Reforming Civil Procedure

Christopher Enright

The trade of lawyers is to question everything, yield nothing, and talk by the hour.
T Jefferson (ed. J Foley) (1900) *The Jeffersonian Cyclopedia* Funk & Wagnalls p226

Anyone who has ever imagined trying to take a nice meaty bone away from a pack of Dobermans will have an idea of the difficulty of getting lawyers to accede to meaningful reform.
Mark McCormack (1988) What They Didn't Teach Me at Yale Law School HarperCollins

Civil Procedure Act 2010 (Vic)
7 Overarching purpose
(1) The overarching purpose of this Act and the rules of court in relation to civil
proceedings is to facilitate the just, efficient, timely and cost-effective resolution
of the real issues in dispute.
(2) Without limiting how the overarching purpose is achieved, it may be
achieved by—
(a) the determination of the proceeding by the court;
(b) agreement between the parties;
(c) any appropriate dispute resolution process –
(i) agreed to by the parties; or
(ii) ordered by the court.

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Christopher Enright is qualified as a barrister, solicitor and chartered accountant. Chris has a Master of Commerce (Management) from the University of New England.

In a former life Chris lectured in law and management at various universities. Much of his research time as an academic was working in the much-neglected field of legal skills. This research was directed to the major tasks with law that involved reasoning. These tasks are organising law, making law, interpreting law, applying law to facts, proving facts and exercising a discretion. The aim was to simplify and systematise these tasks by developing a step-by-step guide to performing them. The ideal was that this guide was as close as possible to an algorithm. The ultimate goal was to enable law schools to train lawyers so that they could understand these tasks and, when required, perform them effectively and efficiently.

There are details of these publications on the Sinch website. This list sets out the titles of some of the major works:

Legal Reasoning	A Method for Interpreting Statutes
Legal Method	Anatomy of a Privative Clause
Proof of Facts	Principles of Constitutional Law
Legal Writing	Fundamentals of Legal Research

Preface

This book grew out of research in which the author is engaged in the area of legal method or technique. It seeks to address the twin problems of cost and delay that beset litigation in common law jurisdiction. This book explores a largely neglected analysis – that cost and delay are substantially caused by failure of court systems to organise the substantial amount of documented information that even a moderately sized case will generate. If this is a substantial cause of the problem, the solution lies in organising the information. Consequently, the book proposes a renovated system of pleading that ensures two things – that a case is fully and clearly presented and that information is organised. This system of pleading is squarely based on a model for litigation.

This renovated system of pleading also makes it possible to provide a system of legal aid for unrepresented litigants. This appendix outlines how legal assistance could be provided in the form of supervised assistance for unrepresented parties from students undergoing practical legal training as part of their qualifications to become solicitors or barristers. This assistance involves preparing documents to be filed by a party which set out the entirety of the party's case, organised according to the structure provided by the proposed system of pleading.

This book is directed to two classes of readers. One is the obvious class made up of people working in the law – barristers, solicitors, judges, administrators, academics and politicians. The other consists of lay persons who may be interested in reform of civil procedure. To cater for the laity the book carefully concepts and terms that law workers would be familiar with.

In writing this book I am especially indebted to Professor William R Long of Willamette University College of Law, Salem, for his kind, thoughtful, helpful and encouraging comments on this proposal. He was a friend indeed, an *amicus curiae*, both literally and metaphorically.

Christopher Enright

Newcastle

26 January 2017

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Fundamental remains my belief that the law is neither occult, arcane nor oracular, but to the contrary dedicated to the rational solution of social conflicts through the legal process; that because law is only a means not an end, it falls to be adjudged not by any internal standard peculiar to it as a closed system, but by the degree to which it furthers relevant social ends; that accordingly legal solutions or 'rules' have to stand the test of functional adequacy in terms of contemporary values – for short, that there should be a twentieth-century reason for all rules, judicial or legislative, with any pretence for survival.[1]

Introduction

The starting point for discussion is a basic proposition: humans are wont to dispute. There are two major ways to resolve disputes namely legal means or extra legal means. Legal means of resolving conflicts and disputes consist of the adjudicative processes of litigation and arbitration, and the conciliatory processes of negotiation and mediation.

Legal disputes involve one or more of any of three kinds of issues – issues of fact, issues of law and issues of discretion (where the issue is how the authority that is vested with the discretion should exercise it). This book focuses on resolving disputes of fact by litigation, which are by far the most prevalent disputes and the most time consuming. In a dispute over facts parties proffer differing and competing versions of one or more of the material facts of a cause of action. The existence of these different and competing versions creates issues of fact.

There are two reasons for focusing on issues of fact. Issues of fact are the most common type of issue. An issue of fact generally consumes more court time than does an issue of law or an issue of discretion. Consequently the major savings in time and costs is likely to come from reforming the procedures for

1 Fleming *The Law of Torts* (1977) p v

resolving issues of fact.[2] The aim of this book is to canvass ideas for reforming procedures with a view to making litigation more efficient by consuming less time and resources than is the case now.

Narrowly conceived, litigation refers to cases that a court decides. In a wider sense, however, litigation refers to any decision making that resolves an issue, whether the decision maker be a court, a tribunal or an official vested with a decision making power. This book focuses on courts although the principles it expounds would apply almost directly to tribunals and with some modification to cases dealt with by an official.

Litigation is now beset by major problems of cost and delay. Essentially this book argues that by properly managing information it may be possible to make a significant and even substantial reduction in these problems. To accomplish this, the book proposes a number of changes to court procedure. One of the major changes entails renovating the current method of pleading. This is aimed at improving the process of pleading while at the same time providing a framework for organising the documented information that a case generates. The rationale for this is that the current failure to provide such a framework makes for longer waits for a hearing, longer trials and longer waits for a judgment. These constitute delay. Delay is a problem in its own right. In addition, the cost of legal representation is a problem for many litigants and delay increases the cost. Lawyers generally charge by the hour so the more hours a case takes the higher are their fees.

Problems

Introduction

There are frequent expressions of concern about the major problems of cost and delay in litigation, much of it expressed by the judges themselves. In fact it is almost a ritual for chief justices to make regular public comments lamenting these problems. So, in Australia three successive Chief Justices of the High Court have spoken. In 1994 Sir Anthony Mason (1987-1995), declared that the 'justice system' was 'costly, inaccessible and beset with delays.'[3] In 1997, Sir Gerard Brennan (1995-1998), similarly declared that the Australian 'system of administering justice [was] in crisis' due to costs and delays.[4] Justice Murray Gleeson (1998-2008) has echoed his predecessors' views, pointing out that

2 There is an account of how to resolve issues of law in Christopher Enright (2015) *A Method for Interpreting Statutes*. There is an account of how to resolve an issue of discretion in Christopher Enright (2011) *Legal Method* Chapter 26.

3 Mason (1994) pp 1-2

4 Brennan (1997) p 139

'[c]ost and delay' are problems endemic to all legal systems.'[5] These distinguished jurists, however, are just some of the voices who have spoken out on the twin problems of cost and delay.[6]

Justice that is overpriced and overdue is not really justice. This is a problem because adjudicating cases is not some luxury good that consumers can do without. Rather, it 'is a special kind of service provided by the government'[7] because it is a citizen's constitutional right to have access to justice in the courts.[8] Justice, therefore, should be affordable and prompt, not exorbitantly expensive and inordinately delayed. Clause 40 of *Magna Charta*, first formulated in 1215, succinctly frames this constitutional obligation owed by the state to its citizenry as it boldly proclaims: 'To no one will we sell, to no one will we refuse or delay, right or justice.'

Delay

Inevitably there will be some delay because litigation takes time. Consequently legitimate concern is directed only towards improper delay, which consists of delay that is beyond what is necessary for the process involved.[9] Delay is possible in any stage of a case from the time when the claim arises by action of the defendant to the conclusion of the case when the court hands down its judgment.[10] In fact, once a case commences, delay can and does occur in each of the three stages of a case:

1. Delay from initiation of proceedings to commencement of the trial.
2. Delay from the commencement of a trial to its conclusion. Indeed the tendency nowadays is for the hearing of matters to take longer than was previously the case.[11]
3. Delay from the conclusion of the trial to the handing down by the court of its judgment.[12]

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5 Gleeson (2002) p 24
6 See also Street (1987), Haynes (1983)
7 Langbroek and Okkerman (2000) p 80
8 Ison (1985-86), Guest (1980), Mendelsohn (1961)
9 Mahoney (1983) p 33
10 Mahoney (1983) pp 30, 33
11 Langbroek and Okkerman (2000) p 87
12 *Goose v Wilson Sandford* (1998) (Court of Appeal, UK) *Times Law Report* 19 February where the court said in relation to delay in receiving a judgment: 'Compelling parties to await judgment for an indefinitely extended period prolonged, and probably increased, the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law.'

Due to these delays courts are 'overburdened,'[13] so that cases pile up in a backlog.[14] In consequence the 'litigation process is, par excellence, a process of bottlenecks.'[15] Delay, as Dennis Mahoney QC put it so well and so succinctly, 'stinks in the nose of the community' which the courts serve.[16] No one, for example 'is able to justify a twelve to eighteen month delay between setting the case down for trial and the trial of it.'[17] Justice delayed, as the saying goes, is justice denied, while justice dragged out is justice dragged down.

Delay occurs because the available resources are not capable of processing cases quickly enough. Thus there are two sides to the problem, the demand for cases to be processed and heard, and the supply of resources to meet this demand.

Demand for litigation is increasing and the increase is manifest in two ways. There is an increase in the number of cases,[18] which is out of proportion to the growth of population;[19] possibly this has happened because to an increasing extent people are regarding law as the solvent of most or even all social problems.[20] Moreover, litigated cases are increasingly more complex and so take increasingly more time to try.[21]

Supply is limited because 'justice is not an infinite commodity.'[22] There 'is a limit to the amount of time that can be given to each case,'[23] just as there are limited economic resources that can be devoted to the judicial system.

Supply of resources depends in the first instance on the budget allocated to a court to fund its activities.[24] When that has been done, the question must then be asked as to how efficiently courts utilise resources that the government has allocated to them. This depends on a number of factors such as the skill and motivation of judges and court officials and the competence and diligence of solicitors and barristers.[25] A most significant factor in this regard is whether the

13 Brennan (1997) p 139
14 Langbroek and Okkerman (2000) p 82
15 Mahoney (1983) p 40
16 Mahoney (1983) p 33
17 Mahoney (1983) p 30
18 Langbroek and Okkerman (2000) p 78
19 Mahoney (1983) p 36
20 Mahoney (1983) p 36
21 Langbroek and Okkerman (2000) p 87
22 Doyle (1999) p 740
23 Doyle (1999) p 740
24 See Lavarch (1999) in Stacey and Lavarch (1999)
25 Mahoney (1983) p 31. Clients have some difficulty in judging how efficient a lawyer is because of information asymmetry as the economists call it. Ordinarily the law person knows little of the substance of the work of a trained person such as a

practices and procedure of the court are conducive to efficient disposal of cases – this factor is the focus of the discussion in this book.[26]

Costs

Litigation costs money for the parties, principally in fees for solicitors and barristers, but also for things such as filing fees, travel to and from court, out of town accommodation if the case is heard away from home, and loss of income from not attending to work because of the demands of a case. Costs have now reached the stage, according to Sir Gerard Brennan, where 'litigation is beyond the reach of practically everyone but the affluent, the corporate or the legally aided litigant.'[27] One consequence of this is that there is an increasing trend for litigants to represent themselves. So great is this trend that there is now, according to Richard Ackland, an 'avalanche' of unrepresented litigants in the courts.[28]

Cause of the Problems

Problems in litigation of cost and delay may have several causes. One major cause is that lawyers have failed to pay sufficient attention, indeed much attention at all, to managing the information that a case generates. This is a problem because litigation typically generates a large amount of documented information, often 'tremendous amounts of information.'[29]

Under present practices, however, there is virtually no proper system in place for managing this information. Rules of pleading and procedure make little or no attempt to organise the documented information that becomes part of the case. In the absence of an official system for organising information, parties can, of course, maintain their own system. This, however, will not be as effective as a court based system which organises all information regardless of its source or bent, so that there is a common system for used by litigants, judges and court official.[30] Lack of such a system, as there is now, surely constitutes the haute cuisine recipe for cost and delay in trials.

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lawyer and so is in no position to judge if the service they provides is prompt and competent.

26 Doyle (1999) at p 737, who refers to 'the efficiency' with which judges 'conduct hearings.'

27 Brennan (1997) p 139

28 Richard Ackland 'Raise the bar, the barbarians are at the gate' *The Sydney Morning Herald 13 October 2002*. There are proposals for mitigating the problem of unrepresented litigants in Appendix 2 Assisting Unrepresented Defendants.

29 Mahoney (1983) p 37

30 A consequence flowing from the lack of such a system is a too ready a tendency on the part of solicitors to content themselves by photocopying every conceivable document that may be of the remotest relevance and then hope that out of this

Solution to the Problems

Insanity is doing what you have always done but expecting different results.[31]

Many approaches have been suggested to the problems of cost and delay.[32] These include appointing more judges, increasing the number of sitting days, increasing the daily sitting hours, granting fewer adjournments, reform of the rules of evidence,[33] reform of the rules of procedure,[34] abolishing the federated court system[35] and replacing it with cross vesting (a partial solution)[36] or a unified Australian judicial system (a total solution),[37] greater reliance on alternative dispute resolution,[38] replacement of the adversary system by an inquisitorial system,[39] case flow management,[40] case management,[41] sending 'hurry up' notices to lawyers and increased judicial control over proceedings (which in consequence become less adversarial).[42]

Some of these have been tried and there have been some successes, but cost and delay are still problems. Some of these have not been tried but should be. This book addresses one specific cause, namely the lack of a system for organising information which litigation generates. Yet this is a substantial cause, and even the major cause, of cost and delay. It makes intuitive sense that the absence of a system for organising information constitutes a substantial cause of cost and delay in litigation. If this is in fact the case, a remedy that could seriously reduce cost and delay lies in devising a structure for organising, storing and retrieving the documented information that the case generates. Courts can do this by constructing a system of pleading and procedure that structures information comprehensively, efficiently and from the outset of proceedings.

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indigestible mass of material will be extracted the information for the conduct of the trial. Similar views were expressed by Justice Staughton in *Paal Wilson v Partenrddederei Hannah Blumenthal* [1982] 1 All ER 197, 207.

31 This is a popular saying.

32 See Edit (1987)

33 Aronson (1992A), Aronson (1992B), Giles (1990)

34 Aronson (1992A), Aronson (1992B)

35 Edit (1978), Street (1978)

36 Baker (1987), Crawford and Mason (1988)

37 Burt (1982), Byers (1984), Edit (1978), Ellicott (1978), Moffitt (1983), Nedsley (1983), Street (1982), Kirby (1988A)

38 Banks (1987), Newton (1987), Matheson (1983)

39 Certoma (1982), Cairns (1992), Findlay (1983-1985), Down (1998), Sampford, Blencowe, Condiln (1999), Sheppard (1982), Stacey and Lavarch (1999)

40 Sallman (1989) Sallman (1995), Mahoney and Sipes (1985)

41 Peckham (1981), Flanders (1998)

42 Sallman (1989), Scott (1983), McGarvie (1989), Sheppard (1982), Brazil (1981), Marks (1993)

This book explains how to do this. The starting point is to explain the simple structure that underlies a case arising from a dispute of fact. Then follows three chapters with each explaining a way to reform civil litigation to reduce both cost and delay. This table sets out the chapters:

Chapter 2	Structuring a Case
Chapter 3	Pleading a Case
Chapter 4	Assembling Evidence
Chapter 5	Providing Low Cost Legal Aid

Diagram 1.1 Chapters Explaining Reforms