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The phenomenon of the vanishing civil trial

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Measuring the impact of ADR

The phenomenon of the vanishing civil trial

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Introduction

The American Bar Association (ABA) Section on Litigation invited Professor Marc Galanter of the University of Wisconsin Law School to gather as much information as he could on the issue of whether trials were on the decline in the federal courts of the United States. Galanter's data, and papers from 15 other respected academics, formed the basis of a symposium held between 12 and 14 December 2003 in San Francisco to discuss their findings with state and federal judges and key representatives of the ABA.

In short, Galanter found that while filings (new cases) in the US District Court had increased five-fold over the last 40 years, trials as a proportion of dispositions had fallen from 11.8 per cent in 1962 to 1.8 per cent in 2002 at a time when court resources had increased significantly and the total number of dispositions had increased in line with filings. In other words, while the courts are getting busier the number of trials is decreasing, or to use American terminology, 'vanishing'. Galanter also found that those cases that did go to trial were much longer in duration, were more complex, and resulted in larger awards.

Galanter noted that the number of cases that terminated before pre-trial procedures rose from 20 per cent in 1963 to 68 per cent in 2000 and he opined that 'courts are more involved in the early resolution of cases than they used to be'.¹ In other words, judicial case management was found to be a contributing factor in the reduction of trials. Evidence of the role of dispute resolution as a contributing factor to the vanishing trial was at best ambiguous. However, reports in some jurisdictions attributed a significant reduction in trials to the rise of court-annexed dispute resolution.

Vanishing civil trials – a study of the New South Wales District Court

The first set of data reflected below in Figure 1 shows the number of civil filings in the Sydney Registry of the New South Wales (NSW) District Court (the Court) and State-wide. Some of the peaks and troughs can be explained by tort law reform, changes in jurisdictional limits and changes in the Court's recording of data.

Not surprisingly the pattern for new filings or new cases in the Sydney Registry of the Court is similar to that State-wide. In 1990 and 1991 new filings in NSW amounted to 22,860 and 18,450 respectively, compared with 7,912 and 6,789 in 2003 and 2004 respectively. The 2004 filings are less than one third the numbers of filings in 1990. The NSW Government's major reform of personal injury claims that took place in 2002 should have settled down by 2003 with, according to the Court, the bulk of the claims coming in the first half of 2002 and a marked slow-down in new filings in the second half of that year.² Notwithstanding the effect of civil litigation reform by the NSW Government, the last two years has seen new filings

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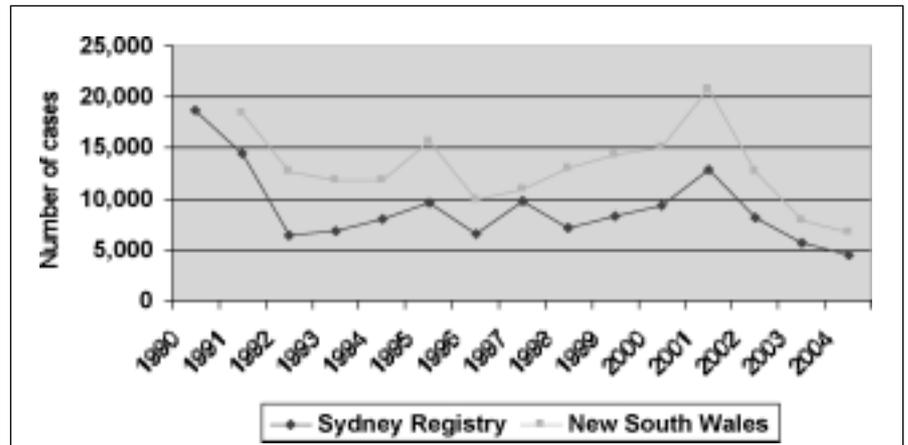


Figure 1. Civil filings in the Sydney Registry of the NSW District Court and State-wide, 1990–2004

drop to their lowest levels in 15 years.

The data reflected in Figure 2 show the Court's disposal rates of cases and the manner of their disposition. Again, there are noticeable peaks and troughs, some of which coincide with the peaks and troughs experienced by the Court regarding new filings. The increase in cases disposed of in 1996 coincides with the peak in new filings in 1995, meaning that the Court clearly recognised the problem of a high influx of new filings and the need to deal with those matters expeditiously to avoid a higher than normal pending case load in following years. The 1996 peak in disposals also coincided with the introduction of the Court's Civil Case Management System which sought to ensure that as many matters as possible were disposed of within 12 months from commencement. Further, it forced cases commenced prior to 1996 to file Praecipes for Trial before 1 January 1998 or face dismissal.

Not surprisingly, the number of cases disposed of by trial follows the overall disposal rates of the Court. Disposal by hearing rates dropped from a peak in 1990 of 3,028 or 34 per cent of all disposals, to a trough of 1,021 or 13 per cent of all disposals in 2003, but then bounced back in 2004 to 1,148 or 22 per cent of all disposals. What the disposals by trial figures show is that the number of disposals by trial varies enormously – in the years between 2002 and 2004 they have gone from 10 per cent of all disposals to 13 per cent and then 22 per cent respectively. It is difficult to discern any stable pattern of the number of trials as a proportion of

disposals. The peak in 1996 disposals by trial reflects the Court's Civil Case Management System that sought to dispose of cases more efficiently than before, and so should be discounted from any conclusions drawn about vanishing civil trials.

From the Court's figures it seems that *prima facie* one could dramatically state that there has been a significant reduction in the number of trials over a 15-year period from 34 per cent of disposed cases in 1990 to 22 per cent of disposed cases in 2004. However, it is more realistic to observe that the 1990 peak has no rationale other than the Court's desire to deal with an influx of new filings in that year and that the true percentage of trials as a percentage of all disposals is around the 10 per cent to 20 per cent percentile over the last 15 years. In other words, the Court's data shows that there is no conclusive evidence that trials in the Court are vanishing. However, the data could support an argument that trials are diminishing at a very slight rate that may, in part, be due to the decrease in filings. Perhaps the better proposition is that in the NSW District Court filings are vanishing with the concomitant effect that trials are diminishing!

Another interesting result from the Court's data is the post-1998 pattern that shows that when settlement rates increase, trial rates slightly decrease. Most notable are the figures from 2002 which show that as settlements increased to 71 per cent as a percentage of all disposals, trials decreased to 10 per cent of all disposals – a pattern that mirrors overall disposal rates.

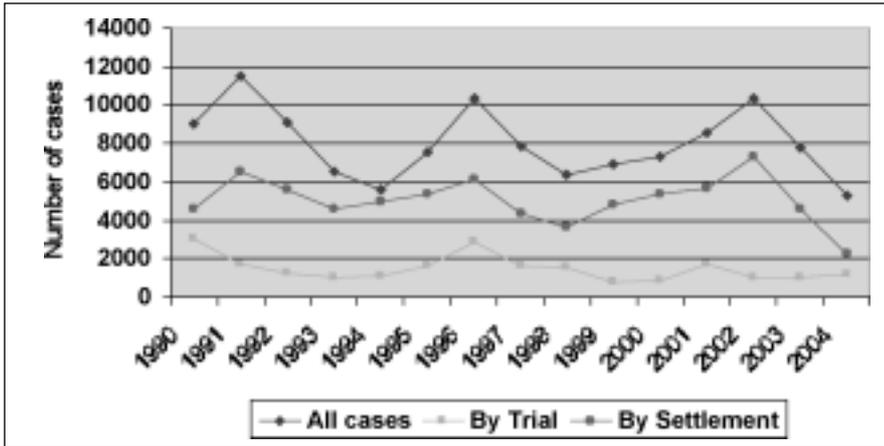


Figure 2. Civil cases disposed of in the Sydney Registry of the NSW District Court by trial and settlement, 1990–2004

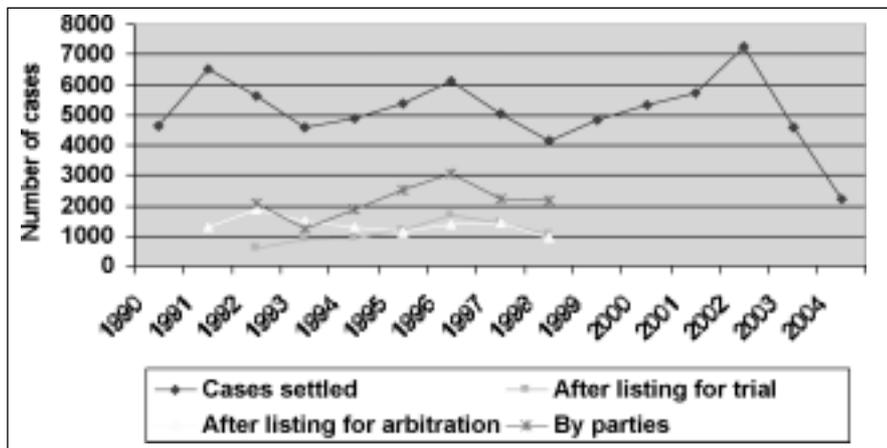


Figure 3. How settled cases are disposed of in the Sydney Registry of the NSW District Court, 1990–2004

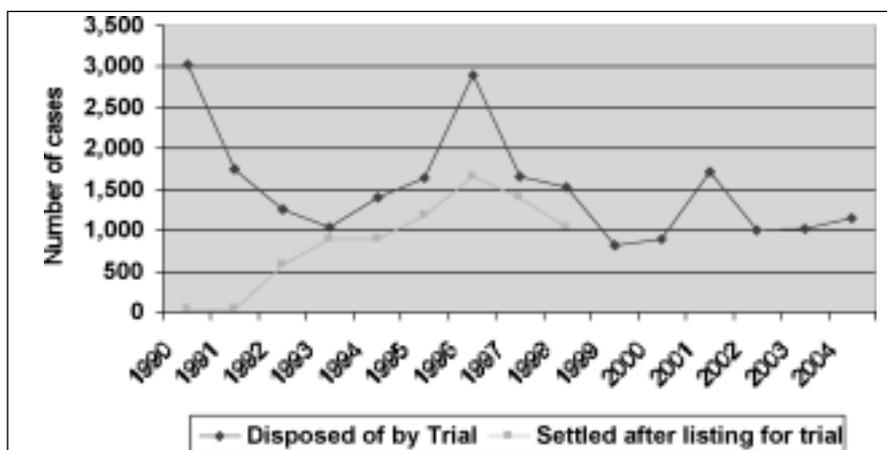


Figure 4. Cases disposed of by trial compared to cases settled after listing for trial in the Sydney Registry of the NSW District Court, 1990–2004

Further, it is interesting to note that settlement rates have dropped off dramatically in 2003 and 2004. This trend is in line with the drop-off rates being experienced in overall cases disposed of, but it runs against the increase in disposal by trial rates.

Figure 3 shows at what stage settled cases were disposed of in the Sydney Registry of the Court. This data gives an indication of the proactive nature of the Court in giving litigants the opportunity to settle their cases before commencing trial. However, not all of the stages of settlement are court-induced. For example, presumably where parties settle the case themselves, the Court has not played a role in such settlements, although it could be argued that the mere fact that the case is on the ‘trial trail track’ is enough to encourage litigants to settle, thereby avoiding trial.

Figure 4 shows an increase in cases settling once they have been listed for trial that corresponds to a decrease in cases disposed of by trial. Further, it shows cases settled after listing for hearing converging on the number of cases disposed of at trial. The conclusion to be drawn from the above is that the Court is very efficient at disposing of cases by mutually-agreed settlement merely by listing cases for trial. In fact, so efficient is the Court at disposing of cases in this manner, that disposal where settlement was induced by listing for trial is nearly as prolific as cases being disposed of by trial. According to his Honour Justice Garling of the NSW District Court, the Court was listing up to six long cases (cases that last five or more court days) per week for trial; however, after increasing settlements the Court is now listing up to 12 long cases per week for trial in the knowledge that half of those cases will settle before trial.³

One of the rationales given for the vanishing trial phenomenon in the United States was the alleged diminishing court resources that prevented large numbers of trials from taking place. Figure 5 provides a comparison between the number of new filings per judge and the number of trials per judge in the Court. Since 1996, when the Civil Case Management System commenced, one would expect trials per judge to follow the trend of new filings per judge because of the attempt to dispose of as

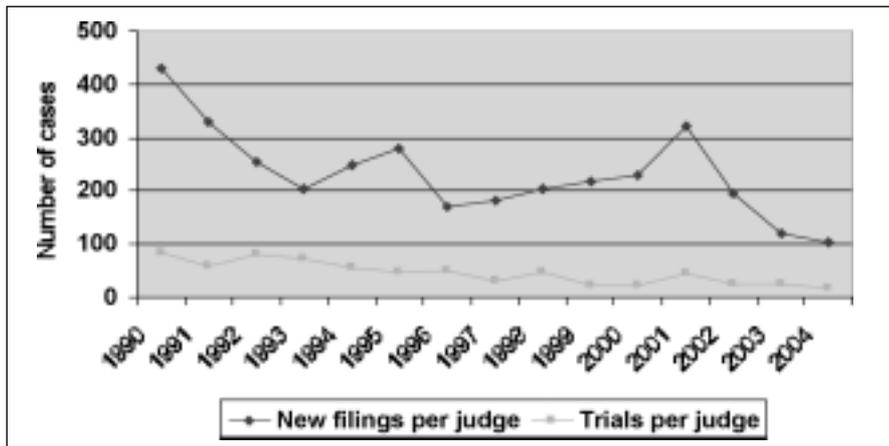


Figure 5. Ratio of judges to civil cases disposed of at trial in the NSW District Court, 1990–2004

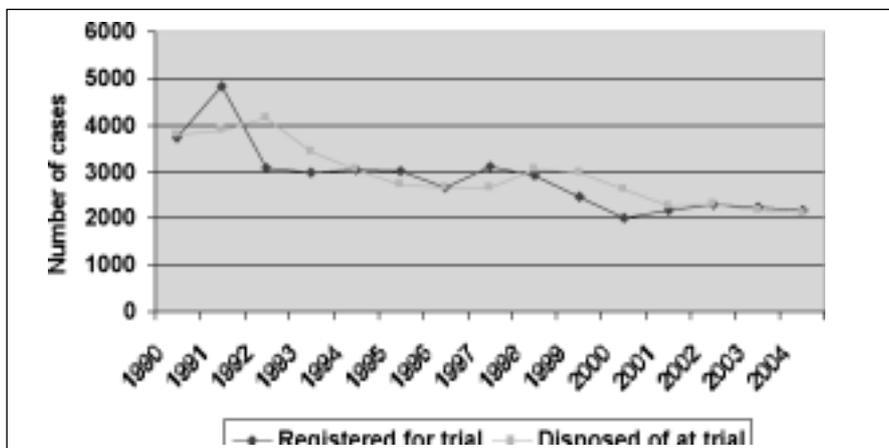


Figure 6. Criminal cases registered for trial and disposed of in the NSW District Court, 1990–2004

many cases as possible within 12 months of filing. In other words, the chances are that if a litigant files one year, her or his case should be heard by the following year, if not before. However, what the data discloses is that at times after 1996 the number of trials per judge decreased while the number of new filings per judge increased – sometimes dramatically as in 2001. However, the pattern of overall disposals takes account of this anomaly which is an indication that, while there is perhaps a slight reduction in trials, there is a parallel slight increase in the overall disposals by means other than trial.

Another reason given for the vanishing trial phenomenon in the United States was the increase and emphasis on the disposal of criminal cases. In other words, criminal trials consumed more court resources at the expense of civil trials. In NSW the proposition of criminal trials displacing civil trials is not

supported by the data available from the Court. Figure 6 shows a reduction in criminal filings, recorded by the Court as registrations for trial, and a concomitant reduction in the number of criminal cases disposed of at trial. No data was available from the Court's annual reviews on the rates of disposition of summary versus indictable cases, so there is no evidence as to whether indictable cases are increasing despite the general reduction in all criminal filings and trials or that indictable cases are consuming more court time at the expense of the civil trial.

From this limited study of the Court's case data what can be said is that filings in the Court appear to be in decline. The number of disposals by trial is also in decline but not as sharp a decline as in the case of filings. Further research would need to be conducted in coming years to ascertain whether this trend will continue after the upheaval of civil tort

reform that has affected the volume of the Court's business quite dramatically. Certainly since the introduction of formal powers for the Court to refer cases to non-curial dispute resolution in 1994, there has been no noticeable and attributable decrease in the number of trials conducted. This is because the Court is still coming to terms with those powers and has relied for many years on arbitration as its only source of ADR. In this respect his Honour Judge Garling stated '[a]rbitration was our mediation for many years in the Court – things have changed now'.⁴ The Court's Civil Case Management System appears to have had a greater impact on the number of trials than other legislative and policy initiatives. The correlation between the decrease in settlements and the increase in trials in 2003 and 2004, at a time when filings are decreasing, also needs monitoring in future years to establish any trend.

Of the cases disposed of by settlement, those settlements are most often achieved by the parties themselves after initiating process has been served and the dispute enters the trial stage. An interesting trend is the increased number of cases settled after listing for trial and arbitration. Clearly there is a concern in litigants, or a perception that raises a concern, that trial and arbitration should be avoided – the simple administrative procedure of listing a case before a judge or arbitrator is enough to trigger settlement. The Court itself has become more proactive in managing cases from initiation through to disposal, as shown by the levels of court intervention through listing cases for trial or arbitration in a short period of time from filing and through pre-trial conferencing. Unfortunately what the data does not show is the encouragement given by individual judges of the Court for litigants to settle cases before they get to trial and the encouragement given to litigants to assist the Court in satisfying its Civil Case Management System disposal time guidelines.

Reasons for vanishing trials

There is an absence of thorough qualitative and quantitative research on the reasons for the vanishing trial. The following non-exhaustive list of reasons has been raised as possible contributing

factors to the vanishing trial. Some of these reasons have already been debunked as a result of Galanter's research in the US District Court and the author's research on the NSW District Court.

- Complex court rules limiting access to courts
- Delay in getting to trial
- Increases in criminal trials
- Diminishing court resources
- *Judges as case managers*
- Increases in summary judgment
- *Proliferation of adjudicatory processes*
- *Dispute resolution*
- Bargaining in the shadow of the law
- Too costly
- Pre-trial investigation too broad meaning adversaries are evenly matched
- Trials are longer
- Uncertainty of trial
- Juries unpredictable.

It is the author's view that at least three of the above-listed issues (italicised) are primary reasons for the diminution of trials in both the US and the NSW District Court.

First, judges are proactive case managers in most courts. Refo confirms this fact in relation to the United States when she states:

For some reason, some judges are simply anti-trial ... These judges view themselves as case-resolvers – the faster the better. They have their ways of exacting a toll on those who want to hold out for a jury trial.⁵

Resnick went one step further when she stated:

... the sentiment that 'a bad settlement is almost always better than a good trial' is recorded in several published decisions ... as another federal district judge put it, trials are evidence of lawyers' failure'.⁶

In NSW it would seem that the introduction of the Civil Case Management System in 1996 placed judges of the Court in the position of having to play a far more proactive role than before in managing cases through to finalisation. The Court's Practice Note 33, effective 1 January 2002, states at paragraph 3.1 that:

In accordance with the Court's published Strategic and Business Plans the Court's objective is to provide a more orderly, cost efficient and expeditious system for the final disposal of civil actions. The Plans include the aim that 90 per cent of civil actions will be completed within 12

months of commencement and 100 per cent within two years. To achieve such an aim it is necessary that *all* contested civil actions be within the Court's control from the time of commencement and that they meet the time standards set.⁷ [not my emphasis]

Penalties for non-compliance with the Court's Civil Case Management System include cases being dismissed, defences being struck out or cross-claims being dismissed. The Practice Note promotes the use of arbitration and mediation in as many cases as possible. Given that the median time between filing and disposition by trial is just 14.4 months in the Court, it is apparent that judges of the Court have embraced their role as 'managerial judges' and are achieving good disposal rates of new cases.

Second, the rise of other adjudicatory bodies as alternatives to courts and trials is of significance. In NSW, as in other States and Territories of Australia, there has been a proliferation of tribunals and commissions that relieve the courts of hearing specialist matters. In NSW there are 12 tribunals and commissions that act as adjudicators in various specialist disputes. In the conclusion to his groundbreaking study Galanter noted the impact of 'diversion theory' on the vanishing trial:

Again, it is necessary to emphasise that the vanishing trial phenomenon includes not only a decline in trials within the core legal institutions but also a diffusion and displacement of trial-like things into other settings – administrative boards, tribunals, ADR forums, and so forth. Although trials in court become less attractive and/or available to litigants, legal counters are invoked in more settings ... At the same time that courts are a declining site of trials, they are, at least potentially, an increasing site of supervisory oversight of the trial process elsewhere. As adjudication is diffused and privatised, what courts do is changing as they become the site of a great deal of administrative processing of cases, along with the residue of trials in high-stakes and intractable cases.⁸

Perhaps another way to look at Galanter's comments over the diffusion and displacement of cases that have trial potential yet fail the substantive elements for participation in the curial process is that with the specialisation of the law comes the need to have specialist

adjudication – the rise of tribunals and commissions is merely a reflection and reaction to the high degree of specialisation in the law.

Finally, the role of dispute resolution should not be underestimated, despite there being little reliable data on its impact on the frequency of trials.

Refo has stated that:

Alternative dispute resolution, in all its permutations, also contributes to the declining trial rates ... It is impossible to know how many matters are diverted from the courts to arbitration, but it is surely safe to say that the rise in arbitrations reduces the number of courtroom trials.⁹

While enthusiasm for the idea that dispute resolution sounded the death knell of the trial reached fever pitch in the United States, Galanter was cautious about overstating the role of dispute resolution in the vanishing trial:

A more persuasive line of argument is the diversion argument – that the claims and contests are there but they are in different forums. In the discussion of ADR above, we saw that there seems to be some substance to this, but it should be kept in mind that the decline in trials is very general, across the board, and is not confined to sectors or localities where ADR has flourished.¹⁰

It seems that there is no conclusive proof that dispute resolution is the sole reason for the vanishing trial in the United States. Most sensible commentators share the view that dispute resolution may well be a contributing factor for a reduction in trials, but that it is only part of a larger set of reasons for the reduction.

Unfortunately, there is at the moment no available data from the Court on the number of cases referred to mediation, other than some figures for long cases in the Court for 2004. His Honour Judge Garling stated that mediation is a relatively new arrival, given the Court's previous reliance on arbitration. Because of this, data is only just starting to be collected on the impact of mediation in the Court. His Honour stated that about 80 per cent of all long cases are referred to mediation and about 50 per cent of those cases tend to settle. His Honour advised that in 2004 there were 358 long cases listed for hearing in 2004, of which 39 were mediated through the



NSW Law Society scheme. Of those 39 matters: one settled before mediation, 16 settled at mediation (with an estimated 114 days of trial days saved), and 22 did not settle at mediation

As at the date of writing this paper in 2005, orders under s 164A of the *District Court Act 1973* (NSW) for referral to mediation had been made in 112 of the 226 long cases presently listed before the Court. This is a marked increase in the number of cases referred to mediation compared to 2004 and augurs well for future data on the

has also acknowledged the fact that in the United States, commentators are mourning over nothing:

Trial was never the norm, never the model way of resolving issues and solving problems in the legal system. In a way, then, we can argue that 'vanishing' is an illusion. There was never much to vanish. There never was a regime of full trials.¹²

Perhaps, therefore, we need not worry about the vanishing trial because it never was the dominant form of dispute resolution. The following discussion points are offered in defence of the trial:

The trial is an important element of a democratic society that enables people to bring each other and the state to account for civil and criminal wrongs.

success rates or otherwise of those matters in comparison with any future declining trial rates. But for the moment it is probably wise to accept Galanter's view of the impact of dispute resolution on the diminishing trial in NSW – that is, that at best dispute resolution may be a contributing factor to the reduction in trials being experienced in the Court.

The impact of vanishing civil trials

The trial is an important element of a democratic society that enables people to bring each other and the state to account for civil and criminal wrongs. The trial defines the law in a way that society can understand and, because of this, it allows people to live their lives according to the rule of law. However, even given the importance of the trial, it should be understood that it was never the centrepiece of dispute resolution in our society. Stipanowich, quoting Galanter in another paper unrelated to the vanishing trial study, described the entire realm of dispute resolution in both the curial and non-curial worlds as, 'liti-gotiation – a process of negotiation, adjustment and accommodation that is carried on against the backdrop of the series of events leading up to trial, and, in very rare cases, beyond'.¹¹ Friedman

- (1) The vanishing trial may represent the loss of an important democratic value. Trials bring the community into the court room and make the application of the law more humane than it may otherwise be. Trials also serve to give a voice to the community and help demystify the law for the layperson. Further, trials are the best venue to expose lies and have them corrected by the process of adjudication. Finally, trials help shape the law by forcing the parliament to constantly look at the law in a critical way – tort reform in NSW is a good example of this factor.
- (2) Private dispute resolution offers no public record. Unlike legal precedent, which seeks to place on public record how the law treats certain factual situations that occur frequently in society, private dispute resolution is often conducted with confidentiality agreements preventing disclosure and no settlement database that can assist people with similar disputes. If trials were to vanish completely then some other way to record the outcomes of disputes would have to be implemented so that society would not have to reinvent the wheel each time a dispute arose, with the

enormous costs this would involve.

- (3) Lawyers cannot try cases. A concern of the legal profession in the US is if trials vanish then lawyers will have to settle cases because they will not have the ability to send cases to trial. Because of the reduction in the number of experienced lawyers it is possible that this will impact on the number of lawyers actually willing to conduct a trial as the risk of something going wrong could be more than lawyers are prepared to risk.

(4) Loss of judicial resources. If significant proportions of the community opt out of the judicial system then its resources will surely crumble. If that occurs then the justice system, despite its publicly-funded status, runs the risk of becoming a second-class system.

(5) Trials as education through entertainment. This

year the Michael Jackson and Schapelle Corby criminal trials were partly televised and provided entertainment for the masses who watched as the real life drama unfolded in the court-rooms and across the television screens of Americans and Australians. Trials have an educative quality that is presented in an entertaining way. Viewers get an insight into the legal system at play.

- (6) Trials have a cultural significance. Butler has stated:

Trials ... have cultural as well as legal significance. They are rituals – one of the few, in our secular, heterogeneous society, that are open to all. When a person puts on a black robe and sits on high, he or she raises expectations. Sometimes we look to trials for explanations of evil (serial snipers, accidents, catastrophes). Sometimes we look to trials for justification of vengeance.¹³
- (7) Lost stories and morals. In an interesting account of the intangible benefits of trial, Butler hypothesised that trials provide an official forum for story-telling. He suggested that trials provide official morals through the handing down of verdicts. He gives the following

vivid example: Everyone knows, for example, that McDonald's and Burger King and KFC are factual causes of obesity. A trial would help inform our judgment about whether they should be held morally responsible as well."¹⁴

Conclusion

While the American Bar Association labelled its findings as 'the vanishing trial phenomenon', Galanter put the real position more accurately when, responding to his own question as to what difference it would make if trials vanished, he stated '[t]rials are not exactly an endangered species – at least for now. But their presence has diminished'.¹⁵ Galanter's view is that trials will never disappear from the judicial landscape – indeed most would agree that they cannot disappear from the judicial landscape for fear of what might replace them. Rather, trials have been displaced from the role assigned to them by the common law. In other words, given that the trial was never the most common way of resolving disputes anyway, all we are experiencing is a rise in other forms of adjudication and resolution that litigants prefer to the trial.

Galanter accounts for the diminishing trial by arguing that the legal profession and the judiciary are merely experiencing a reallocation of cases to other forms of adjudication. Resnik argued that the values of trial have not been rejected, rather the demand for adjudication has changed the face of adjudication and most interestingly has the potential to change the face of the trial as we know it.¹⁶ In other words, perhaps the trial is overdue for a metaphoric facelift by considering the following ideas for reform:

- limiting the fact-finding
- taking a far narrower view of what is and is not relevant
- simplifying the rules of evidence
- allowing more access to what is currently a formalistic and unfriendly environment for the consumer.

Perhaps the diminishing trial would not exist if the trial process had been more able to accommodate the needs of its users – not its players.

Notwithstanding the above ideas for remaking it, what does the future hold for the trial? Landsman suggests a likely

future in which trials have, but for the most unusual cases, vanished, where only cases such as notorious criminal trials of celebrities would exist and '[i]ronically, these might be saved not for any reason related to the integrity of the law, but for their apparently extraordinary entertainment potential'.¹⁷ In this future there is a diminishing number of skilled advocates to conduct trials and powerful, coercive, government-sponsored elements at play to guarantee resolution in order to increase the risks associated with proceeding to trial. In this future there would exist an army of private adjudicators and dispute resolvers who would sub-contract their services to the court and whose livelihoods would depend on court referrals.

The trial is not vanishing in the United States or in the NSW District Court. It may be diminishing, although the data from the Court shows only a slight diminution. Most importantly, the trial cannot be allowed to vanish as it is an important element of our democracy and gate-keeper of the rule of law. It is likely that adjudication will continue to be popular, but via different delivery methods such as court-appointed referees, experts and arbitrators. It would be helpful if the delivery of trials could be expedited or conducted in such a way as to minimise the time, delay and costs. Consumers of litigation would favour a system of trials that did not equate to huge financial outlays before any result is achieved and where the rules and procedures are simple and fair and do not exclude the stakeholders of the trial itself. ❖

Author's note: My thanks to his Honour Judge Anthony Garling of the NSW District Court for assistance in accessing data for the preparation of this article. The article is an expurgated version of a paper given at the Australasian Law Teachers Association Conference held at the University of Waikato, Hamilton, New Zealand in July 2005. The full sets of data supporting the findings in this paper can be found in the conference paper or by contacting the author.

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Endnotes

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