(e), (7); *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) s 37N.

17 *Personal Injuries Proceedings Act 2002* (Qld) s 22.

Under the present regime, I am told, some parties, or, perhaps more accurately, their lawyers, tend to treat early mediation not so much as an attempt to resolve the action by agreement, but more as a means of testing the strengths and weaknesses of the opponent's case. But if the parties are, by this stage, armed with more realistic answers to the questions posed earlier and knowledge of the opponent's principal contentions and documents, there should be greater interest in the possibility of resolution by agreement. That may be especially so in cases in which, it can now be seen, costs are likely to assume a substantial part of the amount or value in issue.

III What Should Happen Next?

If the action has not been resolved by these procedures, I think the court should intervene to see if more should be done to resolve the action before all pre-trial costs have been incurred. Such intervention could be by some informal meeting but in consequence the judge should have power to and should consider making orders for:

- further mediation;
- neutral evaluation;
- appointment of an expert to decide any question involving expertise;
- deciding separately and in advance of trial any question of fact or law in the action;
- that each party make an offer of settlement to the other; and/or
- how the action is to be tried.

I appreciate that some of these may be dealt with under existing practice directions.[18] However, I want to say a little more about some of these, which may result in earlier resolution.

A *Resolution by Early Neutral Evaluation*

There are some cases which will not initially be capable of resolution by agreement but which would be amenable to early neutral evaluation. One example is where a party, or that party's lawyer, has an unrealistic view of the likely result upon

[18] See, eg, Supreme Court of Queensland, *Practice Direction No 11 of 2012: Supervised Case List*, 18 May 2012; Supreme Court of Queensland, *Practice Direction No 18 of 2018: Efficient Conduct of Civil Litigation*, 17 August 2018; Supreme Court of Queensland, *Practice Direction No 1 of 2023: Commercial List*, 16 January 2023; Supreme Court of Queensland, *Practice Direction No 2 of 2024: Building, Engineering and Construction List*, 22 January 2024.

judgment. Another is where, because of a substantial financial imbalance between the parties, the negotiating power of the poorer party may be impaired by her realisation that litigation against her richer opponent may lead to her own financial ruin; and where that imbalance is impeding a fair resolution by agreement.

I do not mean to imply that case appraisal should be limited to those cases. It is useful in many cases in which there appears to be a reluctance to agree. That is why early neutral evaluation should be an important part of the procedures used to resolve actions.

Case appraisal has been rarely used. I am told that the principal reason for this is that lawyers have tended to prepare for a case appraisal as if it were a trial and so, in effect, incurred the costs of a trial. That, of course, was never its intention. It was intended to be a summary procedure in which costs were limited. It is another example of lawyers tending to do too much, more than is warranted by the evident intent of the provisions, and therefore to cost more than the procedure intended.

If early neutral evaluation is to be used, as I think it should, an order for it must be accompanied by an order limiting the costs of both parties in the case appraisal. This should limit the amount of costs that a lawyer can recover from an opposing party and also from her own client.

B *Resolving Questions Involving Expertise More Rationally, Fairly and Cheaply*

Sometimes the resolution of a question involving expertise will lead to resolution of the case or a shortening of a trial. It is therefore beneficial in all cases to resolve that question promptly. But under our present system doing so requires a trial of that question. That is because our system, in my opinion, misunderstands the true role of an expert in court proceedings.[19]

If I were to start afresh to design a means of deciding a question involving expertise, I would, having no expertise myself, ask an expert to decide it. Or if it appeared that there might reasonably be different views among experts about the question,[20] I would appoint a panel of those experts holding different views and attempt to have them resolve those differences. And to the extent that they did not, I would accept the majority opinion. But again, having no expertise, I would not attempt to decide the question myself.

That is the way in which such questions are decided every day in business, in industry and in the professions.

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[19] The following discussion assumes that the expert is qualified as such, whether under s 79 of the *Evidence Act 1995* (Cth) or common law equivalent. See also *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[20] I have no doubt that there are many more differences of opinion expressed within and because of the adversarial context than occur in the real world.

If someone were to suggest to me that such a question could best be resolved by my hearing two or more experts, appointed by opposing parties, have each of them cross-examined by a person who had no expertise, and by then attempting to decide this question myself, I would think that suggestion irrational. And so would those who seek to have such questions decided every day in business, in industry and in the professions.

Yet that is the system which, with some minor modifications, we have now.

Judges should not attempt to decide questions involving expertise. Such questions are, by definition and in reality, beyond the competence of judges to decide.

To be fair to our distant forebears, there may well have been a time when questions involving expertise which came before a court were few and simple; and, consequently, questions which, with a little help, a judge, or more likely a jury, could decide. And it may be that jury trials could not have been conducted efficiently in any other way.

But if that were so, it has long ceased to be the case. Certainly, ever since I have been involved in the law, there have been many actions in which a question involving expertise arises which is beyond the understanding of a judge, let alone within her competence to decide.

Nor should a question involving expertise be turned into an adversarial contest. Especially one in which arguments on each side are made or controlled by non experts. To want to do this requires an adversarial mindset.

The irrationality of the present system is highlighted by the rules relating to referees. Under those rules, a judge may appoint a referee to decide any question of fact or law — questions which the judge herself is eminently qualified to decide. But a judge may not appoint an expert to decide a question involving expertise, a question which is, by definition, beyond the competence of a judge to decide. It must be decided by a judge (or jury) after an adversarial contest. Of course, a judge may appoint an expert under the present system, but that is as a witness only in that adversarial contest.

The system therefore misunderstands the real role of an expert. She should not be a witness in proceedings in the way in which witnesses of fact are. She is, in reality, a decision maker in the way in which a judge is, or, perhaps a better analogy, as a referee is. The expert's role is to decide a question which is, by definition, beyond the expertise of the judge to decide.

That is the fallacy of the existing rules.

Some may say that that is what, in effect, occurs now — that the expert, or panel, in effect, decides the question. But if that is so then we should face reality. We should not pretend that this is an adversarial contest which is decided by a judge.

An expert (or panel) should, in most if not all cases, be appointed by the judge to decide a question involving expertise and, once appointed, she (or they) should proceed to decide that question. No doubt the expert should be able to confer with the judge to ensure clarification of the question which she has to decide and the

facts on which to decide it. But she should have no more contact with the parties or their lawyers then does a judge or a referee.[21]

Nor should the resolution of a question involving expertise be turned into an adversarial contest. The expert should not be cross-examined by the parties. If there is any doubt as to the factual basis upon which the question is to be decided, or the question itself, the judge should have the power to seek the parties' submissions on this.

This may, in some cases, create an element of difficulty if the question arises for decision, as ideally it should, before the judge has resolved disputed questions of fact, such as, for example, where opposing factual contentions may result in different questions for expert decision. But that can often be dealt with, to enable resolution of the question involving expertise at an early stage, by asking the expert to decide the question on, say, two different factual bases. And that may well be sufficient to result in an early resolution of the dispute.

So it seems to me that the *UCPR* with respect to experts should be radically changed. Chapter 11 pt 5, which treats experts as witnesses, should remain to be used in exceptional cases only. In other than exceptional cases there should be rules which treat experts as decision makers. However, unlike the rules with respect to referees, such experts should not conduct hearings or seek submissions from the parties. They should decide the question posed by the judge on the factual basis stated by the judge.

Such an expert could and should be appointed as early as possible in the litigation process and could be appointed before litigation is commenced. One party to a dispute which may result in litigation and which contains a question involving expertise should be able to apply to a court for appointment of an expert, or a panel of experts, to decide that question. And such a question may, in effect, be decided before litigation commences.

The parties could agree upon such an expert or panel and, generally, the court would appoint that person or panel. Or one party could submit a panel to the other from which the other would choose an expert or panel. It would only be if both of those methods of choice failed that the judge herself would be obliged to find the expert or panel. And there should be rules which provide for that eventuality.

Such a system would have a number of advantages over the existing system. In the first place, it would recognise the reality that an expert (or a panel of experts) is, in effect, the decision maker on the question involving expertise.

Secondly, by ensuring that the judge is appointing a decision maker, it would remove the risk, which presently exists, that the opinion of an adversarially appointed expert, which may be accepted because she is more articulate or more

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[21] I do not think that this would involve the delegation of judicial power; the judge would decide the case. It might be otherwise if, under the referee rules, a judge were to delegate all questions of fact and law to a referee and merely rubber stamp the decision. As to delegation of judicial power at the State level: see generally Bede Harris, 'Separation of Powers at State Level— Going the Whole Hog Instead of Making the Dog Bark Many Times' (2017) 15(1) *Canberra Law Review* 1.

persuasive than the opposing expert, will be biased in favour of the party who appoints her. 'Whose bread I eat, his song I sing.'[22] It is mere wishful thinking that statements in court rules, purporting to impose duties on expert witnesses, will change that.

Thirdly, it enables an effective decision on that question early in the litigation process or even before litigation has commenced. Often the resolution of that question will accelerate resolution of the dispute.

And fourthly, it eliminates the costs incurred in having opposing experts proofed by their own party's non-expert lawyer and cross-examined by their opposing party's non expert lawyer.

Unfortunately, these rules are unlikely to be used by lawyers unless compelled to do so. They will be unwilling to surrender their own appointed experts. So these provisions should state that they will apply, to the exclusion of ch 11 pt 5, other than in exceptional circumstances; and that the fact that a party has appointed an expert is not an exceptional circumstance.

C *Deciding a Question of Fact or Law in Advance of Trial*

In some cases, the parties may agree that the decision of a question of fact or law arising in the action will resolve the dispute or, at least, substantially shorten the trial. Or the court may form that view. In either case, the court should consider whether to order a trial of that question or a case appraisal of it, in advance of trial.

The provisions with respect to deciding questions separately seem to have been rarely used. Lawyers seem reluctant to use them and judges seem reluctant to apply them.

In deciding whether to apply them, cost must be an important consideration and the tendency of lawyers to do too much must be taken into account. So, if these provisions are to be used, and I think they should be wherever possible, the earlier that they are used the cheaper that resolution will be. And it may be necessary to fix the costs of those proceedings in some cases to counter the tendency of lawyers to do too much.

Where the question is one of law and the parties can agree on the facts relevant to that question, there is no reason why that should not be decided in a summary way early in the litigation process, or even before litigation commences. And similarly, if a judge can resolve those facts quickly and cheaply. In making a decision on this question, the court should no doubt take into account the views of the parties, but it should not be bound by them.

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[22] This is a translation of the German idiom: *Wes brot ich ess, des lied ich sing*. The more that the expert is dependent on this income the more likely the idiom is to prove true. There may, of course, be other biases which are not dealt with here.

D *Ordering the Parties to Exchange Offers of Settlement*

Making an order that the parties exchange offers of settlement may seem, on its face, to be an extreme example of a court interfering with the rights of parties to determine for themselves how to conduct their litigation. Nor do I suggest that it should be routinely made. But it seems to me that there must be cases in which the issue in dispute is relatively straightforward and the amount or value in dispute is sufficiently small that costs may assume a substantial proportion of it — and in which, in consequence, the court should have such a power. Both the *Motor Accident Insurance Act 1994* (Qld) and the *Personal Injuries Proceedings Act 2002* (Qld) *contain* provisions permitting this.[23] These offers should have the same consequences as offers under ch 9 pt 5 of the Rules.

The following remarks apply, not just to offers ordered to be made, but to all offers made under the existing rules.

Offers made before litigation has commenced should also attract the cost consequences under the rules. There is no logical or commonsense reason, in my opinion, why such a rule should be limited only to offers made during the course of litigation. On the contrary, there is an even stronger argument, in my opinion, that a person who makes a reasonable offer before litigation should be entitled to be protected against the costs of that litigation than there is that one who makes such an offer during the course of litigation should be entitled to be so protected. The *Civil Procedure Rules 1998* (UK) seem to provide for this situation, although perhaps not with sufficient specificity.[24] And an offer should be taken into account in assessing costs if it is close to, but less beneficial to, the offeree than the judgment. Particularly in actions for damages, which, whilst capable of estimation, are not capable of precise calculation, a disputant who makes an offer to settle which is close to but a little less beneficial to the offeree than the judgment sum, deserves to be protected in costs where the amount of that offer is within the range of a reasonable judgment. This is especially so where the offer is made early in the proceedings or before action.[25] A specific rule to this effect would provide greater certainty than an interpretation of the present rules which would permit such a result.[26]

E *Deciding on the Manner of Trial*

If the purpose or one of the principal purposes of our civil justice system is to provide resolution of disputes by adjudication by a judge, then it does not fulfil that purpose if it provides access to such adjudication only to a small proportion

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23 *Motor Accident Insurance Act 1994* (Qld) s 51C; *Personal Injuries Proceedings Act 2002* (Qld) ss 20, 39, 40.

24 See r 36.20.

25 Cf *District Court Rules 2014* (NZ) r 14.11(4).

26 As occurred in *Carver v BAA plc* [2009] 1 WLR 113.

of those who would want to use it — the very rich or the funded or those few other potential plaintiffs whose likelihood of success is all but guaranteed. And I think that that is the case. As I have already said, a person of average means, or even a small company, cannot afford to litigate in the Supreme Court.

There are, it seems to me, two related reasons for this.

The first is that, over many decades, the classes of litigants have increased substantially. Before, say, the 1950s, most litigants were either men of property (no women), or corporations. Then in the decades following *Donoghue v Stevenson*,[27] the law of negligence expanded exponentially. Added to that, social changes and legislative initiatives, especially in social welfare and economic regulation, which commenced in the 1950s and are still continuing, have made all of us potential litigants.

And the second reason, partly for the above reasons, is that relations between us, especially business relations, and consequently litigation, has become more complex and therefore more expensive.

The massively high proportion of cases commenced which are resolved, mostly by agreement, before judgment may therefore be seen in two lights. On the one hand it is to be applauded that so many litigants have chosen to resolve their disputes by agreement. On the other, if it is the case, as I think it is, it is to be regretted that so many litigants have been deprived of having their disputes resolved by a judge solely or principally because they cannot afford to go to trial.

If it is true as, at present, I think it is, that many litigants settle their actions solely or principally because they cannot afford to go to trial, there needs to be a more summary system of adjudication which is within the means of ordinary litigants and small companies.

I do not mean to imply that every potential litigant who cannot afford to litigate under the present system should be entitled to a trial by a judge. There will always be some litigants whose claims or defences are unreasonable or who have acted unreasonably in rejecting an offer of settlement. The harm done to the other party by that unreasonableness may not be capable of being remedied merely by a costs order. In those cases, the court should be empowered to deprive the unreasonable litigant of their presumptive right to trial and to oblige them to accept a reasonable offer of settlement.

The present situation, by which I mean the inability of some parties to litigate to judgment because the cost of doing so is prohibitive, may well change with the evolution of artificial intelligence in our system. There is little doubt that artificial intelligence could and should reduce the work done by lawyers in basic routine tasks like disclosure. It should also enable more accurate prediction of costs and, in consequence, increase earlier resolution by agreement. It may enable more accurate prediction of the likely outcome of cases with the same result. And it may enable accurate prediction of those cases, or those kinds of cases, which

[27] [1932] AC 562.

are more likely to be resolved by agreement.[28] And, perhaps most importantly of all, it should assist in designing a cheaper and fairer system of deciding disputed questions of fact and law.[29]

So the application of artificial intelligence to the litigation process is likely, ultimately, to substantially reduce its labour intensiveness and so its cost. But whether, how, when and to what extent artificial intelligence will reduce the present costs of litigation, and change the present trial system, are, at present, unpredictable. I do not think that the introduction of the reforms which I have proposed should be postponed in order to see the outcome of this application.

I shall not attempt to design the kind of trial system which I have in mind but, in the absence of artificial intelligence, it would be one along the lines of the present rules with respect to case appraisal but with a binding judgment.[30] However, I think that artificial intelligence could be used to design a cheaper and more efficient way of deciding disputed questions of fact and possibly also of law. And if that can be achieved it should be used in most cases, leaving the present trial system to be used in exceptional cases only.

IV Conclusion

The cost to parties of dispute resolution probably remains the most serious challenge for our system. It is therefore ironic that some reforms which have been introduced, having as one of their aims reducing costs, may in fact, by the way in which they have been interpreted and implemented, increase them. This is often because a reform or its implementation has lost sight of some self-evident propositions or facts. I have mentioned three of these because it is so easy to lose sight of them.

The first is that the main reason for the high cost of litigation is the labour intensiveness of the process. The more labour intensive the process is, the higher will be its cost. Consequently, it is important to ensure that a reform does not simply replace one labour-intensive process with another process that is equally, if not more, labour intensive in its operation.

The second follows from the first: for many years, the vast majority of actions have for been resolved, one way or another, before judgment. Consequently, there is little point, at an early stage in a dispute resolution

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28 See generally Don Ferrands, 'Artificial Intelligence and Litigation — Future Possibilities' (2020) 9(1) *Journal of Civil Litigation and Practice* 7; Felicity Bell et al, 'AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators' (Research Project, The Australasian Institute of Judicial Administration and UNSW Faculty of Law and Justice, 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162985>.

29 There is now, in many cases, a substantial amount of contemporaneous objective evidence, which may amenable to more exhaustive analysis than is presently the case.

30 This is sometimes dealt with by case management directions. See, eg, *Rules of the Supreme Court 1971* (WA), order 4A. But I am speaking of a rule to be applied generally, not in discretionary cases.

process, in the parties' lawyers undertaking work aimed at trial and judgment, unless it is also likely to result in a substantially earlier settlement of cases which are likely to settle in any event, or possibly also in enabling settlement of cases which should result in agreement but which would not otherwise settle.

And the third is that the adversarial mindset of lawyers may be so strong that mere encouragement, or even the possibility of an adverse finding on costs against their clients, may not be sufficient to change their focus on trial and judgment. In order to change this mindset, it may be necessary to compel conduct which will cause the change, and to confront lawyers with the risk of a cost penalty, not only against their clients, but also against themselves, if they fail to focus also on early resolution.

I have said in this lecture, more than once, that our present system of trial and judgment is beyond the financial capacity of an ordinary litigant or small company; that only large corporations, government entities, funded parties and those whose success at trial is all but guaranteed can afford to litigate to judgment in the Supreme Court. And although in many, perhaps even most, cases, the best way of resolving a dispute is by agreement, of that massive percentage of litigants who resolve their disputes by agreement before trial, there must be many who do so solely or principally because they realise, many at a point which is too late, that they cannot afford to go to trial and judgment.

If that is so, then our trial system is working for only a small percentage of potential litigants.

In this lecture, I have suggested two possible solutions. The first is one which, within the existing trial system, will better ensure that all of those disputes which can reasonably be resolved by agreement are resolved earlier and more cheaply than they now are.

The second is more radical because it involves an alternative, cheaper trial system for litigants who should be able to have their disputes resolved by an independent arbiter but cannot afford to litigate under the present system. And these may well be the majority of litigants in defended cases.

Do I think that my proposals are likely to be adopted in the foreseeable future? No, I do not.

Hardly anyone likes changing the way they do things, especially if they have been doing them that way for a long time. And even less so if, as in this case, the way they have been doing it follows practices and traditions of highly respected predecessors. The law is a conservative profession, as indeed, in many ways, it should be.

This makes it difficult for us to accept that a system, which was once the subject of pride and admiration, has, by a substantial increase in the classes of litigants it serves, and a substantial increase in the complexity of our relations with one another, ceased to operate successfully; that a system which may have operated effectively in, say, the 1950s, has become, in its operation, too labour intensive, and so too expensive, for most of the classes of litigants it now serves.

But consider this.

Under a system substantially controlled by the parties' lawyers, though 50 per cent of defended actions go to trial, only 10 per cent of those go on to hearing and judgment. That is, 90 per cent of actions listed for trial are either settled or abandoned.

I have suggested some reasons for this: the failure of lawyers to inform their clients, early in the litigation process, of the likely result of the action and of the likely cost of achieving that; and their failure to sufficiently encourage and effect settlement at an early stage in that process.

However, irrespective of the causes of this, does not an overall dropout rate of 95 per cent of actions commenced and a late dropout rate of 90 per cent of actions listed for trial show that the trial system is not working? How many of those dropouts would have been better satisfied, and reasonably so, by a cheaper trial system?

So it seems to me that radical change to our system is not just desirable but essential. And if that includes a radically different system of deciding disputed questions of fact and law it may fulfil the prediction — some may have said gloomy prediction — by Chief Justice Doyle.