

THE DUTY OWED TO THE COURT: THE OVERARCHING
PURPOSE OF DISPUTE RESOLUTION IN AUSTRALIA

This is a revised paper delivered by the Hon. Marilyn Warren AC, Chief
Justice of Victoria, at the Bar Association of Queensland Annual
Conference, Gold Coast[#]
6 March 2011*

‘The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.’¹

To become a legal practitioner, that is to say, a lawyer who may represent the modern client, a law graduate must present for admission and take either an oath or make an affirmation. In Victoria, and similarly in other jurisdictions, this oath or affirmation requires the candidate to declare that they will well and honestly conduct themselves in the practice of their profession, as members of the legal profession and officers of the court. It is the taking of the oath or affirmation, and the signing of the roll, that marks the transition from simply holding a law degree to being a lawyer. It is on this occasion that a lawyer’s duty to the court is enlivened.

[#] The paper is a merger of the speech to the Bar Association of Queensland and an earlier speech to the Judicial Conference of Australia Colloquium, Melbourne, 2009, together with updating and editing.

* The author acknowledges the assistance of her associates Jordan Gray and Tiphonie Acreman.

¹ *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (Heydon J) (*‘AON v ANU’*).

A candidate presenting for admission today may hope to gain any number of benefits. One might have aspirations to advise publicly listed Blue Chip clients on ASX compliance, while another might wish to defend the criminally accused. Both will go on to perform very different duties as lawyers, however, both candidates will owe the same duty to the court.

In this paper, I will examine the content of the duty to the court in a number of contexts. I will reflect on some of the challenges that arise when that duty comes into conflict with practical and commercial pressures on lawyers. I will also discuss recent legal developments that strengthen and expand the duty to the court.

Let us start by examining a recent case from Victoria in which counsel failed in his discharge of the duty to the court. The case demonstrates that even senior counsel can fall into difficulty in observing the duty.

*Rees v Bailey Aluminium Products*² was an appeal from a civil jury trial grounded in a complaint by the appellant that he did not receive a fair trial as a consequence of the conduct of senior counsel for the respondent. The case at first instance was a claim for damages for personal injuries brought against the respondent as the manufacturer and distributor of an extension ladder. The appellant had fallen from the ladder, which had been set up for him by a third party (also a party to the proceedings), in an over-extended position.

It was conceded on appeal that senior counsel for the respondent had, during cross-examination, sought to convey that the appellant and the third party had engaged in a conversation in the court precinct which

² [2008] VSCA 244 ('Rees').

amounted to them conspiring to pervert the course of justice. The intimation was that they were planning to fraudulently implicate the respondent as being responsible for the applicant's accident, thereby exonerating the third party. However, no evidence was adduced to support this allegation and it was not put to the appellant, a clear breach of the rule in *Browne v Dunn*.

In fact, the cross-examination was based upon the personal observation by senior counsel for the respondent of the appellant and the third party in discussion outside the court building. Further criticism was made of the method of cross-examination in relation to counsel repeatedly cutting the witness off, treating his own questions as answers of the witness and disregarding the trial judge's repeated interventions.

The Court of Appeal held that the various aspects of the conduct of senior counsel for the respondent during the trial had breached the duty to the court. The Court noted that an allegation of fraud with no factual basis 'constitutes a serious dereliction of duty and misconduct by counsel' and that the obligation not to mislead the court or cast unjustifiable aspersions on any party or witness arises as part of the duty to the court.³

Other examples of senior counsel's dereliction of his duty to the court are also described in the judgment, including a failure to comply with a ruling of the trial judge, failures to meet undertakings provided to the trial judge and the introduction of extraneous and prejudicial matters in the closing address.

³ Ibid, [32].

The case makes for instructive reading and is a signal that practitioners must remain ever mindful of their role as officers of the court and the standards of professional conduct that must attend such a position. The desire to win a case has no part to play in the assessment by a practitioner of their responsibility towards the court. The duty to the client is subordinate to the duty to court. There is a line between permissibly robust advocacy and impermissible dereliction of duty. It is incumbent upon practitioners to continue to examine the ethical dimensions of their behaviour and consider their actions in the context of their role as officers of the court.

Another well established aspect of the lawyer's duty to the administration of justice is assisting the court to reach a proper resolution of the dispute in a prompt and efficient manner.

As judges experience daily, the legitimate interests of the client are usually best served by the concise and efficient presentation of the real issues in the case. Nevertheless, some clients have an interest in protracted legal proceedings. This cannot be given effect by lawyers if they are to act consistently with their duty the court.

In *A Team Diamond*⁴ the Victorian Court of Appeal observed that the obligation is now more important than ever 'because of the complexity and increased length of litigation in this age'. Without this assistance from practitioners, 'the courts are unlikely to succeed in their endeavour to administer justice in a timely and efficient manner.'⁵

⁴ *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208.

⁵ *Ibid*, [15].

In the recent *Thomas v SMP*⁶ litigation in the Supreme Court of New South Wales, Pembroke J faced the prospect of a 500 page affidavit, filed by one of the parties to the proceeding, which contained mostly irrelevant material. Doing his duty, his Honour embarked on a close, line by line, examination of the objections which had been made to the affidavit, and noted that it was a ‘time consuming, painstaking but ultimately unrewarding task.’ After 3,000 paragraphs, his Honour ceased, proclaiming that he ‘could go no further’, finding it ‘inappropriate’ to rule on each and every objection. The inappropriateness arose not necessarily from the contents of the affidavit — despite this being a problem in of itself — but from what his Honour described as counsel’s failure to do right by the court. His Honour said that ‘counsel’s duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence.’ He found that ‘in all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client’s best interest’.

Heydon J, writing extra-curially in 2007, observed that ‘modern conditions have made [the duty the court] acutely difficult to comply with. Every aspect of litigation has tended to become sprawling, disorganised and bloated. The tendency can be seen in preparation; allegations in pleadings; the scope of discovery; the contents of statements and affidavits; cross-examination; oral, and in particular written, argument; citation of authority; and summings-up and judgments themselves.’⁷ With this in mind, Pembroke J’s finding that counsel’s

⁶ *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822.

⁷ Justice Heydon, ‘Reciprocal Duties of Bench and Bar’ (2007) 81 *Australian Law Journal* 23, 28–29.

duty to the client is an obligation subsumed by and contingent upon the duty to the court, is compelling. It is a view that is coming to prominence in many Australian jurisdictions, both legislatively and jurisprudentially.

Most would agree in principle that the inherent objective of the lawyer's overriding duty to the court is to facilitate the administration of justice to the standards set by the legal profession. This often leads to conflict with the client's wishes, or with what the client thinks are his personal interests.⁸ The conflict between the duty to the court and to the client has been described by Mason CJ as the 'peculiar feature of counsel's responsibility'.⁹ The Chief Justice also observed that the duties are not merely in competition. They do not call for a balancing act. They actually come into collision and demand that, on occasion, a practitioner 'act in a variety of ways to the possible disadvantage of his client ... the duty to the court is paramount even if the client gives instructions to the contrary.'¹⁰

Whilst we may fall in agreement on the fundamental nature of the duty to the court, *Thomas v SMP*, and many other cases, demonstrate that its application in practice is not always as straight forward as would appear. The burden of being a lawyer lies in the lawyer's obligation to apply the rule of law and in the duty 'to assist the court in the doing of justice according to law'¹¹ in a just, efficient, and timely manner.

⁸ *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid).

⁹ *Giannarelli v Wraith* (1988) 165 CLR 543, 555.

¹⁰ *Ibid*, 556.

¹¹ Sir Gerard Brennan, 'Inaugural Sir Maurice Byers Lecture - Strength and Perils: The Bar at the Turn of the Century' (Speech delivered at the New South Wales Bar Association, Sydney, 30 November 2000).

Chief Justice Keane has observed some of the conceptual and practical difficulties posed by the duty to the court. In an address to the Judicial College of Australia in 2009, in which his Honour offered perspectives on the torts of maintenance and champerty in the context of modern day litigation, the Chief Justice noted that ‘in the traditional conception, the courts are an arm of government charged with the quelling of controversies ... the courts, in exercising the judicial power of the state, are not “providing legal services”. The parties to litigation are not acting as consumers of legal services: they are being governed — whether they like it or not.’¹² His Honour went on to observe that ‘when lawyers act as officers of the court, they ... are participating in that aspect of government which establishes, in the most concrete way, the law of the land for the parties and for the rest of the community.’

The increasing commercialisation of legal practice represents a challenge to this ‘traditional conception’. In recent times, legislative amendments and a form of self-deregulation resulted in the abolition of various practices that were viewed as restrictive, such as the use of scale fees and the prohibition on advertising. A shift towards a liberal economic model and a focus on free market principles have also resulted in many law firms moving towards operating under modern business models, and away from the traditional partnership paradigm.

These factors and the ‘move towards the incorporation of legal practices, the commercial alliance between legal practices and other commercial entities and, more recently, the public listing of law firms on the stock exchange’ have all contributed to the ‘commercialisation’ of the

¹² Justice Keane ‘Access to Justice and Other Shibboleths’ (Speech presented to the Judicial College of Australia Colloquium, Melbourne, 10 October 2009).

profession.¹³ This has raised concern amongst members of the profession, the judiciary and regulators. As Mason CJ expressed extra-curially, '[t]he professional ideal is not the pursuit of wealth but public service. That is the vital difference between professionalism and commercialism.'¹⁴

The shift toward commercialism has, in part, been a response to the needs and demands of clients and the changing business environment in which law firms operate. However, the commercial interests of both the law firm and the client do not necessarily tend towards the efficient use of court time and resources, meaning that this aspect of the practitioner's duty to the court can come into conflict with the duty to the client.

The Law Reform Commission of Western Australia has recognised that this is particularly a problem when lawyers act for well-resourced clients. These clients are able to pursue every avenue for tactical purposes, are able to claim legal fees as tax deductions and need not have regard to the burden of litigation on the taxpayer.¹⁵

The system of charging by billable hours could also be said to be a disincentive for lawyers to settle matters expeditiously, and has been criticised as inefficient from a market point of view. It is now appropriate to rethink the system of billable hours in certain contexts. For example, certain transactional work that fits into a defined time period may lend itself to a negotiated fee, rather than a billable unit or rate.

¹³ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 154.

¹⁴ Sir Anthony Mason, 'The Independence of the Bench' (1993) 10 *Australian Bar Review* 1, 9.

¹⁵ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report (1999) 331.

With economic considerations increasingly gaining ascendance over older notions of professionalism, lawyering now viewed as a commercial activity, and the law as an industry, it is hardly surprising that clients of law firms are increasingly being viewed as consumers. This shift works both ways; users of legal services also view themselves as consumers. Again, such a mindset is not novel to the legal market. It is the result of a change in economic practices and social values generally.

The tendency toward viewing the client as a consumer, stemming from a shift towards a liberal economic paradigm, affects the way the duties to the client and the court interact. Consumers generally are becoming increasingly aware of the market power they wield; the market for legal services is no different.

It is of no great surprise then that the commercial aspect of the notion of legal professionalism, that is the provision of a skilled service to paying clients, has become more prominent and begun to resemble the rest of the commercial world. As several former High Court judges have noted in speeches over the years, the advertising of legal services was once unthinkable. Now it is commonplace.¹⁶

The era of the grand social institutions has given way to the era of commerce and the consumer. As Chief Justice Spigelman has observed, the administrative buildings whose stately forms once dominated city

¹⁶ See for example, Chief Justice Gleeson, 'Are the Professions Worth Keeping?' (Speech delivered at the Greek-Australian International Legal & Medical Conference, 31 May 1999); Remarks at Opening of the Supreme and Federal Court Judges' Conference, Auckland, 27 January 2004; The Hon Justice Michael Kirby, 'Legal Professional Ethics in Times of Change' (Speech delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996).

skylines are now dwarfed by commercial high-rises.¹⁷ Barristers working in Owen Dixon chambers now look out over and far above the adjacent dome of the Supreme Court of Victoria, once Melbourne's tallest building.

The dual role of legal practitioners, as officers of the court and, at the same time, as service providers, has evolved and will continue to do so in line with broader changes occurring within and between administrative and commercial institutions, and in line with changing social values.

The evolution of the industry in this regard is not easy to manage, nor is it unmanageable. We cannot ignore the changes that are occurring, or reminisce about days gone by. I continue to believe that, in general, lawyers want to discharge their professional responsibilities competently; and that engendering legal ethics is best begun at the undergraduate level and maintained throughout the career. Lawyers continue to behave ethically, despite the changing legal environment. However, such changes demand that we review and strengthen some of the principles that were developed around concepts of professionalism, including the effective discharge of the practitioners' duty to the court.

The duty to the court remains the very foundation of our dispute resolution system. The duty to the court is thus at the core of *all* litigation, be it civil or criminal. Theoretically, therefore, its purpose should be engrained in the very fabric of our dispute resolution methods. But is it?

¹⁷ Chief Justice Spigelman, Address to the Medico-Legal Society of New South Wales Annual General Meeting (6 August 1999).

We recall the often quoted judgment of Heydon J in *AON v ANU* in which his Honour described the vicious cycle of inefficiency that arises when the objectives of the duty to the court are forgotten — ‘[proceedings often reveal a strange alliance] ... a party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other.’

It seems fitting then to consider the extent to which legislators and courts are attempting to redress the consequences of this ‘languor’. Both have readily sought to establish broad principles that encapsulate the duty to the court as the paramount duty for *all* players in litigation. Courts and legislatures are on the same page; from both we are seeing the emergence of overriding principles which guide judicial intervention in proceedings where time and money are going to waste. At the core of this equation lies the duty to the court.

It is perhaps best to proceed chronologically. First, the High Court’s decision in *AON v ANU*. One commentator views the overall effect of the judgment as transforming the judicial role from that of passive decision maker to active manager of litigation.¹⁸ This shift was considered necessary by French CJ as a matter of public policy, his Honour observing that ‘the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn.’¹⁹ The Chief Justice spoke of the history of the *Judicature Act*

¹⁸ Ronald Sackville AO, ‘Mega-Lit: Tangible consequences flow from complex case management’ 48 (2010) *Law Society Journal* 5, 48.

¹⁹ (2009) 239 CLR 175, [27]. See also, eg, *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487, 494–5 (Gleeson CJ).

Rules and their Australian offspring and noted that these did not make reference to the public interest in the expeditious dispatch of the business of the courts, resulting in this being left to the parties. However, he went on, ‘the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources.’ The plurality, (Gummow, Hayne, Crennan, Kiefel and Bell JJ) spoke of the ‘just resolution’ of proceedings remaining the ‘paramount purpose’ of the procedural rules in dispute in the case.

Looking at all of the judgments collectively, the High Court’s approach in *AON* was one of objectives. The court held that the adjournment of the trial and the granting of leave to ANU to amend its claim was, in those circumstances, contrary to the case management objectives set out in the *ACT Court Procedures Rules 2006*. The purpose of those rules, like most Superior Court rules around Australia, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.²⁰

One immediate consequence of the judgment is that for a lawyer to discharge the duty to the court when seeking to amend pleadings or other court documents at a late stage in the proceedings, he or she will need to consider and abide by the objective of the procedural rules in question, and to be able to demonstrate how the objective of the amendment is consistent with that purpose.

²⁰ *AON v ANU* (2009) 239 CLR 175, fn 153.

In rejecting the submission that the ability to amend court documentation at any time is a procedural right of the parties, the court explicitly stated that a considered approach to the objective of the procedural application in question is necessary. So, being able to account for the reason for the delay and demonstrate that the application is made in good faith may be relevant to a lawyer's exercise of the duty to the court. Other factors which may be taken into account by the court in assessing such applications might be the prejudice to the other parties in that litigation, or in other litigation awaiting a trial date, the costs of the delay, or the status of the litigation.

The language and directions of the High Court in *AON* correspond to the language and purpose of recent and fundamental legislative developments in Victoria, and federally.

The Victorian *Civil Procedure Act 2010*, which came into operation on 1 January this year, is the first Victorian Act to be directed solely, and in broad terms, to civil procedure in Victoria. The Act establishes an 'overarching purpose' which also applies to the rules of court. The goal of the overarching purpose is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the parties' dispute. The overarching purpose may be achieved by court determination, agreement between the parties, or any other appropriate dispute resolution process agreed to by the parties or ordered by the court.

Of course, aspirational statements of this kind are not unfamiliar. Rules advocating efficient and just determination of disputes have existed in

many of the Superior Courts in the States and Territories for years.²¹ The fundamental difference is that here, the overarching purpose is a legislative command to which the courts are to give effect in the exercise of their powers.²² This imperative takes a number of novel dimensions. Specific obligations are imposed upon a greater range of participants, with greater specificity as to their obligations than has ever been seen before. The obligations apply equally to the individual legal practitioner and to the practice of which they are a part,²³ to the parties themselves, any representative acting for a party, and anyone else with the capacity to control or influence the conduct of the proceeding.²⁴ Furthermore, s 14 of the Act states that a legal practitioner or a law practice engaged by a client in connection with a civil proceeding must not cause the client to contravene any overarching obligation.

Under this Act, a legal practitioner is in a different position to a practitioner refusing to act on an instruction which conflicts with their common law duty to the court. Whereas previously, the advice to the client in such a context would have been that the law did not allow the practitioner to follow that instruction, the advice under the new Act would likely be that the instruction is contrary to the client's own obligations, with the secondary advice that the practitioner is bound to ensure that the client does not contravene that obligation.

The Act provides broad powers to the courts in relation to breach of the overarching obligations. The most common means by which a contravention is likely to be dealt is by taking the contravention into

²¹ Eg Rule 1.14 of the *Supreme Court (General Civil Procedure) Rules 2005*.

²² *Civil Procedure Act 2010* (Vic) ('CPA') s 8.

²³ CPA s 10(1)(b)-(c).

²⁴ CPA s 10(1).

account when making orders in the course of the proceeding, most frequently in the form of costs orders.

Critical to our present discussion is s 16 of the Act, which directs that each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice. The primacy of the paramount duty to the court is intended to ensure that the rulings and directions of the Court are not second-guessed in the name of overarching obligations.

Similarly, at the Federal level, *the Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth)* incorporated an ‘overarching purpose’ principle into the *Federal Court of Australia Act 1976*. Section 37M of the Federal Court Act now provides that the overarching principle is to facilitate the just resolution of disputes according to the law as quickly, inexpensively and efficiently as possible. Under s 37N, parties have a duty to conduct the proceeding in a way that is consistent with the overarching purpose, and their lawyer has an obligation to assist them in fulfilling this duty. The new *Federal Court Rules 2011* have introduced changes along similar lines. For example, r 20.11 provides that:

A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

So, we see both the courts and legislatures attempting to draw *all* parties in civil litigation away from unnecessary distractions to focus on the overarching purposes of dispute resolution, that is, the just, efficient, timely and cost-effective resolution of the real issues between the parties under the umbrella of the paramount duty to the court.

So far, my observations have been rather sanguine. I wonder whether it will all be smooth sailing from here and what problems are likely to be encountered in the application of these principles. Previously, the civil procedure reforms proposed pre-action protocols, which the new Victorian government has now repealed.²⁵

I wonder also whether such hope might be found in criminal matters, or matters involving self-represented litigants. I would like to explore these questions by reference to three examples: civil penalty proceedings brought by ASIC, the exercise of the prosecutorial duty, and civil litigation involving self-represented litigants.

In the *Morley v ASIC*²⁶ case, the NSW Supreme Court of Appeal (Spigelman CJ, Beazley and Giles JJA) overturned a finding that seven former non-executive directors of James Hardie had breached their duty to the company. At trial, ASIC contended that the former directors had breached their duty to the company by approving the release of a statement that misleadingly asserted that asbestos claims would be fully funded. The Court of Appeal found that the regulator had failed to prove that fact. To do so would have required the calling of a key witness of central significance to the critical issues in the proceedings, which ASIC — a model litigant owing the obligation of fairness — had decided not to do.

Applying the *Briginshaw* test, the court found that ‘the duty of fairness cannot rise higher than that imposed on prosecutors with respect to their

²⁵ *Civil Procedure and Legal Profession Amendment Act 2011*.

²⁶ [2010] NSWCA 331. The High Court has granted special leave: *Australian Securities and Investments Commission (ASIC) v Shafron* [2011] HCATrans 128.

duty to call material witnesses. In that respect ... the court will not [readily] intervene [but] the ex post facto assessment of the decision not to call a particular witness must be taken in the overall context of the conduct of the whole of the trial.’ A tribunal of fact may have regard to any failure to provide material evidence which could have been provided. The tribunal’s state of satisfaction turns on the cogency of the evidence adduced before it. ‘Relevant to the cogency of the evidence actually adduced is the absence of material evidence of a witness who ... should have been called [absent which the] court is left to rely on uncertain inferences.’

So, the duty to ensure a fair trial is an element of the duty to the court, just as the duty to assist the tribunal of fact to establish the necessary state of mind is also. The application of the *Briginshaw* test in this instance really was the court’s way of requiring ASIC to fulfil its duty to the court; ‘the duty of fairness and a fair trial cannot rise higher than the duty to the court ... such duty forming part of the overarching duty in favour of which all conflicts are resolved.’ It is for legal practitioners to identify what the duty to the court will be in any given instance. Each case is different, each set of circumstances presenting their own set of challenges.

Picking up on the Court of Appeal’s analogy with prosecutorial duties, I will turn to criminal examples.

It is well-established that the prosecutor owes his or her duty to the court and not the public at large or the accused.²⁷ The general duty is to

²⁷ *Cannon v Tahche* (2002) 5 VR 317, [58]; see also the discussion on the role and responsibility of a prosecutor in *Richardson v The Queen* (1974) 131 CLR 116 and *R v Apostilides* (1984) 154 CLR 563.

conduct a case fairly, impartially and with a view to establishing the truth.²⁸ On one view, the prosecutor may be seen as a lawyer with no client, but rather with sectional interests or constituencies.²⁹ Alternatively, the prosecutor may be viewed as having a single client, the state. However, even on this view there is, in theory, an absence of conflict between the prosecutor's duty to the court and the duty to the client because the proper administration of justice serves the interests of both.³⁰ Nevertheless, the function of the prosecution is not free from its own difficulties and pitfalls, and this has come under scrutiny.

The High Court's decision in *Mallard v The Queen*³¹ illustrates this in relation to the duty to disclose unused evidence. There the Court ordered the retrial of Andrew Mallard who was convicted for the murder of a Perth jeweller and imprisoned for ten years. Mr Mallard petitioned for clemency after the discovery of material in the possession of police that was not disclosed to the defence.

Previously held confidence in the relatively informal practices surrounding prosecutorial disclosure has been reduced following *Mallard* and a series of miscarriage of justice cases in the United Kingdom.³² However, in *Mallard* the High Court noted that there is authority 'for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused person, and that failure to do so may, in

²⁸ *Whitehorn v The Queen* (1983) 152 CLR 657; *Cannon v Tahche* (2002) 5 VR 317.

²⁹ Wolfram, *Modern Legal Ethics* (1986) 759-60 in G E Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006) 405.

³⁰ G E Dal Pont, *Lawyers' Professional Responsibility* (3rd ed, 2006) 406.

³¹ [2005] 224 CLR 125 ('*Mallard*'); cf *R v Lawless* (179) 142 CLR 659.

³² For example, *R v Maguire* (1992) 94 Cr App R 133; *R v Ward* [1993] 1 WLR 619. For discussion see, David Plater 'The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2006) *University of Tasmania Law Review* 25(2) 111.

some circumstances, require the quashing of a guilty verdict.’³³ The Court held that the prosecution in that instance had failed in its duty to reveal probative evidence to the defence.

The Victorian Court of Appeal had to grapple with a similar issue in *AJ v The Queen*.³⁴ The appeal concerned the trials of AJ for various sexual offences allegedly perpetrated against XN, for which he had sustained a number of convictions. The appeal was brought on several grounds, mostly asserting error on the part of the trial judge. A second criminal matter, the matter of *Pollard*, was also relevant to the AJ appeal. XN was also the complainant in that matter. In the AJ appeal, two further grounds of appeal were added days prior to the appeal. The grounds were added because the applicant’s lawyers obtained additional material that demonstrated that the prosecutor in *Pollard*’s trial was also the prosecutor in the second and third of AJ’s trials. The material also showed that *Pollard* had stood trial on a number of sexual assault charges in which XN was the alleged victim, for some of which he sustained a conviction.

In the course of *Pollard*’s trial XN was cross-examined concerning a large number of text messages, including messages of a pornographic or sexually explicit nature, that it was alleged she had sent to the accused. In the AJ trial, XN denied sending all but one of the text messages — a denial which could have been demonstrated as false if she had been cross-examined. XN was not cross-examined on the issue in the AJ trial as counsel had no grounds for doing so.

³³ *Mallard* [2005] 224 CLR 125, 133.

³⁴ [2010] VSCA 331, superseded by [2011] VSCA 215.

In the Pollard trial however, the prosecutor did not herself accept XN's denials. She conceded that the complainant had lied. In fact, defence counsel and the Crown came to an agreement about which images had been sent by XN, as it was common ground in that trial that her denials were not to be accepted as she was not a credible witness.

The court found that in the circumstances of AJ's appeal, the prosecutor's failure to alert trial counsel to the circumstances of Pollard's trial and, in particular, to the fact that she (the prosecutor) did not believe XN's denials of having sent a large number of text messages to Pollard, constituted a significant breach of her duty as a prosecutor. Had the Pollard file been disclosed to the defence lawyers prior to AJ's trials, it would have yielded information which could potentially have been of forensic use to the applicant's counsel. Ultimately, the court found that the conduct of the prosecution in failing to disclose that information led to a miscarriage of justice.

After the hand-down of the original judgment in *AJ*, the prosecutor wrote to the Court of Appeal, claiming that she had believed, at the time of the trial, that the material had been disclosed to the defence through other persons. The Court held an additional hearing and published an addendum to its original judgment.³⁵ The Court tempered its criticism of the prosecutor, finding that a file note on the Crown file 'could justify the prosecutor taking the view she did that appropriate disclosure had been made'. The source of the information in the file note was another barrister who briefly held the brief. However, in the Court's view, the prosecutor should have 'ensured that the [accused's] lawyers were [informed of the material], if not before the trial commenced then at least

³⁵ [2011] VSCA 215.

when it ought to have become apparent that, as no mention of that material had been made, it was probable that they were ignorant of it'.³⁶

The Court held that:³⁷

where, for any reason, a prosecutor returns a brief to prosecute in a trial and the brief is subsequently delivered to another member of counsel, the duty of disclosure arises for consideration and discharge again by the new prosecutor. It is the personal responsibility of that prosecutor to ensure that that duty has been discharged prior to the commencement of the trial and as and when any further occasion calling for its exercise arises.

The prosecutorial duty to the court is an important part of the administration of justice. It is integral to the duty owed to the court and in some cases, it is for the courts to enforce. In 2010, Western Australian Chief Justice, the Hon Wayne Martin, referred a DPP lawyer to that state's legal watchdog after his Honour declared that his failure to disclose evidence during a murder trial was a serious departure from professional standards.

The duty of defence counsel to the court is the same at a conceptual level as that of other practitioners; if counsel 'notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.'³⁸

³⁶ Ibid, [38].

³⁷ Ibid, [39].

³⁸ *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

This issue was considered by the Victorian Law Reform Commission in its final report on Jury Directions.³⁹ The Report examined obligations of defence counsel to the court and to their client in the context of the judge's charge to the jury.⁴⁰ It was noted that while the duty of counsel to raise exceptions to the charge was well established, errors that could have been dealt with by the trial judge were not being raised at trial. In fact, in more than fifty per cent of successful applications for leave to appeal against conviction in Victoria between 2004 and 2006, the grounds of appeal included issues that had not been raised at trial by defence counsel.

Whilst it is not suggested that all of these errors should have been identified by counsel, many of them should properly have been raised at the trial stage. The failure to do so has implications for the efficacy of the trial process in terms of financial inefficiencies and the emotional burden on victims and their families, witnesses and accused persons.

The *AJ* case demonstrates that a lawyer must always acknowledge the way in which the vulnerability of the other parties may affect his or her duty to the court. In that case, the vulnerability came from the applicant's ignorance of the relevant information. This problem is particularly acute in litigation involving self-represented litigants. In that context, a similar trend of requiring counsel to account for the court's duty as 'manager' of the litigation process is emerging. Earlier this year in the *Hoe v Manningham City Council*⁴¹ case, Pagone J of the Victorian Supreme Court considered an application for leave to appeal a planning decision of the Victorian Civil and Administrative Tribunal in which the applicant

³⁹ Victorian Law Reform Commission, *Jury Directions*, Report No 17 (2009).

⁴⁰ *Ibid*, 87-8.

⁴¹ [2011] VSC 37.

was self-represented. He was not legally qualified. Throughout the proceeding, issues arose as to the applicant's identification of a question of law which, in the words of his Honour, did not have the 'advantage of careful consideration of a legally qualified lawyer'. The respondent's counsel maintained that the applicant had failed to identify any error of law.

In dismissing that submission, his Honour noted that the question of law could have been 'identified with greater elegance [but that] the initiating process [did] contain the proposition that the Tribunal's decision contained an error in law.' The applicant was complaining that the facts found did not fit the legal description required by the Planning Scheme in question.

The judge acknowledged that some of this applicant's submissions appeared to take issue with the facts as found by the Tribunal, but that did not detract from the force of the principal complaint that the provisions of the Planning Scheme did not apply to the facts found by the Tribunal. The view adopted by the Associate Justice, who had refused leave to appeal, that Mr Hoe's complaint involved no question of law was encouraged by those representing the Council.

Now, the judge did not go so far as saying that counsel breached his duty to the court, however, the observations his Honour makes about the duty to the court in the context of his case, where opposing counsel encouraged an interpretation of the applicant's claim which ultimately did

not assist the court in the exercise of its duty or to come to the correct conclusion, are worthy of note. His Honour said:⁴²

The duties to the administration of justice of adversaries, their representatives and the Court come into sharp focus when a party is not legally represented. In such cases the duties of litigants and their representatives to the Court and the duties of the Court itself in the administration of justice require careful regard to ensure that the unrepresented litigant is neither unfairly disadvantaged nor unduly privileged. A litigant may in some cases also be expected to act as a model litigant where, for example, the litigant is the Crown, a government agency or an official exercising public functions or duties.

... The right of a litigant to have a fair and just hearing may require such assistance as diverse as listening patiently to an explanation of why something may not be given in evidence ... The court's task is "to ascertain the rights of the parties" and can ordinarily look to the legal representatives of the parties to assist it in the discharge of that task. The court relies upon the assistance it receives from the parties, and their representatives, in doing justice between them. It is, after all, the parties who have knowledge of the facts and the interest in securing an outcome. It is the parties who have the resources, in the form of evidence and knowledge, needed to be put to the court for an impartial decision to be made. Public confidence in the proper administration of justice, however, may be undermined if the courts are not seen to ensure that their decisions are reliably based in fact and law. That may require a judge to test

⁴² Ibid, [5]–[6] (citations omitted).

the facts, conclusions and the submissions put against an unrepresented litigant and to “assume the burden of endeavouring to ascertain the rights of the parties which are obfuscated by their own advocacy”. It may require a judge to focus less upon the particular way in which the case is put by the parties and more precisely upon the decision which is required to be made.

At the centre of all this is the paramount duty to the court and the just, efficient and timely management of disputes, the court’s ultimate purpose. Ultimately, the following points resonate:

- Following *AON v ANU*, a practitioner’s duty to the court may no longer be viewed as a static obligation. A practitioner will need to factor the purpose of rules of court and procedure in the exercise of his duty to the court and to the administration of justice.
- Civil procedure reforms in Victoria and federally create obligations on *all* parties to litigation to adhere to a set of overarching purposes that aim to ensure the just, timely and efficient resolution of disputes. These objectives are subject to the paramount duty to the court.
- Recent case law demonstrates that in civil litigation, criminal proceedings, or proceedings involving self-represented litigants, the key aspect to retain is that the nature of a lawyer’s duty to the court will change in colour and form according to each dispute, the stage of the proceedings and the circumstances at hand at each stage of the litigation. What the court needs to achieve to deliver justice in any particular case may be a relevant consideration.

- It is critical to remember that the duty is not confined to the determination of the particular dispute at hand and may require a departure from the traditional adversarial duties of counsel and legal practitioners.
- The duty to the court is now the paramount duty on *all* participants in litigation, be it civil or criminal.

On that point, the passage of Richardson J of the New Zealand Court of Appeal in *Moevao v Department of Labour*⁴³, frequently cited with approval by the High Court,⁴⁴ is most apt:

[T]he public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by state and citizen alike. And the due administration of justice is a continuous process, *not confined to the determination of the particular case*. It follows that in exercising its inherent jurisdiction the court is protecting its ability to function as a court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice. (emphasis added)

⁴³ [1980] 1 NZLR 464, 481.

⁴⁴ *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, 29-30 (Mason CJ); *Williams v Spautz* (1992) 174 CLR 509, 520 (Mason CJ and Dawson, Toohey and McHugh JJ).

This really is the heart of the matter. De Jersey CJ has said extra-curially that public confidence in the judiciary and the courts, and the threat of losing it, is an important consideration for the administration of justice.⁴⁵ As Brennan J observed: ‘A client — and perhaps the public — may sometimes think that the primary duty of [a lawyer] in adversary proceedings is to secure a judgment in favour of the client. Not so.’⁴⁶ The foundation of a lawyer’s ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state. It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of government, the judiciary. Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law? It is this inherent characteristic of the duty to the court that distinguishes the legal profession from all other professions and trades.

⁴⁵ Chief Justice de Jersey ‘Aspects of the Evolution of the Judicial Function’ (2008) 82 *Australian Law Journal* 607, 609.

⁴⁶ *Giannarelli v Wraith* (1988) 165 CLR 543, 578 (Brennan J).