Chemically affected clients

Chris Phillips, Chris Phillips Solicitor, Bunbury, WA

It is true that chemical victims are increasing in number, often with unusual symptoms which may mystify the patient's general practitioner and which may cause, for example, a purely psychiatric diagnosis.

If you come across clients who consult you for inability to work and their symptoms include, for example, fatigue, headache, nausea and other generalised or polysystemic problems, always explore the possibility that the cause is work-place over-exposure to toxic chemicals or exposure to toxic chemicals in dangerous products at home or otherwise.

If the client is rendered very ill by exposure to a range of industrial solvents in glues, paints, fuels and so on, then a toxic explanation is likely and you will need to get the client reviewed by a doctor skilled in this area of medicine if there is a history of actionable over-exposure to toxic chemicals.

If you are interested in this area, or need further guidance you may wish to join the Chemical Injury Litigation special interest group of APLA.

We would be pleased to assist you with queries. ■

Chris Phillips is the Convenor of APLA's Chemical Injury Litigation Special Interest Group, and is a Solicitor in Bunbury, WA. **Phone** 08 3721 4977, **fax** 08 9721 3412, **email** pristeco@highway1.com.au

Beyond the adversarial system: some of the challenges

Jenny Finlay-Jones, Lecturer, Faculty of Law, University of Newcastle; Solicitor, Newcastle Legal Centre

The current and future challenges facing courts, tribunals and practitioners were the focus of a conference held on 10-11 July 1997 in Brisbane. The international conference, hosted by the Australian Law Reform Commission (ALRC) and the National Institute for Law, Ethics and Public Affairs (NILEPA), was part of the consultative process currently being undertaken by the ALRC in its review of the adversarial system of litigation (the ALRC conference)[1]. It followed an earlier conference on civil justice reform held in Brisbane in March 1996 by the Queensland Litigation Reform Commission. This earlier conference coincided with the visit to Australia by Lord Woolf and members of his civil justice inquiry team. Its focus of discussion was the reform proposals of the Litigation Reform Commission and the Lord Woolf team relating to pleadings, discovery, case management and alternative forms of resolving disputes.

1. The ALRC's adversarial inquiry

The ALRC's inquiry commenced in late 1995 having regard to the need for a simpler, cheaper and more accessible legal system and recent and proposed reforms to court and tribunals[2]. Whilst limited to the conduct of civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction, it is expected to have repercussions for civil litigation generally. The final report of the Commission due 30 September 1998 will address the advantages and disadvantages of the present adversarial system of conducting proceedings and whether any changes should be made to the practices and procedures used in those proceedings.

2. Access to Justice: Lord Woolf's report on the civil justice system in England and Wales

The ALRC inquiry occurs in the wake of the final report and recommendations made in 1996 by Lord Woolf in the UK on the civil justice system in England and Wales[3]. Lord Woolf's substantial report makes 303 recommendations and is accompanied by a draft set of new court rules to replace existing rules of the Supreme and County Courts. Whilst the report has not escaped criticism[4] it has promoted discussion about reform and provides insight into the extent of change that may be required in Australia to bring about a simpler, cheaper and more accessible legal system. ▶

a. Principles of a civil justice system

In his report, Lord Woolf sets out a number of criteria which a civil justice system should meet to ensure access to justice. It should:

i. be just in the results it delivers;
ii. be fair in the way it treats litigants;
iii. offer appropriate procedures at a reasonable cost;
iv. deal with cases with reasonable speed;
v. be understandable to those who use it;
vi. be responsive to the needs of those who use it;
vii. provide as much certainty as the nature of particular cases allows; and
viii. be effective: adequately resourced and organised[5].

b. The problems

Lord Woolf's report identifies the present system as being too expensive, slow, unequal, fragmented and too adversarial. Some of the findings of the report were that costs often exceeded the value of a claim, particularly those at the lower end of the scale and that there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It found that there are difficulties in forecasting the cost and length of litigation and that it is too adversarial as cases are run by the parties rather than the courts, and that the rules of court are often ignored by parties and not enforced by courts.[6]

c. New rules

Lord Woolf perceived that new rules were needed because of the complexity and overlap contained in the present rules of court. For example, too many ways of doing the same or similar thing, the use of specialist terms and over-elaborate language and the piecemeal amendment which has taken place over the years. The overriding objective of the new rules it to enable the court to deal with cases justly. To achieve this the court must ensure, so far as practicable, that the parties are on an equal footing and deal with the case in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the parties financial position. Cases must be dealt with expeditiously and be allotted an appropriate share of the court s resources, taking into account the need to allot resources to other cases.[7]

Suggested amendments to the rules include replacing the word pleading with statement of case and introducing a single method of starting all types of case by the claim. These are sensible suggestions. A system which has a number of different ways of commencing proceedings depending on which jurisdiction you are in, as is the case in Australia, is confusing and unnecessarily complex.

d. The new landscape

Lord Woolf states in his report that: *"If my recommendations are implemented the landscape of civil litigation will be fundamentally different from what it is now"*. Some features of the new landscape in England and Wales will involve the avoidance of litigation wherever possible and making it less adversarial and more cooperative. Litigation will be less complex and its timescale will be shorter and more definite. The cost of litigation will be more affordable, predictable and proportionate to the value and complexity of individual cases with parties of limited financial means being able to conduct litigation on a more equal footing. There will be clear lines of judicial and administrative responsibility for the civil justice system with the structure of the courts and the deployment of judges being designed to meet the needs of litigants. Judges will be deployed effectively so that they can manage litigation in accordance with the new rules and protocols and the civil justice system will be responsive to the needs of litigants.[8]

Given the similarity between the civil justice systems in Australia and England and Wales, Lord Woolf's new landscape provides an important and useful guide for the type of reform required here.

3. The Queensland Litigation Reform Commission[9]

In Queensland, the Litigation Reform Commission[10] (the Commission), which was in existence from 1992 - 1996 and chaired by Justice Davies of the Queensland Court of Appeal for the majority of that time, brought about a number of changes to civil litigation in that State. The aim of the Commission was to simplify and standardise procedures in the three main Queensland courts - the Supreme, District and Magistrates Courts. It also sought to enable disputes to be resolved more cheaply and quickly and to reduce the risk of unfairness which can occur by one party misusing the system to cause delay or increase cost.[11]

Some of the changes implemented by the Commission include new rules of court for disclosure and interrogatories, ADR, the reception of evidence by video link or telephone, the power to dispense with rules of evidence where these would cause unnecessary expense or delay, the streamlining of the numerous forms of judgments and orders into one and the ability for the courts to resolve discrete issues in advance of trial.

In relation to discovery, the old procedure of sworn affidavit of documents was replaced with a simpler procedure and the Peruvian Guano chain of inquiry test was replaced with a requirement that only documents which are directly relevant to the issues be disclosed.[12]

In the area of ADR, the Supreme Court in Queensland now has the power to order non-consensual mediation and the mediator has power to seek advice on aspects of the dispute from independent third party experts. Also, case appraisal by a third party with corresponding costs penalties to the dissatisfied party if the matter subsequently goes to trial and the result is not more favourable to that party, has been introduced.[13]

The Commission was abolished in late 1996 as part of a Queensland state government cost-saving measure. At the time of its abolition it had formulated a number of other significant reforms relating to pleadings, disclosure of names of witnesses, the ability for matters to be determined on the papers without the need for parties or lawyers to come to court, the electronic filing of documents, the use of court-appointed experts, the simplification of the process of enforcement of money judgments, simpler procedural rules for Mareva injunctions, Anton Pillar orders, representative proceedings and amicus curiae, case management, summary judgement procedures and fixed costs for each stage of proceedings.

The work of the Commission came under opposition from sections of the legal profession. This highlights a point

made at the ALRC conference by Justice Ipp of the Western Australia Supreme Court, namely the need to ensure that change is not made to the profession, but rather have the profession experience and shape reform. He suggests this can be achieved by firstly persuading the profession that far-reaching reform is required, and secondly ensuring the profession and judiciary discuss reform in concert amidst cooperation, consultation and compromise.[14]

4. The adversarial mind-set and resistance to change

At the ALRC conference, two of the major obstacles identified by Justice Davies as posing problems for improvement in our system so as to make it fairer for those affected by it, are the adversarial mind set held by lawyers and judges and their resistance to change.[15]

Justice Davies describes the adversarial mind set of lawyers and judges as comprising: first, a belief that our civil justice system delivers near perfect justice; second, the adversarial imperative and the leave no stone unturned mentality; and third, a narrow focus which looks only at legal rights and interests in dispute resolution.

Justice Davies noted that there are few who would dispute that our system is too slow and too costly and that this leads to a system which operates unfairly. However, he emphasised the underlying causes of unfairness in our system which cannot be fixed by a "nip here and a tuck there" is the strongly adversarial approach encouraged by our system:

> *the adversarial imperative, the compulsion which each party, and especially the party s lawyer, has to see the other as the enemy who must be defeated. The system is designed along the lines of trial by battle. It tends to discourage the contesting of only the real issues and the disclosure of relevant and only relevant information to the other side, particularly if either is likely to help the opponent. Because it tends to focus on winning and losing it thereby obscures the advantages of an agreed solution which might benefit both parties. It emphasises resolution by ultimate trial thereby obscuring the advantages of and providing few opportunities for resolution of a dispute before then. It encourages witnesses to be partisan. It advantages the richer litigant who can afford better lawyers and greater expenditure of labour and by leaving the pace and shape of litigation substantially to the parties, it permits that advantage to be abused.*[16]

How can the mind-set be changed?

Justice Davies proposes five things which must occur to change the mind sets:

1. Change the way lawyers, judges and law students are educated.
2. Provide economic incentives to lawyers and litigants to resolve disputes by means other than labour intensive litigation and to impose economic sanctions on those who unreasonably choose more costly or time consuming modes of doing so.
3. Legislation to free lawyers of the fear of being sued by clients if they adopt non-litigious means of resolving disputes
4. Change the professional ethical rules which embrace an adversarial attitude of confrontation and concealment to one which require greater cooperation nd candour with sanctions for their breach;
5. Require lawyers to provide information and realistic advice about the options for clients for resolving their disputes and the likely costs of each both at the outset of a matter and at various times thereafter.

The Judge notes that the first proposition relating to education is a long term project and unlikely to produce significant change in the short term.

5. The challenge posed for legal education of law students

As part of its inquiry into the adversarial system, the ALRC has recently released an Issues Paper on Rethinking legal education and training.[17] The paper is intended to facilitate discussion and the public are invited to make comments and submissions on the paper by 2 November 1997.[18]

The paper states:

Legal education and training may contribute to current litigation practices by creating or maintaining an adversarial style of engagement, including the confrontational style used in some adversarial processes. Often academic legal education concentrates on appellate decisions and court processes in teaching about law, rather on the majority of disputes that are resolved outside of courts. This may create an expectation that court based adjudication is the norm in legal practice.

Other examples of inculcating adversarial practice in legal education is the emphasis given to appellate moots in law schools and use of the mock court room. Although law schools are beginning to integrate dispute resolution throughout the curriculum[19] we still have a long way to go to bring about a shift in emphasis which moves away from resolving disputes via traditional adversarial court-based means. This is notwithstanding the fact that so called alternative forms of dispute resolution now play a mainstream role in current litigation.[20] Professor Astor notes that there are unlimited possibilities for creativity in introducing dispute resolution elements in both compulsory and optional courses which covers not only skills but also doctrine, policy and theory.

a. Other areas which need to be embraced in legal education and training

In addition to alternative means of resolving disputes, there are other areas which should be included in the law school curriculum in order to give students a balanced mind set. These include the significance of facts in law; case management; an understanding of costs as a factor in civil litigation; an appreciation of the role of tribunals in our justice system and how tribunal processes differ from traditional court processes.[21]

Professor William Twining has drawn attention to the rule centred outlook of traditional legal education and scholarship and their tendency to neglect facts. For example, he sees the modern study of evidence as largely equated with the study of rules of evidence, just as the study of legal reasoning is confined almost entirely to reasoning about disputed questions of law. He has called for the systematic study of facts in law to be given a central but not dominating place in legal education. Twining is a pioneer of efforts to foster the development of law school curricula which includes intellectual ▶

awareness of and analytical skills relating to facts in law. Fact-finding, proof and evidence are lawyer tasks which are critical to legal practice and legal process. They provide equally important theoretical and practical links to other fields like logic and forensic science.[22]

b. Client-centred learning in law

One way of developing a change in mind set away from an adversarial focus is to place greater attention on the needs and expectations of clients. Research has found that plaintiff satisfaction following litigation has less to do with the actual outcome of their case and its duration than with how their experience compared with their expectation.[23] An expectation which is generally created as a result of information provided to the client by their practitioner. Effective delivery of services to clients is generally not tackled as part of our mainstream education processes, it is something practitioners are meant to acquire once in practice.[24] However if a lawyer focuses primarily on legal rights and obligations, the client is not likely to be receiving a good service. The focus, which should form part of the legal education process, must be on what the client wants to achieve, the options for resolving the problem and which of these options is likely to produce a result which is in the best interests of the client.

At Newcastle, the Faculty of Law established the Newcastle Legal Centre to provide both a community service and quality placements for its students. Under the supervision of practitioners who have a commitment to legal education, students conduct initial interviews with clients during advice sessions and assist practitioners to run matters. In an educational and clinical setting the Legal Centre provides a forum for law students to engage in realistic lawyering skills. Students come face to face with real clients and real problems. They are not merely dealing with problems on paper. It helps students understand the needs of clients and the difficulties some clients have in accessing justice.

In addition to its day to day practice, the Legal Centre is currently involved in a number of large projects on which students work in conjunction with practitioners and Faculty academics. As well as being of benefit to the students learning of law and practice, the students provide valuable assistance in analysing facts and data and conducting research on points of law. If any practitioners having a matter of public interest wish to explore the possibility of supervised student assistance they may contact Assoc Professor Ray Watterson or Jenny Finlay-Jones on (02) 4921 8808 or lsjafj@law.newcastle.edu.au ■

Jenny Finlay-Jones is a Lecturer at the Faculty of Law, University of Newcastle and a solicitor at the Newcastle Legal Centre. Jenny can be contacted on **phone** 02 4921 8808.

References:

1. The papers delivered at the conference are becoming available in electronic form on the NILEPA website, http://www.gu.edu.au/gwis/hum/nilepa/homepage.htm. The papers are to be published by The Federation Press in 2 volumes in early 1998.
2. See the terms of reference of Michael Lavarch, then Commonwealth Attorney-General, 29 November 1995.
3. The Right Honourable the Lord Woolf, Master of the Rolls, *Access to Justice: Final Report- Final Report to the Lord Chancellor on the civil justice system in England and Wales*, July 1996, London: The Stationery Office (Lord Woolf's Report). Available on the internet at http://www.open.gov.uk/lcd/lcdhome.htm
4. See Lord Woolf's response to criticisms by Professor Michael Zander in an extract from the *Samuel Gee Lecture to Royal Physicians* on 13 May 1997 by Lord Woolf, Master of the Rolls entitled: Medics, Lawyers and the Courts.
5. Lord Woolf s Report, page 2
6. Lord Woolf s Report, page 2
7. Lord Woolf's Report pages 274-275
8. Lord Woolf's Report pages 4 - 9
9. The information relating to the Queensland Litigation Reform Commission was obtained from its Annual Reports 1992-1993, 1993-1994, 1994-1995 and 1995-1996
10. The Litigation Reform Commission was established by s 71 of the Supreme Court Act 1991 (Qld). Its four members were Judges and, with the assistance of other Judges and numerous members of the legal profession, performed its valuable work on a voluntary basis. See page 6 of the Commission's Annual Report 1995-1996.
11. The aims and work of the Litigation Reform Commission is discussed extensively by Justice Davies in Davies, GL *Blueprint for reform: some proposals for the Litigation Reform Commission and their rationale* (1996) 5 Journal of Judicial Administration. Also see, Davies, GL Justice Reform: A Personal Perspective (1997) 15 Australian Bar Review
12. O. 35 Queensland RSC
13. O. 99 Queensland RSC
14. Published works by Justice Ipp on the area of reform see: Ipp, the Honourable Justice David, *Reforms to the Adversarial Process in Civil Litigation* (1995) 69 ALJ 715 and 790
15. Davies, GL *"Fairness in a Predominantly Adversarial System"* Paper presented at the ALRC conference held in Brisbane 10-11 July 1997.
16. Davies, GL *Fairness in a Predoninantly Adversarial System* Paper presented at the ALRC conference held in Brisbane 10 - 11 July 1997, page 4.
17. Australian Law Reform Commision, *Review of the adversarial system of litigation: Rethinking legal education and training,* ALRC IP 21, AGPS Canberra, 1997
18. A copy of the paper is available from the ALRC in Sydney phone 02 9284 6333; E-mail adver@alrc.gov.au
19. Professor Hilary Astor, Abbott Out Professor of Litigation and Dispute Resolution , Faculty of Law, Sydney University, *The Place of Dispute Resolution in Legal Education,* paper delivered at the ALRC conference available from the NILEPA webite referred to in footnote 1.
20. Astor, above footnote 19
21. Some of these factors were noted as lacking in law school education by Professor Greg Reinhardt, in his paper at the ALRC conference entitled *Changing Roles and Skills for Practitioners.* They are in fact included in the Litigation and Trial Process subjects at the University of Newcastle.
22. Twining, William, *Rethinking Evidence: Exploratory Essays*, Blackwell, 1990, Oxford.
23. Matruglio, Tania, *Plaintiffs and the Process of Litigation: An analysis of the Perceptions of Plaintiffs Following their Experience of Litigation*, Civil Justice Research Centre, Sydney; December 1994: Law Foundation of New South Wales.
24. See Dolan, N, Civil Litigation: *A Guide to Good Practice*, The Law Society of New South Wales, Sydney 1992.