AFTER DINNER SPEECH – 15 JULY 2004

LAW OF OBLIGATIONS CONFERENCE

THE UNIVERSITY OF MELBOURNE

15-16 JULY 2004

May I begin by saying that, subject to one notable exception, we all owe a considerable debt to those who have organised and participated in this Conference. Organising a conference such as this is a very large undertaking. Delivering papers of the quality we have heard today requires a very great deal of time, work and thought.

It is unfortunate then that having set such commendably high standards the organisers should slip by inviting me to speak at this dinner. I suspect that the last thing that any of you feel able now to confront is another speech, let alone a speech by a High Court Judge. Especially is that so when I am minded to invite your attention to some questions that lie behind issues of the kind that you have been examining in the Conference. But they are questions which I think are important and which all of us who practise, study or teach the law would do well to think about.

The circumstances in which the principles we have been discussing in this Conference find application are changing. Change is no new phenomenon in the law. It has been happening for a very

long time. The common law is always evolving and developing. If it were not so, we would have no law reports. Statute law is always changing. A glance at the bookshelves reveals how rapidly the rate of change in statute law has increased over, say, the last 100 years. Of course, all of us concerned with the practise, study or teaching of the law must take account of these changes. But there are some other changes to which I want to draw attention tonight which may be more deep-seated than the obvious changes in common law principle and applicable statute law. The changes to which I want to draw attention are changes in the way in which the judicial system is operating.

When I was admitted to practice in 1969, the Supreme Court of this State was the principal trial court. The only federal courts created by the Parliament that existed were the Federal Court of Bankruptcy and the Industrial Court. There was no Family Court; there was no Federal Court. The Supreme Court of this and other States exercised federal jurisdiction in matrimonial causes. The High Court exercised original jurisdiction in taxation and intellectual property matters.

In the Supreme Court, a single Full Court of the Supreme Court disposed of all civil and criminal appeals each month. Parties in civil cases could appeal as of right to the High Court or to the Privy Council if the amount at stake exceeded a relatively modest

threshold. Criminal appeals to the High Court or the Privy Council were very rare indeed.

The work of a trial judge, at least a trial judge in the Supreme Court, was then very different. There was no case management. The speed at which cases were made ready for trial was a matter entirely for the parties. The trial judge knew little or nothing about the case until counsel for the plaintiff opened it. Parties had no warning of the way in which the opposing party proposed to conduct its case beyond such definition of issues as the pleadings provided. Seldom would the trial judge reserve the decision. When the last speech by counsel ended, the trial judge began to deliver judgment. A case which went more than two or three days was considered to be a long case.

How the practice of the law has changed.

Trials are, I think, becoming much less frequent, much longer and much more complicated. Yet at the same time, more and more questions, once decided administratively, are committed for decision by judicial or quasi-judicial processes in specialist tribunals. The extempore oral judgment at the end of a trial is now almost unknown, whether in court or in the specialist tribunals. Every decision is reserved, every decision is recorded. Every decision is then examined with a fine-toothed comb for appealable or reviewable error.

There are many reasons why these changes have happened. The search for individualised justice has led to very large changes in statute law and in common law principle. No court proceeding is now thought to be respectable unless one or other party alleges contravention of the *Trade Practices Act* and I await with interest the day when a charge of homicide is met by a plea of misleading or deceptive conduct. The Imperial march of negligence has proceeded to the point where all civil claims are seen by some as explicable only by reference to an allegation that one party breached a duty of care owed to another.

In addition, technological advances as familiar as the photocopier, leave aside the possibilities presented by our ability to use computers to manage huge quantities of data, have had two very great effects on the conduct of litigation. First, they have changed who it is who makes the decision about what is relevant or irrelevant. Once it was the solicitor who did that when briefing counsel. Counsel was given only the relevant papers, not every bit of paper that the case has generated. Solicitors no longer feel able to do that. Now they feel obliged to send all the papers to counsel.

Secondly, these technological advances have changed the time at which a decision is made about what is relevant. All too often now, discriminating between what is relevant and irrelevant in a case, and between what is important and what is unimportant, is left until a very late stage of the trial of a proceeding. Often it is left to

the judge deciding the case rather than being undertaken by the instructing solicitor or by counsel choosing what to put before the court. How often, as a trial judge, did one hear counsel say that the three, or five, or seven, lever arch files of documents being passed to one's associate were being provided as "background reading". Such invitations were impossible when the key documents had to be identified and then reproduced by copy typists.

Despite what you may think, I do not mention these things solely so that I may indulge in some nostalgia for the "good old days". I mention them because they begin to explain why the trial of proceedings may be becoming less frequent but much more complex than was so when I first came to the practice of the law. As we have become better able to reproduce and manage documentary material, we have multiplied the amount of material we have available for consideration at every stage of the judicial process.

This is no uniquely Australian phenomenon. Commentators on, and participants in, the United States federal judicial system have pointed to the phenomenon of the disappearing trial. And that phenomenon is not confined to the civil side. Fewer and fewer criminal trials are being heard in the US federal courts. More cases are being instituted in US Federal Courts than ever before, both on the civil and on the criminal side; far fewer are proceeding to trial.

The explanation for the diminution in the number of trials of criminal proceedings in the United States federal system lies in part, perhaps in large part, in the importance of plea bargaining conducted against a background in which sentencing judges have little or no discretion about the sentence to be imposed. If accused persons are to have any control over the consequences of their conduct, they must bargain with the prosecution about the charges to which they will plead guilty. But on the civil side, the dominant factor leading to reduction in the number of matters going to trial is the emergence of managerial judging whose principal purpose is to convey to the parties that the solution which they choose to their dispute is *inevitably* better than submitting their dispute to adjudication by the courts. More than faint echoes of this can be heard in the Australian judicial system.

Hitherto, the premise, that any settlement is better than going to trial, has been understood to present questions described as "access to justice" questions. No doubt that is right and I do not for a moment suggest that those questions are unimportant. But it is the questions which lie behind them to which I want to draw your attention and about which I ask you to reflect in the light of what we have learned [and will learn] during this Conference.

At the very heart of the notion of judicial power lies the application of the power of a polity to resolving disputes or quelling controversies. That is a central function of the government of the

polity and it is a central function for the simple reason that it is the power of the polity that underpins the judicial system. I see nothing whatever wrong in telling disputants that, if they can resolve their differences without resort to the power of the State, they may be more content with the resolution they choose, than they will be if the State quells their controversy for them. But sometimes the message that litigants are given is not just that they should consider composing their differences; it is that *any* solution is better than going to trial. If we find that litigants are being told that to commit the resolution of their dispute to the power of the State is a prospect too horrible to contemplate, we must ask why is that so.

There are, I think, three key questions. First, if the dispute is one about facts, why is its resolution so much harder now than once it was? Secondly, if the dispute is about applicable legal principle, why is there doubt about the content of that principle? Thirdly, and most importantly, what do these doubts and difficulties tell us about the way in which the judicial system is operating? In particular, what do they tell us about the processes that we are using to identify what facts are in dispute and then to determine them? What do these doubts and difficulties tell us about the way in which we are stating applicable legal principle?

Let us begin at the beginning, with the way in which our young lawyers are trained. What directions do we give our students and young lawyers which will enable them to find a path through the

thicket of legal and factual information that now is available to them? Are we teaching them enough about how to distil a complicated mass of information in a way that will enable them to identify the relevant principles that are to be applied to the relevant facts? Are we giving them the tools, and the courage, to identify what is relevant and to discard what is not?

In matters of legal principle, are we allowing exceptions to obscure the content of the basic principles? The exceptions and qualifications are interesting and it is there that we will find the most recent developments in the law. But do we spend enough time looking at the basic principles? At another level, do we focus so much upon the aspirational content of broadly stated rights and freedoms that we obscure the proper identification of applicable norms and obligations?

Perhaps you will say that these are questions that find their answers in the conduct of others. Thus you may say that statutes are too many and too complex. You may say that the High Court should abandon seriatim opinions in favour of majority and minority opinions. We could have a very long debate about both of those propositions. But not tonight. For the moment I want to direct your attention to more basic questions. The way in which the judicial system operates has changed over the last 40 years. That process of change continues. All of us who study, practise or teach the law must do more than observe the changes that are happening around

us. We must look at what we do, to see whether we should be changing what we do and how we do it.

In particular, we must recognise first that dispute resolution in the courts is becoming more complex, both factually and legally. Secondly, we must recognise that more and more disputes are being resolved outside the courts. These two kinds of change are related. Because dispute resolution in the courts is becoming more complicated and, therefore, more difficult, disputants are looking elsewhere. But although they are related in this way, the two kinds of change I have identified are different. The increased application of quasi-judicial resolution processes in administrative decision-making is one important difference.

This Conference is, I think, the only conference of its kind in Australia. Conferences about aspects of public law and aspects of international law occur frequently. This Conference, however, is the only one, I think, which focuses attention upon the law of obligations. It gives us all the chance to reflect upon questions of the kind I have mentioned. In particular, it gives us a chance to reflect upon the first of the problems I identified: that of complexity. Why is the resolution of questions, for example, about the rights and duties of parties to a contract now seen as attended by such difficulty? What do we need to do to avoid those difficulties? What can we do to avoid them?

Such questions may cause us to examine some very deep and difficult issues. In particular, they may cause us to examine whether the search for what Gleeson CJ once called the Holy Grail of Individualised Justice[1] has led to such elaboration and refinement of applicable rules that we should consider altering those rules in some respects. So, to give but one instance of what I have in mind, do we need to devote more time and effort to articulating the criteria which we say are to be used in deciding whether, for example, conduct is unconscionable? Perhaps that is what is happening in relation to negligence when the Court rejects (as it has) the adoption of tests stated in conclusionary terms like "fair, just and reasonable"[2]. On another, separate, tack, do we need to consider altering the way in which issues for trial are to be identified? At the moment, the rules assume that this is done by the pleadings and is done once and for all at the start of the case. Should we consider changing these procedures and, in particular, consider requiring the *progressive* refinement of issues during the life of a case?

There are, no doubt, many other questions that arise and there are many different answers that can be given to the few questions I have posed. What I invite you to do is to recognise that there are important changes happening. What are we to do about them?

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1 Gleeson, "Individualised Justice – The Holy Grail", (1995) 69 *Australian Law Journal* 421.

2 *Sullivan v Moody* (2001) 207 CLR 562.

This Conference gives us the opportunity, in the words of Bacon so often quoted by Sir Owen Dixon, "to visit and strengthen the roots and foundations of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance"[3]. The speakers we have heard [and will hear], the papers we have read and will read have no doubt graced the science of law in reputation and dignity. It is for all of us to attempt to amplify it in perfection and substance. And that we will do if we can reduce some of the difficulties and complexities to which I refer.

For that opportunity, for the papers we have heard [and will hear], for the chances we have to discuss these issues, we owe an immense debt to all who have organised this event.

Thank you.

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3 Bacon, *Maxims of the Law*, quoted by Sir Owen Dixon, "Professional Conduct", *Jesting Pilate*, 2nd ed (1997) 129 at 134.