

THE MARTIN KRIEWALDT MEMORIAL ADDRESS

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THE PURPOSE OF LITIGATION

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The first in this series of addresses was given in 1992, by the late Lord Oliver of Aylmerton¹. His Lordship said the title for his address, which had been suggested to him by Justice Angel, should be taken as a clothes-hook on which he would hang whatever he wanted to say. The same applies to me. Justice Angel mentioned, without undue sensitivity, that I am about to become unfit for office by reason of age. He suggested that I should have learned, or at least noticed, a few things in 25 years as a barrister and 20 years as a Chief Justice. It was generous of him to assume that, unlike the Bourbons, who learned nothing, and forgot nothing, I might be able to respond to his suggestion.

¹ Lord Oliver of Aylmerton, *Requiem for the Common Law* (1993) 67 ALJ 675.

Since my chief preoccupation for the last 45 years has been with the administration of justice, civil and criminal, it occurred to me that the process of litigation may be a topic worth exploring.

I have often asked myself what I would say if someone outside the law asked me to explain the purpose or object of our system of civil litigation. So I will take advantage of your generous invitation, and the latitude offered by Justice Angel, to mention some ideas about a topic that is a large part of the *raison d'être* of most judges and many lawyers.

The system is much more the product of evolution than of planning by a rational intelligence. That is no bad thing. From time to time, it is questioned, and changed. Yet, while we share general ideas about its strengths and weaknesses, there is not much examination of some of its basic assumptions. It has occurred to me that it may be useful to raise some issues about the way the system works, and might be changed, in order to test some of those assumptions. My aim is not to offer a program of change (it is much too late in the day for me to do that) but to offer some reflections that might stimulate ideas in other people.

The boundaries between criminal and civil justice are not always clear, but the distinction is real, and remains useful. The criminal justice system does not have to explain or justify its existence, although its methods are always open to criticism and improvement. When the fairness and efficiency of the system are called in question, the values

according to which those things are measured are not difficult to state. We accept that a person accused of crime has a right to a fair trial before an independent and impartial tribunal. The practical application of that standard may cause disagreement. In the case of trial by jury, are majority verdicts acceptable? In trials for sexual offences, should certain kinds of relevant evidence be excluded in the interests of protecting a complainant from humiliation? In dealing with alleged terrorist offences, is it permissible to rely on evidence not made available to the public, or perhaps even to the accused? There are many such issues. Even so, there is a shared understanding about what criminal justice is seeking to achieve, and generally about how we can evaluate its success.

Problems of cost and delay, which have always plagued both criminal and civil justice, are of concern, but again, on the criminal side, we know what we are trying to do, even if, through inefficiencies, or lack of resources, we do not always live up to our own standards. Sometimes, through pressure of business, our standards change in their practical application.

A Northern Territory case is a good example of how our ideas of acceptable delay have become less exacting. In *Stapleton v The Queen*², the appellant killed a police officer on 9 June 1952. By

² (1952) 86 QB 358.

20 October 1952, he had been tried in the Supreme Court of the Northern Territory and convicted of murder, his appeal to the High Court had been heard, and his conviction had been quashed. The time from the alleged crime to final disposition of an appeal to the High Court was four months. At about the same time a famous English case, later found to have involved a miscarriage of justice³, was before the courts. A youth named Bentley was involved in the fatal shooting of a policeman on 2 November 1952. He was tried by jury. He was convicted of murder on 11 December 1952. He was sentenced to death. He appealed. His appeal was dismissed on 13 January 1953. He was hanged on 28 January 1953. These time-lines now seem astonishing. Yet this is not ancient history. Those cases were heard about 10 years before I became a barrister. When I was admitted to the New South Wales Bar, a long criminal trial was one that took more than two days. Human rights instruments typically refer to a right to be tried without unreasonable delay, but I have seen a major change in what is taken as unreasonable delay. It would be useful to investigate when, and why, it happened. My present concern, however, is with civil justice.

Although we can look at criminal justice with a clear and common understanding of what it seeks to achieve, it is more difficult to say the same about civil litigation. It serves many different interests. The participants have conflicting objectives. Those responsible for the

³ *Reg v Home Secretary; Ex parte Bentley* [1994] QV 349.

conduct of the process exercise only limited power over its operation. Evaluating the performance of our system of civil justice is difficult, partly because there is no single objective which the system pursues, and no single source of control of the process.

Civil justice involves a substantial application of public resources. Inevitably, governments want reasonable assurance that such resources are being applied efficiently and effectively. Management looks for performance indicators, upon the theory that what cannot be measured cannot be improved. At a certain, fairly basic, level some aspects of the performance of the system can be measured and some useful comparisons can be made. This is not the occasion to go into the topic of evaluating the productivity of courts. As in other areas, such as hospitals or universities, performance indicators may be crude, and sometimes hilariously inapt. Qualitative evaluation is distrusted. These matters have been widely debated. For the present, I wish to raise some issues that are less widely discussed.

It is possible to describe the aim of civil justice uncontroversially but at a high level of abstraction. It is the method by which the state - the government - enforces the legal rights and obligations of citizens. The law, whether enacted by Parliament or declared by judges, defines those rights and obligations. Their existence raises the possibility of disputes, either between citizens, or between the government and citizens. The courts exercise the judicial power of government, which secures justice, and keeps the peace, by enforcing the civil law and

imposing the will of the state on disputing parties. A court order, which is the outcome, or product, of litigation, is an exercise of official power through the government's judicial organs.

Government resolves disputes, but in the exercise of its legislative power it has an anterior role. By making the law, it creates, expands or limits the occasion for the disputes. More than 30 years ago, the New Zealand Parliament decided that a large part of the law of tort, in its application to claims for damages for personal injuries, would be replaced by a system of social insurance, dealt with administratively. The Parliament thereby put an end to a kind of litigation that still constitutes a substantial part of the business of Australian courts, and of the work of Australian lawyers. That decision of public policy illustrates the influence of the legislative branch of government on the business that comes before civil justice system. New Zealand judges spend a much greater proportion of their time dealing with criminal cases than their Australian counterparts. New Zealand courts, by our standards, do not have many tort claims.

In Australia, at the federal level, and also at the State and territory levels, the kinds of civil dispute that come to courts are now determined largely by legislation. Public policy behind the legislation changes over time, and so does the nature of the business of courts. Although we still have actions for damages arising out of motor vehicle collisions, or industrial accidents, such claims are now subject to an overlay of legislative regulation in most jurisdictions. Through the Family Law Act,

the federal Parliament regulates the kinds of legal dispute that may arise upon the breakdown of a marriage, and the jurisdiction according to which those disputes may be resolved. Australian Parliaments are constantly defining, and re-defining, the nature of civil claims, and the jurisdiction of the courts which deal with such claims. Government is not merely a passive recipient of disputes that require resolution; it creates and defines the occasions for dispute.

Civil courts deal with public and private law. Some forms of public law, based on the Constitution, are beyond the reach of parliamentary control, as are some forms of jurisdiction. The High Court's jurisdiction to enforce observance of the rule of law by officers of the Commonwealth, conferred by s 75(v) of the Constitution, cannot be taken away by Parliament. Disputes between governments, or citizens, or citizens and governments, about the limits on legislative, executive or judicial power established by the Constitution must be resolved by the courts. These are forms of civil jurisdiction. Parliament has also legislated for judicial review of many kinds of administrative action. The incidents of that legislation change over time, but the general objectives of public law are clear, and the methods of dispute resolution by which it is enforced can be judged in terms of fairness and efficiency. Public law brings into being the subject matter of disputes, and establishes procedures for their resolution.

At the federal level, the immigration laws define rights and liabilities of non-citizens, and set up a complex machinery of decision-

making, and of administrative and judicial review of decisions. The jurisdiction of the federal courts expands or contracts according to changes in legislative policy. The Parliament may take note of the consequences of its legislation upon the business of the courts, but the courts themselves cannot control or even influence the volume. They have some capacity to adapt their procedures to their workload, but it is limited.

In an ideal, or even a reasonably efficient, world the effect of legislative changes upon the workload of the courts, and the resources they need, would be estimated and monitored. In practice, performance in this respect is patchy. One of the responsibilities of a head of jurisdiction is to keep in touch with government about resource requirements, but systematic consideration, in advance of legislation, of its effects on the capacity of the courts could be made a routine part of policy-making if the will to do so existed.

To describe what is going on as a system, in managerial terms, may create misunderstanding. The legislative arm of government is creating rights and obligations, the occasion for disputes, and the power to resolve disputes. Litigants pursue disputes, often against the executive government. The judicial arm of government decides them. The standards by which we evaluate the fairness and efficiency of what is going on are elusive. To continue with the example of immigration, Australia has a multi-layered system of decision making and review. If a case ultimately makes its way to the High Court, typically there will have

been a decision by a delegate of the Minister, administrative review of that decision by a Tribunal, judicial review of the Tribunal's decision by a Federal Magistrate, an appeal from the Federal Magistrate to the Federal Court, an application for special leave to appeal to the High Court and, if the application succeeds, an appeal to the High Court. There may have been five or six levels of decision-making in one case. While all this is going on, often over a period of years, a visa applicant, perhaps with a family, will be awaiting resolution of his or her status. Is that a good thing or a bad thing? From the point of view of the litigant, the time taken by the process may be welcome or unwelcome. From the point of view of the community, such time is the result of a legislative decision to provide for reviews and appeals. To describe what is involved as delay is question-begging. If there is inefficiency in the procedures of the courts, resulting in more time being taken than is reasonably required for just decision-making, or if there are opportunities for manipulative abuse of the process, in order to gain time, then it is fair to speak of delay, and it will be necessary to seek ways to eliminate it. But if all that can be said is that the legislative policy has established a process that takes substantial time, the issue is not one of delay, but one of policy. Issues of cost and delay in the resolution of public law disputes are more often related to legislative policy than to the efficiency of the litigation process, although, of course, inefficiency in the process needs to be eliminated.

In public law cases, a simple matter such as legislative policy with respect to filing fees may have a large effect on the volume of litigation.

Typically, filing fees are decided by parliaments, not by courts. Even a modest fee will cause some potential litigants to think twice about commencing proceedings. But if there are no fees there may be no discouragement of unmeritorious claims. The salutary effect of the imposition of some fee for invoking the procedures of a court should not be overlooked.

The efficiency of private dispute resolution is harder to evaluate. No one would doubt that, as a general proposition, governments have an obligation to maintain courts which vindicate legal rights, enforce legal obligations, and redress civil injury. Equally, no one would suggest that a publicly funded dispute resolution system should be made available to deal, quickly and inexpensively, with every kind of dispute or grievance that may excite conflict. It is not the responsibility of government to ensure that anyone who wants to challenge a library fine may appeal to the High Court. If courts are regarded as service-providers, then the supply of those services could never meet the potential demand. In practice, the services are rationed by both formal and informal means.

The concept of rationing government services raises questions of principle and process that are rarely brought into the open. Consider, for example, the provision of public medical and hospital services. In a host of ways, these are effectively rationed. There are good reasons for this; in truth it is inevitable. Yet, to invoke a term now in vogue, there may be little transparency in the process of rationing. Decisions are made at all

levels of management that effectively, and in many cases wisely, limit the availability of limited resources by effectively denying them to some who would otherwise wish to use them. How transparent, and accountable, are those decisions? This is a question of obvious interest. Similar questions arise in respect of the services provided by courts.

An example of a formal mechanism for rationing of court services is the provision, in the Judiciary Act, that appeals to the High Court may not be brought except pursuant to special leave. The success rate of special leave applications is about one in ten. Civil litigation in Australian courts waxes and wanes. In most jurisdictions outside New South Wales, for the time being, it appears to have waned. The number of appeals heard by the High Court has been fairly constant over the last 10 years. Largely because of immigration cases, often involving self-represented litigants, special leave applications increased for a time, but have now levelled out. In the year ended 30 June 2008, the number of applications for special leave to appeal was almost exactly the same as the number in the previous year. With recent changes in government immigration policy, the number may fall.

An informal mechanism for rationing the supply of services by courts is the cost of litigation, whether in the modest fees charged by the courts to litigants, or the substantial fees charged by lawyers. Both formal and informal methods of rationing the supply of court services raise issues of public policy, and of the role of government in private dispute resolution.

I became Chief Justice of New South Wales in 1988. That was a time of economic rationalism, and governments looked at the concept of user pays in many areas of public services. Attempts were made to apply it to courts, both in New South Wales and elsewhere. Governments noticed that litigants, especially in commercial cases, paid little for the services of judges compared with what they paid their lawyers, or what they paid arbitrators or mediators for private dispute resolution. Perhaps, it was suggested, at least in certain kinds of litigation, the parties should be required to pay a commercial rate for court services and time. There was room to increase court fees in some cases, and this was done. However, courts exercise the judicial power of government, and governments have an obligation to provide citizens with access to justice. The extent to which they may require at least some people, or corporations, to pay more than they pay at the moment has received some attention. It may be that, by requiring some litigants to pay more to offset the cost of maintaining the civil justice system, governments could make that system more accessible to other litigants. On the other hand, people come to court to enforce their rights, and enforcing the rights of citizens is a duty of government, not a discretionary benefit.

There is no market for the services which courts provide, although there is a market for private dispute resolution services, and there is a market for the legal services engaged by litigants when they go to court. Because there is no market for the services of courts, price is not an

efficient mechanism for allocating or distributing the resources involved in the supply of those services. Attempts to require some litigants to pay more appear never have gone far beyond a rough-and-ready comparison between what litigants pay for court time and what they pay their own lawyers. It is really no more sophisticated than the making of an observation that some litigants, typically commercial organisations, obtain access to a dispute resolution system for which they could afford to pay, and would probably be willing to pay, much more. It does not represent an attempt at rationalisation of service provision by a price mechanism. Lack of enthusiasm for further examination of the idea may owe more to an absence of any clear objective to be served by such a course than to a commitment to the principle of access to justice.

There is a related question that is most apparent in some commercial and corporate cases. Mega-litigation is not new, but in recent years there have been several examples of cases that have occupied months, sometimes years, of judicial time. Plainly, in these cases, legal costs are not an effective form of rationing. The parties are willing and able, or obliged, to spend so much on the services of lawyers, accountants, economists and others, that the value of the time of judges is utterly insignificant. Indeed, in some of these cases the parties, before or during litigation, engage private dispute resolution services at a commercial rate.

Another reason why governments have not pursued the idea of user pays with much vigour may be that to do so would require

consideration of what users are entitled to receive. That, in turn, would prompt examination of the level of resources that governments apply to court services. If users, or some users, were required to pay substantial fees for government dispute resolution, then they would soon begin to question the value of that for which they are required to pay, and to ask what standards government itself sets for its own performance in this area. Governments may not wish to go down that path.

There are some services provided in connection with litigation for which commercial rates are charged. They include, for example, the cost of transcripts, or the use of certain facilities provided for the convenience of litigants or lawyers. Even so, the basic services, that is to say, the judge or judges, the judicial support staff, court registry and its officers, and the hearing room are normally provided at a fairly nominal charge and without any attempt to recoup the cost to government, let alone to recover a price that the traffic will bear. My purpose is not to advocate a system of user pays in relation to court fees generally. On the contrary, I believe there are both theoretical and practical objections to it. But it is an example of an issue that receives sporadic attention but is rarely considered in any depth.

The performance of governments as suppliers of services in the area of civil justice is a subject of increasing attention at a micro, but not a macro, level. Efforts are made, within courts and within the executive government, to examine, and where possible measure, the efficiency with which the resources provided to the civil justice system are applied.

Court management, and the management of individual cases by the presiding judges, are topics of interest, and the science has developed rapidly in recent years. What is notable, however, is the absence of attention to the wider question of the level of resources that governments might reasonably be expected to apply to their civil justice systems. Issues about resources arise when problems are encountered, or complaints are made, about some particular aspect of the system. If, for example, a serious backlog of cases develops in a court, consideration is likely to be given to providing further resources either by way of appointing additional judges, or court officers, or by some form of extra funding. These usually are temporary measures to meet emergencies. Putting them to one side, there remains a question: what is a reasonable level of government funding of the civil justice system? We are constantly reminded of how much governments spend on defence, or roads and bridges, or public housing, or welfare, or sport. There are, it is said, no votes in courts. Occasionally, problems in courts could cost votes unless they are fixed but, as a general rule, governments do not make political capital from the level of their commitment to funding the justice system. Increasing the size of a police force is always popular. Appointing more judges, providing better court facilities, or widening or streamlining access to dispute resolution services may sometimes appear on a political agenda, but usually only as a matter ancillary to some more specific public policy issue. This relative lack of public and political interest in the civil justice system is not inevitable. In France, at the moment, reform of what is described as the *carte judiciaire*, involving a substantial rearrangement of judicial

services and facilities throughout the country, is a hot political topic. I have no understanding of the merits of the proposed changes, but I have a certain envy of the interest that is being taken in what most Australians would regard as a very dry subject.

I do not suffer from the delusion that any Australian government, federal, state or territorial, is likely to introduce a grand plan to double the level of funding of its civil courts, or to attempt to win votes by promising to appoint more judges and magistrates. Yet there is room for greater interest, especially within the judiciary and the legal profession, in the issue of the public policy according to which levels of government expenditure on civil justice are decided.

If a system of user pays is constitutionally objectionable, as many judges believe it to be, because it is inconsistent with a government's obligation to provide access to justice, what of the practice by which some courts demand that litigants pursue (often at their own expense) mediation or other forms of private dispute resolution before the court will deal a case? This also raises an interesting question of principle. In some Australian jurisdictions there is legislation about certain kinds of dispute (such as claims by banks against farmers) which requires parties to pursue a process of conciliation or mediation before suing. In the absence of such legislative backing, could a commercial court, for example, by its rules of court or as a matter of practice, decline to deal with a case until the parties had made an attempt to resolve their differences in some other way? In practice, this kind of rationing of court

services occurs, in different ways, in a number of jurisdictions. From one point of view, it is no more than an aspect of case management. As with the concept of user pays, I doubt that there has been, at least publicly, any rigorous analysis of the principles involved, which must include a concept of the responsibility of government, including the judicial arm of government, to provide civil justice to those who need it.

I referred earlier to the formal rationing of the time of the High Court through the system of special leave applications, which rests on a legislative foundation. There is an equally effective, and no less frank, but informal, rationing of the time of the High Court. It has been one of my responsibilities, and I have never had any complaint about it. The Court allocates to each appeal a certain time - rarely more than a day - for argument. The parties normally agree on a division of that time between themselves. By comparison with the Supreme Court of Canada or the Supreme Court of the United States, the time we allow is generous, but it is limited, and the parties and their lawyers accept that. I do not doubt that in many appeals the lawyers would take several days if that were permitted. A glance at the reports of argument of cases throughout most of the 20th century will bear that out. I can understand that trial judges find it much more difficult, without knowing the possible direction of a case, to do the same, especially without the support of a statute. Yet I believe that this kind of rationing of court time, provided it is consistent with a fair hearing, is appropriate, and will become increasingly necessary. Without it, there is an unfair and possibly irrational allocation of scarce judicial resources. Judges do not hesitate

to apply limits to potentially vexatious litigants who waste court time pursuing minor grievances or unmeritorious claims - and rightly so. This is a power that should be exercised more extensively. The principles according to which it may be done, and the kind of legislative backing that may be desirable, could usefully be made the subject of wider consideration by the judiciary and the profession.

Courts can be, and in my experience have been, overwhelmed by demands of certain kinds. In November 1988, the Common Law Division of the Supreme Court of New South Wales operated what was called a Sydney Civil List. On any given day, the average number of available for that part of the Division's business judges, was three or four. The number of cases awaiting hearing in that list was 10,800. A delay reduction programme was undertaken. It was my introduction to judicial management. In fact, the Supreme Court of New South Wales has been carrying on a virtually continuous delay reduction programme since 1824, but the late 80's and early 90's was a time of unique intensity. This is not the occasion to describe the techniques adopted, or the lessons learned. The best lesson was: when you are in a hole, stop digging. Yet with all the daily concerns of that period, it was necessary to face some fundamental issues, and to how far courts can go to protect themselves from being submerged by such a flood of litigation.

According to one theory, the demand for court services, although constrained by legal costs, is otherwise practically unlimited. In litigation

of the kind that created the alarming delays, mentioned, legal costs did not limit demand because plaintiffs' lawyers provided their services on a no-win no-fee basis. The majority of cases were settled, and the terms of settlement almost always provided for the defendant, who was insured, to pay the plaintiff's legal costs. In more recent times, litigation funding, where available, has also removed what for some people is the main obstacle to commencing lawsuits. Legal aid, to the extent to which it exists in civil cases, has the same effect. The age-old criticism of the courts is their inaccessibility to people of ordinary means. Yet the corollary has been that governments have provided a justice system that, by comparison with the potential demand, is very modest in size. If courts were readily accessible to everybody who wanted to sue, how many judges would we need?

It is rarely acknowledged that, cost and delay prevent the civil justice system from being overwhelmed. This is an unpopular idea. Equally, I have never seen any attempt to estimate the number of courts and judges that would be required if these barriers were miraculously removed.

The point may be emphasised by considering one particular form of civil litigation: claims against governments. Those claims may take different forms, including ordinary actions in tort against governments, government instrumentalities and corporations owned or controlled by government; actions in contract; proceedings for judicial review of administrative action; and claims arising from industrial grievances.

Governments, in their various manifestations are major litigants; mainly as defendants. Increasing access to justice involves making it easier to sue, and means making it easier to sue governments. There are some other identifiable categories of regular defendants: banks, insurance companies, media proprietors, transport companies, providers of hospital and medical services, builders, and lawyers. It is impossible to measure the extent to which there is an unmet demand to sue, but it can hardly have escaped the notice of popular defendants, including governments, that increased access to the courts means increased claims against them. Recent legislative changes in a number of Australian jurisdictions, making it considerably more difficult to litigate claims for damages for personal injury - a significant limitation on access to the courts - appear to have been a response to representations from potential defendants or their insurers. What is called tort-law reform, aimed at limiting the capacity to enforce common law rights, includes protection of certain kinds of defendant against litigation.

To my mind, a principal justification for a reasonably accessible court system, and civil litigation process, is prophylactic. As a citizen, I value civil justice, not because I think I might want to sue somebody, but because I know how some people would behave if they were beyond the reach of the law. Justice has a civilising effect upon power, whether that power be formal or informal, official or unofficial, public or private. To most people, a lawsuit is a last resort; one never likely to be used. But they understand that, without that possibility, the unchecked power of bureaucracy, or private forces, would subject them to intolerable stress.

On occasions, people who assume that I must see be a promoter of litigation, challenge me to identify anyone who has benefited from suing. There are some examples that could be given, although when I was a practitioner I normally discouraged people from litigating, and nothing in my experience as judge has caused me to change my mind. The challenge, however, can be answered differently. The system of civil justice, by its very existence, enables people to conduct their affairs without resort to conflict. It is because people have a reasonable assurance about what would happen if they went to court that most of them never need to do so. It is the dispute prevention aspect of civil justice that is its primary justification. The question is not: who is better off because he or she went to court? The question is: what would society be like if we did not have courts to enforce our rights, and require others (including governments) to honour their obligations. It requires very little imagination to identify some people or organizations who would be very unpleasant to deal with if there were no practical possibility that they could be taken to court.

Without doubt, the cost of legal services is a practical barrier to access to civil justice. There is a certain randomness, and irrationality, about the means by which that barrier is lifted for some litigants, or some kinds of litigation. Litigation funding is becoming more systematic, and its regulation is a topic of current interest, but its availability is limited by the commercial considerations that brought it into existence. Contingency fee arrangements are most likely to be available in the kinds of case where a favourable result for a plaintiff by way of

settlement is most likely. Actions for damages for personal injuries in motor vehicle or industrial accident cases are the best known example. Legal aid for civil cases has to compete for funds with legal aid in criminal cases, and in most jurisdictions it is not extensive. The commonly heard assertion that only the wealthy, or the very poor, can sue is at best an over-simplification. If it had been universally true, the Supreme Court of New South Wales would not have had a vast number of cases awaiting hearing in 1988. Almost all of the plaintiffs in these cases were persons of ordinary means. They had lawyers who were working on contingency fees. What is true is that, because there is no available litigation funding or legal aid for many kinds of case, and the cases do not lend themselves to contingency fees, much litigation is beyond the financial reach of ordinary people litigation may or may not be affordable, depending on the kind of claim a person wants to bring. It is difficult to account for the difference between cases that are affordable and cases that are not affordable on grounds of justice. That is the greatest weakness of the system.

Cost is not only a factor that makes resort to litigation impractical for many people. It has another, less understood, aspect that is of increasing concern to judges. It can be used by some litigants oppressively. The process of discovery, for example, lends itself to abuse by litigants whose interest lie in increasing the stakes. A number of aspects of the litigious process lend themselves to this kind of abuse, and such behaviour may be difficult for judges to control. It would be as naive to assume that all litigants seek to avoid cost as it would be to

assume that all litigants seek to avoid delay. Some turn cost and delay to their advantage. This is another respect in which it is misleading to regard the system as a process amenable to the techniques of management. The parties to a court case may have different interests in the efficiency of the process. For some of them, the more expensive and dilatory the process the better. This is a reason why modern judges take a more interventionist approach to the management of cases. Not only is it necessary in order to promote efficiency application of the system's limited resources; it is essential if the system is to operate with reasonable fairness.

Suggestions for reform are constantly before the government, the judiciary and the legal profession. Such proposals are more likely to improve the quality of justice if we can clarify our understanding of the fundamental purpose of the litigious process. I am not sure that, after 45 years, I know the answers, but at least I have learned some of the questions.