

TOWARDS THE CIVIL LAW?: THE LOSS OF 'ORALITY' IN CIVIL LITIGATION IN AUSTRALIA[#]

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I INTRODUCTION

Orality is a tradition of modern Australian litigation. That is to say, the historical preference for spoken forms of communication in the conduct of litigation in the common law has carried forward to the Australian experience. However, orality has not had the same significance in civil law jurisdictions in Continental Europe. Further, the justification for and the extent and quality of orality in Australian practice have changed significantly in the last 50 years.

The greatest differences between Australian civil practice – based as it is on English common law processes – and Continental systems have been in the fact-finding process. The differences result from the different paths that the common law and civil law jurisdictions travelled from the 12th century.

Through the Middle Ages and up to the mid-12th century, English and Continental law proceeded along much the same path. The law was Germanic and feudal in substance and in procedure. A traveller from the Continent in England, prior to the time of King Henry II, would have had no problem, apart from linguistic difficulties, in recognising the rules, arguments and modes of proof in an English manorial, borough or feudal court. Until then, the growing influence of Roman law, derived from the *Corpus Iuris Civilis* of Justinian, could be discerned both on the Continent and in England. However, a century later the legal systems on the Continent and the system in England had begun to diverge. While Roman law was transforming legal life in many parts of the Continent, the native law in England, common to the whole kingdom, began to develop and to move away from the Roman jurisprudence that prevailed on the Continent.¹

[#] This paper was inspired by the address given by Justice Bryan Beaumont, of the Federal Court of Australia, to the 14th South Pacific Judicial Conference in September 2001: see Justice Bryan Beaumont, 'Written and Oral Procedures: The Common Law Experience' (2001) 21 *Australian Bar Review* 275. I am indebted to Justice Beaumont for the research that he carried out.

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1 R C Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (1987) 114.

The reforms in judicial organisation and procedure introduced during the reign of Henry II marked the beginning of the divergence of the common law from the Romanist Continental jurisdictions. Those reforms had such wide and immediate success that no need was felt in later centuries, when the Roman model of the Continent was available, to give up the native system. The principal reforms involved the creation of a group of royal judges, with competence at first instance for the whole of the kingdom, and the introduction of the jury in civil cases. The old local courts were abandoned by litigants because of the quality of justice that was dispensed by the new brand of royal judges.²

England adopted an adversarial system of trial by jury, together with a qualitative system of evidence, under which – though many types of evidence were excluded – the weight attributed to that which was admitted was not mechanically fixed but submitted in each case to the judgment of a group of lay men. On the other hand, Continental jurisdictions adopted the inquisitorial system of trial by public officials. Further, they also adopted a system of evidence under which everything was admitted, but was allowed only a fixed weight.³

The changes in the extent and quality of orality in modern Australian litigation have resulted, in some respects, in a position closer to the Continental systems and, in other respects, in a position further away from such systems. That can be seen in the way in which:

- evidence is taken;
- submissions are made on behalf of parties to the court, both at first instance and on appeal; and
- reasons for decision are published by the court.

II ORALITY IN EVIDENCE-TAKING

On the Continent, professional judges have traditionally taken the main responsibility for investigating and adjudicating, although the lawyers for the parties guide and limit the judicial inquiry in important ways. In the common law legal tradition, by contrast, the work of fact-finding has been divided among the lawyers for the parties, the professional judge and the lay jurors. The lawyers had the responsibility for gathering, sifting and presenting evidence of the facts. The trial judge sat with a jury and directed the jury as to the fact-finding process, but it was the jury that found the facts.⁴ In a sense, the judge presiding over a jury court mediated between the lawyers and the jurors: the judge supervised the lawyers as they adduced competing versions of the facts, and instructed the jurors on the standards they should apply to the facts found by them. In the second half of the 20th century, the function of fact-finding has been ceded to the judge.

2 Ibid.

3 Julius Stone and W A N Wells, *Evidence: Its History and Policies* (1991) 29.

4 John H Langbein, 'Historical Foundations of the Law of Evidence: A View From the Ryder Sources' (1996) 6 *Columbia Law Review* 1168.

Nevertheless, basically the same fact-finding process has been maintained.

A The Law of Evidence and the Jury

In a common law courtroom, civil or criminal, counsel interrupt regularly with objections founded upon the rules of evidence. In a French, Italian or German courtroom, there is no such interruption. There is much hearsay testimony, but never a hearsay objection. No one complains of leading questions, and opinion evidence is given without objection. In Continental systems, judges have always determined the facts in dispute as well as the law. They see no danger in their listening to evidence of hearsay because, when they come to consider their judgment on the merits of the case, they apparently trust themselves to disregard the hearsay evidence, or to give it as little weight as it may seem to deserve.⁵

Under the jury procedure of the common law, disputes as to evidence were decided by the judge in the absence of the jury with a hearing of the evidence, if necessary, on the *voir dire*. That process avoided the possible pollution of the minds of the jurors, who might otherwise hear inadmissible material. Of course, common law judges, who now perform the fact-finding function formerly performed by juries, are regularly called on to rule on the admissibility of evidence but claim to have no difficulty in removing it from their consideration if it is rejected.

In the age of small agricultural communities, jurors were drawn from the neighbourhood of the contested events and, originally, were self-informing. If the jurors thought they needed more information, they obtained it by consulting informed persons who were not called into court. The medieval jury came to court, not to listen, but to speak; not to hear evidence, but to deliver a verdict formulated in advance.⁶ By the 16th century, however, the constant employment of witnesses as the jury's chief source of information brought about a radical change. Juries changed from being active neighbourhood investigators to passive triers. Juries became groups of citizens chosen not for their knowledge of the events, but rather in the expectation that they would be ignorant of the events.⁷ The function of the jury changed from one whereby the jurors' decision was based upon their own knowledge, to one of deciding on the basis of the evidence put before them by the witnesses called by the parties. That change necessitated the development of rules as to who could be compelled to give evidence and, more importantly, what evidence could be put before the jury through the witnesses so compelled.⁸

At a theoretical level, distinctions can be drawn between the following:

- facts;
- proofs of facts; and
- law.

5 Ibid 1169.

6 Ibid 1170.

7 Ibid 1170–1.

8 Stone and Wells, above n 3, 32–3.

In a common law system, those distinctions continue to be maintained, however difficult in practice they may sometimes be. The law must take as its premise a fact, or a complex of facts. If it does not it cannot be applied, because it has no point of reference outside itself. Thus, in the present context the term ‘facts’ means simply that which is envisaged more or less explicitly by a rule or principle of law.⁹ The rules of evidence, which consist mainly of exclusionary rules and exceptions to them, are concerned with the inter-relationship between the first and second elements referred to above. That is to say, rules of evidence determine how facts are to be proved.

An essential attribute of the common law rules of evidence is the effort to exclude probative but problematic material, such as hearsay (principally oral) for fear of the inability of jurors to evaluate the material properly. The central event in the formation of the modern law of evidence was the rapid development of adversary criminal procedure in the last quarter of the 18th century, a development that thereafter came to influence the conduct of civil trials as well.¹⁰

The law of evidence in its infancy was concerned almost entirely with rules about the authenticity and the sufficiency of writings. The modern law of evidence, however, came to be centred on the oral testimony of witnesses at trial, supplanting the older law at the end of the 18th century and across the 19th century. The modern law abandoned the effort to treat the document-preferring best evidence rule as the organising principle of the law of evidence. Cross-examination replaced oath as the fundamental safeguard for the receipt of oral evidence, defeating the competency regime that had disqualified parties for interest and allowing the hearsay rule to assume its ultimate character.

From the Middle Ages, the driving concern animating the law of evidence in England had been to protect against the shortcomings of trial by jury. Jurors, untrained in the law, decide without giving reasons and have no continuing responsibility for the consequences of their decisions. Their verdicts are difficult to review. While the law of evidence has changed significantly since the Middle Ages, along with the jury itself, the primary object of the law of evidence – to guard against the inherent weakness of jury trial – has remained constant.¹¹

In common law systems, something is either admissible as evidence or it is not. If it is not admissible as evidence, then at least in theory the judge is not allowed to know about it. The exclusionary system of the modern common law rules of evidence, exemplified in the hearsay rule, had an essentially prophylactic purpose. It was difficult for a trial judge to correct error in a jury verdict once error had occurred. Accordingly, the law of evidence attempted to prevent error from infecting adjudication by excluding from jurors information that might mislead them. Thus, the common law rules exclude from consideration testimony concerning facts that are logically relevant to the issue.¹²

Where a jury is involved, there are no separate reasons for factual findings. On the other hand, where a judge is the only arbiter, reasons for factual findings must

9 J A Jolowicz, *On Civil Procedure* (2000) 212.

10 Langbein, above n 4, 1171–2.

11 Ibid 1194.

12 Ibid 1195.

be given, in addition to reasons for legal determinations made on the basis of the factual findings. The modern Australian practice in civil litigation, whereby the judge is the arbiter of both fact and law, did not initially change the situation where the judge was a stranger to the proceeding, at least at the beginning of the trial. That practice, however, has the potential to be, in some respects, more akin to the Continental system than the more traditional common law system involving a jury, as is still to be found in the United States.

The significance and scope of the exclusionary rules have been much reduced so far as civil proceedings are concerned. The hearsay rule in relation to documents has now been significantly abrogated by provisions such as those dealing with business records.¹³ This abrogation has only been made possible by the virtual disappearance of the civil jury. The rationale of the exclusions was the idea that some kinds of evidence, oral hearsay for example, could not safely be left to a jury. The law of evidence allowed the jury to take account only of what the law considered that it was safe to let them know. However, that is not to say that the distinction between hearsay and direct evidence has been abolished – even now, when the judge sits alone, the same rationale continues to underlie the rules of evidence, notwithstanding the significant relaxation of the rules as they applied when juries were the norm.

The Continental approach is different. There are no exclusionary rules such as those of the common law of evidence. However, there is recognition of the existence of a number of different modes of proof, to some of which specific weight is attributed, while others are left to the free evaluation of the judge. For example, any so called 'authentic' or public act, such as a notarial act or deed, provides conclusive proof of certain matters unless it is displaced by a special procedure attacking its validity. Even a private writing may be conclusive unless it is disavowed by the party whose signature it bears.

The oral testimony of witnesses is included within the recognised modes of proof, but such testimony does not enjoy the same pride of place as it does in the common law. Nor is it taken in the common law manner by examination and cross-examination at a trial. Witnesses are usually examined by the judge at a special hearing specified for the purpose. What is more, oral testimony is traditionally regarded as untrustworthy because it comes into existence only after the dispute between the parties has arisen and after the litigation has itself come into existence. Preference is given to modes of proof, such as deeds and other forms of writing, that existed before the dispute arose.¹⁴

B Inquisitorial Proceedings

Under the non-adversarial mode of the Continental systems, there are no separate witnesses for the claimant and the respondent. All witnesses are evidentiary sources of the court and it is the judge, not the parties, who has the primary duty to obtain information from them. The parties do not have an opportunity to affect, let alone prepare, the testimony of witnesses.

¹³ See *Evidence Act 1995* (Cth) ss 69–70.

¹⁴ Jolowicz, above n 9, 214–5.

In Continental systems it is generally maintained that the case is to be decided on the basis of the proofs offered by the parties. Nevertheless, the Continental judge may acquire information in the course of the proceedings by methods that are not considered to involve the taking of evidence or proofs and which may, and often do, depend on his or her own initiative rather than on the initiative of a party.¹⁵

While the taking of witness testimony is one of the recognised modes of proof, it is for the judge, not the parties, to question the witnesses. Further, the testimony heard is not necessarily restricted to that given by witnesses whom the parties wish to be heard or to matters that the parties wish to be drawn to the attention of the court. It is a general principle in Continental systems that the parties to litigation may not give evidence. They are not competent witnesses. They may, nevertheless, be interrogated by the judge on his or her own initiative. Originally such interrogation had as its only purpose the clarification by the party of the actual claim or defence as the case might be. However, it is now common that the judge may examine the parties on the facts of the case.

At a Continental hearing, the witness is first asked by the judge to present a narrative account of what he or she knows about the facts of the case. The story may be interrupted by questions from the judge only to help the witness express him or herself, to clarify a point or to steer the witness back from irrelevancy. Only when that informal communication comes to an end does the judge proceed to the interrogation. Some of the questions go to the credibility of the witness and serve, to a moderate extent, as the equivalent of cross-examination. When the interrogation by the judge has been completed, the parties are permitted to address questions to the witness, in an attempt to bring out omitted aspects favourable to them, or to add emphasis to certain points on which testimony has already been obtained. However, the bulk of relevant information is obtained through judicial interrogation and only a few informational aspects are left to the parties. It is not until after the proof-taking phase is over that each side makes its own one-sided assessment of the evidence taken and advances its legal arguments.

Under such a process the judge will, of necessity, have some prior knowledge of the case in order to become an effective interrogator. Being somewhat familiar with the case, the judge will inevitably form certain tentative theories about the reality that he or she is called upon to reconstruct. More or less imperceptibly, such preconceptions must influence the kinds of questions that are addressed to witnesses. Further, there will be an ever present danger that the judge will be more receptive to information conforming to the theory formed by him or her than to that which clashes with the theory. Presumably, judges are usually aware of this distorting psychological mechanism, although that shortcoming of the arrangement cannot be entirely eliminated.

15 Ibid 215.

1 Italy

In Italy, the judge's right to question the witnesses does not confer any significant power, since the parties, in their request for oral testimony, must set out the facts on which they wish a given witness to testify and the judge's questions may be directed only to those facts. On the other hand, the judge may, at the request of the party or of his or her own motion, call upon a person to testify if another witness has, in the course of his or her testimony, indicated that that person has knowledge of the facts.

The judge may also call any person named by a party as a witness, but not previously heard, either because the judge had previously excluded that person's testimony as superfluous or because the parties had agreed that the witness need not be heard. In addition, the judge may recall for further examination a witness who has already been examined, if that is necessary to clarify the testimony of that witness or to correct irregularities.

2 France

In France, the powers of judges are extensive. First, it is open to the judge to make an order for the hearing of witnesses *ex officio*. If the judge does so, the facts to be proved and the designation of the witnesses are, at least in the first instance, for the judge. Secondly, in examination of a witness, the judge is not restricted to the facts previously admitted to proof but may question the witness in relation to any facts of which proof is legally admissible. Thirdly, the judge may, at the request of a party or of his or her own motion, call for the examination of, and examine, any person whose testimony would – as it appears to the judge – be useful to the revelation of the truth. Nevertheless, it is normally for a party to request an order for the hearing of witnesses. In that case, that party must state the facts sought to be proved and indicate the witnesses to be heard.¹⁶

French law allows the judge to invite the parties to provide such explanations of fact as he or she considers necessary for the decision. By separate and more elaborate provision, French law also allows the judge to order the personal appearance of the parties for interrogation. The use of this latter procedure does not form part of the proof-taking process. Neither the answers of the parties nor their behaviour in response to the judge's interrogation amount to evidence or proof. In reality, however, they are clearly capable of having an effect on the ultimate decision, if only by influencing the judge in the exercise of the power of free evaluation. In France it is specifically provided that the judge can draw any conclusions from the parties' answers, or from their refusal to answer, and also that the judge may treat the answers as equivalent to 'a beginning of written proof'.¹⁷

16 Ibid 217–8.

17 Ibid 215–6.

3 Germany

Under the system in Germany, although introducing the factual allegations together with the evidence is the responsibility of the parties, the taking of evidence is done *ex officio*. The parties have the right, but not the duty, to be present at the hearing of evidence. The taking of evidence can even take place if no party is present. There is no cross-examination – it is the judge who poses the questions to the witnesses and only after that are the parties allowed to ask additional questions. The witness, having been properly summoned, is obliged to appear at the hearing to make a deposition or to make an affidavit. Some few persons have the privilege to decline to answer questions or to refuse to give evidence at all. Those persons include relatives of a party, priests, doctors and lawyers. Although provision is made for evidence to be given under oath or some other equally binding form, it is common not to require that formality.¹⁸

The deposition by the parties themselves is only ‘subsidiarily admissible’, either upon application of a party or *ex officio* by the court. It is unusual for one party to require the deposition of another party. Normally that would be required only where the burden of proof makes it necessary. However, the judge can exceptionally order a deposition by a party if either no evidence was furnished or the taking of evidence was not sufficient. In any case, the evidence of the parties is not regarded as having great weight because of the assumed natural bias of the party in favour of his or her own case.¹⁹

Generally, a judgment must not be delivered in Germany unless there has been an oral hearing. Nevertheless, the practice of many courts deviates considerably from this principle.²⁰ After the filing of a statement of claim, a German court has discretion to adopt one of two different forms of procedure, either a written preliminary procedure or a procedure that involves an early oral hearing. The judge must choose the procedure that brings about the quickest conclusion of a matter, on the basis of the statement of claim.²¹

The advantage of a written preliminary proceeding is that the main oral hearing is thoroughly prepared. The parties are forced to state precisely and factually the legal basis of their claims and defences, including their evidence.²² The early first hearing would be chosen by a judge primarily in matters that are more easily dealt with orally, or where no further facts will be presented by the plaintiff, or where the court has to make rulings on points of law to progress the case further. The judge will generally prefer an early oral hearing where the case is either straightforward in favour of one of the parties or is so ambiguous as to necessitate having the parties present to sort it out.²³

The parties are free to decide what information should be withheld or presented to the court. However, it is up to the judge to determine the relevance of evidence and to request specific arguments. In theory the parties are obliged to

18 Harald Koch and Frank Diedrich, *Civil Procedure in Germany* (1998) [173].

19 Ibid [174].

20 Ibid [28].

21 Ibid [105].

22 Ibid [106].

23 Ibid [107].

submit all the relevant material and documents because there is no direct sanction that the client is treated liberally.²⁴

If the court believes that the parties have sufficiently clarified the matter to reach a decision in a single oral hearing it will set the date accordingly. The main oral hearing usually lasts no more than a day and generally takes an average of half an hour up to an hour, since the issues are already determined in the written statements.²⁵

It is the task of the parties to introduce factual allegations and to furnish evidence accordingly. If the evidence is present, the judge must order the taking of evidence by a simple decision without any formalities. Otherwise, the taking of evidence has to be formally ordered by the court. The order to take evidence must specify the facts to be proved, the evidence and the party bearing the burden of proof. The judge should make sure in advance first that the facts need to be proved and secondly that the facts are actually decisive for the claim or defence. If the court does not order the taking of evidence of its own motion, it must do so if one party explicitly applies for it, unless the court considers that the evidence is superfluous or inadmissible.²⁶

C Adversarial Proceedings

The desirability of oral evidence, as against written evidence, was recognised in the *Corpus Iuris Civilis*.²⁷ For example, the practice of Hadrian, who was emperor of Rome from 117–38 AD, was to question witnesses about their evidence. Hadrian regarded the evidence of witnesses actually present as having a different weight from that of depositions recited in court.²⁸ Accordingly, he regarded depositions as out of place in a proceeding before him.

While the Romans often regarded oral testimony as necessary, the value of the oral testimony depended upon the dignity, faith, morals and gravity of the witness. The judge had to decide what weight to attach to the testimony of witnesses, what their dignity and reputation was, whether they spoke simply, whether they kept to a premeditated story, and whether they gave likely answers to questions. Those who departed from their previous evidence were not to be relied upon.²⁹

Even in Roman times, it was considered appropriate that the number of witnesses should be regulated by the court. Judges were required to allow only the number of witnesses they thought necessary to be called, lest unbridled licence caused superfluity of witnesses to become vexatious.³⁰ If the witnesses were all of the same honest reputation and circumstances, but there was disagreement among them, the court was required to accept the evidence that fitted the circumstances and was not tainted by suspicion of favour or enmity.

24 Ibid [108].

25 Ibid [109].

26 Ibid [172].

27 Justinian, *Corpus Iuris Civilis, Digest*, 22.5 ('Digest').

28 *Digest*, 22.5.3.3 and 4.

29 *Digest*, 22.5.1.pr, 22.5.2.pr and 22.5.3.1.

30 *Digest*, 22.5.21.2.

The judge should confirm his personal view from the arguments and evidence that seemed more appropriate and closer to the truth. What was decisive was not numbers of witnesses, but sincere and reliable testimony that could illuminate the truth.³¹

On the other hand, the Romans had different views from those of common lawyers concerning the admissibility of certain oral testimony. Such views are the foundation for some practices still current in modern day Continental systems. Thus, no one was regarded as a satisfactory witness in his or her own cause.³² In addition, a judge should ignore the evidence of a person found guilty of the crime of calumny,³³ and a person found guilty of corruption could not give evidence.³⁴ If the matter was such that a gladiator or similar person had to be called as a witness, his evidence should not be believed without torture.³⁵

In England in the 17th and early 18th centuries, it was the trial judge who examined the witnesses and the accused and, like the modern Continental presiding judge, dominated the proceedings. From the middle of the 18th century to the middle of the 19th century, however, the degree of judicial collaboration in the formulation of the jury's verdict at trial declined. Adversary procedure pressured the judge toward passivity and broke up the older working relationship between judge and jury. In a system of trial that was coming to be more commonly conducted by lawyers, the judge came to play a much less active role in producing the evidence. By the middle of the 19th century, the judge was almost a stranger to what was going on, while counsel examined and cross-examined the witnesses.³⁶

Thus, under the adversary mode, each party calls its own witnesses and tries to obtain from those witnesses information favourable to that party's case. In order to do this effectively, the party will normally prepare the witness for the court appearance. A proof of evidence will be prepared. What is later to be evidence is first told in the solicitor's office or in the chambers of counsel.

At the trial, after one party has elicited the desired information from his or her witness, the adversary takes over the interrogation process. The purpose of that second stage is two-fold: the cross-examining party will attempt to obtain from the witness reliable information in favour of the cross-examiner's case, and the reliability of the witness will be questioned. It is through such rival use of evidentiary sources that the fact-finding stage of the trial takes place.

While there may be some intervention by the judge as the fact finder, judicial intrusion into the process is limited. At least in the early stages of a proceeding, it would normally be exceedingly hard for a judge to ask meaningful questions, since the judge would have no prior knowledge of the case. A detailed opening may familiarise the judge with the issues that are to be decided, and is necessary at least for the purposes of qualifying the judge to rule on the relevance of

31 *Digest*, 22.5.21.3.

32 *Digest*, 22.5.10.

33 *Digest*, 22.5.13.

34 *Digest*, 22.5.15.

35 *Digest*, 22.5.21.2.

36 Langbein, above n 4, 1198–9.

evidence, but that is all.

Nevertheless, the essence of the adversarial mode is that the decision-maker is passive and the information sources are tapped by the procedural rivals. The information about the facts of the case reaches the fact-finding tribunal, be it judge or jury, in the form of two one-sided accounts.³⁷ The adversarial manner of developing evidence is designed in such a way that the art of suspended judgment can be practised for a much longer period of time by the judge. The judge is not driven by the duty to lead an enquiry into forming early tentative theories about the facts of the case. An interrogator hostile to a witness will be in a better position to bring out potential conscious or unconscious distortion mechanisms inherent in the testimony of that witness. For example, inaccurate perception and faulty memory images, mystifications on the part of basically honest witnesses can be exposed by cross-examination.³⁸

On the other hand, the damage to testimony inflicted by the preparation of witnesses can be serious. Parties can hardly be expected to interview potential witnesses in a detached way that would minimise the damage that interrogation can do to memory. The process of preparing a proof of evidence may induce the witness to try to adapt him or herself to the expectations of the interviewer, who will normally be searching out evidence favourable to the case of the client. Thus, even unconsciously, gaps in memory may be filled by what the witness thinks accords with the lawyer's expectations, and when evidence is given in court such additions to memory images may appear – even to the witnesses themselves – as accurate recollection.³⁹ Further, even with the best of intentions on the part of a cross-examiner, reliable testimony may easily be made to look debatable as a result of cross-examination, and clear information may become obfuscated.

Where evidence is provided in written form, such as by affidavit or signed statement, the risk of unreliability is increased. The efforts involved in preparing an affidavit or statement of evidence involve the casting into what is perceived to be admissible form the unstructured recollection of the witness. Once that is done, the testimony of a witness is likely to be permanently tainted. The taint is not necessarily the result of dishonesty (although it could be): it is more likely to arise inadvertently. The evidence of a witness who has been examined privately by the lawyers of one of the parties, albeit by lawyers of the highest integrity, may not be as reliable as the evidence of a witness who has not been prepared in that way.

On the other hand, if a witness is prepared by a person who is completely disinterested, it may be that the recollection of the witness can be genuinely prompted in a way that does not influence the evidence that the witness will give. Thus, refreshing of recollection from reliable contemporaneous documents may be a perfectly legitimate and valid method of eliciting evidence. An important question in such case, however, is whether the contemporaneous material is

37 Mirjan Damaska, 'Presentation of Evidence and Fact-finding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083, 1091.

38 Ibid 1092.

39 Ibid 1094.

reliable.

D Modern Common Law Case Management Practices

Modern common law civil litigation has always been regarded as a predominantly voluntary system in which the parties play a dominant role in formulating and developing the demand for a remedy and the presentation of the factual and legal issues for determination by the court. Within that framework the parties are free to bargain for settlement – within or without the available court procedures – and to withdraw the case at any stage prior to judgment. The courts have traditionally remained neutral and inactive towards the parties, regulating the way in which the disputants must proceed if they are to obtain finality, responding only to interlocutory applications and delivering judgment after a trial has taken place.⁴⁰

The procedure that regulates the conduct of civil litigation in a common law court also regulates the extent of participation by the state in private disputes between citizens. The need to limit the cost of courts has become an important consideration by executive governments. In that context, the neutrality of the court is replaced, not by a desire to play an inquisitorial role in the substance of the dispute itself, but by an active need to ensure that litigants are closely supervised in the use of public resources. Executive governments are concerned to ensure that the parties move through the system as quickly as possible. Courts are therefore encouraged to operate of their own motion to an increasing extent.

The increase in intervention by courts in the interlocutory process in order to force the parties to trial and the greater reliance on the use of written materials constitutes an erosion of the adversary and orality principles.⁴¹ Further, alternative dispute resolution processes are fostered and encouraged in Australian courts, even to the extent of providing the services of registrars as mediators. Courts even have power to require the parties to submit to mediation processes against their will.⁴²

However, there has been no attempt in Australian systems to take complete control of the settlement process. In Germany, it is an important duty of the judge to seek an amicable solution of the case by way of settlement at any stage of the proceeding. Sometimes the judge tries to press the parties into a settlement. In such a case, it is apparently regarded as unwise not to accept the court's assistance, since it is expected that the court will react in an unfriendly and unfavourable manner to a party who is particularly opposed to settlement.⁴³ Such a notion would be anathema to the adversarial nature of a common law civil proceeding.

The civil procedure introduced into the unified Supreme Court of England and Wales as a result of the *Judicature Act 1873* (UK) allowed for two principal

40 Cyril Glasser, 'Civil Procedure and the Lawyers – The Adversary System and the Decline of the Orality Principle' (1993) 56 *Modern Law Review* 307.

41 Ibid 308.

42 See, eg, *Federal Court of Australia Act 1976* (Cth) s 53A.

43 Koch and Diedrich, above n 18, [112].

modes for the conduct of civil litigation. The first was the procedure by writ, written pleadings and the disclosure of relevant documents where required. The evidence, which was generally oral, was given at the trial. The other mode was that commenced by originating summons, where formal pleadings were not required. A judicial order was necessary if discovery was to be given and the evidence was mainly given by affidavit. The originating summons procedure was not to be used where serious issues of fact between the parties were expected.⁴⁴

That dichotomy continues in modern Australian systems. For example, the Rules of the Federal Court of Australia require that a proceeding must be commenced with an application accompanied by either a statement of claim or affidavits.⁴⁵ That distinction was derived from the distinction between proceedings commenced by summons and proceedings commenced by writ and pleadings. Summonses and affidavits are the appropriate procedure only where there is no likely dispute as to the facts. Where dispute as to the facts is expected, proceeding by statement of claim and oral evidence is appropriate. As a general rule, evidence at a trial in the Federal Court of Australia is to be given orally.⁴⁶ Nevertheless, affidavits often take the place of the oral evidence-in-chief of witnesses even in a proceeding that is appropriately begun by a statement of claim.

Recent reforms in England are seen as a movement from comprehensive party control towards greater court regulation of the conduct of litigation, falling short, however, of a court-based investigation of the facts themselves.⁴⁷ The new English rules are the result of proposals originally made by the Civil Justice Review⁴⁸ established to examine civil court procedure and administration and which reported in 1988. The Review perceived considerable merit in the view that a 'cards on the table' system would not be fully effective without a considerable addition to the amount of fact discovery that was required from litigants during the pre-trial phase. The main proposal for achievement of that end was pre-trial disclosure of witness statements prepared by the parties themselves. Such a proposal was thought to render unnecessary an extended system of oral depositions, such as that in place in United States jurisdictions, which was perceived as time consuming and expensive.⁴⁹

The formal position, whereby the work produced by the parties relating to the litigation remains privileged from production, has been preserved by permitting each side to choose whether it will furnish the statements of its witnesses. However, litigants are not permitted to lead evidence at the trial that has not been disclosed to the other side at the exchange stage, though there is no obligation to present at trial the evidence thus disclosed.⁵⁰

44 Jolowicz, above n 9, 151.

45 Federal Court Rules, O 4 r 6.

46 Federal Court Rules, O 33 r 1 provides that unless the court otherwise orders or the parties otherwise agree, evidence of a witness at the trial of a cause is to be given orally.

47 Glasser, above n 40, 310.

48 United Kingdom, *Report of the Review Body on Civil Justice*, Cmnd 394 (1988).

49 Ibid 314.

50 Ibid.

Under a system of exchanging statements or affidavits, parties remain responsible for the disclosure of the case through the discovery process. That leads to careful drafting of the statements or affidavits, designed to emphasise the elements of the case favourable to the party concerned, while dealing ‘tactfully’ with any weaknesses. The opposing party is given no opportunity to examine witnesses prior to trial or to obtain discovery of information that the other side does not intend to produce at trial, such as the names of unhelpful witnesses.

One noticeable effect of such a system of disclosure is on the trial process itself. Where the witness statement is allowed to stand as the evidence-in-chief of the witness after the witness has been called, and the case then proceeds with cross-examination, the length of the trial may be reduced, as well as ensuring that a party’s case is properly presented. The provision of witness statements to the opponent also allows early preparation of cross-examination.

That system of exchange was anticipated in New South Wales in the early 1980s by Justice Andrew Rogers – the judge in charge of the commercial list, and subsequently Chief Judge of the Commercial Division of the Supreme Court of New South Wales. In order to avoid adjournment delays caused by surprise, the parties were directed by Rogers J to serve each other with written statements of the oral evidence that was to be led from witnesses. It was not originally intended that the statements would serve as evidence-in-chief. An order was also often made that no use could be made of the statement if the witness was not called. Indeed, it was sometimes directed that a witness could not be cross-examined on any inconsistency with a statement.

However, the practice changed as the court’s workload increased. Occasionally, in order to save time, the course was adopted of asking a witness to verify his or her statement and treating the statement as the evidence-in-chief of that witness. That practice has evolved to such an extent that it is nowadays an expectation in much civil litigation in Australia that written statements will be exchanged and that the statements will stand as the evidence-in-chief of the witness. Sometimes the practice is varied to require affidavits rather than written statements.

The practice as it evolved has not necessarily saved costs or time. Substantial costs are incurred in the preparation of statements or affidavits in relation to matters that are genuinely in dispute in the proceeding. The affidavits and statements are then parsed and analysed in detail by the opposing legal team and vast numbers of objections are reduced to writing and served on the tendering party. The court’s time is then occupied in sterile argument about whether particular words, phrases or sentences should be allowed. These disputed components of the statement or affidavit are often struck out on the basis that the tendering party may ‘supplement’ the written evidence with oral evidence. Clearly inadmissible material is rejected. Sometimes, however, the result is that the material that is left makes no sense because it is taken out of context. It can be extraordinarily difficult to work out precisely what is in evidence and what is not.

The traditional approach of requiring evidence-in-chief to be given orally enables the judge to assess the witness giving evidence. Where the witness has

not had the opportunity of giving evidence-in-chief orally, the first impression given to the judge will be in cross-examination on written evidence of the witness expressed in the words of the lawyers rather than in the words of the witness. No matter how honest and diligent lawyers are in endeavouring to prepare written evidence, the written evidence will be the lawyer's understanding of a witness's evidence, which will not necessarily be the evidence that the witness would give orally.

On the other hand, a dishonest witness has a great advantage in having the evidence-in-chief in support of his or her case placed in writing before the trial judge. Once the evidence is in, it will be necessary for the opponent to cross-examine it out. It is sometimes easier for a dishonest witness to defend false assertions prepared with the assistance of lawyers than it will be for an honest witness to defend words put into his or her mouth by well intentioned legal advisers.

While a system of written evidence-in-chief, even where disputed, still clings to a formal adherence to the adversary model, a slow erosion of some basic characteristics has taken place in response to the demands of modern litigation and the pressures on public funds. A transition to a more interventionist and regulatory role in relation to the parties takes control away from the parties and, to that extent, erodes the adversarial nature of the process and weakens the significance of the ultimate trial.

The adducing of evidence-in-chief in writing or even merely disclosing to the opponent the evidence that is to be given orally results in much greater importance being placed on the written word rather than the spoken word of witnesses. In those circumstances, there will be a greater facility for judges, as the deciders of both fact and law, to consider evidence in private.⁵¹ The process of written evidence-in-chief thus leads to loss of publicity, which is an important aspect of the administration of justice. There is also a weakening of the element of dialogue that enables the judge to assess the credibility of the witness under friendly examination. Such a process involves a significant shift from the oral tradition towards a greater dependence on written materials.⁵²

E The Concept of the Trial

One of the fundamental differences between common law and Continental systems is that the common law system assumes that there will be a trial, while the Continental system assumes no such thing. That difference arose from the use of the civil jury in common law systems, which has always been unknown to Continental systems. The significance of the use of a jury to the fact-finding process was that the members of the jury could be brought together only for a single session. Once it was accepted that the jury had to decide on the basis of materials presented to it in court, largely by word of mouth, the essential characteristic of the trial was established. Thus, 'trial' refers to a single interrupted session of the court at which all the evidence furnished by the parties

51 Ibid 317.

52 Ibid 315.

is presented once and for all.⁵³

On the Continent, the civil jury never emerged and there was no compelling need for a single-session trial in a system where professional judges dealt with all aspects of the case. Continental procedure therefore has nothing that corresponds to the common law trial. There is a divide between the two systems in the basic assumption of the common law that the information upon which the judgment would be founded is supplied to the court only at the trial. On the Continent, no such assumption is, or could be, made. Rather, provision is made for the information on which the decision would be founded to emerge in a piecemeal fashion.

Both systems see the legal process as consisting of two principal stages, the first of which is preparatory. However, common lawyers see the business of the preparatory stage as preparation for trial. Continental lawyers see it as preparation for decision. Once the decision stage has been reached, it is, virtually by definition, too late for additional information about the facts to be offered to the court. It is during the preparatory stage – the *instruction*, as it is known in France – that the court acquires the information upon which its decision will be based. Thus, it is almost inevitable that the process of fact-finding should be differently conducted in the two systems.⁵⁴

The difference is often referred to as the distinction between adversarial and inquisitorial procedures. However, no system of civil procedure can in the nature of things be wholly adversarial or wholly inquisitorial. It cannot be wholly inquisitorial because there is nothing to which a civil inquisitor can direct his or her inquiry unless and until one party has propounded a claim against another in more or less specific terms. It cannot be wholly adversarial either – even in common law systems the judge is expected to make use of knowledge and experience on matters of fact as well as of law. That means that the judge must inquire of him or herself and is also expected to inquire of others, as to when a question is directed to a witness or when the judge engages in dialogue with counsel. The most that could be said is that common law procedure is predominantly adversarial while Continental systems of procedure are predominantly inquisitorial.

Considerations of this kind demonstrate the existence of a difficult and delicate question of balance. It is for the parties to allege in their pleadings the facts on which they rely and this must continue to be the general rule. No one wants the judge to have a completely uncontrolled roving commission of inquiry. However, it is also for the parties to control the evidence that is presented and here there may be room for change. The common law idea of the single session trial, at which the presiding judge learns about the case to be decided only as the trial proceeds, leaves little opportunity for the judge to intervene and call for further evidence. Any such intervention would lead to an adjournment with all the inconvenience and expense that that entails.

The balance of adversarial and inquisitorial elements was set for English civil

⁵³ Jolowicz, above n 9, 205–6.

⁵⁴ Ibid 206.

procedure by the *Judicature Acts* and was adopted thereafter in Australian jurisdictions. That balance has been placed under scrutiny in England. Reform is under way because of the costs and delays that that balance was perceived to have brought. A balance between adversarial and inquisitorial elements in any system of civil procedure is inevitable, reflected in the division of labour between the parties and the judge. If it is appropriate to give greater powers to the judge at the expense of the parties, reform should not be inhibited solely for fear that such a change might make the procedure less adversarial.⁵⁵

The *Judicature Acts* cleansed common law civil procedure of most of its worst technicalities. However, underlying the new procedure was the common law notion that questions of fact must be decided by a jury. When the use of the jury began to decline and cases came to be decided by judge alone, the pretence was for a time maintained that, in performing the role as judge of fact as well as law, the judge fulfilled *separately* the distinct roles of judge and jury. That pretence is no longer maintained, but the structure of civil procedure in Australia remains much as it was when juries were in regular use.⁵⁶ That observation applies equally to the practice of the Federal Court of Australia, notwithstanding that the power to summon a jury has never been exercised.

In order for the single, uninterrupted hearing (necessitated by use of a jury) to be conducted with reasonable efficiency, there must be a pre-trial stage – this explains the clear-cut division of proceedings into two stages, which is typical of the common law. During the pre-trial stage, the proceedings must be started, the parties must prepare themselves for trial and as much precision as possible must be given to the questions that the jury will have to answer. That is the principal objective of the pleadings.

Such a distinction has an analogy in the bifurcated procedure under the formulary system (as it was called) in the time of the Roman Republic and early empire.⁵⁷ The first was the process *in iure* before the Praetor, where the issues were formulated. That stage is generally analogous with the pleading stage in the common law. Once the Praetor concluded that there were issues for trial, the matter was referred for decision to a lay tribunal, the stage *apud iudicem*. That stage corresponds to the trial in the common law procedure. The *iudex* of Roman Republican procedure was not a professional lawyer but a lay citizen. Evidence was tendered not only as to the facts but also as to the law. The formulary system prevented a case going for trial if the claims were not regarded as giving rise to a good cause of action or if the only defences raised were not regarded as being good in law. Curiously, while Continental jurisprudence is based on Roman jurisprudence, there is no such analogy to be drawn between modern Continental procedures and Roman law.

In a time of wide spread illiteracy it was necessary that the materials on which the jury were to base their decisions on questions of fact – the evidence – should

55 Ibid 181–2.

56 Ibid 373–4.

57 See Herbert F Jolowicz, *Historical Introduction to the Study of Roman Law* (3rd ed, 1972) 199–232; and William W Buckland, *Textbook of Roman Law from Augustus to Justinian* (3rd ed, Peter Stein (ed), 1963) 630–9.

be presented to them by word of mouth. This simple fact is sufficient in itself to explain the marked preference of the common law for oral evidence, a characteristic that it did not, and still does not, share with Continental systems.

The members of a jury were brought together for the first and only time when the proceedings had reached the stage of trial. In modern time, the jurors knew nothing of the evidence, or even of the nature of the case they were to try, before the opening of the trial. It was their duty to reach conclusions on the evidence given at the trial, and that evidence could only be collected and produced by others. The judge remained passive and all procedural activity fell to the parties. It was for the parties to determine not only the subject matter of the action but the precise questions at issue between them. It was also for them to determine on what evidence the jury would come to its conclusions. In other words, because the role of the jury was necessarily a passive one, it was the parties who had the dominant role.⁵⁸

There is still a reasonably widely held view that it is desirable that a judge sitting alone enters the court room knowing nothing, or virtually nothing, of the case that is to be tried. That way, the parties could be confident that only the evidence they wished the court to hear would be taken into account.⁵⁹ However, things have changed. Before the commencement of the *Judicature Acts*, the common law scarcely admitted that a question of fact might be decided by a judge alone. Now there are very few classes of civil proceeding in Australia for which a jury is required.

Common law civil procedure continues to distinguish sharply between the pre-trial stage and the trial stage of a proceeding. However, rules requiring exchange of witness statements by way of oral discovery represent a departure from the common law's traditional insistence that oral evidence is presented at the trial for the first and only time.

Current practices in Australia give the judge the opportunity to inform him or herself during the pre-trial stage and so to form a view as to the evidence that should be adduced. Judges can take advantage of the opportunity thus provided to play a more active role in preparation for trial, over and above the management role that is presently cast upon them.

The absence of a jury in the majority of civil proceedings in Australia provides scope for fundamental reform in the approach taken to the resolution of civil litigation. The concept of the trial, being a part of a process with a recognisable beginning and end, is a historical vestige of the system of jury trial developed in England in the Middle Ages. There is no longer the necessity for such an element in the process of resolving litigation by a court in modern Australia.

Modern case-management procedures involve a significant departure from the traditional approach of a purely reactive court. For example, in the Federal Court of Australia, where active case-management has been the norm since its creation in 1976, the judge responsible for the management of a case during the interlocutory stage will normally be the trial judge. Under the individual docket

58 Ibid 374–5.

59 Ibid 375.

system presently in operation, each case, as soon as it is commenced, is assigned to a particular judge who has the responsibility for management and final determination of the case. This system facilitates the adoption of a radically different approach to the conduct of civil litigation.

Under such procedures there is the opportunity for the judge to become familiar with the issues and evidence at an early stage in the process of the case. The trial judge will acquire considerable knowledge of the issues, and often of the evidence, in the course of managing the litigation. So long as a single judge is concerned with the management and determination of any given proceeding, there is no reason in principle why all of the different aspects of the proceeding need be resolved at the same time. For example, it is possible for rulings on admissibility to be made in advance of the formal commencement of a trial.

There would be no necessity for specific evidentiary issues to be the subject of evidence given at more or less the same time in one session. For example, there may be scope for a court to take evidence and hear argument in relation to particular issues and to express at least a provisional view. That could avoid excessive delay on those issues between the time of relevant events and the taking of evidence as to those events. Of course, it may be necessary to have regard to documentary evidence such as contemporaneous written materials that might bear on the probability of one version of events or the other. Where issues are determined – at least provisionally – very soon after the proceeding begins, the recollections of witnesses may be fresher than if the full gamut of preparation is undertaken before any evidence is taken.

As the process continues, the judge could make a series of determinations of primary factual matters, each of which may build on others, and provisional views may change as further material becomes available to the judge. Ultimately, the judge will determine the proceeding with the assistance of the legal representatives of the parties. It may be necessary for there to be preliminary argument as to the legal principles concerned, with this argument dictating the relevance of particular evidence. Alternatively, that argument may be undertaken as questions arise. If there are competing views as to the relevant legal principles, the appropriate course may be to admit evidence so that the party tendering it will have the opportunity of putting the matter before an appellate court if need be.

There would still be a need for final addresses when all of the determinations made in the course of the conduct of the litigation are drawn together and relevant legal principles applied. In a fact-finding process such as that described above, there would be no 'trial' as that term is presently understood. Further, there would be no occasion for thesis writing by a trial judge. The task of the trial judge would be to decide the case before him or her, not to establish general principles. So long as the reasoning of the trial judge is clear as to the findings of fact and the legal principles applied are stated, nothing more would be required. Of course, much of the judge's reasoning may be exposed in the course of the fact-finding process, rather than in reasons for judgment published as a single document after the trial.

III ORALITY IN SUBMISSIONS

In an Australian court, submissions by the parties are designed to enable the parties to persuade the judge to a particular decision on the assumption that the judge starts from a position of neutrality. Having heard the evidence, of course, the judge may have a leaning one way or the other. Nevertheless, the object of submissions is persuasion. The court reacts to the matters put by the parties. Oral submissions have been the norm, although written materials may be used to supplement the oral argument in complex cases.

In Continental systems, however, the starting point is different. By way of example, in Germany, when there is to be an oral hearing the judge has to make sure that all the details of the case are fully discussed. The court opens the oral hearing with a summary of the factual and legal issues and the arguments of the parties, by referring to their respective written submissions. The court must also discuss legal points that were raised by the parties if it wishes to base its decision on those points. The procedure is designed to ensure that the court has understood fully and correctly the written submissions already made by the parties, in order to prevent surprises about the factual basis of the ultimate decision.

If the issues turn out not to be sufficiently clear, the court will adjourn the case and set a new date for continuing the oral hearing. Otherwise the court will proceed to hear the evidence. At the end of taking the evidence the court is bound to discuss the outcome with the parties. At that stage the parties are each given the opportunity to sum up their prior submissions, which is normally done by simply referring to all the earlier pleadings in light of the outcome of taking evidence. At the end of the oral hearing the court may immediately deliver a final judgment or it may set a date within about three weeks for the reading of its judgment.⁶⁰ The emphasis in any oral hearing is to ensure that the court understands the written contentions of the parties. It is not designed to enable the parties to explain the case to the court and to persuade the court.

In an Australian appellate court, the convention has, until quite recent times, been for full oral argument, perhaps supported by a brief written outline to assist the court in following the argument. However, that convention has begun to change in the direction of the system in the United States. The convention in appellate courts in the United States today is to limit strictly the extent of oral argument.

In the United States Supreme Court parties are given a short time to present oral argument. In many state and federal appellate courts oral argument is not permitted as a matter of right. Courts of Appeals for some circuits authorise a three judge panel to refuse oral argument if they so decide unanimously. Thus, writing in 1983, a judge of the US Supreme Court recorded – with what appears to be a mixture of amusement and amazement – the fact that one of the US Supreme Court's more celebrated decisions, *Gibbons v Ogden*⁶¹ (concerned with

60 Koch and Diedrich, above n 18, [110].

61 *Gibbons v Ogden*, 22 US 1 (1824).

the extent of federal power over internal commerce) was argued over several days for a total of 24 hours from the several parties.⁶² The reduction in oral argument time in the United States has been attributed to the burgeoning dockets of appellate courts. As judicial time became restricted, the oral side of the appeal, and the art of oral advocacy, has come to play a smaller and smaller part in the presentation of cases to appellate courts in the United States.⁶³

The intangible value of oral argument and the dialogue between counsel and bench to judges and to the public is considerable. Despite the growth of written argument in the United States, the weight that English and Australian courts put upon oral argument would impress an American observer.⁶⁴ Oral argument offers an opportunity for a direct interchange of ideas between court and counsel. Counsel can play a significant role in responding to the concerns of the judges – concerns that counsel will not always be able to anticipate in preparing briefs or written submissions.

Further, oral argument has the value that any public ceremony has. Lawyers and the clients are brought face to face with the judges who will consider and decide their case. The judges are brought face to face with the lawyers who have written the submissions on either side.⁶⁵ While lawyers generally have contact with clients, other members of the profession and people in general, appellate judges will, of necessity, lead a more aloof and solitary professional life if there is no longer the face to face dialogue with counsel. That will be the inevitable consequence of replacing oral argument with full written submissions.⁶⁶

Detailed written submissions increase the time that a judge spends out of court. It makes the life of the judge more flexible in the sense that the judge can read submissions at a time of his or her choosing. The inevitable consequence, however, is that diligent judges spend more and more of their own time to read written submissions in order to maximise the use of available court time. That simply imposes a heavier and heavier burden on judicial officers. The principal beneficiary from the adoption of a process of detailed written submission and the abandonment of detailed oral argument is the State, in the reduction of direct court costs. That is to say, there would be no need for courtrooms to be kept open and accessible to the parties or the public who may be interested in the way in which justice is administered.

However, such a practice is not necessarily a more efficient way of conducting litigation on the whole. Counsel must spend more and more time preparing detailed written submissions prior to a hearing. In the absence of some indication from the bench, it is incumbent upon counsel to cover all reasonable points that could be raised. The preparation of written submission must be paid for by clients. Time taken by competent counsel to prepare and develop an oral argument will be far less than that required to draft and settle detailed written submissions.

62 William H Rehnquist, 'Oral Advocacy: A Disappearing Art' (1984) 35 *Mercer Law Review* 1015, 1021.

63 *Ibid* 1019.

64 *Ibid* 1021.

65 *Ibid* 1022.

66 *Ibid*.

One of the great advantages of oral argument is to refine the contentions of the parties and to expose futile contentions and eliminate them. It is not a criticism of counsel that contentions change in the course of oral argument. That is the genius of the system whereby contentions are developed in dialogue between bench and bar.

The tendency towards detailed written submissions in Australian courts, both at first instance and on appeal, represents a further significant move away from the common law tradition of the public trial, whether before a jury or before a judge alone. 'Persuasion' of the court can take place in private at a time unknown to the parties, just as the presentation of evidence in writing permits the court to learn about the facts in private and not in the presence of the parties.

IV ORALITY IN REASONS FOR JUDGMENT

The opinions of the great 18th and 19th century English judges were delivered orally, often *ex tempore*. A system under which judgment was given and delivered immediately after the completion of a hearing tends to produce reasoning that is very much directed to the facts of the particular case. It is harder to deal promptly and convincingly with a particular case if trying to fit the case to make a general statement about the law. This was so even for appeal courts.

Until the advent of the photocopier and word processing, copying a draft was a major undertaking. Even if a court took time to consider its decision, the judges could not easily circulate a draft of the reasons they proposed to deliver. Accordingly, where there was not to be a joint judgment, the judge delivering the first judgment might have to add or to clarify a point as a result of what a colleague said after him or her. Later judges had to try to assess exactly how far they did or did not agree with what had been said before them. Modern technology makes it easier to circulate draft judgments and thereby produce a joint judgment. Modern technology also enables multi-judge courts to produce varying reasons for reaching the same conclusion. That tendency was much more restricted when judgments were delivered orally *ex tempore* or from the personal notes of the judges when the decision was reserved.

The form of judges' reasons for judgment has evolved even in the past 40 years, to a form of communication that is normally written. Reasons that are delivered *ex tempore* will, ordinarily, be somewhat different from reasons composed in private and handed down subsequently. For one thing, when the judge gives reasons *ex tempore*, whether at first instance or as a member of an appellate bench, he or she is very much addressing those who are present in court, normally the parties and their advisers, who are familiar with the case that has just been heard.

When a judge reserves his or her decision and then prepares reasons, the original audience may well not be present when reasons are published. The judge may then be tempted to address, not simply the parties, but the wider public, who are likely to read the law reports. Where judgment is reserved and the reasons are written with one eye on the wider public, the judge will be able to set out the

facts and arguments much more fully than when delivering judgment to the parties who have been in court throughout the hearing.⁶⁷

The traces of the tradition of reasons for judgment as oral communications are being obliterated and, in some cases, have become almost undetectable. Judges' reasons now take forms that are typical of documents composed in writing, rather than the oral communication of thought processes that led to a particular conclusion.

For example, the use of footnotes or endnotes in reasons is commonplace. Footnotes are used in the same way as they are in academic books and journals. Sir Harry Gibbs wrote in 1993 that 'the use of footnotes which contain observations not fit to be included in the judgment' was to be avoided and that the American use of footnotes is 'not our tradition'.⁶⁸ Nevertheless, the High Court of Australia regularly publishes opinions furnished with footnotes that – like academic footnotes – contain material that goes beyond mere references but that the author does not wish to put in the body of the reasons for judgment.

The trend in the United States is along those lines. Footnotes are now a standard feature of most opinions of the Supreme Court of the United States.⁶⁹ Most United States appellate systems are oriented around the production of written opinions that will refine or develop the substantive law.⁷⁰

Other devices are used that are consistent only with reasons for judgment being a written rather than an oral form, such as tables of contents and schedules, which are now commonplace. Information set out in the form of a chart or table, as well as headings and subheadings, are usually found in reasons for judgment in Australia. The facilitation of media neutral citation has led to the introduction of paragraph numbers throughout Australia and other parts of the common law world. That makes cross-referencing much easier. It can also have the effect of making paragraphs much shorter and therefore easier to comprehend.

The introduction of cross-referencing, tables, appendices, footnotes and the like is a sign that the judges who compose those opinions are producing what – for all intents and purposes – amount to academic articles and mini treatises on the point at issue.⁷¹ Judges anticipating further scrutiny may produce a judgment that shows, on its face, that the judge too has read the literature. Judgments that mimic many of the external forms of academic writing may more readily invite comparison with such writing. Those written decisions indicate how far the modern form of reasons for judgment has progressed from the traditional form.⁷²

With numbering, paragraphing has assumed much greater prominence and can contribute more significantly to the effect of an opinion. 'In particular, a succession of short, staccato paragraphs can, whether intentionally or not, give a

67 Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 *Law Quarterly Review* 226, 229–31.

68 Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 500.

69 Rodger, above n 67, 234–5.

70 Rehnquist, above n 62, 1021.

71 Rodger, above n 67, 237.

72 Ibid 238.

judgment an added appearance of decisiveness'.⁷³ Justice Cardozo once observed that, in writing a judicial opinion,

clearness, though the sovereign quality, is not the only one to be pursued. The opinion will need a persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness of the proverb and the maxim. Neglect the help of these allies, and it may never win its way.⁷⁴

However, one wonders why a judicial opinion should be persuasive. That is the task of the advocate or, perhaps, the academic who might wish to persuade judges to a particular view. The purpose of a judicial opinion is to state reasons for a decision, not to persuade anyone else to the same view.

Where such written forms are adopted, the summarising and restatement of the law on a particular topic becomes possible. It is easier to write a thesis on a particular topic. Such writings of course are irrelevant for the parties who are interested in the decision in a particular case, although some litigation will involve a party who is interested in establishing the law on a particular topic because that party may expect to be involved in disputes in the future where the question will arise – governments and government instrumentalities, such as the Australian Consumer and Competition Commission, the Commissioner of Taxation or the Australian Securities and Investment Commission would often fall into such a class of litigant. Nevertheless, it is not the function of the judiciary in Australia to give advice and opinion.

If the community looks to the judiciary for no more than the settlement of the disputes between the parties who come before them, and the decisions of the courts have no significance for those who are not parties to the decisions then, probably, the nearer that a procedure can approach the ideal adversarial system, the better. There is no judicial duty to ascertain some 'independent truth' in a contest purely between one litigant and another. Justice will have been fairly done if the decision has been in accordance with the available evidence and the law, even if the decision is known not to be based on the whole truth of the matter by reason of the imperfection or the withholding of evidence.⁷⁵

However, courts are often looked to for more than the bare answer to the question whether the moving party should get from the responding party what has been claimed. Thus, it is often the case that the outcome of litigation in a superior court affects not only the parties to the litigation but also persons who do not have a direct legal interest in the litigation as such but who may nevertheless be affected by the outcome. Whenever the parties to litigation are or include corporate bodies, the corporate party represents the interests of all those who are affected by the position in which the corporation finds itself – shareholders, employees, taxpayers, beneficiaries, public services and so on.⁷⁶ The procedures under Part IVA of the *Federal Court of Australia Act 1976* (Cth), which deal with representative or class actions, have the consequence that the result of particular litigation might affect citizens who are unaware of the

73 Ibid 236–7.

74 Ibid 240–1.

75 See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438.

76 Jolowicz, above n 9, 179–80.

litigation. Courts may have a duty in such proceedings to look beyond the interests of the specific persons involved in the litigation.

Further, litigation between citizen and State is in a different category from civil litigation between citizens. The second category is the private affair of the parties. However, civil litigation between citizen and State can lead to a declaration that legislation is invalid for unconstitutionality. Such litigation is not uncommon in Australia. The consequences of a declaration of invalidity in relation to legislation will be felt throughout the community.

The potential importance of litigation to the development of the law cannot be ignored. On the other hand, it is by no means self-evident that the giving of guidance to trial courts and stating new principles in general terms or restating established principles is the proper function of the judge. That is the province of the legislature. It is the province of the academic to comment and thereby suggest to judges the direction that might be taken by the law in particular fields. However, the essential function of judges is to decide the cases before them. The genius of the common law has been its capacity to develop the law case by case, in accordance with the principle of *stare decisis*. That arises from recognition by the judge that he or she is deciding the case at hand. It is not the function of a judge to decide cases that have not yet been commenced and to endeavour to legislate for the future. Replacement of the *ex tempore* oral tradition with a formal written approach has facilitated that tendency.

That is not to say that judges should never deliver written reasons for decision. However, reserving a decision should not be for the purpose of writing a treatise or academic article or of considering literary style or the persuasive force of the reasons to be published. It is for the purpose of marshalling the material before the court and considering the issues raised by the particular case.

Continental practice in giving reasons is by no means as discursive as it is in Australia. Reasons are much shorter. It may be that the position under Continental practice concerning the delivery of judgment and reasons for judgment is more prescriptive than it is in common law systems. For example, the position in Germany is regulated by the *Civil Procedure Code*. Thus, a judgment must be formally pronounced, either at the end of any oral hearing or at a separate time within three weeks. Under exceptional circumstances, serving the judgment on the parties can be substituted for formal pronouncement. Where there is a separate date for pronouncing the judgment, the judgment must be available in complete written form. Pronouncing a judgment simply means that the written operative provisions of the judgment must be read aloud in open court, whether or not the parties are present.⁷⁷

The detailed form of a judgment is also prescribed by the *Civil Procedure Code* of Germany. The operative part of a judgment, which contains the decision on the claim, the costs of the proceedings and the provisional enforceability of the judgment, follows after the formal heading and statement of the parties and their legal representation. The facts of the case are then set out containing, in short form, the claims and defences and all motions of the parties. That is done

77 Koch and Diedrich, above n 18, [113].

without too much detail and with reference to the files of the court. That practice can result in complication because it will not be apparent from the judgment itself whether the court has taken into account all issues raised by the parties. The expectation, therefore, is that the court will not base its decision on facts not mentioned in the written judgment. Finally, the reasons for the decision are set out, giving a summary of the deliberations of the court in relation to legal points and evidence that resulted in the judgment. Reasons tend to be very detailed and reference is often made to scholarly writings and earlier decisions of higher courts in the hierarchy. The judgment must then be signed by all judges participating in the decision.⁷⁸

The process just described, apart from the requirement of written reasons, is closer in substance to the traditional common law process of deciding the case at hand for reasons delivered at the end of the trial, or within a short time thereafter – the reasons being limited to those necessary for the decision of the case before the court. The tradition in Continental systems is for greater reliance upon law found in the Codes, with the assistance of academic exegesis. There is no tradition of law-making such as one finds in ultimate appellate courts in common law systems such as the House of Lords and the High Court of Australia.

The English common law, as inherited in Australia, is the creation of the judges. However, in Continental systems academic writings have been of the greatest importance in the development of law. There are large and important fields of law created by Continental jurists, just as the English common law was created by judges. Even today, when the Codes have taken over the role of the *Corpus Iuris Civilis*, the teaching in the law faculties of civil law countries and the doctrines expounded by their most eminent commentators are of considerable moment and carry great weight, not only with students but also with the judiciary and the legislature. The jurists not only expound the Codes and comment on them, they also criticise Codes and judgments and work out theories and philosophies about the way the law is, or ought to be, developing.⁷⁹

V CONCLUSION

An important function of a legal system is deciding matters of past fact. The gulf that separates modern Continental systems from common law systems is largely concerned with the procedure of fact-finding. A fundamental consequence of such different arrangements for the conduct of fact-finding has been the difference in attitude towards what common lawyers call the law of evidence.

In the second half of the 20th century, a departure from the essentially oral tradition of civil proceedings in Australian jurisdictions has become more apparent. It is possible to discern two consequences of the departure. First, there has been a tendency to abandon the practice of giving evidence-in-chief orally. In

⁷⁸ Ibid [115].

⁷⁹ Van Caenegem, above n 1, 53–4.

the decision making process, therefore, there is greater scope for abandonment of the concept of the trial, being a hearing with an identifiable start and an identifiable finish. Secondly, there has been departure from the tradition of oral argument and *ex tempore* judgments. Thus there is much greater scope for thesis writing at first instance and on appeal.

In the former development, Australian experience tends to move closer to the Continental system. In the absence of a jury, there may no longer be a need for a formal trial, as distinct from an ultimate decision at first instance arising from a continuous process of decision-making. In the latter development, however, Australian experience has begun to move further away from the Continental system in so far as it involves writing law for the future rather than merely deciding cases.

There is a tension between the two developments. That is to say, if the decision at first instance is made over a period of time and involves a series of determinations, there will not be the same scope, as a general rule, for thesis writing. Rather, the task of the judge will be restricted to deciding the case at hand.

There is certainly some utility in authoritative summaries of the law as it stands. However, stating principles for the future that go beyond the particular case at hand or purporting to change the existing law should not be the function of judges. That process usurps the function of the Parliament. The genius of the common law has been to develop the law by increments. No matter how wise and learned a judge may be, it is not possible to foresee the future. The function of a trial court is to decide the case before it. The function of an intermediate appellate court is to correct errors made by the court below. Those functions are best served by hearing oral argument and, where practicable, giving a decision immediately on the issues raised, not by writing a thesis on those issues and foreseeable variations of the issues.

Of course, principles will emerge from successive decisions. Those principles will be drawn out by academic and other jurisprudential writing and may be cited in subsequent decisions. However, they should not be propounded in advance of circumstances that give rise to them. The only reason for taking time to decide a case should be to marshal the materials before the court and to enable reflection on complex issues. Otherwise, if there have been adequate oral submissions, supported by appropriate written outlines where necessary, oral reasons for deciding the case in hand should be the norm.

This is not to say anything about 'activism'. A decision dealing with a new question may or may not extend the law on a given subject matter. An 'activist' may decide the question one way, while a 'conservative' may decide the question a different way. However, a decision should do no more than decide the case before the court, even though its effect may be to give rise to a new principle.

If it be the case that a function of an ultimate appellate court – such as the High Court of Australia – is also to give guidance to inferior courts, academic-like pronouncement may be appropriate. However, such pronouncements should not be regarded as binding on lower courts except in accordance with the strict rules of *stare decisis* according to a *ratio decidendi* that is clearly discernible in

what is published by the court.