

**UNIVERSITY OF NEW SOUTH WALES  
FACULTY OF LAW  
CONTINUING PROFESSIONAL DEVELOPMENT PROGRAMME**

**SEMINAR: KEY INSIGHTS INTO CIVIL LITIGATION**

**22 March 2016**

**OPENING COMMENTARY**

**by  
Justice Geoff Lindsay**

- 1 The theme for this seminar (“Key Insights into Civil Litigation”) is well served by the topics nominated for particular attention: The over-riding purpose provisions of the *Civil Procedure Act* 2005 NSW; Discovery in NSW, now and in the future; Expert evidence; and Freezing orders in NSW and beyond.
- 2 These topics have occupied centre stage in the decade or so either side of enactment of the *Civil Procedure Act* 2005 and the *Uniform Civil Procedure Rules* 2005 NSW.
- 3 Last year was a watershed year for anniversaries in this area of the law. It was the 10<sup>th</sup> anniversary of enactment of the *Civil Procedure Act*, and the 20<sup>th</sup> anniversary of enactment of the (Commonwealth and NSW) *Evidence Acts* of 1995.
- 4 Both anniversaries were marked by seminars.
- 5 I hesitate to draw attention to the fact that last year’s celebrations of these seminars – relating to the court procedures, practice and evidence – attracted more attention than the 30<sup>th</sup> anniversary of the (Commonwealth and Imperial) *Australia Acts* of 1986 on the third of this month. That legislation, the means by which Australia became legally as well as politically “independent”, had at least as profound an impact on Australian law as the recalibration of civil proceedings effected, first, by the *Evidence Act* 1995 NSW and, then, the civil procedure legislation.

- 6 Care needs to be taken to see the administration of justice in its broader dimensions as well as in particular respects when endeavouring to understand a topic such as “civil litigation”.
- 7 Perspectives of the *Evidence Act* 1995 NSW depend greatly on the nature of the jurisdiction in which the operation of the Act was experienced.
- 8 That everybody experienced disruption can be seen, across the board, in cases relating to legal professional privilege. High points along the way were *Mann v Carnell* (1999) 201 CLR 1 and *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49, both decided by the High Court of Australia on 21 December 1999. The former explained the concept of waiver of privilege. The latter shifted the common law of privilege from a “sole purpose” test to a “dominant purpose” test in order to rationalise the general law in light of the legislation.
- 9 In criminal cases, as appellate judgments testify, the *Evidence Act* was an invitation to lawyers to enter upon a morass of technical objections. In civil proceedings, on the other hand, the practical effect of the Act has been, perhaps, located towards the other extreme. Technical objections have tended to be swept away by broader rules about the admissibility of business records, provisional relevance and the like. Where those engaged in criminal proceedings might insist upon technical objections (and be grateful for a diversion from the merits of a case), those engaged in civil proceedings have been driven towards pragmatism by cost-benefit imperatives.
- 10 In some civil cases, the practical effect of the *Evidence Act* has been to abolish technical rules of evidence that formally dominated adversarial battlefields. A more relaxed attitude towards the admission of evidence that may have a rational bearing upon a determination of fact, coupled with flexibility empowered by discretionary exclusionary provisions found in sections 135-136 of the Evidence Act, reinforces the idea that, in civil proceedings, there are only two fundamental “rules of evidence” that operate under an overriding necessity to respect a need for procedural fairness: (a) Is

the evidence *relevant* to a fact in issue?, and (b) Is the evidence *probative* of a fact in issue?

- 11 Each question, let it be noted, turns on identification of a “fact in issue”. For that we generally turn our minds away from “rules of evidence” to “rules of practice and procedure”. That shift is artificial, and to some extent cultural, but it remains embedded in a litigation lawyer’s mindset.
- 12 Experience of the Civil Procedure legislation has been more uniform because it has been targeted at civil litigation.
- 13 The necessity for the legislation was seen, at the time of its enactment, in a need for courts to reassert control over the litigation process, in the interests of a due administration of justice, conscious of access to justice, costs and efficiency issues. Court administration embraced “case management” philosophy at about the same time as everybody became increasingly aware of a need to adapt to a society preoccupied with computers and their derivatives.
- 14 (Electronic publication of judgments, with medium neutral citations, commenced in the late 1990s, with the High Court leading the way in (1998) 192 CLR and the New South Wales Law Reports following suit in Volume 46.)
- 15 There was a need for courts to reassert control over the conduct of civil litigation. Well healed or determined litigants could, and did, derail proceedings, *inter alia*, by oppressive use of discovery procedures; the deployment of “expert” witnesses as forensic champions; and rapid movements of assets to put them beyond the easy reach of any creditor.
- 16 This is not an occasion for me to dwell upon these topics. They are to be explored by others during the course of this seminar.
- 17 It is sufficient for me, perhaps, to draw attention to chapter 3 of Miiko Kumar and Michael Legg (eds), *Ten Years of the Civil Procedure Act 2005 (NSW): A*

*Decade of Insights and Guide to Future Litigation* (Law Book Co., Sydney, 2015), a copy of which has been made available to each participant in the seminar.

18 Chapter 3 reproduces, from paragraph [3.20] on, a paper presented by me to a UNSW seminar very much like the present one on 2 March 2005. Entitled “Dynamics of the Civil Procedure Regime in New South Wales”, it explored the origins, rationale and essential features of the, then, coming Civil Procedure legislation.

19 In a short, retrospective overview of the paper, published (in paragraph [3.10]) as another form of commentary, I wrote, and I now repeat, the following:

“Rising above particular details of legislative, judicial or administrative reform, if asked today, in 2015, to nominate a single most important feature of the civil procedure reforms of 2005, I would say: ‘elevation of the concept of purpose into prominence by its enactment as section 56 of the *Civil Procedure Act 2005* (NSW)’.

This legislative statement of an ‘overriding purpose provides a constant challenge to all participants in civil proceedings, across jurisdictions, to test what is done, or not done, against the perennial questions: ‘*Why* do this?’ ‘*How* can we do it better?’ A purposive approach to case management, authoritatively sanctioned, is calculated to save us all (lawyers and litigants) from the natural, but sometimes stifling, appeal of rule-based technicality.

20 Any success attending the Civil Procedure legislation is due, in large part, to the preparedness of judges, lawyers and litigants to use it, constructively, to recast *expectations* about the way civil disputes are dealt with.

21 Critical to any shift in expectations has been the support of judges at all levels of the hierarchy of courts. Highpoints have been *AON Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 and *Expense Reduction Analysts Group Pty Limited v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303. In the former case, the High Court supported the need for discipline in identification, and the determination, of “real issues” in dispute. In the latter case, the High

Court embraced principled pragmatism in dealing with a question of waiver of privilege in the context of documents mistakenly disclosed in discovery.

- 22 In a search for an understanding of *how* the dynamics of civil litigation operate, there remains much to explore.
- 23 For those with an historical bent, insights can be had by tracing the rise and fall of civil juries. The strength of the Equity tradition in NSW may owe at least something to the late development of trial by jury in civil proceedings in a convict society, and a continued embrace of the jury system in the democratic society that emerged in after-years: David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early NSW* (Cambridge University Press, 1991); Ian Barker QC, *Sorely Tried: Democracy and Trial by Jury in NSW* (Forbes Society, Sydney, 2003). It was no accident, in the 1960s, that parallel steps were taken towards abolition of civil jury trials and the introduction of a *Judicature Act* system of court administration.
- 24 No sooner had a *Judicature Act* system commenced operation on 1 July 1972 (with the commencement of the *Supreme Court Act 1970* NSW) than case management theories came into vogue. They are not unrelated to outcome driven management philosophies in vogue, from at least the middle of the 20<sup>th</sup> century, in public administration theory generally. With the abolition of civil jury trials, processes of curial determination by judges sitting alone, the embrace of case management attitudes of mind, and the ubiquity of directions hearings in all courts, the very concept of a “trial” (a once for all hearing on a particular day) has been displaced by incremental steps, unheralded and often unnoticed: J.J. Spigelman, “Truth and the Law” (2011) 85 *Australian Law Journal* 746 at 751-752 .
- 25 Just as we have re-fashioned the concept of a “trial”, so there have been other accommodations in the litigation process.
- 26 One needs, always, to look to the substance of what is done as well as to its form. Discovery, these days, is not wholly unlike processes for issuing

subpoenas and serving notices to produce. With the practical abolition of “general discovery”, courts have been, perhaps, more liberal in allowing the use of subpoenas and notices to produce in lieu of Equity’s traditional processes for the discovery of documents (“discovery”) and discovery of facts (interrogatories). And, one suspects, compulsory mediation processes have provided an informal substitute for the procedural devices of discovery and interrogatories by compelling parties to engage in discussions under the scrutiny of an independent third party.

- 27 A topic for another day is whether the nature of civil litigation has changed, is changing or will change dramatically by: (a) administration of dispute resolution procedures through “specialist” courts, tribunals or lists in which, under judicial management, all participants tend to develop common expectations about law, procedure, practice and evidence (the full range of substantive *and* adjectival law) in dealing with commonly occurring cases; or (b) a blurring of administrative and judicial functions as “judicial” decision-making processes become more managerial, and “administrative” decision-making processes become more judicial, *via* the Civil and Administrative Tribunal of NSW (NCAT), integrated in the Court system with appeal mechanisms that vary with the nature of the jurisdiction exercised.
- 28 Much of what we do in the conduct of civil litigation, especially under a regime of “case management” is about managing expectations in a variety of approaches to problem-solving. In a legal community, of which we all form part, this is an ongoing conversation.
- 29 Accepting for the moment the validity of distinctions between substantive and adjectival law, we should remain open to the possibility that, by silent steps, practice and procedure can drive changes in substantive law.
- 30 An example of that may, possibly, be seen in the conduct of litigants, at trial, in the way they sidestep disputes about the unity or diversity of “estoppel” concepts by agreement on the elements of an estoppel formulated by Brennan J in *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at

428 - 429. By their autonomous definition of issues to be determined, parties can govern the course of a trial, and the scope for appellate review.

GCL

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