

**National Judicial College of Australia**

**Conference on the Australian Justice System in 2020**

**Sydney, Saturday 25 October 2008**

**Complex Litigation**

**Justice James Allsop**

President, Court of Appeal NSW

*Edited transcript*

1. Complex litigation and 20/20: I think, first of all one should understand, it's not just 'big' litigation, and it's not just 'big' commercial litigation, and this can be seen, I think, from some of the reasons which lead to litigation being complex. Some of these are being discussed today, and I won't dwell on them. We have a more complex society, I think, than some decades ago, greater diversity of population, and multi-jurisdictional sources of law.
2. It was only in the mid-1980s that English common law was replaced in Section 80 of the *Judiciary Act* with Australian common law as the default law in federal jurisdiction. We have spent 20 years developing Australian common law as a distinct entity.
3. Secondly, the increasing demands in society for individual fairness, and the resolution of disputes by the application of law, by reference to apparently simple norms. Fairness and justice, misleading or deceptive conduct, and human rights, all can be simply expressed, but all have within them complex circumstantial investigation as to the "correct" result. One only has to recognise that, before the *Contracts Review Act*, most guarantee cases, if they ever got to court, could be dealt with in a matter of hours. With the *Contracts Review Act* they became, almost necessarily, an investigation taking some days. That is not stated as a bad thing, but one needs to recognise it in terms of cost, complexity and time, the price of reaching individual justice on a fair basis.
4. Legislative trends have also led to complexity. There is an increasing reliance, certainly in Commonwealth legislation, on a deconstructed model of drafting which adds to complexity. In my change of court in the last three or four months, one of the immediate impressions was of the comparatively simpler drafting style of the State Parliamentary Draftsmen. If you began at the beginning of an Act and read through it, you generally got hold of what was involved much easier than one can generally get in modern Commonwealth statutes. Again, that's not necessarily a personal criticism; it is a fact or at least in my impression.
5. Large and complex subject matters have grown more common: class actions, physical, economic and environmental disasters or disputes involving many,

many people. We will see in abundance in this country certainly in the coming four or five years major litigation involving many people.

6. There has been a loosening of procedural restrictions, such as the encouragement of class actions and the encouragement, both at a policy level and a legal level, of litigation funding.
7. So, the various factors that lead to complex litigation can lead to 'big' litigation, but also can lead to quite complex 'small' litigation.
8. Well, how to deal with these things, and how will we be dealing with them in the future? I think any discussion of these matters needs to recognise some basic elements that one will always be dealing with in litigation.
9. First, skilled professionals, to the extent that they are involved, will always be, relative to the rest of the community, expensive.

Secondly, if you force skilled professionals to work at a low cost you reap both the advantages and the disadvantages of volume litigation.

Thirdly, if you allow unlimited time for any undertaking of a legal task, the work will generally expand to fill that time available.

10. Fourthly, if you have no effective and clear supervision on costs some people, perhaps more than one would like to think, will tend to be somewhat elastic with their accounting.

Fifthly, if you permit litigants to conduct litigation at their own will and at their own pace they will demand of the state to resolve issues to be tried for all sorts of reasons other than those that justify the public expense involved.

Sixthly, litigation can induce a form of unbalanced human conduct; a mild but distorting form of paranoia often comes over litigants, even in commercial litigation.

Seventhly, society pays a huge cost for dispute resolution but, ultimately, the fair and just resolution of disputes is one of the most fundamental and important governmental functions that exist in society.

11. I think the litigation landscape in Australia has developed to a point where it is now common to see cases lasting months, and in recent times sometimes years. Judges and lawyers from other countries look at this and recoil with some horror, and rightly so. A 100-day case is bad enough for one person to absorb and resolve. It is just as bad for a court of appeal to have thrust upon it the transcript and exhibits and be expected to 'rehear' that case in a tenth or a twentieth of the time.
12. These cases are simply not sustainable and I don't think the public will continue to put up with them. I don't think the public should have to. These

cases reflect ultimately a failure of the system. That is not necessarily a personal criticism of anyone.

13. Well, what analytical tools should be brought to bear, in order to deal with the complexity that society and the legal system is thrusting upon litigation? What is the correct framework? Wayne Martin dealt with this, if I may say so, very clearly this morning. There seem to me to be four models that we are used to, one of which is being used more and being developed more.
14. The first is simple party autonomy. The judge as referee in civil cases died some time ago.
15. Secondly, a full inquisitorial system. We do not have an executive structure for that.
16. Thirdly, the use of juries in civil cases. This died years ago.
17. Fourthly, a process that is developing all round the world and that is a mixture of party autonomy and state control over what can be done, recognising that the resources are State resources as well as private resources.
18. There is a lot of discussion about case management. I do not propose to discuss all the various tools with which many of us are familiar. However, I think there's one element in case management that is very often forgotten. The great case managers in their commercial lists understood, both intuitively and otherwise, that the whole of litigation has to run with a degree of cooperation between the parties. To some people this seems strange because the parties are at war in a civil way. But, just as there are laws of prize and other rules of war, the rules of litigation must be founded on the principle that you only have the right to use the resources of the state to resolve issues that you truly believe cannot be resolved by cooperation.
19. This requirement for cooperation is often forgotten. It can be enforced by a number of ways, not just through costs. Certainly, in NSW now, the requirement in the new Act that the parties behave in this way means that practitioners and parties need to be re-alerted to their responsibilities and obligations in taking advantage of the right to use State resources for litigation.
20. What are some of the responses to managing litigation of a large or small client that is complex? The first is the debate whether courts should be more general or more specialised. Those of my colleagues who are here will know my personal views about this. The role of general and specialist courts is a structural matter which is very important to the efficient resolution of what can be complex matters. The performance of the takeovers panel in dealing with takeovers, compared to the various superior courts in the 1980s, is a very good example of what happens when courts are not able to deal with particular specialist problems as efficiently as a commercial community would want. I think there is a range of subjects that in respect of which a degree of specialisation is important – the commercial list, and building list, Land and Environment Court, patent & intellectual property, and shipping and the like.

But it is important to ensure that that specialisation is not lost in an arid desert where those judges who do that specialised work are lost to their colleagues and don't have the ability to see other work.

21. Secondly, the question of control and case management. I won't talk too much about all the tools of case management that are often discussed at meetings like this and meetings with the profession. My personal view, after twenty years as a barrister and then as a first-instance judge for seven years, is that the answer to discovery is to abolish it. Replace it with a more sophisticated entitlement to ask for documents by, in effect, a developed law of subpoena. As Justice Finkelstein was dealing with that class action with \$25,000,000 price tag for discovery, his initial answer was, 'if it costs \$25,000,000 you can't have it'.
22. Thirdly, discussion of alternative or appropriate dispute-resolution. It shouldn't be called 'alternate'; it should be called 'appropriate'. The fact is that so many disputes resolve by a mechanism with litigation in the background and not in the foreground, that it should be a continuing central focus for thinking about procedure. One can enforce, through rules, procedure and developing a culture amongst practitioners, that the parties, not just the practitioners but the parties, have an obligation to cooperate. Most complex litigation could be resolved down to its nub very quickly if the parties acknowledge that there are only a limited number of things that needed to be litigated about. For instance in the *C7 Case* the applicant put its case on anti-trust bases on up to a hundred different alternatives, and when asked to choose was somewhat reluctant to do so. Again, I am not intending to be critical of anyone involved in that case but it seems to me that that kind of approach to litigation is simply intolerable, and if the public understood their taxes were being used enable it to be funded they would be rightly upset.
23. Technology has been discussed. Someone said today "I think our sons and daughters ..." – certainly in my case – "will handle this better than we do". I think a lot of the technological change will come about naturally. I do not want to say too much more about it except that I was very sceptical about such things as e-courts, in effect chatrooms for directions hearings and the like, until someone actually sat me down and told me I could not leave until they had explained it. Once they had, and once I had realised that it was not a free-for-all and it could be controlled, and it was subject to very strict protocols, I recognised that all that 'shoe-leather money' of people coming to directions hearings could be done away with.
24. One thing that many people in Australia do not appreciate, certainly many lawyers do not appreciate, is that almost all the international litigation done in the world is done by people other than courts. Apart from the United Nations Founding Convention, one of the most widely-adopted conventions in the world is the New York Convention of 1958 about the enforcement of arbitral awards. There are 144 signatories at the moment, which means that if you get an arbitral award that is not set aside you can enforce it in 144 countries against the assets of the loser. That, and party autonomy, and a degree of privacy, are the three real reasons why most international commercial

litigation goes nowhere near a court. There are some exceptions in the London Commercial Court and the courts in New York, but very often they are only in the business of protecting and supervising arbitration.

25. Against that background, I do not think one should be too fearful of a degree of private involvement in dispute resolution. If that is what people want, and if that is what is deemed to be appropriate, then I think the response of the courts and of governments ought to be to foster it. We need to bear in mind the need for the retaining of confidence both in that private resolution and in the courts' involvement with it. To that extent, I think that in the coming ten or twenty years we will see the Australian superior courts begin to play a supervisory role much more than an adjudication role in commercial disputes. The use of referees, the use of expert determination, the use of arbitrators and the use of independent assessors in complex commercial areas where people have a degree of trust in a particular person involved will much more become the norm than the commercial judge hearing the case. One only needs to see how the building and construction list in the Supreme Court here operates. I do not say this in any way derogatorily; it is a clearing house for building disputes. It manages a portfolio of references and arbitrations, and that's what the parties want. You do not see building cases heard by a building list judge in the Supreme Court any more, and rightly so, if I may respectfully say so.
26. That recognition of the ability to resolve disputes outside a strict judicial confine may, I think, see, in a domestic context, a paradigm similar to that which exists in international commercial litigation. That said, the attraction of skilled, competent commercial judges in superior courts of record in this country should not be underestimated. The one thing that litigants fear perhaps more than anything else, about litigation is the railroad tracks of the appellate process – being dragged unerringly down to Canberra in three or four years time. I do not mean that rudely, but I am referring to the fear of losing control. I think one aspect that one may well see in the future, in relation to even judicial disposition of controversy, is an ability in the parties, through statute, to choose their appellate regime by consent. If that were available to commercial parties, certainly that would enable them to maintain a degree of party autonomy over the system that otherwise might engulf them.
27. In large cases, I think we will see the use of teams. Teams not only of judges but masters, and special masters, as have been used in America for many, many years. In a sense it is quite unfair to someone like Ron Sackville to make him do the *C7 Case* alone. Everyone else had two silks and three juniors, and teams of solicitors, and he's left to do it on his own. The fact that he was able to do that is a testimony to his skill but it is absurd, I think, to expect one judge. Apart from being bad for people's health, the process is oppressive. You need two judges with a senior judge deputed – not necessarily *the* senior judge but a nominated judge – and then the reserve, to help with the resolution but not take responsibility finally for the decision, and with teams of registrars and masters to help winnow the litigation. Now, that is very costly but in the *C7* litigation, for instance, or any other large piece of commercial litigation like that, the question arises whether that shouldn't be a cost to be borne by the parties.

28. There are many techniques and tools that can be used in the winnowing of issues and the control of parties. Essential to it, as I have said, is the notion of cooperation between the parties, as well as enough resources to enable the judge to have the time and ability to absorb a vast body of information.
29. One matter now needs to be raised in relation to the kinds of alternative use of referees, assessors, arbitrators and the like. Arbitration by consent is not a problem, of course, but to the extent that these mechanisms operate over the objection or without the consent of one party very much gives rise in Australia to the question, how does this work in relation to federal jurisdiction? Because, if a matter is to be heard by a referee or an assessor, and in effect with a very limited right of appeal in relation to factual matters, whether it be at the point of adoption of a referee's report or otherwise, the question arises as to whether this is conformable to Chapter Three of the Constitution. This issue will have to be broached in due course. It probably will lead a fundamental rethink of some aspects that have been taken for granted, but it is a live issue at the moment. VCAT hears most building disputes, as I understand it, in Victoria. I have never seen a building dispute that did not have a 'misleading or deceptive conduct' allegation in it somewhere. That would involve, almost necessarily in many cases, the building dispute being in federal jurisdiction – if there's a Section 52 plea.
30. There will need to be some reconsideration of how these things are done, and a recognition that use of tools such as referees is not an abrogation or abandonment of judicial power but the use of the special trial, as was explained in *Buckley and Burnell*, and other cases on references and arbitration. Incorporating that in a wider and more coherently expansive notion of the operation of the judicial power and how it's deployed in the resolution of disputes.
31. Finally, two last points. No one today has spoken of Australia as a regional leader in international dispute-resolution. It should be spoken about because if we want to be that, our systems and structures have to be simple, clear and amenable to understanding by people who might want to litigate. In 2006, in a speech in honour of my dear late colleague Richard Cooper, I said this in the context of admiralty litigation:
- “The complexity of the federal structure and the division and overlapping of authorities in the administration of justice are deep structural impediments to the simple and coherent of judicial and arbitral dispute-resolution in Australia, in particular for international disputes.
- “Without intending the slightest criticism of the correctness of the judgments or of the Justices of the High Court in *Wakim*, the destruction by that case of a nascent national legal system, established by the exercise of the common sense of the governments of the Federation in the 1980s, is a matter both of profound regret and national importance. Any lawyer who has experienced the deep resentment and frustration of a client, in particular a foreign client, paying good money to have our federal legal system

explained to him or her, and to have the privilege of seeing jurisdictional arguments debated, realises the importance of this.

“Given a choice, and all things being equal, parties will not willingly submit themselves to a jurisdictionally complex legal system. Simplicity in dispute resolution is not always possible but complexity, or the risk of it, is to be avoided if it can be. Legal structures for court and arbitral systems should be simple and easily able to be understood. We face the risk over time of insignificance as a centre for international dispute-resolution in this region. This applies to maritime dispute-resolution as well as other litigation.”

32. That is not a plea for the Federal Court; it's a plea for some degree of simplicity. Politics will not easily give up branches of government – nor should they. They are important things. But the complexity of our necessarily federal structure is something that has to be recognised.
33. Finally, our universities lag behind those of the United States, Europe and even the UK in their attention to procedural theory and litigation theory, and the wider notions of dispute resolution. The likes of Geoffrey Hazard and Zuckerman do not write here, as they do in Europe and the United States. Again, as I say, if that is too harsh it may be that I should be criticised, but I think the major universities should have professorial chairs in dispute resolution and procedure. It is not just a matter of practice for judges and lawyers to talk about. There are deep underlying questions of sovereignty, justice and the deployment of public resources and how we do our work. It is not just ADR work; it is the whole field of dispute resolution in a civilised way, and I think it would be good to see some chairs in this subject in some of the major universities.