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ARTICLES

IMAGINING THE PAST, REMEMBERING THE FUTURE: THE DEMISE OF CIVIL LITIGATION

Hon John Doyle AC

"Civil litigation as we know it in the higher courts will come to an end." This prediction of the end of civil litigation in the Supreme Court, District Court and Federal Court by the author is explored through a review of the distinctive features of the common law system. The author examines what has gone wrong; the strains on the system, proposing that the problems of the system come from within, from the characteristic features of the system. The impact of information technology, the increasing complexity of the law and the emergence of alternative dispute resolution are also discussed. Briefly, the author comments on parallels occurring in the criminal jurisdiction, albeit to a lesser degree, and the impact of the rise of therapeutic jurisprudence. The author concludes by suggesting an abandoning of the present system and recommends an alternative that embodies a concept that all civil claims be presented at a single registry and in simple form, after which judicial officers will take charge of them. 240

APPELLATE JUDGING: ONWARDS AND OUTWARDS TOWARDS MID-CENTURY

Ronald Sackville AO

The only confident thing that can be said about predictions is that they are bound to be wrong. With that comforting thought in mind, I propose to consider likely changes in the way the High Court and intermediate appellate courts in Australia discharge their respective functions in civil cases. Before doing so, however, I refer to the constitutional framework within which the courts operate and will continue to operate for the foreseeable future. Because the appellate courts, particularly the High Court, play a significant (but not exclusive) role in shaping public perceptions about the judicial system, I also consider likely changes in judicial attitudes towards engagement with the wider community. 249

THE CIVIL STANDARD OF PROOF AND THE "TEST" IN BRIGINSHAW: IS THERE A NEUROBIOLOGICAL BASIS TO BEING "COMFORTABLY SATISFIED"?

Hayley Bennett and G A (Tony) Broe

The High Court decision of Briginshaw v Briginshaw (1938) 60 CLR 336 is understood to lay down certain principles in relation to the civil standard of proof, that is, that the facts in issue must be proved to the satisfaction of the decision maker on the balance of probabilities. One of those principles relates to the state of mind of the decision maker and to the nature and quality of the decision-making process leading to the obtaining of the requisite satisfaction. In Briginshaw, the judges held that, in cases where serious and grave allegations have been made, a "reasonable satisfaction" of mind will not be achieved unless the decision maker "feels an actual persuasion", feels "comfortably satisfied", and is not "oppressed" with reasonable doubt. With this, the judges have suggested that what a judge feels and somatically experiences contributes to, and in fact may be decisive of, the decision-making outcome. These judicial insights from 1938 are

intriguing from a neurobiological perspective, given what is currently known about the participation of mental processes and somatic sensations in decision making. This article will review the decision in Briginshaw and the principles discussed therein. In particular however, the aim is to examine the decision-making processes described by the judges in order to determine whether the processes outlined are consistent with what is scientifically known today about decision-making processes and their neurobiological underpinnings. 258

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