Lawyers Administering Justice

A Tribute

Keynote Address to Australian Lawyers Alliance

Western Australia Conference

The Honourable Justice Peter Quinlan

Chief Justice of Western Australia

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I thank the Australian Lawyers Alliance for the invitation to speak at this year's Western Australian conference. This is particularly so, given that 2019 marks the 25th anniversary of the Australian Lawyers Alliance (*albeit* not in name, a matter I shall return to shortly).

May I begin by acknowledging the Whadjuk people of the Noongyar nation, the traditional owners of the land on which we gather this morning, and pay my respects to their elders past, present and emerging.

When I initially agreed to speak at this morning's event, I thought I would take for my theme a quote from Sir Gerard Brennan that I referred to at my welcome to the bench of the Supreme Court and that I have used in every speech marking the admission of new lawyers that I have conducted since that time.

Sir Gerard's remarks were made in the year prior to my own admission as a lawyer and, appropriately enough, were made in a case on appeal from the Supreme Court of Western Australia. He said this:

> The law is administered more frequently and more directly by legal advisers than it is by judges.

The importance of this quote comes from what it says to every lawyer: that what you are doing, in your work, is administering the law and administering justice. Not only when you are assisting the Court to do so: but doing it directly yourselves.

It emphasises that every time a lawyer provides frank, independent and accurate advice to a client that resolves a problem, however large or small, he or she is directly administering justice.

Why raise this quote in the context of an address to the Australian Lawyers Alliance?

The answer comes, in part, from the name change of this association that I alluded to earlier.

Many of us here will recall that, for the first ten years of its existence, this gathering was known as the Australian Plaintiff Lawyers Association. It was an association formed, in 1994, with the purpose of furthering the interests of persons seeking compensation for injury caused by negligence. Notwithstanding the name change, the topics in today's sessions demonstrate that in substance, if not in form, that continues to be the ethos of the association.

I must confess to a certain affection for the old name. And can I suggest that, as noble as the new name is, and as reflective as it may be of the scope of the interests of the association, there are some subtle but important things that have been lost by the name change?

First, its directness and its clarity. Everyone knows what a 'plaintiff lawyer' is. It tells the world immediately, and with precision, who comprises this group and what its core interest is.

And in that context, 'plaintiff lawyer' is not simply a person acting for the initiating party in a court proceeding. We don't call a practitioner who acts, from time to time, for the moving party in a defamation claim, or a contract claim, or a misrepresentation claim, a 'plaintiff lawyer'. It's a particular kind of plaintiff that the expression brings to mind.

The plaintiff who has suffered a personal injury.

And so to the second subtle loss in not being the Australian Plaintiff Lawyers Association. The name told us who it was *for*. It was an association *of* lawyers

but it was not *for* lawyers. It was about the plaintiffs; about the clients. It was about them and not about us.

And thirdly, I always thought that there was a wonderful brashness, even defiance, associated with the name. Because as we know, regrettably, in parts of the legal profession personal injuries work is looked down upon – even frowned upon - and regarded as low status.

This is nothing new. As early as 1906 the American Bar Association, in a report on its Code of Ethics, said the following:

> Once possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct; but now the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion so long as they stop short of actual fraud and violate no criminal law. These men believe themselves immune, the good or bad esteem of their colaborers is nothing to them provided their itching fingers are not thereby stayed in their eager quest for lucre.

Such sentiment finds its way into legislative policy. It is plaintiffs' personal injury lawyers, and those lawyers alone, who are prohibited, under pain of criminal penalty, from advertising their services and from touting. Such a prohibition is, apparently, unnecessary for the rest of the legal profession.

And so, to name an association the *Plaintiff Lawyers* Association, brought with it a certain impertinent pride. It said, 'we are plaintiff lawyers and we own it'.

Finally, and returning (finally!) to my theme, it always seemed to me that my colleagues who routinely acted for plaintiffs in personal injuries claims were in many ways the exemplar of the ideal of lawyers administering justice. The

overwhelming majority of claims for compensation, by ordinary men and women, of course, never see the inside of a courtroom. They are resolved by negotiation and mediation, both formal and informal, in which the law and justice must be administered by the lawyers involved; lawyers whose responsibility it is to see that those ordinary men and women leave the process with a sense that the law has been vindicated and that justice has been done.

Which introduces the other component of the title to my address this morning: a tribute.

Because, reflecting upon my own impression of plaintiff lawyers as exemplars of lawyers administering justice, there is, for me, one particular exemplar of such a lawyer.

And so, in exploring a little further the important responsibilities of a lawyer administering justice, I do so in the context of a tribute to the contribution and career of Kevin Steven Pratt, who after 36 years of dedicated service, has this year retired from legal practice.

Kevin Pratt commenced his legal career at Jackson McDonald and was admitted in December 1982. He continued with that firm for a number of years until 1990, although from 1984 to 1985 he spent time in Kalgoorlie with the firm Sheppard Lalor.

In 1990 he commenced practice as a barrister at what was then Bar Chambers in Cathedral Square. As a little personal aside, I can claim to have been the first person to deliver Kevin a brief, which I did as a summer clerk at a small Perth law firm.

Kevin Pratt's practice at the Bar over the next 29 years was not confined to personal injuries work: he was at home in criminal law, wills and estates and commercial law, to name but a few.

More broadly, Kevin Pratt, has always maintained a fervent interest in the law generally. Those of us who like to pride ourselves on being up to date with all the latest High Court decisions would struggle to keep up with the rate at which Kevin read and digested the law in all of its variety.

What has always struck me, however, is not the breadth of Kevin's understanding of the law, but its depth. Unlike many who can claim an encyclopaedic knowledge of precedent and authority, Kevin has a preternatural insight into what lies beneath a particular judicial expression of the law; getting to underlying philosophical presuppositions that lead a particular judge in a particular direction. Such an ability comes not only from a keen understanding of the law but of human nature itself.

So it was that Kevin Pratt was able to bring a breadth and depth of vision to legal practice that can be sadly lacking in our times.

That breadth and depth of vision extended to the legal profession itself: the subtle, but significant, changes in the way in which lawyers conduct themselves that have profound effects on the legal system and the community as a whole. In this regard Kevin was able to diagnose the cause of many of the problems that beset modern litigation (over-servicing, undue complexity and unnecessary interlocutory disputation) long before the rest of us could even recognise the symptoms. His insights into our own collective failings have always been invigorating.

But it was his work for injured plaintiffs for which Kevin is rightly renowned as a leader in the field. The sheer scale of his practice, and his commitment to clients, is the stuff of legend. He is the only person to have paid rent on two separate sets of chambers at Francis Burt Chambers, one for himself and one to serve as a conference room for the multiple settlement conferences that would be conducted (often simultaneously) both before and after court sitting hours. When he moved to establish Central Law Chambers with Theo Lampropoulos SC, it

was necessary to design the chambers with a separate entrance and waiting room in order to accommodate his clients.

So it is that, echoing the aphorism of Sir Gerard Brennan with which I began, it has often been said of Kevin Pratt that he single-handedly administered more justice on a daily basis than most courts do.

And this was, of course, true. But it was true in a way that goes beyond mere results.

Which brings me to the deeper meaning of the notion of lawyers directly administering justice, when they give frank, independent and accurate advice to a client that resolves a problem.

It is the distinction, particularly in the context of mediation (formal and informal) between results, on one hand, and justice, on the other.

The success of a system of mediation is sometimes expressed in numerical terms, reflecting the numbers of matters resolved by a particular process or institution. Success, according to this metric, is a *result*. A settlement is a success; the failure to settle is *ipso facto* a failure.

Metrics are important, of course. And outcomes (including mediated outcomes) are essential to any properly functioning legal system. But outcomes, or results, are not enough, if they are not delivered within the context of, and consistent with the requirements of, justice. A mediated outcome that is achieved by reason of attrition, or cost, or fear, or fatigue, is not a just outcome. It may, strictly speaking, be a result. But it is not justice and it does not vindicate the rule of law.

And so the aphorism that the law is administered more frequently and more directly by legal advisers than it is by judges, is not simply a comforting platitude, designed to make lawyers feel better about themselves. It is an urgent responsibility against which the performance of the profession is to be judged.

We are indeed fortunate in this State, and indeed the envy of other jurisdictions throughout Australia, to have a well-developed, and well-understood, court based mediation system. Court based mediation is an essential component of the broader dispute resolution system because it aims to achieve consensual outcomes within the context of the delivery of justice, which is, of course, the courts' overriding responsibility.

The delivery of justice in this context is both procedural and substantive. It must aim for both a fair hearing *and* a just outcome according to law.

That is where lawyers come in, and *apropos* today's remarks, plaintiff lawyers. Because, whether a matter is settled within a court based mediation, an informal conference or in a lawyer's office, it is the lawyers who ultimately must ensure a fair hearing and a just outcome.

Let me develop this by reference to two aspects of the administration of justice drawn from the obligations which are properly understood to be owed by courts.

First, the right to be heard. One of the fundamental obligations of natural justice is the hearing rule. Persons whose interests are affected by a particular decision have the right to be heard in relation to it. Even an apparently obvious outcome may be regarded as unjust if the person affected by it does not have the opportunity to be heard. And, indeed, sometimes the apparently obvious case is the one in which the right is most important.

As Sir Robert Megarry observed:

> As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a

> change. Nor are those with any knowledge of human nature who paused to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

We are all, of course, acutely conscious of the need to provide those affected by our decisions the opportunity to influence the course of events in a court or administrative setting.

But it applies equally in the context of a mediation or negotiation, where the need to be heard, and the feelings of resentment if one is not, are just as real. And often, in those circumstances, the only opportunity to be heard that a plaintiff might have is the opportunity to be heard by his or her own lawyer. The course of a negotiation may be one in which it is only the plaintiff's own lawyer that hears all of his or her story. And so in ensuring that justice is done, and seen to be done, in those circumstances it is necessary for the lawyer to learn to listen. And to listen to real needs and concerns of that client.

The second aspect, to which I wish to refer, is the duty, in the administration of justice, to give reasons. As an incident of the judicial process, this duty is, of course, well known and is an important aspect of judicial accountability. It facilitates the capacity of an appeal court to determine whether a particular decision is affected by factual or legal error.

But the duty to provide reasons has other, more human, benefits. As Meagher JA once put it:

> A failure to provide sufficient reasons can and often does lead to a real sense of grievance that a party does not know or understand why the decision was made. This Court has previously accepted the proposition that a judge is bound to expose his reasoning in sufficient detail to enable a losing party to understand why they lost. One reason is obvious: if decisions cannot be

> understood, a feeling of injustice can arise and, as Justice Brennan of the United States Supreme Court … recently perhaps overstated: "...Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down." Aside from the sense of injustice which can be caused there is a broader interest in maintaining public acceptance of judicial decisions and the judicial system.

These remarks, of course, were made in the context of the judicial system. But they reflect a broader human reality. Confidence in the legal system and in the rule of law may be affected just as significantly by a mediated outcome as it can be by a judicial decision. The *reasons* why a person settles a claim may be as important to their sense that justice has been done as the nature of the *outcome* itself.

A plaintiff may leave a mediation room, or lawyer's office, not only with a negotiated outcome, but with an understanding as to *why* the outcome is what it is and *how* the law has been applied to the facts of their case to achieve that result. Even where the outcome is not one which meets the particular plaintiff's expectations, or is a disappointment, such an understanding has real benefit.

Or a plaintiff may leave that mediation room, or lawyer's office, with a brooding sense of injustice and with no real understanding as to how the result was achieved.

And it is the plaintiff's lawyer that has a vital role in determining which of these two alternatives is brought about. In such a case, it is the lawyer, inevitably, who provides the reasons for the outcome and whose duty it is to explain how that outcome is the result of the application of the law to the facts of the client's case. And sometimes that might be the most difficult task the lawyer has: to explain the result (or the proposed result) in a frank and impartial way. In some cases that frank and honest explanation might be unwelcome, because the application

of the law to the facts may not be in accordance with the client's wishes. But such an explanation is essential to the attainment of justice and to the maintenance of the rule of law.

Returning to my tribute, both of these aspects of the maintenance of the rule of law were conspicuous in the way in which Kevin Pratt has practised the law over many decades. Notwithstanding the many thousands of them, Kevin brought a genuine interest in the story that each of his clients had to tell. He brought a passion to the pursuit of justice which, let's be frank, sometimes bordered on the irascible. And, importantly, he brought an honest and frank explanation of the legal and factual merits of the client's case according to law, including, occasionally, a frankness that courts can only envy. All of this ensured any outcome that was achieved was reasoned, attentive to the needs of the client and served the public's confidence in the law and its institutions.

Kevin Pratt's retirement from practice therefore leaves a significant gap in the legal landscape in this State.

In concluding these remarks may I offer my gratitude for Kevin's fine example to me and to a generation of lawyers and pay tribute to his significant contribution to the administration of justice in this State.

Thank you for your time.