JUDGES IN SEARCH OF JUSTICE

by

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> "'What is truth' said jesting Pilate and would not stay for an answer. I have not forgotten that when Pilate said this he was about to leave the judgment hall."
>
> Sir Owen Dixon "Jesting Pilate" p 10

The then Lord Justice Denning, speaking of the judicial function said: "His object above all is to find out the truth and to do justice according to law" (Jones v National Coal Board [1957] 2 QB 55 at 63; cf Lord Maugham, "Observations on the Law of Evidence with Special Reference to Documentary Evidence" (1939) 17 Can Bar Rev 469). Having delivered this unimpeachable sentiment as part of the judgment of the Court, he then went on to impose what some might think are substantial obstacles in the way of a judge arriving at the truth and doing justice. Alternatively, he was using "truth" in a highly artificial sense. As will be seen, Lord Denning painted the judge as a type of a referee adjudicating solely on the material the parties see fit to place before the court. This approach would accept that a possibly crucial witness might not be called at all and the evidence the witness could give remain unknown to the court. The questions thrown up by this kind of dilemma in the search for truth on, possibly imperfect, material go to the heart of what should be accepted as proper performance of the judicial function.

Even more basic is the question: what should be the function of a trial? What should be the function of a judge in the search for truth? When and where should the judge draw the line in the search for the truth? Is the community content that adversarial procedures should yield a resolution of the dispute solely on the basis of arguments presented to the court by the parties? Is a judge to preside over a contest like an umpire and make a determination on the basis only of the evidence the parties see fit to adduce? Is the trial to be shaped by and come on for hearing at the pace dictated by the parties and without any attempt at case management by the judge? Should there be a change to a more inquisitorial type of procedure? Should a judge attempt to bring about a settlement?

It is important to recognise that the questions offered for discussion are not simply about the procedure to be followed in litigation. Definition of the purpose of a trial, the function of a judge and scope of the enquiry far transcend procedural niceties.

The fundamental questions posed are basic to problems confronting the administration of justice in Australia in the 1980s. I am afraid that this paper cannot offer definitive answers. I am certainly not alone in my difficulty. Lord Devlin, after discussing the adversary procedure and contrasting it with the inquisitorial in The Judge (pp 54-83), refrained from final conclusions. A good

deal of further research is required before any suggestions which go to the heart of the questions posed can be put with confidence. In Discussion Paper 16 on Reform of Evidence Law, the Australian Law Reform Commission said (p 12):

> "The larger question of the merits of the adversary system as opposed to the continental judicial enquiry approach would appear to be beyond the terms of the Evidence Reference. It might be said that it is worthy of a reference in its own right."

Mr Connolly QC in his oral presentation at the 1975 Australian Legal Convention, mentioned (49 ALJ 685) the conclusion drawn by the Rapporteur at an IBA Conference:

> "It may not be possible to make any conclusion about the relative merits of different procedural systems and cultural differences from country to country make any generalisations suspect. Nevertheless, the following generalisation is offered for discussion: The mediation system is the best means of resolving disputes to the satisfaction of the parties, the inquisitorial system is the best means of finding the truth and the adversary system gives the most impressive display of 'justice being seen to be done'."

Whilst the community awaits a more thorough examination, discussion of the problems may at least ventilate the issues that customarily tend to submerge under the pressures of professional life.

Before commencing the discussion, it may be appropriate to draw attention to the view of Guido Calabresi in A Common Law for the Age of Statutes (1982) in which he contrasts the scholar's obligation to "think lucidly and openly" about issues whilst a judge must act in a manner sensitive to

political and other realities and may need to sacrifice openness and candour. In what follows I have sought to follow the path of a scholar.

The basic and elementary questions I have mentioned are thrown up for consideration because of the entrenched features of the adversarial system of dispute resolution which Australian courts have inherited from England. As one commentator described that system (49 ALJ 439):

> "Its essential characteristic is that the contestants define the paramaters of the dispute. they introduce such evidence as they think fit and advance such legal propositions as seem appropriate to them. The judge is above and beyond the battle."

To that catalogue may be added features that have suffered considerable attention in more recent times. Included are the fact that the parties disclose as little of their case to the other side as possible prior to the commencement of the hearing and proceed to the trial at the speed, or lack thereof, that their own and their lawyers' convenience dictates.

It is ironic in the extreme that although the adversary system owes many of its fundamental features to the system of trial by jury it has survived the virtual disappearance of jury trials with its principal elements intact.

Recently, Lord Roskill reiterated the orthodox theory of the function of a trial and of a judge in the traditional

adversarial procedure. In Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854 at 920, he said:

> "The adverb 'fairly' has been frequently used in the context of what is called a 'fair hearing'. It is said that a hearing cannot be 'fair' if witnesses or documents who or which might have been available at an earlier date were no longer available. But this risk is inherent in all litigation and all arbitration. Even at an early date a witness may die or become unavailable for some other reason and documents may be destroyed. Sometimes witnesses are available to parties but not to the court since, for what is thought to be good reason, under our adversarial system, they are not called and available documents may not be put in evidence. To say that in those circumstances the trial or the hearing of the arbitration is not 'fair' is, with respect, misuse of that word. I agree with my noble and learned friend, Lord Brandon of Oakbrook, that the better phrase is 'not satisfactory'. Every tribunal must do its best with the material placed before it. But no tribunal can add to that material however much it may wish to do so; and if in the end the result is 'not satisfactory' the blame lies not with the tribunal but with the parties. In such an event I do not think the result can be said to be 'unfair'."

Is this comfortable thought, that the fault lies with the parties for a not satisfactory hearing, acceptable? Lord Roskill's comments make clear that the problem is not an elevated philosophical discussion point for the delectation of lawyers. I would hazard a guess that most people outside the legal profession would be little short of horrified at the lawyers' apparent ready acceptance of the possibility of a trial being unsatisfactory in the sense in which the word is used by Lords Roskill and Brandon.

Not surprisingly, many judges have felt uncomfortable with the proposition that, notwithstanding their best efforts,

from time to time they can provide only a hearing which, even if not to be labelled unfair, is not satisfactory. Unfortunately, even marginal changes to the adversary method of procedure calculated to surmount some of the features making the trial unsatisfactory are slow to evolve and difficult to effect. The voice of change can be heard in Superintendent of Licences v Ainsworth Nominees Pty Limited (NSW Court of Appeal, unreported, 23 July 1987). However, as the judgment points out, the particular proposal has not progressed since it was first mooted by Street CJ in 1981. Samuels JA said:

> "I think that the time has come to consider the desirability of loosening the grip which the adversary or accusatory system has upon forensic procedure in Australia. There is much to be said in favour of the view that fairness and efficiency in the conduct of trials and first instance proceedings generally would be promoted by permitting the judge or magistrate to play a larger and more constructive role than that at present allowed. ... These matters of procedure were not argued and therefore I mention them only briefly and because they are of general importance and should be discussed. They involve the question whether the rule in New South Wales is that a judge in civil proceedings has no power to call a witness save with the consent of the party: see Cross on Evidence (3rd Aust ed, 1986) at 375 and following for a discussion of the principle and citation of the cases. It is possible, however, that the authority of Re Enoch & Zaretzky, Bock & Co's Arbitration [1910] 1 KB 327 has been unduly extended. This was the view expressed by Street CJ in R v Damic [1982] NSWLR 750 at 755-6, and by Wilcox J in Obacelo Pty Limited and anor v Taveraft Pty Limited and anor [1986] 66 ALR 371. Reference might also be made to the article by Sheppard J, "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?", in (1982) 56 ALJ 234. There, his Honour, after detailed examination of the issue, concluded (at 243) that in both civil and criminal cases the judge should have a discretion, 'to be exercised sparingly and with great care', to call a witness over the opposition of a party. I respectfully agree. So

> far as I can see the question has not been referred to any Law Reform Commission in Australia. The rule, as conventionally understood, was mentioned by the Australian Law Reform Commission in Vol 1 of its Interim Report No 26 (1985) on Evidence. To my mind it is time that the position was clarified in favour of the views of Street CJ, Sheppard J and Wilcox J."

Marquet v Marquet (NSW Court of Appeal, unreported, 23 September 1987) involved a dispute over the custody of a child and, therefore, admittedly was in a special category. No doubt, by reason of that fact, Kirby P felt able to go further than earlier judgments when he said:

> "There was, regrettably, no expert evidence before his Honour as to the psychological effect of such disruption upon the life a such a young child, in being removed at the age of two and a half years from the environment of his relationship with his mother, especially given the virtual continuity from his birth. In my view, such evidence should have been given at the trial. I regard it as virtually indispensable for the proper resolution of a case such as the present not to usurp the judicial function but to help it to be properly exercised. If necessary, it should have been required by his Honour. His Honour's task was not, in this case, simply to resolve the respective rights of the parties before him. His orders affected the rights of a person who was not a party to the litigation but whose interests were principally at stake. In such circumstances, I consider that a Judge of the Court is entitled to seek expert assistance from a child psychologist or psychiatrist as to the typical impact of the disturbance of established relationships. The Court was informed that such is frequently done in the Family Court of Australia where, but for an accident of constitutional history, this case would have been resolved." (emphasis added)

Whilst comments such as these suggest that courts are becoming restless and change may be on the horizon, there have been false dawns before. The industry of Young J has

unearthed a judgment of Scrutton LJ, obscurely reported and all but forgotten, in Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou (1931) 107 LJ KB 386. Scrutton LJ said (p 389):

> "It must be remembered that the court is not a mere machine to decide such issues, genuine, fictitious or collusive, as the parties choose to put before it, on such evidence, complete or incomplete, as they choose to put before it, without any power of enquiry into the truth of the matters and of investigating whether the judgment is to be used for purposes for which it could not be used if the real facts were known. The question may be illustrated in this way. Suppose in the first case in the day's list, A v B or A v X - it does not matter which - evidence is given which satisfies the court that B is dead. The next case is called on, C v B or C v Y and the parties proceed on the footing that B is alive. The court cannot proceed on its finding in the first case that B is dead, but it can and ought to either require evidence that B is alive, or, if the parties will not enter such evidence itself direct the official solicitor to investigate and produce evidence whether B is alive or dead. One exercise of that power will be found in Harbin v Masterman [1896] 1 Ch 351."

Whether a judge should have the power to call a witness of his own motion, as suggested by Samuels JA, is but a small facet of the larger philosophical problem. Nonetheless, even this modest proposal meets resistance in entrenched judicial views as to the role of a judge. Take the admittedly extreme example given by Scrutton LJ. Is the farcical situation presented to the court to be tolerated? Is this justice? Is it satisfactory to the community that the search for truth should degenerate into an expensive enquiry into some but necessarily all of the facts? Surely there can be no quarrel with the proposition that "for a 'correct' decision to be achieved the court must be able to

obtain and to use the information which it considers necessary, rather than that it should base its decision only on the information which the parties are willing that it should have." (Jolowicz, "The Dilemmas of Civil Litigation" (1982) 18 Isr L Rev 161).

The shackles of orthodoxy have at times entrapped even such a far sighted and activist a judge as Lord Denning. In Jones v National Coal Board [1957] 2 QB 55, an appeal was taken to the English Court of Appeal and one of the grounds of complaint was that the nature and extent of the judge's interruptions during the trial had been such as to render it impossible for the plaintiff's counsel to put her case properly or adequately or to cross examine the defendant's witnesses adequately or effectively. It is interesting to note that, on the fourth day of the hearing of the appeal, counsel for the respondent sought and obtained the leave of the court to give notice of cross appeal on the same grounds, that the extent of the judge's interruptions had prevented the Board from having a fair trial. A future Lord Chancellor, Gardiner QC, appearing for the plaintiff appellant said in argument, "In substance the judge conducted the trial on both sides." A future Law Lord, Edmund Davies QC, counsel for the Board, is reported in argument as saying that the judge "with his keen mind, his passion for the law and his passion for exploring a point to its last position" nonetheless came to the correct conclusion. Through Lord Justice Denning, the court responded (p 63):

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and notable role. Was it not Lord Eldon LC who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'? See Ex parte Lloyd (1822) Mont 70, 72n. And Lord Greene MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Green, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict' see Yuill v Yuill [1945] P 15, 20. ... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that (Essays or Counsels Civil and Moral. Of Judicature): 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"

Lord Justice Denning quoted from the judgment of Lord Greene MR in Yuill v Yuill [1945] P 15 at 20 but it is appropriate to complete that citation:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so

> to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and over practically the whole of the crucial matters which are in issue."

The comments I have cited and the approach that they encapsulate are pregnant with many assumptions. For example, it is assumed that all parties are represented by competent counsel. If counsel on all sides are incompetent, how will the truth emerge? If one party is represented by skilful and experienced counsel and the other by a raw junior, of no great intellectual eminence, is the judge to keep aloof from the unequal struggle? Should the court allow points to become submerged in incompetence or inexperience? What is to be done if the "powerful statements on both sides" referred to by Lord Eldon are restricted to one side? The dilemma so posed is only obscured by high flown language describing a judge who seeks to bring about equality in the contestants as "no well tuned cymbal". I would suggest that the comments I have cited fail to adress some of the consequences that obedience to the prescribed course of conduct may bring in its train. There is no judge who has not seen a meritorious case lost through incompetence, or laziness, or inefficiency. That is indeed a high price to pay for the opportunity to bring a well tuned cymbal to play.

So far efforts to effect changes to the adversary procedure have not been attended with much success. When the Family Court was established in 1975 it was thought by some that, integral to the change in methods of resolving disputes between husband and wife, should be a departure from the adversary system. It is to be noticed that s 97(3) of the Family Law Act 1975 declared that it was the duty of the court to endeavour to ensure that proceedings were not protracted. In R v Watson ex parte Armstrong (1976) 136 CLR 248, a judge of the Family Court, of his own motion, directed that an affidavit should be filed by the wife as to her financial position at the time before she was first supported by the husband. An application for prohibition was made to the High Court arising from the judge's order and conduct of the hearing and, in the course of considering the matter, the court said (p 257):

> "These matters do not lend support to a charge of bias, but the active intervention of the learned judge in this way at this interlocutory stage was consistent with his remark that the proceedings were not adversary proceedings but were in the nature of an inquisition followed by an arbitration. It is impossible to allow that observation to pass uncorrected. It indicated a basic misconception as to the position of the court in proceedings of this kind under the Family Law Act 1975."

The court then went on to explain that, although unnecessary formality was to be dispensed with, the judge of the Family Court exercised judicial power which he was required to discharge judicially. Once again, perhaps it is permissible to suggest that the comment is pregnant with a basic

assumption. Why is it thought impossible to conduct a dispute resolution process at the same time judicially and in a non-adversary fashion somewhat on the pattern practised by some civil law countries in Europe?

It is interesting to notice an argument put forward in support of the view that a judge should have a non-activist role in a trial. One suspects that Mr Justice Connolly was playing the devil's advocate in the paper that he delivered at the 1975 Australian Law Convention. He suggested that (49 ALJ 439 at 441):

> "In a society such as ours, in which there is a profound suspicion of anyone who could be described as belonging to a social elite such as a professional caste, it may fairly be assumed that the involvement of the judge in investigation as well as decision would be socially disturbing."

It must be accepted that, as long as the adversary procedure is retained with all its features intact, the coincidence between verdict and truth will depend upon the parties and the quality of the performance of their legal advisers. The questions that ought to be asked include whether adoption of the system of judicially led enquiries is more likely to lead to the truth and whether there is some compromise between the civil law system and the adversary system better calculated to throw up the correct answer.

With the full panoply of the adversary process, as damned with faint praise by Lord Roskill, may be contrasted the German system. I should perhaps explain that the only

reason I am using the German code as a comparison is becuse I have access to more material relating to it than to other models. There are obviously considerable differences even between the investigatory models outside the socialist countries (see eg Cappelletti, "Social and Political Aspects of Civil Procedure - Reforms and Trends in Western and Eastern Europe" (1971) 69 Mich L Rev 847).

Under German law a court is considered to have a responsibility to see that the case before it is thoroughly investigated. S 139 of the Code of Civil Procedure provides that the presiding judge:

> "1 ... shall ensure that the parties make full statements regarding all relevant facts and make appropriate motions, in particular that the parties enlarge upon insufficient statements regarding the facts which they plead and that they indicate means of proof. For this purpose, so far as may be necessary, he shall discuss the case and the issues in both their factual and their legal aspects with the parties and ask questions.
>
> 2 ... shall point out doubts arising with regard to any point that has to be considered ex officio.
>
> 3 ... shall permit any member of the court who wishes to ask a question to do so."

This provision has been described as "the Magna Carta of the present German civil procedure" (Gottwald, "Simplified Civil Procedure in West Germany" 31 Am Jnl Comp Law 687 at 692). The underlying concept is simply that inequalities between the parties should not come between the court and the correct conclusion.

Nonetheless, as Professor Zeidler pointed out ("Evaluation of the Adversary System: As Comparison, Some Remarks on the

Investigatory System of Procedure" 55 ALJ 390) even under the German system the parties draw the ~~perimeters~~ parameters of the dispute and within these the court must determine the issues raised by the parties. Subject to that, it is the judge (p 395):

> "who advances the course of the proceedings and conducts the hearings at the trial. He has the duty of finding out the law including the foreign law and to some extent even the facts of the case. To allow the examination of the witnesses and experts to be placed in the hands of the attorneys has always been thought to be incompatible with the most important rule, namely that it is the chief function of a court of law to find out the truth and not merely to decide which party has adduced better evidence or, moreover, to conduct social enquiries."

A little later in his paper, Professor Zeidler drew a neat contrast between the principal features of the two systems when he said:

> "Indeed, in the judicial system, it is the duty of the court to search out the truth of the matter and not simply to name the victor in a litigious battle played according to the parties' terms. As a result, the judge interrogates the witnesses and experts, while the attorneys only put supplementary questions. If in the adversary system a judge takes over the examination of the witnesses from counsel, it is likely, if I perceive it rightly, that the Court of Appeal will order a new trial of the action. In contrast, in the investigatory system a judge's failure to discharge his duties under s 139 constitutes a procedural error on which an appeal may be based."

Lest it be thought that the latter system overcomes all the difficulties of the adversary system it would appear that even under the German procedure only witnesses named by a party may be ordered to appear (International Encyclopedia

of Comparative Law, Vol XVI, 6-440). Furthermore, s 278 of the Code of Civil Procedure provides that "even if a proof taken ex officio produces real new facts and arguments, the court is not entitled to consider them in its judgment unless at least one party takes up these facts in his own allegation".

Features of the German system have led Prof Langbein, amongst others, to conclude ("The German Advantage in Civil Procedure" (1985) 52 Uni of Chicago Law Rev 823) that:

> "The familiar contrast between our adversarial procedure and the supposedly non-adversarial procedure of the continental tradition has been grossly overdrawn ... [p 842] German civil procedure is materially less adversarial than our own only in the fact-gathering function, where partisanship has such potential to pollute the sources of truth."

Sir Richard Eggleston recommended in a paper delivered to the 1975 Australian Legal Convention (49 ALJ 428 at 437) that:

> "There should be a general enactment to the effect that it is the responsibility of the judge to take steps to ensure that cases are correctly decided and, accordingly, that the judge is entitled to intervene if he thinks that the case is being conducted in such a way as to lead to an unjust decision; to require a particular witness to be called; or to ask questions of the witnesses beyond his present restricted role of clearing up ambiguities in the evidence."

This suggestion appears to have sunk in the morass of indifference and the requirement to give professional attention to next day's case instead of the philosophical

basis on which the determination of that dispute is to be made. The community is entitled to better than that from those whose training equips them to grapple with the difficult issues presented.

It should be noticed that some departures from the adversary system have appeared in the conduct of administrative tribunals exercising judicial functions. Thus, to some extent, the investigatory stance has been sanctioned in the procedures to be followed by the Commonwealth Administrative Appeals Tribunal. This may be illustrated by the decision of the Full Court of the Federal Court in Sullivan v Department of Transport (1978) 20 ALR 323. Mr Sullivan had appealed to the Tribunal against the refusal of the Department to renew his two licences to fly aircraft. He appeared before the Tribunal in person. Two problems arose. First, the evidence adduced was deficient in that a medical witness who Mr Sullivan wished to call was, for some reason, not present. The Tribunal neither volunteered to adjourn nor informed the applicant of the possibility of an adjournment. The Full Court held that these failures on the part of the Tribunal did not constitute an infringement of the rules of natural justice. Nonetheless, Mr Sullivan's appeal to the Full Court was upheld on the basis that the Tribunal had failed to consider the grant of a conditional licence as an alternative to a full licence. Deane J, in whose judgment Fisher J concurred, explained that ordinarily a tribunal which has the relevant parties before it will be

best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate. He then added (p 342):

> "Circumstances may, of course, arise in which such a statutory tribunal, in the proper performance of its functions, will be obliged to raise issues which the parties do not wish to dispute and to interfere either by giving guidance or by adverse ruling, with the manner in which a particular party wishes to present his case. Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be counter-productive and, indeed, even over-awe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case."

Later in his judgment, Deane J explained that it was neither surprising nor improper for the Tribunal to refrain from dealing in detail with all conceivable arguments which could have been but were not advanced to support the grant of conditional licences. On the other hand (see p 348):

> "One could, in view of the manner in which the matter was presented to the Tribunal by both parties, well understand the Tribunal losing sight of the question whether a conditional licence should issue pursuant to reg 57(2). That whole question was, no doubt as a result of the appellant's lack of forensic experience, largely ignored in both evidence and submission."

Although his Honour thought that, in the circumstances, the Tribunal's failure to direct its attention to considerations properly relevant was understandable, nonetheless the proceedings miscarried. If one may say so with respect,

although the result certainly accorded with the common sense of justice, the judgment is no warm encouragement to depart from the standard of judicial conduct prescribed by Lords Greene and Denning in the passages I have already cited.

More progress has been made in relation to pre-trial procedures. At the outset I can do no better than to cite some words which fell from Mr Justice Wells in an unreported decision of the Supreme Court of South Australia in 1981, because it illustrates to perfection what some feel is the role of a judge. He said:

> "In former times it was fashionable - I am not sure that it was always correct, but it was certainly fashionable - to regard the procedures laid down in the Rules of Court as providing simply the facilities for parties to use at their will and pleasure. They could make use of them if they wished; they could decline to make use of them further if they wished; they could, in a phrase, if they wished, play ducks and drakes with them. It was apparently thought that the Court is required simply to act as arbitrator on the sidelines, and if the parties did not wish to proceed any further with something, if they wished to delay inordinately, if they wished to disobey the rules, then that was up to them, and the Court had no responsibility to the community and the parties had no responsibility to the Court. Well, however that may have been, in my opinion, it is now no longer the case. Courts provide a facility, an important facility, to the community. It is a facility that is greatly sought by litigants. Lists are increasing, difficulties are continuous in the management of hearings. It seems to me that if parties decide that they want to invoke the proceedings of this Court, then they should act crisply, responsibly, promptly. Once the wheels are set in motion, then, in the absence of some good reason, they should continue to turn; and, in my view, there is a dual responsibility, a responsibility of the parties to courts and also to the community, a responsibility of the courts to the parties and to the community. There are scattered throughout the rules of court discretions reposed in judges to relieve parties of the

> consequence of non-compliance with rules. They are what they are intended to be, namely discretions. ... It seems to me that if parties go to sleep on their rights, go to sleep on the procedures, they cannot expect that discretion will be exercised in their favour as a matter of course, and if discretions are exercised, then they must be prepared to accept the responsibility for their own shortcomings."

Within a relatively short time the approach exemplified by these words has become the norm (cf Pincus J, "Court Involvement in Pre-Trial Procedures" (1987) 61 ALJ 471). In this field, the enquiring judge has the assistance of much experience and material from the United States. This is not the place to discuss the measures appropriate for efficiently conducted pre-trial and directions hearings. Suffice it to say that the real questions that are thrown up include just how much involvement the ultimate trier of fact should assume over the timetable for interlocutory steps and the development of facts (Encyclopedia of Comparative Law (supra) para 6-448). What also does call for examination is the problem arising from the fact that judges sometimes assume roles in pre-trial hearings which are not strictly adjudicatory. Is this a development to be encouraged? For example, to what extent, if at all, should a judge attempt to conciliate?

The United States Federal Rules of Civil Procedure, as amended in August 1983, by rule 16(c)(7), authorise the participants in a pre-trial conference to discuss "the possibility of settlement or the use of extrajudicial

procedures to resolve the dispute". The notes of the Advisory Committee on Rules explain:

> "In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." (my emphasis)

Mediation by judges has been a natural evolution in the United States from pre-trial hearings. The temptation to attempt to dispose of the whole of the dispute proved irresistible to activist judges. (Needless to say, here I am not using the expression "activist" as in judicial activism in substantive decision making in contrast to judicial restraint cf Veatch, "A Poor Benighted Philisopher Looks at the Issues of Judicial Activism (1987) The Amer Jnl of Jurisprudence 1.) It was in the State courts that settlement oriented pre-trial with active judicial participation really took off. Initially, the judge enquired from counsel what they considered a case to be worth then expressed an opinion what the settlement figure should be. If that was not acceptable, the case was reassigned to another judge.

The next development lay in the words of a Federal District judge:

> "I urge that you see your role not only as a home plate umpire in the courtroom calling balls and strikes. Even more important are your functions as a mediator and judicial administrator."

Today, in the United States the virtue of active judicial

participation in settling civil cases is part of the received wisdom. As has been said: "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family." Rule 16 of the Federal Rules of Civil Procedure in a sense merely served to confirm an existing practice. Judges are more aggressive and inventive in pursuing settlement and they regard it as an integral part of their judicial work. As Professor Galanter of the University of Wisconsin-Madison, remarked, "We have moved from dyadic to mediated bargaining." The hallmark of change is that mediation is not regarded as radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous. Interestingly, research by the Disputes Processing Research Program of the University of Wisconsin-Madison has not so far confirmed that more judicial intervention produces more settlements.

It is, of course, recognised that active promotion of settlement by judges can become dangerous. Parties will be anxious not to antagonise the judge and may succumb to what they perceive to be pressure. Again, the judge may form an impression on incomplete material. There is undoubtedly a fear that "managerial judges" may prevent a full and fair resolution of the case (Resnik, "Managerial Judges" (1982) 96 Harv L Rev 376).

In Australia, apart perhaps from some fairly generalised

platitudes about costs and the stresses of litigation, generally speaking, judges have refrained from the role accepted by their brethren in the United States. Should they continue to practise abstinence?

There is another problem that judges in the '80s have to confront. In part, the problem stems from judges being more active in the supervision and disciplining of the progress of litigation. This tends to bring a more activist and confrontational atmosphere to the courtroom. In part, also, it stems from a greater awareness by the public and by litigants of their rights or presumed rights. Again, another reason is the perceived entitlement to hold judges accountable for the manner of their performance of functions. These factors have led to a far greater readiness on the part of the community and particularly the media to examine and criticise judges for their performance both in and out of court. It has also led to a readiness on the part of determined litigants to challenge judges by legal action. It is one of the interesting features of judicial life that the judiciary has not learned to respond to the spirit of the '80s in this regard. Generally speaking, judges have adhered to the convention established many years ago and in far different circumstances that they will neither explain nor respond. A judge having delivered a judgment will not respond to criticism, be it sound or ill-informed. The attitude was explained by Lord Denning in Reg v Commissioner of Police of the Metropolis ex parte

Blackburn (No 2) [1968] 2 QB 150, a decision best remembered for the fact that Mr Blackburn sought to have the future Lord Chancellor, Lord Hailsham, then a Queen's Counsel, punished for contempt of court. Lord Denning said (p 155):

> "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

It will be remembered that after the House of Lords delivered its judgment in the proceedings for injunction brought by the Attorney General to restrain publication of excerpts from Mr Wright's book, Spycatcher, one of the British newspapers saw fit to print photographs of the three Law Lords, constituting the majority, upside down with the appealing heading "You Fools". Although somewhat more picturesque than the usual, it has not been an isolated instance. Following the decision in British Steel Corporation v Granada Television [1981] AC 1096, Mr Michael Foot called Lord Denning "an ass". The Observer also found some likeness to that unhappy equine in the venerable Master of the Rolls. Mr Justice Leonard has made Page One as a result of his decision in the Vicarage rape case. Mr Justice Lymbery was criticised for freeing a man who later killed a policeman and Mr Justice Caulfield incurred the displeasure of the press for an allegedly over partial summing up in the Archer libel case. With this may be contrasted the attitude in the '50s when Bernard Levin was kept out of the Garrick because he wrote an article

criticising Lord Chief Justice Goddard for his conduct in a celebrated murder trial.

Is the answer the one suggested by Ivan Rowan in the Sunday Telegraph (2 August 1987) that "I believe that the judges simply have to learn to live with Page One status - and as they live with it, be less upset. Or, people who live in ivory towers need thicker skins"?

Should judges respond to attacks of the kind to which I have referred? The last judge who entered into public debate with a critic was no less than Lord Chief Justice Cockburn. Taylor, the author of the Treatise on the Law of Evidence, wrote a letter to The Times, on 17 November 1878, critical of Cockburn CJ's interpretation of the law in the trial of a man called Bedingfield. Thereupon, the Chief Justice published a pamphlet of twenty-four pages in reply. The pamphlet was not a success. It has been described as betraying:

> "a conceit and lofty condescension scarcely calculated to evoke a sympathetic public response. The sarcasm is mordant, the tone often unbearably supercillious and the object quite clearly to intimidate his opponent". ("The Judge who Answered his Critics" (46 Cambridge Law Journal 303)

The conclusion of the author of the article is:

> "As has perhaps been shown, it is not particularly seemly for judges to wrangle in public. Moreover, when they do, they will not necessarily emerge the victors and, to a degree, the reputation of the Bench will be tarnished thereby. Hence, the moral to be derived from Cockburn's foray into controversy: no matter what the provocation,

> should a judge ever again be tempted to answer his critics, the best advice he can take is, 'Don't!'"

Surely sound advice so far as the individual judge is concerned. No doubt, it is urgent that judges develop the thicker skins advocated by Mr Rowan because the clamour will not still. On the other hand, what judges need to be concerned about is not their individual comfort but rather whether the vehement attacks on them as individuals will vitally damage the institution of which they are part. At that point, surely preventive measures are required. The courts appear to be floundering in their attempts to meet their critics.

There are many other challenges to the judges which need to be addressed. It would need another paper to deal with them in the detail required. Just to mention some of them: should New South Wales and Federal judges adopt the Victorian practice and decline to serve as Royal Commissioners? McGregor J and Evatt J received nothing but attacks and criticism for their pains in acting as Royal Commissioners. The tone of the attacks on the work of these judges does nothing to enhance the institution of the administration of justice. Again, increasingly, Ministers feel called upon to attack individual judges and the judiciary generally. This is no doubt in a measure due to judges making orders which Ministers feel constitute an inappropriate interference with their administration of their portfolios. This will be an increasing problem as

judges feel it necessary to provide protection to citizens in fields one would expect to be covered by legislation. Thus, only this year, courts both in New South Wales and Victoria have stayed a number of criminal prosecutions where the accused had not been dealt with for a long period of time. The Crown responded with the argument reproduced by Kirby P in Aboud v Attorney General for New South Wales (NSW Court of Appeal, unreported, 16 October 1987). He said:

> "The Attorney General argued that it would be quite wrong for the Court, by a decision in a case such as this, effectively to require the expenditure of public funds on the criminal justice system rather than on hospitals or different public purposes. The appointment of every new District Court judge, to try more promptly persons such as the claimant, involves a considerable capital cost. Judges cannot travel to Coffs Harbour for sittings alone. They must be accompanied by court officers, court reporters, relief typists and the other members of an expensive team involved in the conduct of criminal trials. It was put that this Court should not be concerned in the way in which public resources are allocated. That was the proper province of Parliament and of the Executive Government."

There is no doubt about the correctness of the proposition that determining expenditure of public funds rests with the elected Government. There is equally no doubt that by granting stays of prosecutions the court may effectively be obliging the Govetnment to devote more resurces to criminal prosecutions than it likes. The resultant room for ill feeling between the two branches of Government needs to be recognised. There are many other problems of this kind.

It will be a measure of the resolve of the judges of today

in meeting these problems how sound will be the system of administration of justice that is passed to their successors.

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