The Future of Civil Justice - Adjudication or Dispute Resolution?

Murray Gleeson*

In law making, whether by legislators or by judges, there is regular competition for influence between the claims of reasonable predictability and certainty in the law, and the claims of fairness and of justice which is appropriately responsive to the circumstances of individual cases.

The law reports and legal journals contain many examples of powerful arguments on one side or the other.

An example of an argument on one side is that put to the House of Lords by counsel for the respondent in *Midland Silicones Ltd* v *Scruttons Ltd*:[1]

> The respondents take their stand on orthodoxy. That is the correct approach. Departure from it is not justified and would necessarily produce confusion in the law, since those who make contracts are entitled to have their meaning ascertained in accordance with established legal principles. This case must be decided on the fundamental and elementary principle long established in the common law ... namely that only a person who is a party to a contract can sue on it. It is more important that the law should be clear than that it should be clever.[2]

That proposition may be thought to involve a degree of over-simplification, but that is often a feature of effective advocacy.

For an example of a contrasting approach, consider the following passage in a judgment of the High Court concerning a contract between a bank and sureties for the bank's customer:[3]

> They (the sureties) were advanced in years. Their grasp of written English was limited. They relied on (their son) for the management of their business affairs and believed that he and Amadio Builders were prosperous and successful. They were approached in their kitchen by the bank ... at a time when Mr Amadio was reading the newspaper after lunch and Mrs Amadio was washing dishes. They were presented with a complicated and lengthy document for their immediate signature. They had received no individual advice in relation to the transaction which the document embodied ... Foolishly ... they did not attempt to read the document for themselves. They signed it in the mistaken belief that their potential liability was limited ... It is apparent that Mr and Mrs Amadio, viewed together, were the weaker party to the transaction between themselves and the bank ... That weakness constituted a special disability of Mr and Mrs Amadio in their

---

* Chief Justice of the High Court of Australia.

1 [1962] AC 446 at 459.

2 The argument prevailed in that case, but compare *New Zealand Shipping Co Ltd* v *AM Satterthwaite & Co Ltd* [1975] AC 154 and *Port Jackson Stevedoring Pty Ltd* v *Salmond and Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300.

3 *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447 at 476 per Deane J.

> dealing with the bank of the type necessary to enliven the equitable principles relating to relief against an unconscionable dealing.

Numerous, familiar, examples can be given of the trend, in the last twenty years or so, towards what has been referred to elsewhere as individualised justice.[4]

They include the following:

1. The increased readiness of courts, including the High Court of Australia, in the area of contract law, to rely upon equitable principles justifying the granting of relief against unconscientious conduct;[5]
2. legislative prohibition, in trade and commerce, of misleading and deceptive conduct, and the availability of remedies in damages for contravention;[6]
3. the development of principles providing for more flexible relief in cases of illegality;[7]
4. legislation giving courts and tribunals wide discretionary powers to reformulate contracts;[8]
5. the development of the concept of unjust enrichment in the context of constructive trusts;[9]
6. the expansion of the concept of fiduciary relationships into commercial areas.[10]

Writing extrajudicially Millett LJ recently said:[11]

> Equity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied. What they once opposed through excessive caution they now embrace with excessive enthusiasm.

---

4 This expression was first used by Professor P S Atiyah in a paper entitled "From Principles to Pragmatism", Oxford University, 17 February 1978 (Clarendon Press) p 15.

5 *e.g. Legione* v *Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387; *Foran* v *Wright* (1989) 168 CLR 385; *The Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394.

6 *e.g.* Trade Practices Act 1974 (Cth), s52, and corresponding State legislation in Australia such as Contracts Review Act 1980 (NSW).

7 *Nelson* v *Nelson* (1994) 184 CLR 538; *cf Tinsley* v *Milligan* [1994] 1 AC 340.

8 Consumer Claims Tribunal Act 1987 (NSW).

9 See Simon Gardner "The Element of Discretion", *Frontiers of Liability*, vol 2, ed Peter Birks, Oxford University Press, 1994, p 186.

10 Trenchantly criticised by Lord Browne-Wilkinson in his paper "Equity in a Fast Changing World", 1996, NewZealand Law Confer ence, Dunedin. See also *Westdeutsche Landesbank* v *Islington London Borough Council* [1996] AC 669.

11 "Equity's Place in the Law of Commerce," 114 *LQR* 214, April 1998.

His Lordship, in examining this trend, and criticising certain aspects of it, remarked that the pendulum was swinging back again, at least in Australia. We might as well accustom ourselves to swings of this pendulum. The arguments for and against the competing tendencies are well understood, and have been canvassed so extensively in recent years that it would be pointless to seek to cover that ground again.[12] Contrary influences will wax and wane.

Which particular influence will predominate depends, amongst other things, on the context in which the issue arises. Circumstances vary, and give rise to different expectations as to the way in which the law should deal with particular problems. Two commonplace examples may be given.

In Australian parliamentary elections, voting is compulsory for people who have attained the age of eighteen years, and impermissible for people who have not. This bright line rule is accepted by the community, even though everyone knows that there are some people under the age of eighteen who are more intelligent and responsible than some people over the age of eighteen, and even though what is involved is an important democratic right.

People who wish to drive on public roads are required to be licensed. In order to have a licence, it is necessary not only to have attained a certain age, but also to have faced an individual assessment of competence. Such is the risk of damage to other persons, or to property, that might result from unsafe driving, the community expects that the right to drive a motor car will be determined on a case by case basis. The administration of such a licensing system is, of course, expensive. The cost is well recognised, and procedures have been established to meet it.

These are two examples of laws which, in terms of the contrast between a clear and inflexible general rule, and a rule which requires consideration of individual cases on their merits, stand at opposite extremes. There is no inherent superiority in one type of rule as opposed to the other. Some circumstances call for an emphasis on clarity and certainty. Others call for an emphasis upon individual evaluation and flexibility. The community has no particular preference for one kind of rule as opposed to the other. What is important is that the rule, in either its generality or its flexibility, be appropriate to the problem which it addresses. Furthermore, it is understood and accepted that in cases where the law calls for individual decision-making, on a case by case basis, substantial cost may be involved, and it is necessary for appropriate procedures to be established to recognise and meet the cost.

A good deal of recent writing, by judges and commentators, on the competing claims of certainty and fairness, has emphasised that commercial law is one context in which special importance has been attached to certainty, predictability and clarity. However, as will appear, it is not only in that context that the issue has arisen for recent consideration.

---

[12] Two examples of somewhat different points of view appear in the *New Zealand Law Journal* for November 1996: one a paper by Justice E W Thomas: "An Affirmation of the Fiduciary Principle" (p405), the other an article by Sir John Balcombe, "Fiduciary Relationships: Litigator's Dream or Nightmare?" (p402).

Uncertainty takes different forms, but that which is of particular relevance for present purposes is the uncertainty that exists where the practical application of a legal principle depends upon a case by case examination of facts and circumstances, so that it may be difficult to predict in advance of litigation what the consequences of the application of the principle might be. The uncertainty does not lie in the identification or formulation of the legal rule; it exists because the rule is such that its practical operation requires an examination of the facts of each individual case. The uncertainty is increased if relatively minor differences in the facts, or different approaches to the exercise of judicial discretion, can produce different outcomes in litigation.

In some areas of the law, in the interests of expediency, (which is not regarded by the law as necessarily antithetical to justice), a line is drawn which may be difficult to justify in terms of logic. The result may be that the difference between individual cases standing a little to either side of the line may appear to be minimal. However, this is usually the consequence of drawing a line anywhere.

A familiar example is to be found in the principles relating to liability, in tort, for what is sometimes called pure economic loss. Here, the adjective "pure" is used to distinguish the loss under consideration from economic loss occurring in conjunction with injury to the person or property of the plaintiff.

The circumstances in which the negligent conduct of a defendant, which causes physical injury to, or harm to the property of, one person, might also result in foreseeable economic loss to a third person, are virtually boundless. Two motor vehicles which collide on a busy highway may cause extensive delays, resulting in financial harm to other users of the highway. A ship which damages a bridge may cause economic harm to users of the bridge until the bridge is repaired. Physical injury to a key person in a business enterprise might throw other employees of the enterprise out of work, or result in insolvency and loss to creditors.

As a general rule, damages are not recoverable for economic loss which is not consequential upon injury to the person or property of the plaintiff, even if such loss is foreseeable. This bright line rule was adopted in the interests of expediency, and for the purpose of avoiding indeterminate liability. Dissatisfaction with the inflexibility of the rule led to its modification, by the High Court of Australia, in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad*.[13] The approaches of the members of the High Court varied somewhat. For present purposes it is sufficient to refer to Gibbs J who said:[14]

> In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owed the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be

13 (1976)136 CLR 529.

14 At 555.

> wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed... Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them. All the facts of the particular case will have to be considered.

Note the concluding words of that passage. In some minds, they set alarm bells ringing. In other minds, they reflect the sort of thing the law is supposed to do. The Australian approach was rejected by the Privy Council, and subsequently the House of Lords. In *Candlewood Navigation Corporation Ltd v Mitsui Lines Ltd*[15], the Privy Council said:

> Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence ... Not only has the (established) rule been generally accepted in many countries including the United Kingdom, Canada, the United States of America and until now Australia, but it has the merit of drawing a definite and readily ascertainable line. It should enable legal practitioners to advise their clients as to their rights with reasonable certainty, and their Lordships are not aware of any widespread dissatisfaction with the rule.

The attitude of the English courts may be summarised as follows. The exclusionary rule is clear. It was formulated in the interests of avoiding indeterminate liability. If, in some individual cases, it appears to operate harshly, then the solution is to make appropriate contractual arrangements or to insure. That, as a matter of policy, it is said, is a better solution than the one adopted in Australia, which involves subjecting a clear rule, formulated as a matter of coherent principle, to ill-defined and unprincipled exceptions. The English judges are saying, in effect, that the High Court's decision in *Caltex* illustrates that hard cases make bad law.

A similar conflict of approach, this time between senior English judges and a NewZealand member of the House of Lor ds, appears in the recent decision of *Hunter v Canary Wharf Ltd*.[16] The question was entitlement to sue for damages for private nuisance. The established general rule was that nuisance is a tort directed against a plaintiff's enjoyment of rights over land, and that an action for private nuisance may be brought by the owner of land, or a tenant, or a licensee with exclusive possession, but not by an occupant who has no right in the land (such as, for example, the wife or child of the owner or tenant). This rule was reaffirmed by the House of Lords in *Hunter.* Lord Cooke was in dissent. He was against confining the right to sue in nuisance. He accepted that some link with land is necessary for standing to sue for private nuisance, but the precise nature of the link remained to be defined because of the flexibility of the concept of occupation. He thought that "occupation of the property as a home" was an acceptable criterion and would allow residents who were members of the family or tenants, including perhaps de facto partners and lodgers, to sue. The approach

---

15 [1986] AC 1 at 25, see also *Leigh and Sillavan Ltd* v *Aliakmon Shippng Co Ltd* [1986] 1 AC 785.

16 [1997] AC 655.

of the majority, from a policy standpoint, was expressed by Lord Hope[17] as follows:

> Once (the) principles (distinguishing nuisance from negligence) are appreciated it should be relatively easy to identify those who have a right to sue for private nuisance and those who have not. ... It is tempting to depart from principle out of sympathy for the plaintiffs or in search of a remedy for some objectionable activity, but in this area of the law it is important to resist the temptation and to rely instead on the guidance of the principle. To do otherwise would risk confusion and be likely to lead to uncertainty in the development of the law, as the point would ultimately be reached when each case would have to be determined entirely on its own facts.

It is the necessity of determining each individual case on its own merits, without clear and adequate guidance as to the determining principle by reference to which the outcome of the case will be decided, and with the possibility of conflicting decisions depending on minor factual differences, or differences in the exercise of judicial discretion, that underlies much of the fear that is expressed about potential uncertainty. Behind that fear there is also, often, an apprehension that law-makers, whether parliamentary or judicial, may be setting for courts a task which is not judicial, and which is essentially a task, not of adjudication, but of dispute resolution.

This is not to suggest that there is a rigid distinction between adjudication and dispute resolution. The administration of civil justice by courts is a well-known form of dispute resolution. At least in Australia, there is now a fashion to describe other forms, such as arbitration, mediation, or conciliation, as "alternative dispute resolution".[18]

There is nothing new about taking notice of the difference between what is expected of courts and judges and what is expected of people who engage in other forms of dispute resolution. In 1869 a Judicature Commission was established to review the English court system. One of the important matters considered by the Commission was the manner in which commercial litigation was handled. Representations were made to the Commission by commercial people from the City of London. The complaints about courts included complaints of delay and expense. However, the complaints of the City were not reserved for litigation. Another well established means of resolving commercial disputes, arbitration, was also strongly criticised, but for different reasons. The complaints made against arbitrators were that their decisions tended to be idiosyncratic and unpredictable, and they decided cases according to their personal notions of what was fair in the circumstances, rather than according to general principles which could be applied across a broad range of cases. The Commission, rejecting a proposal that commercial cases be decided by merchants, said:[19]

---

17 At 723.

18 For a discussion of the trend towards ADR in New Zealand see John Lamar "Dispute Resolution in a Market Economy," *The Arbitrator* vol 16 No 4, February 1998.

19 Third Report, January 1874, as quoted in Colman & Lyon, *The Practice and Procedure of the Commercial Court*, 4th Ed, 1995, Lloyds of London Press.

> Now we think that it is of the upmost importance to the commercial community that the decisions of the courts of law should on all questions of principle be, as far as possible, uniform, thus affording precedents for the conduct of those engaged in the ordinary transactions of trade ... We fear that merchants would be too apt to decide questions that might come before them ...according to their own views of what was just and proper in the particular case, a course which, from the uncertainty attending their decisions, and with the vast and intricate commercial business of this country, would sooner or later lead to great confusion.

The importance to England's commercial interests of reasonable certainty and predictability in the resolution of commercial disputes is a recurring theme in English judgments, right up to the present time. Commercial dispute resolution is itself a valuable service provided by English courts, and it is one that appears to be valued by foreigners. A text book on the English Commercial Court records that, in 1995, in eighty percent of cases tried in the English Commercial Court at least one party was from overseas, and in more than fifty percent of cases all parties were foreign.[20]

The utility of judicial decision-making which follows, and sometimes establishes, precedent, is an important difference between the work of judges and that of other dispute resolvers. In the importance that is now attached to dispute resolution we some times overlook the significance of dispute prevention. Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.

Chief Judge Richard Posner has described the body of precedents in an area of law as a stock of capital— "specifically, a stock of knowledge that yields services over many years to potential disputants in the form of information about legal obligations."[21] He also referred to the utility of judicial services in the following terms:[22]

> There is, it is true, a good deal of private judging. But an arbitrator or other private judge is hired by the parties to a dispute to resolve that dispute, not to produce the full range of judicial services. The full range includes rule making through the issuance of opinions that interpret statutes, common law principles, rules and regulations, and constitutional provisions; the provision of a stand-by dispute-resolution service for people who can't agree on a neutral arbiter; the interposition of a neutral body between the State and the citizen— and the enforcement of arbitration awards, making the public judge a backstop to the private one.

Parties to litigation ordinarily want their disputes resolved as expeditiously, inexpensively, and fairly as possible. They do not want to become involved in leading cases. This, however, should not distract attention from the equally important consideration that most people do not want to become involved in

---

20 Colman & Lyon, op cit, fn.19, p.12.

21 Richard A Posner, *Economic Analysis of Law*, 3rd Ed, p 509.

22 Richard A Posner, *Overcoming the Law*, Harvard University Press, p ll4.

litigation at all, and there is economic and social utility in the availability of a process of public adjudication in the course of which judges declare and apply legal principle rather than seek a solution to each individual dispute which appears fair to them.

There is substantial cost, both to individual litigants, and to the community, in a system of discretionary, or over-particularised decision-making, where, to use a phrase borrowed from another area of the law, individual cases simply constitute a wilderness of single instances.

These considerations, however, whilst important, should not be overstated. How much weight they should be given varies with the context. It is not always the case that rules of law, which, for their practical operation, depend upon an examination of the facts and circumstances of individual cases, make it impossible or difficult for disputes to be resolved without individual curial examination.

Two examples demonstrate that proposition.

In Australia, people who suffer injuries arising out of the use of a motor vehicle frequently seek compensation by suing for common law damages in negligence. This kind of action gives rise to an enormous volume of litigation. There are tens of thousands of such actions pending in our courts. In cases of that kind the issue of liability is determined by reference to principles of the law of negligence which depend for their practical application upon an examination of the facts and circumstances of each individual case. The same applies to issues relating to the quantification of damages. It would be impossible for all, or even most, of such actions to be determined by judicial decision. The great majority of such cases, somewhere between 80% and 90%, are settled between the parties. The most important factor in procuring settlements of cases of that kind is a common understanding between the parties of what the outcome of the case is likely to be if it is left for judicial decision. Experienced lawyers on both sides of the record, at least in cases where there is not a great area of dispute as to the primary facts, can quickly reach common ground on what individual cases are worth. Even where there is serious dispute as to the facts, the parties usually settle their differences by taking a view of the probabilities of success or failure. The civil justice system would collapse if it ceased to be the case that most litigation of that kind was settled out of court.

A second example is the way in which the legal system deals with financial claims resulting from the breakdown of marriages or of de facto relationships.

The relevant statutes establish general principles which then have to be applied to the facts and circumstances of individual cases. Many cases require judicial decision. However, once again, what saves the system from collapse is that, usually as a result of the ability of experienced lawyers to reach a common understanding as to the likely outcome of litigation, most cases are resolved by settlement between the parties.

The two examples that have just been given constitute the most common examples of the circumstances in which ordinary Australian citizens are likely to find themselves involved in litigation.

These examples show that certainty is a relative concept, that it needs to be considered in a practical way, and that there is always a question as to how much certainty the community wants, and what price it is prepared to pay for it.

Modern legislation has created many administrative tribunals in the nature of "grievance handling mechanisms which perform mediative rather than judicial functions".[23] Perhaps some of those tribunals in time develop what might be described as their own jurisprudence, with a consequent predictability of outcome. In Australia some large corporations, such as banks, have established private dispute resolution services for dealing with their customers. It would be interesting to investigate the extent to which tribunals or dispute-resolvers, such as the Commercial Claims Tribunal, or the Banking Ombudsman, although often instructed to deal with each case or complaint according to equity and good conscience, and without being bound by technical rules of law, develop their own set of quasi-precedents and principles. Self-protection is one practical reason why they might tend to do so. It may be the only way of avoiding being crushed by a workload. Most of these tribunals or bodies have procedures designed to filter claims or complaints before they arrive at the point of requiring formal resolution. It is likely that those procedures will often include published information for the guidance of potential claimants, or complainants, including information aimed at helping to predict a likely outcome, and stating the principles according to which the body in question acts.

The relatively modest size of the judiciary, and the limits on the resources governments are willing to make available to courts, provide an important practical constraint upon the capacity of the judicial system to resolve conflict on a case by case basis.

Whether courts themselves should provide alternative dispute resolution facilities to litigants is a current issue of judicial policy. The predominant view in Australia is that they should, and some courts already provide such facilities. What are sometimes called multi-door courthouses have operated for some time in parts of the United States.

Even so, the administration of civil justice has a function that extends beyond the resolution of individual disputes. Whilst the pendulum will continue to swing, the judicial function, adjudication, will continue to require due consideration, according to the context, of the conflicting claims of both certainty and fairness.

---

[23] Martin Loughlin, *Courts and Governance - The Frontiers of Liability*, Vol 1 ed PBirks, Oxford University Press, 1994, p 91 at 96.