Civil Justice Reform: Some Common Problems, Some Possible Solutions.

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Introduction

As some of you know, last year I gave a paper at a conference in Vancouver entitled "Civil Justice Reform: Why We Need To Question Some Basic Assumptions".[1] In that paper I questioned two basic assumptions upon which, it seems to me, our civil justice system is based. The first of these is that, once proceedings in a dispute are commenced, it will be resolved by trial and judgment. And the second is that the best way of resolving a dispute is by a contest between competing adversaries. I did not mean by stating either of those assumptions that most judges, or even most litigating lawyers, believe that it is better to go to court than to settle. I meant rather that, whatever we may believe, the procedures and practices which constitute our system make those assumptions.

As to the first of those assumptions, we all know that the vast majority of actions commenced are resolved without trial. Some are abandoned; some are resolved by default or summary judgment; a few are resolved by some other form of adjudication; and the rest are settled by agreement. Moreover I think that many of us now believe that, generally, it is better to resolve a dispute by agreement than by trial, whether or not that agreement is aided by some form of alternative dispute resolution. Yet, from the time an action is commenced, the parties embark on procedures designed to bring the action to trial: exchange of pleadings, requests for and provision of particulars, discovery and so on. None of them are designed to encourage or accelerate settlement and, although discovery may actually do both, traditionally it occurs so late in the dispute resolution process that settlement after discovery is unlikely to result in any substantial cost saving.

My first point then was that our system should no longer assume a trial and judgment. Rather it should assume or at least accept and assist earlier resolution, whether by settlement or by some summary means. It should not be left to judges, with or without encouragement by court rules, to recommend to parties that they go outside the system to resolve their dispute by agreement. The system should provide means by which that can be achieved. And those means should enable that to be achieved early in the dispute resolution process, before substantial costs have been incurred. In order to do that whilst maintaining fairness, each party needs to become better informed about the other's case as early as possible in the dispute resolution process. The, perhaps self evident, aims of these changes would be to cause more disputes to be resolved by agreement and, perhaps more importantly, to cause more disputes which will be so

[1] Since published in (2006) 25 C.J.Q 32; hereinafter Davies.

resolved to be resolved earlier in the dispute resolution process. I went on to explain ways in which these could be achieved. I shall discuss some of these a little later.

By the second assumption, that the best way of resolving a dispute is by contest between competing adversaries, I mean that, if trial is to ensue it will be conducted, on both sides, in a traditionally adversarial way with competing adversarial witnesses of both fact and opinion, cross examination by the adversary and competing adversarial submissions. My second point in that paper was that trials would be cheaper, fairer between parties of unequal bargaining power and more objectively truthful if they were less adversarial. I then attempted to show how adversarialism in our system distorted the truth, whether of fact or opinion; made litigation unnecessarily expensive; and made it unfair between parties of unequal bargaining power. I am not at all sure that I convinced my audience of this. But I gave examples of ways in which, in my opinion, a less adversarial process would be more likely to get closer to an objective truth and to be cheaper and fairer. I shall also mention some of these later.

And finally in that paper I made the point that reforms of the first kind are likely to be more successful than those of the second kind. That is because, whereas those of the first kind change the civil justice system, those of the second kind attempt to alter lawyers' conduct within the existing system, a task which I think is less productive and more difficult than changing the system. This is an underlying theme in much of what I will say today, for the reforms which I will discuss are much more concerned with changing the system than with attempting to change lawyers' conduct within an existing system.

A second underlying theme is proportionality, for what I propose involves a balance between cost, the amount or value in dispute and the risk of unfairness. And achieving that balance necessarily involves some compromise between these competing concerns.

All of this implies that there should be fewer rather than more trials. Yet, in the United States recently, concern has been expressed about the so-called "vanishing" trial and a consequent concern by some that there may now be too many settlements causing too few trials. So my first topic in this paper is whether trials are vanishing in my own system and, perhaps also, in yours. In concluding that they are not, I shall point to some critical differences between the US system, at least as it operates in Federal Trial Courts, and my own.

Even if civil trials are not vanishing, trial rates in civil courts are declining throughout the common-law world. I shall discuss some reasons why I think that is so. And if I am correct in thinking, as I do, that the principal reason for this is an increasing perception by litigants that the advantages of settlement outweigh its disadvantages, then unless that perception is plainly wrong, and I do not think that it is, settlement should be encouraged by our system rather than, as is now generally the case, largely ignored by it. Moreover parties should be encouraged to resolve their disputes earlier than they

now do, before adversarial attitudes have hardened and increasing costs incurred. I shall discuss some ways in which these can be achieved.

One of these is to require some mutual disclosure earlier in the dispute resolution process than is now traditionally the case. Once the focus shifts from adjudication to earlier agreement, the need for earlier mutual disclosure of relevant facts becomes more apparent, for a settlement reached in ignorance of highly relevant facts may be as unfair as a trial so reached. I shall discuss this need and how the extent of earlier mutual disclosure must, like disclosure generally, be balanced against its cost. And I shall discuss how, in England and Australia, parties to disputes have been required to make some mutual disclosure before litigation has commenced.

These provisions in England and Australia, for the first time, advert to the desirability of encouraging parties to settle before litigation has commenced. I shall then discuss some other provisions, designed to encourage settlement, which could and should also be extended in their operation to the prelitigation period of dispute resolution.

The other major impediment to a fair settlement in our system and, indeed, to a fair adjudication is the extent to which adversarialism impedes objectivity. The adversarial nature of our system tends to make partisans of witnesses including expert witnesses. I shall mention how at least expert evidence may be obtained in a less partisan way and consequently be more objective; and how more objective expert evidence, made available to all parties early in the dispute resolution process, may increase the rate of fair settlement and accelerate settlements which might otherwise occur.

I would then like to say something about the disadvantages of settlement. It would be wrong to simply sweep those aside particularly as at least one ultimate consequence of increasing settlements, a very small trial rate, may have effects which are substantial and far reaching. On the other hand, as I shall attempt to explain, I think it would be wrong and, indeed, impracticable to attempt to reverse this trend towards greater settlement as some US commentators have suggested we should. Nevertheless it is important to understand these disadvantages and to consider whether anything, and, if so, what should be done about them.

Finally I shall attempt to draw some conclusions.

Are trials vanishing?

This concern appears to have had its origin in an excellent research paper written by Professor Marc Galanter entitled "The Vanishing Trial" and a symposium of the American Bar Association, also with that title, which followed and discussed that paper and included a number of papers delivered by other leading American academic

lawyers.[2] The seminar and those papers, in turn, spawned more seminars and more papers on this topic.

The phrase "the vanishing trial", on its face, assumes that the trial of which it speaks, the civil trial, is disappearing quickly. That also seems to be the assumption upon which many of those papers are written. And a number of them go on to assume also that the trend towards more settlements and consequently fewer trials is a bad thing and discuss whether and, if so, how this trend might be reversed.

I don't know to what extent these views have affected thinking in this country. Moreover I don't wish to presume to express a view about what is best for the American system. It is in so many material respects different from my own that it would be unwise for me to do so. And before looking at the so-called vanishing trial in the United States, I should point to three of those differences because, at least until recently, all have, I believe, been causes of a higher settlement rate in the US Federal Courts than in courts in Australia. I hope that you will find discussion of these differences helpful for I think that, in each respect, your system is somewhere between the US Federal Court system and my own.

The first of these is a difference in cost regimes. These are different in two respects. The first is that, in the US system generally, parties pay their own costs; whereas, in my own, costs generally follow the event, that is, the successful party recovers costs from the unsuccessful one. However both of these regimes have been modified by a rule rewarding reasonable offers of settlement by penalising in costs a party who is found to have rejected a reasonable offer.

The second difference in cost regimes is that, in the US generally, the plaintiff's lawyer may recover from his client contingency fees, based on a proportion of the amount recovered; whereas, in my own, lawyers' fees are generally fixed by a cost regime which reflects the amount of work done. This has been modified somewhat in my own system by permitting fee uplifts, increases based on a proportion of usual fees, in the case of settlement; and by permitting cost agreements which make some modification of this. But even with these modifications, the fortunes of a plaintiff's lawyer in my own system are not nearly as closely tied to those of his client as they are in the US system.

These differences in cost regimes have, it seems to me, two consequences. The first is that the US system, by freeing a plaintiff of the risk of costs if he or she should fail, encourages litigation; whereas a system such as my own, which penalises an unsuccessful plaintiff, tends to discourage litigation.

And the second consequence of these differences in cost regimes is to encourage settlement in the US system and to discourage it in my own. I do not think it is any great criticism of lawyers' ethical standards to say that they are no exception to the general rule that economic activity tends to follow the most rewarding path. The most rewarding path for plaintiffs' lawyers in a contingency fee system is to settle early, take

[2] Journal of Empirical Legal Studies, Volume 1, Number 3, November 2004.

the fee and move on. The most rewarding path for plaintiffs' lawyers in a system in which they charge on the basis of the amount of work done which, with some exceptions, is my own system, is not to settle early but to continue on to trial or to settle only on the eve of trial.

As I understand it, you still have a system in which, on the whole, costs follow the event but that some provinces permit contingency fees. So I find it impossible to generalise about the effect upon settlement of cost regimes here.

The second material difference between the US Federal Court system and my own which I think has, for long, encouraged a higher rate of settlement in that system than in my own, is the difference in discovery regimes. As you know, since 1938 the US Federal Rules of Civil Procedure have permitted a system of discovery much more extensive and expensive than that which traditionally existed in the English system which, as I shall explain later, we have made less extensive and expensive. If both sides use the Federal discovery rules to their fullest, they will know everything that is relevant (and a great deal that is irrelevant) about the other side's case; thereby making it more likely that their views about the likely result will converge and they will settle. It is axiomatic that the more that parties to a dispute know about one another's cases, the more they are likely to settle.

Consequently there is likely to have been a much higher settlement rate in those cases in which there has been extensive use of those rules than in those in which that has not occurred or in systems which do not permit such extensive discovery. One US commentator[3] has proffered, as the explanation for why there is a substantially lower trial rate in the Federal Court than in state courts, that though many states have adopted the Federal discovery rules, the stakes tend to be lower in State cases[4], making extensive discovery uneconomic.

In theory, it is difficult to criticise a discovery system which enables both sides to become fully informed about the case they have to meet. But a system which does that tends to encourage discovery which is so extensive that its cost is disproportionate to the amount or value involved in the case and increases the risk of abuse and consequently unfairness. But even absent abuse, lawyers tend to be cautious, especially when the stakes are high and they are themselves at risk, as they would be if they settled in ignorance of highly relevant facts. And parties often expect more from discovery than they achieve or are realistically likely to.

Acting with economic rationality, parties would not expend more on discovery than the amount by which the result is likely to be improved for them and would match the cost of discovery, or extra discovery, against that amount. But parties and their lawyers do not

[3] Yeazell, S.C., "Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial", ibid, text at footnotes 5, 59; hereinafter Yeazell.
[4] Eisenberg, T., and ors., "Litigation Outcomes in State and Federal Courts: A Statistical Portrait",19 Seattle U.L.Rev., 433, 438, (1996); Yeazell at footnote 49.

always act rationally.[5] Once having made substantial expenditure, they often persist in further expenditure beyond the point at which they should. Consequently the rules are likely to have increased the cost of settlement by encouraging more extensive search and by postponing settlement until after full discovery[6]. Moreover, by making more information available, they have tended to make trials longer and consequently more costly.

For those reasons, the Federal discovery rules are likely to have increased settlement rates thereby reducing trial rates. But it is unlikely that they have done so in a way which significantly reduces costs. On the contrary, the more extensively that they are used, the more expensive the process of dispute resolution will be.

Although I know that you also have oral discovery, the extent to which it is permitted and used appears to vary between provinces. However, the more that it is used, the more that costs are increased. And it may be questioned whether, except in rare cases, it is ever cost effective.

And the third difference between the United States system and my own which, I believe, tends to encourage settlement more in the former, is the much greater prevalence there of jury trials. In Australia, juries in civil trials have virtually disappeared.

Jury verdicts are much less predictable than judgments by judges alone. So while, in the United States system, the parties' views may, after discovery, converge on what the result should be, the unpredictability of the jury reaching that result also tends to encourage settlement.

As I understand the Canadian systems you have a much greater proportion of civil jury trials than we do but substantially less than in the United States. Consequently I rather suspect that, in this respect, you are somewhere between the United States system and my own.

So before translating the US experience to my own system, or perhaps yours, it is important to bear in mind these differences. Moreover before concluding that the civil trial is vanishing, even in the United States generally, it is worthwhile to look a little closer at the overall picture there.

First, whilst it is true, as Professor Galanter demonstrates, that in the Federal trial courts trial rates have dropped from 11.5% in 1962 to 1.8% in 2002, once this is broken down into categories of cases, it can be seen that it is predominantly tort cases which are responsible for this massive drop. Trials in contract cases, by contrast, have declined only slightly. Because the vast majority of tort cases involve the application of settled principles to fairly routine situations, these are plainly the kinds of cases which should most easily be resolved by settlement.

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[5] Yeazell at footnotes 24, 25.

[6] Yeazell. The requirements of the rules with respect to so-called " initial disclosures", introduced in 1993 and 2000, do not appear to have affected this though they may have tended to reduce discovery costs.

Secondly, federal trials occupy less than 3% of total trials in the United States. And, as best it can be ascertained, the position in State Courts is somewhat different. Though trial rates have declined there, too, they do not appear to have done so at nearly the same rate.[7] While, therefore, it may safely be said that, over the last two decades, there has been a decline in trial rates in all civil courts, not only in the United States, but in most common-law countries, it is somewhat alarmist, to say the least, to infer from this that civil trials are vanishing, even in the US.

However, it is important to look at why trial rates have declined in all common-law jurisdictions for, unless we know that, we cannot form any worthwhile view about whether this trend is a desirable or an undesirable one.

Why trial rates have declined

The immediate cause of declining trial rates in Australia is the increase in the number and the percentage of disputes which are being resolved by agreement. A number of those who participated in the "Vanishing Trial" seminar pointed to the fact that many disputes have gone to other forums, as if that reason, in itself, is an explanation for declining trial rates. But there is, it seems to me, no point in saying that disputes have gone off to other forums if the percentage of disputes in those forums which are resolved by agreement is about the same as that of court cases. In that event, the dichotomy is not between courts and other forums but between adjudication and agreement. And although I know of no empirical evidence on this question, anecdotal evidence in Australia is that that is so; that of those disputes which, for one reason or another, go to another forum, about the same percentage are resolved by agreement as the percentage of actions which would otherwise end in trial. And although I know too little about the American system, or about yours, to make any useful comment on whether that is also the case in either of those systems I would be surprised if it were not if, as in my own system, it is an increasing appreciation by litigants of the advantages of settlement which has been the main cause of an increasing rate of settlement in litigation.

There seems little doubt that, in my own country, in England, in the United States and here, the percentage of disputes resolved by agreement is increasing. The advantages to disputing parties of an agreed solution are not difficult to see. It is generally cheaper than trial, the more so the earlier it occurs. It can be moulded to achieve an outcome which both parties will accept rather than being bound by rules to a fixed result which neither party may want. It is more conducive to an amicable resumption of a former relationship between the parties, whether business or personal. Parties are more likely to feel in control of achievement of a result which they have chosen themselves than of one which is imposed on them. They may value the privacy of an agreed solution. And such a solution avoids the tension and emotional pressure that litigation often entails.

[7] Friedman L., "The Day Before Trials Vanished", ibid, at footnotes 4 and 5; Yeazell at footnote 59.

These have long been advantages of an agreed solution. But what has happened more recently in Australia and, I suspect elsewhere, is that litigants, especially repeat litigants, have become more aware of these, especially of cost saving. And those litigants who have seen the economic advantages of settling claims, mostly repeat litigants such as insurers, have increasingly exercised control over conduct of litigation by their lawyers. More recently again in Australia, litigation funders have entered the picture. Because these, also mostly insurers, fund plaintiffs for a share in the amount recovered they, like the repeat litigants to whom I have referred, see litigation as no more than an economic proposition. It is impossible to overestimate the influence of cost, or perception of cost of litigation in the increase in the rate of settlement throughout common-law jurisdictions.

In Australia this trend towards greater settlement has also been driven by judges and by changes in court rules. It appears from the above articles that this is also the case in the US. Whilst cost has also been a major focus of judges' concern, so also has been a perception of increased filings and increased trial dockets. One aspect of this has been the extent to which trial judges have exercised increasing control over the management of cases during the pre-trial period. And the way in which this has been achieved has sometimes increased costs notwithstanding that its ostensible aim has been to reduce them.[8]

If the primary reason for declining trial rates is increasing settlement rates, whether or not such settlement is assisted by some ADR process, and if, as I think, the primary reason for that is an increased appreciation by more sophisticated litigants of the advantages of an agreed solution over an adjudicated one, then it is difficult to criticise the decline. And, in practice, it may be pointless to do so. It would be impossible and, in any event, wrong, in general, to attempt to prevent parties to disputes from resolving them by agreement. Rather we should be concentrating on two more worthwhile goals. The first is to ensure that such agreements are reached more fairly and more cheaply than is now the case. The first three of the following topics discuss that question. And the second is to try to ameliorate the disadvantages which decreasing trial rates will bring, for there will undoubtedly be some. The fourth of the following topics discusses that question.

Encouraging earlier settlement: earlier mutual disclosure: the problems of fairness and cost

It is understandable that our traditional system did not much concern itself with settlement or with matters arising before litigation arose except to the extent that, at trial, they were relevant to substantive issues. That is because, as I have explained, it assumed a trial and judgment. But once we accept, as I think we must, that our system should now be concerned as much with settlement, and with early settlement, to the extent that it can be achieved fairly, as with trial and judgment, the system should look for ways in which settlement can be assisted and encouraged. That is because early

[8] An example of this may be the United States Federal Court individual docket system. See Davies at footnote 31.

settlement is likely to be cheaper and sometimes easier than late settlement after litigation costs have been incurred and adversarial lines drawn.

Parties, and especially their legal advisers, are often reluctant to settle early if there is some realistic possibility that relevant information in the possession of other parties may materially affect the outcome of the case. So early mutual disclosure of relevant information is likely to increase and accelerate the rate of settlement.

However there is a dilemma here. On the one hand, it is self evident that, cost aside, the fairest agreements are those which are best informed; but under our traditional system, mutual disclosure generally occurs late in the dispute resolution process after all issues have been joined and is expensive. On the other hand, the cheapest agreements are those which are reached early in the dispute resolution process. Consequently early settlement in our system is unlikely to be fully informed and may therefore be unfair; and fully informed settlement is likely to be late in the process and expensive.

If, as I believe, the main perceived advantage of settlement over adjudication is the saving in cost, it is necessary to permit parties to make some compromise, early in the dispute resolution process, between full information disclosure and cost, instead of being required to wait until late in the process for mutual information disclosure. Some attempt has been made to do this in England and Wales and in my own jurisdiction.

In England and Wales, under the Woolf reforms, pre-action protocols require parties, before commencement of litigation, to exchange basic information.[9] For example, the prospective plaintiff in a personal injuries action must give details of the event giving rise to his claim, the nature of his injuries and an outline of his financial loss. And after an interval, the prospective defendant must respond with whatever relevant information is in its possession. Statements taken from prospective witnesses must then be exchanged. Similar requirements exist for most other kinds of actions.

In my own jurisdiction, the requirement for pre-action disclosure, which is statutory, is confined to personal injury claims. In any such claim a claimant must, before commencing proceedings, give the potential respondent particulars of the incident giving rise to the claim including the names and addresses of any potential witnesses known to the claimant; particulars of the nature and treatment for the injury sustained including any medical or hospital reports obtained and the names and addresses of any relevant health care providers. The respondent then has reciprocal obligations to give the complainant copies of any reports about the incident, any medical or hospital reports obtained with respect to the claimant and any other relevant information in its possession.

Three criticisms may be made about these procedures. The first is confined to the requirement in my own system. It was introduced as part of a more general regime with

[9] A useful summary of their use is contained in Zuckerman, **Civil Procedure,** LexisNexis, 2003 at 1.110 to 1.114.

respect to personal injury actions. Nevertheless, whilst it is easier to state with some specificity the kind of information which should be exchanged early in actions of this kind than in actions of many other kinds the requirement should not be so restricted. The English protocols show that it is possible to specify the kind of information which can and should be exchanged before actions of other kinds.

A second more general criticism is that requirements of these kinds may increase or frontload costs and it may be that each of the procedures which I have just described does this to some extent. However there are two answers to this criticism. The first is that, even if those procedures materially increase costs at the stage at which they operate, it is possible to simplify them so as to ensure that any increase in costs is minimal by ensuring that parties are not required to do more than exchange documents, statement or information of identified kinds which they already have a in their possession or control and which they believe are central to the issues in dispute. Cost is frontloaded or increased only if a party's lawyer is required to perform work additional to that which he or she would have performed at that stage.

And the second answer to this criticism is that, if the disclosure caused by these requirements causes settlement of cases which would not otherwise settle or substantially earlier settlement of cases which would probably settle, but only after expenditure of some additional cost, then the increase or frontloading may well still be justified. It is, perhaps, too early to say whether that is the case but I would be surprised if, in the long term, it were not. There can be no doubt that these requirements increase the rate of settlement and the proportion of cases which settle early.

A third general criticism is that neither of these requirements imposes any obligation on parties after commencement of litigation. If, as I think, it is appropriate to require exchange of relevant information in the possession of the parties, even before commencement of litigation, it is even more appropriate that that requirement continue after commencement of litigation. There should be a continuous requirement upon parties to disclose information which is directly relevant to the perceived issues in dispute when it comes into their possession; for example, a further statement taken from a prospective witness.

Encouraging earlier settlement: some other examples

The reforms which I have just discussed adopt the reasoning that our system should encourage earlier settlement. But that reasoning should be adopted more extensively. The following are two examples of situations in which, in my opinion, its adoption would be beneficial.

Common to most common law jurisdictions now are provisions which reward reasonable settlement offers by imposing cost penalties on parties who unreasonably reject them. These apply only to offers made in the litigation; that is, after litigation has commenced. But if their purpose is, as I think it plainly is, to encourage the acceptance

of reasonable offers of settlement, they should encourage acceptance of such offers made before litigation commences as well as of such offers made in the litigation[10]. As with offers made in the litigation, the question of reasonableness should depend, amongst other things, on the extent to which there has been mutual disclosure of relevant information.

One reason why settlements, in my own system, often occur late in the dispute resolution process, sometimes even on the eve of trial, is the reluctance of parties, or one of them to make a realistic assessment of the likely result. Assisting parties to perceive that reality is one way in which mediation may assist them to reach a settlement. Mediation has been made part of my own system by requiring that mediators be persons approved by the court; by permitting a judge to refer a matter to mediation even over the objection of the parties; and by ensuring that the process remains under the control of the court which may give directions to the mediator on any issue.

There is anecdotal evidence from litigation lawyers that the fact that mediation is seen to be part of the court system has given parties to disputes more confidence in the mediation process. And there is also anecdotal evidence that the exercise by judges of the power to compel parties to engage in a mediation process has increased the rate of settlement. However the provisions at present apply only after litigation has commenced. There is no logical or common sense reason why they could not apply, at least with the consent of the parties, to a dispute before litigation has commenced. And there is no reason why at least a settlement conference should not, generally, be a precondition of litigation. In my own jurisdiction it is in personal injury cases.

More generally, any provision which assists or encourages settlement, or assists or encourages earlier settlement, should, wherever possible, apply to settlement of disputes before litigation has commenced, provided that the parties are entitled to reasonable mutual disclosure before they settle.

Adversarialism an impediment to fair settlement and fair trial

The concept of continuous mutual disclosure from an early stage in the dispute resolution process is inconsistent with the way in which our civil justice system has developed. So also are the concepts of a cost penalty for rejection of a reasonable offer of settlement[11] and mediation as part of the court system. Until the last 20 or 30 years, the dispute resolution process, at least up to trial, remained entirely in the hands of the parties or, more accurately, of their lawyers. Consequently, it remained very adversarial. Increasing control by judges lessened this adversarialism somewhat

[10] The same may be said of rules penalising a party in costs for refusing to respond to an offer to negotiate, if the Court considers that acceptance of the offer might have resulted in settlement of the action.

[11] When it was first introduced in the United States it was much criticised for that reason; see for example Fiss, O.M., "Against Settlement",93 Yale L.J. 1037; hereinafter Fiss.

though in discovery and in the selection and calling of witnesses it remains generally confrontational.

My own system has sought to make both of these processors less adversarial. As to discovery, the traditional document discovery process, involving as it did a requirement to disclose, not only relevant documents, but also documents which might, either directly or indirectly, enable a party to advance its case or to damage its opponents', required disclosure of too many documents at a cost which was often disproportionate to the amount or value involved in the case. I explained earlier how provisions making such disclosure available in all cases tended to encourage their excessive use. Moreover the traditional discovery process was often used as an instrument of oppression; by disclosing too many documents, the inspection of which, in order to find those which were directly relevant to the issues in dispute, could be performed only at an uneconomic cost.

The traditional system of interrogatories, by the 1990s, was also seen to be used more as an instrument of cost building and consequently of oppression than for a legitimate purpose. It is impossible to say how much our cost system contributed to the abuse both of discovery and of interrogatories. But I cannot help feeling that if we had had a system in which costs did not follow the event and in which plaintiffs' lawyers were rewarded only by contingency fees, we might have had less abuse. And it may well be that, in the American system, market forces make those abuses less likely[12].

In 1994 we made four changes to this system. The first, which I have already mentioned, was to require limited prelitigation discovery. The second was to require exchange of witness statements. The third was to limit document discovery to those documents which are directly relevant to the issues identified by the pleadings. And the fourth was to limit interrogatories to those cases only in which the Court is satisfied that there is not likely to be available to the applicant at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited. Similar changes were made, a few years later, in England and Wales in consequence of the Woolf reforms, though there interrogatories were abolished entirely.

The first of these changes was, by far, the most important in encouraging settlement and making settlement fairer. But each of the others contributed to these worthwhile goals: the exchange of witness statements by ensuring earlier, more effective information exchange; the others by reducing cost. And as I have endeavoured to show, the more that costs build up, the less that parties appear to be likely to settle.

In the selection and calling of witnesses our system still remains largely adversarial. Witnesses are chosen by the party's lawyer, not because it is thought that they are truthful or that their recollections are accurate or that their opinions are objective and correct, but rather because their evidence supports the party's case. In the process of engaging and calling witnesses, objective ones are discarded in favour of partisan ones.

[12] That is not intended as a plea for contingency fees generally. A discussion on that topic is complex and beyond the scope of this paper.

All of those engaged then feel the subtle psychological pressure to join the team; to emphasise or even enhance favourable aspects of their evidence and to downplay or even omit unfavourable ones. The result is that a court may never receive evidence of the true facts of a matter or the opinion which is most clearly right. Rather it is more likely to receive evidence which, on one or, more usually, both sides, is distorted by adversarial bias.

This distortion also affects the likelihood of settlement. There is a natural tendency of a party and the party's lawyer to believe that the evidence of their witnesses will be preferred to that of their opponents; or, perhaps more accurately, to assess their prospects of success on the assumption that the evidence of their witnesses will be substantially accepted. This tendency may diminish after discovery but witness selection and preparation in a less adversarial way would diminish this distortion much earlier.

In the paper to which I referred at the outset, I discussed ways in which evidence of fact could be obtained in a less partisan way and therefore would be more objectively truthful. I do not propose to repeat that discussion here. However I do propose to say something about expert evidence because, once parties to a dispute which involves a question requiring expert opinion- a large proportion of civil cases- can be confident about which opinion is likely to be accepted by a court, that question, and sometimes the case as a whole, is more likely to settle. In many, if not most cases where there are competing expert opinions, the difference between them is caused either by different factual scenarios upon which the competing opinions are given or by adversarial bias.

One way in which, in a number of systems including my own, an attempt has been made to resolve or at least reduce these differences, is by requiring competing experts to confer, in the absence of the parties' lawyers, and to produce a joint report stating where they agree, where they disagree and why. Such conferences have sometimes resolved factual differences and have somewhat reduced those differences caused by adversarial bias.

However differences of both kinds remain. It may not be possible to eliminate factual differences until findings of fact are made. But it is, I believe, possible to eliminate those differences caused by adversarial bias. The causes of adversarial bias are those to which I referred earlier; partisan witness selection and partisan witness preparation. And it may be eliminated by having, as the only experts whose evidence is received by the court, those who are engaged and prepared neutrally.

Recently in my own system we have introduced rules requiring parties, in most cases, to agree upon a joint expert or joint experts or to submit to the appointment of an expert or experts by the court, in either of which cases such experts would be the only experts whose opinions would be received by the court. However, before being required to submit to the opinion of such experts, indeed before litigation commences, parties to a dispute may agree upon an expert or experts, or one party may apply to the court for appointment of an expert or experts, in either of which cases the experts appointed will

be the only experts whose evidence will be received by the court if litigation ensues. These rules, I need hardly say, are much more elaborate than that, but as I have discussed them fully elsewhere[13], I do not propose to do so here. However I should emphasise that the requirement for joint party or court appointed experts is not limited to the appointment of only one expert on any issue. If a court is satisfied that there are genuine differences of view on any question, it may appoint more than one expert on that question.

I have two principal reasons for mentioning these provisions. The first is that the more objective that evidence is, the more likely it is to be accepted by a court, if trial ensues, and consequently by the parties as the basis upon which to resolve their dispute. And the second is that, absent agreed or court appointed experts, opinion evidence is likely to be affected by adversarial bias and to be argumentative rather than objective. For these reasons, in my opinion, requiring experts to be agreed or court appointed is likely to lead to more settlements, earlier settlements and fairer settlements.

I have already made the point that the trend towards settlement is likely to continue whatever you or I may think of its merits. However more settlements means fewer trials and low trial rates may cause problems. It is to those problems that I now turn.

Some possible problems with low trial rates

Before turning to those problems I should concede that my opinion that the advantages of settlement outweigh its disadvantages is not one which is universally accepted. As long ago as 1984, Professor Fiss of Yale Law School wrote an article entitled "Against Settlement"[14] which has since been influential among those who oppose settlement. I do not propose to embark here on a detailed critique of Professor Fiss' article, which is strongly oriented towards cases in the US Federal Courts, but I think that three of his criticisms of settlement require comment.

The first arises from his contention that there is a much greater imbalance of power in a settlement than in a trial. I am by no means convinced that this is generally the case. I agree that a settlement is affected by the resources available to each party but so also is trial. And I agree that, though it seems that disparity of resources is not as great now in the United States as it was 20 years ago[15], there can be no doubt that such disparity sometimes exists. But my own experience in Australia has been that it is as likely to skew the result of a trial as of a settlement; and the longer that litigation continues, the greater the opportunities are to exploit any such imbalance. Notwithstanding additional powers which judges may have in limited classes of cases in some jurisdictions[16], generally judges who, by and large, must remain aloof from the contest, have little power to rectify such imbalances. Mediators, by contrast, are free to point to imbalances and to suggest how they may be rectified.

[13] "Court Appointed Experts", (2004) 23 C.J.Q. 367.
[14] Fiss.
[15] Yeazell.
[16] As to which, see Fiss at 1077 to1078.

More recently, reforms such as compulsory early exchange of relevant information and the imposition of cost penalties for rejecting reasonable offers of settlement have tended to reduce these imbalances.

A second criticism of settlement which Professor Fiss makes, and which I think deserves comment, is that it often involves an absence of authoritative consent; by which he means that lawyers or insurance companies or other representatives of parties may agree upon a settlement that is in their own interests but not in the best interests of the parties and to which the parties would not agree if the choice were theirs. However it is the parties' lawyers, generally, who choose the issues to be contested at trial and the evidence to be called on those issues. These may or may not be the issues or the evidence which the parties themselves would have chosen. And, in my own system, a party's lawyer may choose to go to trial when it is in the party's interest to settle So the possibility of abuse, in this respect, exists in going to trial as it does in settling. Nevertheless the risk remains that, in a contingency fee system, plaintiffs' lawyers will settle cases more cheaply than they should in their clients' interests, because it is in the lawyers' interests to do so.

A third criticism of his, it seems to me, has much greater substance though I think it is more a criticism of a paucity of trials than of settlement as a preferable way of resolving disputes in most cases. I agree with his proposition that the function of courts is not just to resolve disputes. It involves also stating the law, developing the law and deterring harmful behaviour without deterring desirable behaviour. And a substantial paucity of trials, and consequently judgments, may inhibit the performance of each of those functions.

However I do not see that, or any other of Professor Fiss' criticisms, as a reason for being opposed to settlement generally, as Professor Fiss apparently is, or for looking for ways in which to reverse the trend towards fewer trials, as some more recent commentators suggest. In the first place, the advantages to disputing parties of settlement, to which I referred earlier, in my opinion, easily outweigh its disadvantages. And secondly, I believe that the perception of more sophisticated and economically driven litigants that settlement yields a better economic result than trial and judgment will ensure that the trend towards settlement will continue whatever any of us may think about it.

It is more helpful, I think, to look for alternative ways in which to maintain the clarity of the law, to ensure that it develops and changes with changes in circumstances and in community values and to ensure that it continues to deter harmful behaviour without deterring desirable behaviour.

Low judgment rates may leave unclear how some claims or some categories of claims should be resolved, because of an insufficient number of contemporary precedents. This may occur in quite common kinds of cases where the law is fairly stable. It is especially a problem in such cases where judgments have a discretionary element,

such as, for example, negligence and contributory negligence and general damages. But it will be an even greater problem in less common kinds of cases.

In all of these kinds of cases, the lack of a contemporary precedents from which to predict a just result may cause the parties to elect to proceed to trial. On the other hand, at least in common kinds of cases, the results in previous settlements, if known, may themselves provide sufficient precedents to assist in reaching a settlement. There is, for example, already a market in damages claims which are settled, a market which is known to frequent litigants and to lawyers who practise in the relevant area. It would not be difficult to ensure that information known to those in the market became generally known by having the results of settlements published on a court website without reference to the names of parties or any identifying particulars. A legislative obligation could be imposed on lawyers engaged in a settlement to forward specified particulars of it to the web site for publication.

Low judgment rates may impede the development of the law where new factual circumstances have arisen or where, for some other reason, community values have changed. Either of these, alone, may make it less likely that the parties' estimates of a just outcome will converge; and may be sufficient to persuade them, or one of them, to go to trial and judgment. But no doubt other factors, including cost and the desire of one or both parties for secrecy, may influence that decision.

However we should not to jump to the conclusion that fewer trials and fewer trial judgments necessarily means a decline in the capacity of courts to develop the law. The experience in Australia and, I think, also in England, is that, while trial rates have declined substantially, appeal rates have not. As in the United States, the substantial decline in trial rates in Australia has been in routine tort cases, primarily actions for personal injury arising out of motor vehicle or workplace accidents. By and large this decline has not inhibited the development of the law. And whilst that does not mean that only difficult legal questions are now going on appeal, it does mean that cases of that kind now make up a higher proportion of cases decided at an appellate level.

Fewer judgments may lessen the capacity of courts to deter harmful behaviour without deterring desirable behaviour. One commentator has suggested that settlement may fail to achieve this outcome only where the defendant, at the time settlement occurs, has better information about a critical aspect of the case than does the plaintiff.[17] Equally importantly, however, it may fail to do this in cases the results of which may affect third parties. It may be contrary to the public interest to conceal from the public the results in cases of that kind; for example cases involving faulty products or deliberate or negligent conduct which may have caused harm not only to the plaintiff but to others as well. And it may fail to do this in new or developing circumstances of human activity where little or no precedent exists.

[17] Wickelgren, A.L., "No Free Lunch: How Settlement Can Reduce the System's Ability to Induce Efficient Behavior", http://law.bepress.com/expresso/eps/37

It is not difficult to think of examples of cases, the results of which may affect third parties, in which it is in the interests of both parties to conceal the basis upon which they have settled, or even the fact that they have; a defendant to lessen the risk of other claims, the plaintiff because of payment of a generous sum on condition of secrecy. On the other hand, of course, there may be cases in which a defendant decides that the best way of deterring other claims is to go to trial and judgment.

There is, nevertheless, in my opinion, a case for denying secrecy to settlement of cases the result of which may affect third parties. In Florida, legislation[18] has mandated disclosure of any order having the purpose or effect of concealing a public hazard or any information concerning a public hazard; and has prohibited courts from entering an order or judgment which has the purpose or effect of concealing any information which may be harmful to members of the public in protecting themselves from injury which may result from the public hazard. And in South Carolina a local rule[19] has restricted sealing of filed settlement agreements. These provisions are, however, quite limited in their operation. In particular they are, unsurprisingly, limited in their operation to matters already within the jurisdiction of a court. They do not apply to settlements reached before litigation has commenced or even to those reached in the course of litigation in respect of which no order is made. And whilst it may be possible to enact legislation which deals with those cases also, this may be more difficult to enforce.

Nevertheless that task is not impossible. As mentioned earlier in a different context, it would be possible to impose obligations upon lawyers involved in such a settlement, enforceable by disciplinary proceedings, to forward, for publication on a website, specified particulars of the settlement. It would be possible also to impose a similar obligation upon plaintiffs, at the risk of having their settlements set aside; upon defendants, enforceable by monetary penalties; and upon insurers, at the risk of having their licences suspended or revoked. And it would be possible to identify with some specificity the kinds of claims, judgments in which might well affect the rights of other claimants, and consequently full particulars of settlement of which must be disclosed.

Conclusion

As I mentioned at the outset, an underlying theme of what I have said today is that it is more productive and easier to change our civil justice system than it is to attempt to change lawyers' conduct within the existing system. To say that the former is easier is not a criticism specifically of lawyers: it is a criticism which may equally be made of all of us. None of us really likes change, particularly if it alters the way in which we have been doing things for a long time.

[18] The **Sunshine in Litigation Act** 1990. Similar legislation, having the same name, has been proposed federally but not yet enacted.

[19] Local Court Rule 5.03(D.S.Cal, 2004). The provisions referred to in this and the preceding footnote are discussed by Professor Resnik in "Procedure as Contract" (2005) 80 Notre Dame Law Revenue 593 and in "Migrating, Morphing, and Vanishing: the Empirical and Normative Puzzles of Declining Trial Rates in Courts" (2004) 1 Journal of Empirical Legal Studies, 783.

More importantly, a civil justice system which retains its focus on trial and judgment when that has long been the least favoured way of resolving disputes, must change. Accepting the perception of litigants that an early, reasonably informed, agreed solution is the best way to resolve a dispute, and that that perception is a reasonable one, the system should focus its attention more on how that can be achieved in the most cost effective and fair way. That is, primarily, why what I have said is focused more on changes to the system than on attempts to change lawyers' conduct within the existing system. Earlier and continuing mutual disclosure; extending the system of cost penalties for rejecting reasonable offers of settlement to offers made before litigation; extending the benefits of court sponsored mediation to mediation occurring before litigation; and reducing adversarialism by having agreed or appointed expert witnesses in lieu of party appointed ones; all involve systemic change.

A second underlying theme has been proportionality. That means two things; first that the cost of resolution of a dispute to must be proportional to the amount or value in dispute; and secondly that the cost effectiveness of resolution must be balanced against the risk of unfairness; for there is no point in a cost effective solution if it is intrinsically unfair. And in arriving at each of those balances compromises must be made. There is no perfect system.

Making those compromises will, I think, almost invariably favour settlement over adjudication. But we cannot ignore the problems which, it seems to me, may arise from low trial rates. Other than to suggest that the trend towards settlement and consequently lower trial rates should be reversed, which I think is both wrong and impractical, academic writers appear, on the whole[20], to have ignored these problems. But if, as I think, they are real, they deserve further extensive consideration.

[20] Two notable exceptions being Professors Resnik and Yeazell, referred to earlier.