

Print Page

Close Window

Courts In The 21st Century – Should We Do Things Differently?

AUSTRALIAN COURT ADMINISTRATORS GROUP CONFERENCE COURTS AND TRIBUNALS IN THE COMMUNITY: THE ROLE OF ADMINISTRATORS

SYDNEY - NOVEMBER 2005

COURTS IN THE 21ST CENTURY – SHOULD WE DO THINGS DIFFERENTLY?

The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales

There is always a temptation to assume that the achievements of our own generation represent the pinnacle – no one can do better. Although we hear the old saying “records were made to be broken” we do not always believe it. And so it is with other human endeavours. Those of us involved in the administration of the law are tempted to believe that the latest judgment from the High Court in a particular area has finally explained the law and it will not require re-examination or revision. Is the decision in *Vairy v Wyong Shire Council* [2005] HCA 62 the last word on the law of negligence? We wish it was but know it is not. Does the *Evidence Act* 1995 provide a satisfactory framework by which evidence can be admitted and decisions made in trials both now and in the future? Again, we wish it was so but very few who have to interpret and apply its provisions would argue that it will survive unchanged. Some would go so far as to suggest that change is necessary sooner rather than later.

Centuries ago problems between citizens were resolved by quite different methods to those we use today. The medieval person gave allegiance to God through the church. When problems arose requiring a decision as to whether a person was guilty or in other contexts, was telling the truth, the church participated in a common form of trial which imposed an ordeal on the accused or defendant. In one type of ordeal the medieval priest would commence by blessing a heated iron accompanied by an incantation which could take the following form:

“Oh God, the just judge, who are the author of peace and give fair judgment, we humbly pray you to deign to bless and sanctify this fiery iron, which is used in the just examination of doubtful issues. If this man is innocent of the charge from which he seeks to clear himself, he will take this fiery iron in his hand and appear unharmed; if he is guilty, let your most just power declare that truth in him, so that wickedness may not conquer justice but falsehood always be overcome by the truth.” (Zeumer, *Formulae*, pages 700- 701)

A person accused of a crime or seeking to claim or defend his or her rights (almost always his) would, after a solemn three day fast, pick up the hot iron, walk 3 paces and put the iron down. His hand would be bandaged and sealed and, then, after 3 days, inspected. If it was clean – that is healed without discolouration - he was innocent or vindicated, if the wound was unclean he was guilty. There was no right of appeal.

There were various types of ordeal tailored to meet particular “litigious situations.” Enduring a hot iron, or hot or cold water were common and on occasions fire was utilised. The law codes of 13th century Scandinavia provided that if a woman’s husband accused her of adultery she must clear herself with the iron. Men would commonly be faced with the hot iron if accused of sexual crimes.

In the series of laws issued by Edward the Elder in the 10th century to the Assizes of Henry II in the 12th century the ordeals by hot iron and cold water are prescribed for a wide range of offences including murder, fire raising, witchcraft, forgery and simple theft. Apart from criminal and civil processes the ordeal was also used to determine matters of religious belief and heresy.

Trial by physical ordeal gave way to trial of a different kind, a trial where the evidence was verified

upon oath. This was itself an ordeal - the assumption being that God would render justice to the liar if society's process did not. Swearing by Almighty God carried with it the prospect of an adverse finding on the day of judgment.

It is not surprising that as learning and knowledge increased and science brought forward explanations of natural phenomena the community sought out rational ways of determining a person's guilt or innocence or resolving disputes between citizens. The ordeal which invoked natural phenomenon to determine issues which could otherwise not be decided gave way to a system where disputes were determined after an analysis which applied a rational mind to the available evidence. The court process has gradually evolved to provide this change.

No one is certain why the English adopted the adversarial system to resolve disputes. The reaction to the "Star Chamber" of the 17th century may have been the critical factor – the inquisitorial system being perceived as too close to the detested prerogative court. The fundamental elements of natural justice - the right to have an independent decision-maker and be heard in your cause - were the foundation for the trial process. As the courts developed, rules were required to guide the process and inform the decision-making function. Bureaucratic mechanisms were created to manage the documents and assist the trial process. If the system was to work fairly advocates were necessary to both assist the litigating parties to provide the court with the evidence and to help with its analysis. In large part these developments occurred within a society where the great majority of people could neither read nor write and did not own property. As a consequence, by the end of the 18th century rules had been formulated for criminal trials which were intended to protect the illiterate and disadvantaged from any inherent unfairness in the working of the criminal law.

The increase in commercial activity and the rise of a middle class saw the growth of civil litigation. This created a need for the courts to respond with an effective trial process supported by the efficient management of cases. It did not always happen. The great novelist Charles Dickens variously suffered at the hands of the law, participated in its workings and wrote of its shortcomings. In his novel "Bleak House" Dickens writes of the celebrated law suit Jarndyce and Jarndyce in these caustic terms:

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every master in Chancery has had a reference out of it. Every Chancellor was "in it," for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers in select port- wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers, the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, "or when we get through Jarndyce and Jarndyce, Mr. Blowers"--a pleasantry that particularly tickled the maces, bags, and purses."

Dickens describes the Court of Chancery in colourful language:

"This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every

churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearing out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give -- who does not often give -- the warning, 'suffer any wrong that can be done you rather than come here!' "

One of the indicia of a civilised society is that it provides a process for the peaceful resolution of disputes between citizen and citizen and the citizen and the State. The fundamental objectives of the process are that it be fair, efficient, and its decisions accepted by the community as just. A fair system must be accessible. If this is to occur it must ensure that the cost of litigation remains proportionate to the nature and money value of the problem which is to be resolved.

Many legal disputes involve conflict between the citizen and the State. Most criminal cases are prosecuted by the State. Complaints about administrative decision-making in relation to areas such as immigration, taxation and the environment normally have the State, in one of its manifestations, on one side of the dispute. The resolution of these matters must take place in a facility provided by the State with its decision makers capable of making decisions contrary to the State's interests. The system requires significant capital to provide court buildings, judges and administrative staff. The State must supply sufficient resources to enable the court to function in a manner which meets the fundamental objectives. The money cost to the State is significant. The importance of spending that money appropriately cannot be overemphasised.

There are, of course, many disputes between citizen and corporation where the interests of the State are not directly affected. However, the State maintains an overriding interest in ensuring that the problem is resolved in a peaceful manner. Many of these problems can be and often are resolved by private dispute resolution mechanisms with resort to the publicly funded courts only when the outcome of that process is not accepted by one of the parties.

One challenge for government in the 21st century will be to ensure that adequate resources are available to enable the courts to discharge their fundamental obligations. The challenge for the courts must be to provide and manage the litigation process to make the best use of the available resources. They can not do this alone and legal practitioners must accept responsibility for ensuring that their practices are compatible with the fundamental objectives. There is no reason to assume that the methods we have used in the past are the most appropriate for the future. Courts and the legal profession must listen and respond to the community which they serve.

Charles Dickens makes the point that in the 19th century the civil litigation process had broken down and was badly in need of repair. Although serving the interests of those who made money from litigation it was so far removed from the practical interests of the litigants that injustice was inevitable. Some 19th century litigants may have been literate and some no doubt had significant financial resources. For many it was otherwise. In later years with the growth of corporations and the concentration of commercial power as a result of the industrial revolution, followed more recently by the technological age, the prospect of injustice because of the different level of resources available to litigants is acute. The courts must be careful to protect the rights of the less fortunate and so far as they are able provide them with an ability to litigate on, at least roughly, level terms. Unless this is possible the great advances western society has made in human rights for its citizens will inevitably be diminished.

Australia inherited the adversarial system and we have assumed it to be the most effective means of resolving disputes. However, we have not always been concerned with its efficiency and cost. In its purest form – the adversarial system contemplates the court, through the judge, providing a forum with a neutral umpire who presides over a contest carried on by the parties with the assistance of their advocates. The rules administered by the umpire extend to the process of the trial, the admissibility of evidence and the analysis of that evidence to determine who will win. One consequence of the adversarial system is trials in which "ambush" of the opponent can bring considerable forensic benefits. Many have questioned whether this is the appropriate means of achieving a just outcome.

The 20th century has seen many developments in the litigation process. In response to the growth of commercial activity in the community a commercial court was established in London in 1895. It was

followed by the *Commercial Causes Act* 1903 in NSW at the beginning of the 20th century. In the latter part of the century the Commercial Division of the Supreme Court of NSW saw a revolution in the way the court served the commercial community of New South Wales and Australia. It took up many of the tasks which had been identified as able to assist in the efficient resolution of disputes.

At the time when the commercial causes legislation came into force the NSW Parliament was also turning attention to legislation to provide for the arbitration of commercial disputes. The *Arbitration Act* 1902 provided a structure whereby commercial people could engage experts to resolve their disputes subject always to the ultimate supervision of the Court. In 1985 the Supreme Court Rules 1970 were amended to provide a process of appointing expert referees to investigate and report in relation to a dispute. The intention, which has been achieved in practice, was to provide an expert referee with knowledge and learning appropriate to the dispute. It was introduced in recognition of the fact that judges may not be the ideal adjudicators of problems outside their usual area of learning.

But change was not confined to New South Wales. During the latter part of the 20th century courts in many common law countries began to review and modify the litigation process in an endeavour to enhance access to all members of the community. Some of these changes have been external to the court and others have been devised by them. There have been a combination of measures.

One of the most significant changes has been the reduction, in some places almost the complete elimination of juries in civil trials. Once sacrosanct civil disputes are generally confined to judges, with juries being utilised only in criminal trials. Another significant development has been the provision of legal aid. Available in both criminal and civil litigation it originally offered the prospect of funding both the impecunious and the not so impecunious with modest sums to provide an opportunity to enforce his or her rights. However, always hindered by inadequate resources, it has never been able to provide significant assistance to the moderately well off. Increasingly, even the impecunious civil litigant finds little assistance from legal aid, although in one form or another, it still funds the defence of alleged offenders.

The effects of the reduction of legal aid for civil plaintiffs is readily identifiable. Apart from its impact on private litigation the difficulties in funding "public interest" litigation are observable in the reduction in court challenges in many areas, including the environment.

Within the court system many changes have occurred. Simplified pleadings have been introduced. Many more cases proceed by summons avoiding the necessity for complex, and sometimes costly, pleadings of marginal relevance. Discovery has been confined and made more specific. Efforts have been made to define the issues to be tried in advance of the hearing and sanctions are imposed for non compliance with pre-trial directions.

Courts have encouraged parties to resolve their disputes by alternate means rather than litigate. Mediation and neutral evaluation have been utilised. Court sponsored mediation is developing, albeit slowly, and not without concerns by some as to whether it is an appropriate use of judicial resources. Special rules apply to the commercial court in London where litigation cannot be commenced without the dispute first being mediated. In Australia some courts require the mediation of suitable disputes after they have already commenced. Other pre-trial negotiation processes have been imposed.

As part of the pre-trial case management process, litigants have been required to identify with particularity the case they propose to make and the evidence which will support it. Affidavits, witness statements and expert reports are required to be prepared and exchanged. This has been done not only to make the trial more efficient but also to provide an opportunity for the parties to appreciate the strength of the respective positions and consider whether settlement is appropriate.

Although not always understood as such, these changes are a significant intrusion into the adversarial system and in many respects do not sit comfortably with it. In its purest form the adversarial process condones, some would say promotes, "trial by ambush." Modern reforms have attempted to diminish the camouflage and remove the surprise.

More recently the courts have acknowledged that the litigation process must embrace the technological age. Not all in the community are computer literate. However, it is useful to remind ourselves that many litigants in the 19th century were not literate in the conventional sense and litigants were dependent on their agents to conduct litigation on their behalf.

With the taking up by the general community of the advantages which technology has brought, both in

the storage and distribution of knowledge and the capacity of people to communicate with each other, which for Generations X and Y is what the biro was to the baby boomers, the benefits of technology must be quickly translated into the litigation process. The mobile phone, once an appendage of the “trendy”, has become an essential accessory of most people’s lives. It will not be long before disputes are commenced, managed and concluded in electronic form. The change has already started in some places and will inevitably accelerate.

These are some of the more recent changes. What of the future?

The use of technology

As I have indicated the courts have begun to embrace technology. Familiarity with its advantages will bring an increasing awareness of its utility. Many pre-trial processes can be conducted by email and greater use must be made of the telephone. In the New South Wales Land and Environment Court a great many pre-trial directions are issued following internet or telephone exchange between the Court and the parties. My personal experience confirms that it is not only successful but can bring very considerable savings in time and cost to the parties. It is used both by the Registrar and the Judges.

I have noted with interest the discussion in recent days of video evidence. This process is in its infancy and is still viewed with suspicion by many judges and practitioners. Its development has been hampered by problems with the quality of the transmission. However, it was used in the recent “HIH” trials. A witness was in London and examined from Sydney, without difficulty. One comment I have heard is that it gives the jury a greater opportunity to appreciate the witness’s demeanour. They get a close up view as the evidence is given. I understand both picture and sound were of high quality.

A word of warning. If courts are to be able to make the best use of the available technology there will need to be a commitment to fund the capital cost. This may not be cheap. Providing court rooms with computer capacity for the judge, jury and multiple parties will prove expensive. To my mind, this is a priority for capital expenditure.

Expert Evidence

It has been apparent for some time that the growth in our knowledge of natural and man-made phenomena is accelerating. Its impact on litigation has been significant. Centuries ago the ordeal provided the forum for the answer to a problem which may, in truth, have required an understanding of specialised knowledge. Later, an expert jury may have been called to resolve a complex scientific question. Our present mechanisms impose that obligation upon a judge and sometimes on a jury. Whether these mechanisms will continue to be acceptable to the community may be questioned.

The adversarial system has many virtues. When an understanding of historical events is in issue it allows the parties, through their advocates, to put their account of events and test the relevant recollections. The giving of oral evidence allows the decision-maker, judge or jury, an opportunity to evaluate the veracity of the witness’s testimony. That process is unlikely to change.

The evidence of experts raises different issues. Experts are available to assist in the analysis of the cause of the accident through to the future needs of the disabled plaintiff. Contrasted with even thirty years ago the increase in the community’s knowledge has generated experts in many fields of endeavour. DNA evidence has significantly altered the tools of the prosecutor and it must be assumed that medical science will provide further advances of this type in the future. The question which is already asked, and will be asked more frequently, is whether disagreements between experts should be resolved exclusively by lawyers without the assistance of people with the knowledge of the relevant field of learning.

From time to time the use of assessors or other experts to assist the court has been discussed and trialled. However, these methods have not been significantly embraced. But the question has not gone away. The trend, at least of the last thirty years, has been to question the role of judges and the courts as the ultimate decision-maker where the problem requires the application of another professional discipline. This trend will continue and the experts will want to claim a greater role in the determination of disputes within their area of expertise. Furthermore, I believe it likely that the litigating public will wish this to occur. The community will not leave all decisions to the judges.

In some jurisdictions changes have already taken place. The use of expert referees to report to the court on particular questions within the referee’s area of expertise, and sometimes the whole of the problem, has been used successfully. With an increasing pool of able people to draw from, this method of resolving disputes will almost certainly increase. Although more expensive, the referee and

the accommodation must be paid for, it can prove quicker than the court process and has the advantage for some that the hearing is not exposed to the general public. There is every reason to expect this trend to continue.

What will certainly change is the dependence on the adversarial system in its traditional form to resolve disputes between experts. Change is already occurring. Regrettably, many who have expertise in a variety of fields of learning will not accept a retainer which may involve them giving evidence in the court room. The belief of these experts is that the current court process is not concerned with identifying the truth but rather with achieving a victory for one or other party. The expert is not required to discuss or debate the issues with another expert and seek where possible common ground. Rather the debate is with an advocate hired for the event with little interest in the resolution of the problem beyond achieving a win for his or her client. If a problem arises in business, engineering, medicine or many other areas the experts do not set up a court case to resolve the disagreements. Rather they meet, exchange their views and seek common ground. If that cannot be found, one person or a committee, who has listened to and perhaps participated in the discussion, will decide the way forward. Why should the court be different?

Some courts have sought to address this issue by modifying the expert witness process using single experts, court appointed experts and taking the evidence of experts concurrently – a process which encourages discussion between the experts directly. I have spoken about these processes on many occasions.

An issue which may have to be faced is whether the trial process should be modified so that a party cannot withhold the evidence of an expert out of a concern that the evidence which he or she offers may not be “as good” (ie beneficial to their client) as the other party’s expert evidence. The present process where you can hire many experts but produce only some or perhaps none at all to give evidence is a vestige of the adversarial system with its “trial by ambush”. The assumption is that the party “owns” the expert. Maybe future rules should provide that once an expert’s report has been filed that person must be available to give evidence with the other experts if the opposing parties require this to occur. Perhaps if an expert has been retained correspondence with the expert should be discoverable. One illustration of the consequences of revealing the correspondence between expert and solicitor can be seen in *Universal Music Australia Pty Ltd v Sharman* (2005) 220 ALR 1 at 57.

Expert evidence can give rise to acute problems in criminal trials. The difficulties in England with paediatric evidence in cot death cases has served to highlight the issues. The blood which turned out to be paint in Lindy Chamberlain’s car has, amongst other matters, stimulated similar discussion in Australia. One suggestion being explored in the United Kingdom is the accreditation of experts. Only if accredited by the relevant professional body, or with the leave of the court, will the expert be permitted to give evidence. If the expert is found to be unsatisfactory, having regard to appropriate ethical and professional standards, the accrediting body, after appropriate enquiry, could withdraw accreditation. These possibilities are now being considered in Australia.

Rules of evidence

Some of our modern rules of evidence date to the Middle Ages but in most cases their development began with the decisions of the common law judges in the 17th and 18th centuries. They were somewhat crudely described by Cockburn CJ in *R v Birmingham Overseers* (1861) 121 ER 897 at 899 in the following terms:

“People were normally frightened out of their wits about admitting evidence unless juries should go wrong. In modern times the tendency is to admit the evidence and discuss its weight.”

It was not until as recently as 1895 that a defendant could give sworn testimony. Referring to his report on the criminal justice system in the United Kingdom Sir Robin Auld referred to these developments in critical terms saying: “rules devised in the main for the protection of the 18th and 19th century unrepresented and procedurally crippled accused from the barbarous penalties resulting from conviction by a barely directed jury are no sensible basis for our law of criminal evidence today.” (Sir Robin Auld *Criminal Justice System: Experiences from the United Kingdom* British Council, India, 2004, at 29 and see also Sir Robin Auld *Review of the Criminal Courts of England and Wales: Report*, London, October 2001 at (p 11, para 76) His Honour went onto to question whether many of the rules remain appropriate when the judges and not juries are increasingly the finders of fact.

From the early beginnings came the rule against hearsay, the rule excluding opinion evidence, and many other restrictions designed to ensure that the reasoning process of judges and juries was pure. As Cockburn CJ points out, now that juries are generally confined to criminal cases, there are signs of a significant relaxation of the rules concentrating upon the weight to be given to the evidence rather

than being overly concerned about whether it can be admitted at all. A question which will increasingly arise is whether some of the laws of evidence, particularly the hearsay rule, designed to confine the material which can be tendered but which do not reflect how people in the community make decisions, should remain.

Criminal trials

The criminal trial will not escape scrutiny. The prosecution of corporate offences will no doubt continue and probably increase. This raises particular problems. Will the current form of the jury trial prove adequate for these complex matters – see *R v Petroulias* (2005) 152 A Crim R 244? Will the process require modification with a return to a jury of experts or perhaps some experts drawn from accountants or others with suitable qualifications? The ordinary person is equipped to reach a conclusion as to who is lying in relation to historical events but are they equipped, even with instruction from a judge, to form a conclusion as to whether the negotiations between the parties involving an analysis of emails, letters and oral conversations led to a binding contract? Or whether the auditor complied with his or her obligations under the Corporations Law?

Sentencing

Sentencing is always a controversial matter. For many people the sentences provided by statute and imposed by the judges are not adequate to deal with offenders. Other people are concerned about inconsistency in the sentences imposed for apparently similar offences. Some have questioned whether the imposition of a prison sentence for many offenders brings real benefit in reforming the offender and worry that it may encourage recidivism and more creative criminal activity upon release. Others are concerned that the prison system itself is inadequate to discriminate and provide punishment and educative regimes suited to the needs of particular individuals.

Many approaches to these problems have been suggested. Mandatory sentencing is spoken of, a greater involvement of members of the community in sentencing, including juries has been discussed. In New South Wales guideline sentences have been authorised by statute and provided by the Court of Criminal Appeal. The collection of statistical material by the Judicial Commission has proved of considerable assistance in defining a penalty in an individual case which is consistent with other penalties for similar offences. Difficulties have been identified as to the extent, if any, which the damage to the victim or the grief inflicted upon family members should be reflected in the sentence imposed.

The level of discussion of these matters confirms that there are unlikely to be solutions acceptable to all. However we can be certain the controversies will continue. It is foreseeable that although the judges will remain the final arbiters of appropriate sentences, they may be aided and informed by direct assistance from those who have expert knowledge of human behaviour and others who have a broad understanding of the community's aspirations.

Standing

In *Boyce v Paddington Borough Council* [1903] 1 Ch 109 Buckley J, in a decision which for many years was given application by Australian courts, laid out principles which confined the right of a member of the public to approach a court to enforce a public right. In 1980 the High Court in *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 146 CLR 493 adopted and reformulated the *Boyce* doctrine. Thereafter single judge decisions have tentatively opened the door to individuals associated with organised groups to bring proceedings seeking orders that a public authority obey the law. That the developments have been tentative was made plain by the remarks of McHugh J in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 where he said at [83]:

"The enforcement of the public law of a community is part of the political process; it is one of the chief responsibilities of the executive government. In most cases, it is for the executive government and not for the civil courts acting at the behest of private individuals to enforce the law. There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a law at a particular time or in particular circumstances may result in the undermining of the authority of the executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and blood shed."

There may be good reasons why any person in a community should not have a right to bring a criminal prosecution, or, at least, the State should have the right to terminate such a prosecution. However, many in the community would question whether it can be legitimately argued that any citizen should not have the right to bring proceedings to enforce a public law. If, as Justice McHugh argues, the particular law is no longer relevant or appropriate, having regard to contemporary problems, the legislature may repeal it, or, a court in the exercise of its discretion, may decline to enforce it. To adopt

the position that a citizen cannot approach a court to ask that a member of the executive or a government agency should obey the law, which the Parliament has provided in the interests of the general community may itself carry significant dangers for the stability of the community. Some of those dangers have been apparent in environmental disputes in New South Wales. Given that the court has a discretion as to whether or not to make orders, these dangers are likely to far outweigh any risks from the bringing of proceedings.

The oral tradition

The adversarial system promoted the oral tradition. The assumption is that once the evidence is complete the decision either by the trial judge or on appeal will benefit from an oral exchange between the advocates and the bench. In former times, when juries resolved most questions of fact, oral submissions were essential. In the latter part of the 20th century, when juries are not involved, courts have required written submissions both at the opening of a trial but particularly to assist the court once the evidence is complete. Written submissions are now required at all appellate levels including the High Court.

In my time as a lawyer the emphasis upon written submissions has significantly changed the skills required of the able advocate. It is not hard to see this trend continuing and courts confining the extent of oral discussion to critical issues which may not be adequately considered on paper.

The increased use of written material has been accompanied by a change in the style of advocacy which is necessary and effective in most courts. Aggressive demeanour supported by the grand rhetorical flourish is seen less today than in former years. Many see this style of advocacy as a product of the previously male dominated legal profession where aggressive demeanour toward opponent, witness and sometimes the bench was assumed to be the best form of persuasion. With the increased use of written material comes a greater focus on the intellectual quality of the argument, diminishing the significance of the theatrical capabilities of the advocate. This has been both stimulated and accompanied by the increasing presence of women as advocates. It is now clear that that presence will increase.

Although there are exceptions, in my experience the style of advocacy which is most effective and compatible with these developments is that which has generally been adopted by women. The skilled cross-examiner will increasingly demonstrate an ability to destroy the intellectual integrity of the witness's position without rancour, impatience or an overbearing presence. Persuasion of the jury or the judge will be achieved by the assembly of the intellectual building blocks – the grand gesture accompanied by emotional pleas will have less relevance than in the past.

Women advocates are bringing significant change to the forensic methodology of the courtroom – this will intensify as their numbers increase.

Final thoughts

Writing in the *New Zealand Law Review*, Sackville J talked of the problems faced by courts in meeting the needs of contemporary society (see Justice Sackville, "Courts in Transition: An Australian View" [2003] *NZ Law Review* 185). Acknowledging the community's entitlement to expect that courts and tribunals will operate fairly expeditiously and without undue expense, Sackville J recognises the need for the community to constantly review whether the court process meets contemporary community needs. A common theme echoed by his Honour is to question whether an "unrestrained adversarial culture", spoken of by Lord Woolf in his report "Access to Justice: Interim Report" (1995) 18, meets the needs of contemporary society.

As I have indicated, providing a system which is independent and fair but confines the cost to the State and litigants to that which is proportionate to the problem is now an acknowledged challenge. Over the latter part of the 20th century western communities have demanded of both government and private corporations increased efficiency in the utilisation of the available capital resources both physical and human. The courts cannot remain immune from these demands. Judges, court administrators and lawyers will be required to accept new burdens and modify existing practices to ensure that the available resources are efficiently used. Even though a practice may have proved appropriate in the past, the courts and the legal profession will be asked to continually consider whether the problem can be solved more appropriately in the future.
