

# Working for seriously injured foreign nationals

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*Acting for a seriously injured plaintiff is a challenge at the best of times. The task of acting for a number of seriously injured Japanese Nationals injured in Australia was a responsibility easy to underestimate at the outset. Having lived and worked in Japan in 1994-5, I returned to legal practice in Australia keen for such a challenge. I have recently settled a number of these matters and have some pointers for those contemplating taking on similar matters.*

## Do I accept the instructions?

I thought I had reasonable qualifications for the job. I had some basic Japanese language skills. I had recently worked in the Japanese bureaucracy. I had over 10 years experience in personal injury litigation. Surely I could do the job?

Little was I to know, my best qualification was that I knew of a very good Japanese interpreter/translator. A native speaking interpreter with empathy for his fellow national in need. An interpreter with great patience, dedication and attention to detail.

This interpreter has a working knowledge of the way things are done in Australia and a commitment to explain to me how things were done in Japan. This interpreter was computer literate with the latest AppleMac hardware and Japanese language word-processing software. All that and he lives down the road! It is truly amazing the resources we have around us, if we only go out and look for them.

## Lines of communication

As in all major pieces of litigation, it was crucial to establish proper lines of communication early on. Fax machines were a must, mobile phones and email (using Japanese language software) were essential to establish and maintain an adequate flow of information.

As with all seriously injured plaintiffs, adequate direct communication with the client had to be established early to obtain

the authority to speak on all issues with carers and family members. This was all the more important in Japan where, for example, the role of care and control of the household falls to the eldest son's wife.

## Initial arrangements

The time spent with the interpreter early on saved time later when clear and prompt comprehension and decisions were needed. A good translation of the legislation and related forms and authorities was important (in our case - the *Motor Accident Insurance Act 1994 Qld*).

Surprisingly, our detailed explanations of the authorities given to the insurer to access otherwise private information did not cause concern with the clients. Simple "client care" concepts from the standard Client Retainer Agreement easily became minefields.

## Face to face meetings

The latest in modern technology, mobile phones, faxes, video conferencing cannot replace a good cup of tea (albeit Japanese tea) face to face with the clients. A detailed video of the client, their daily life, immediate surroundings and daily tasks was crucial. I took the trip to rehabilitation with the clients in the taxi. I had the opportunity to see and document the difficulties first hand.

Speaking directly with the care providers, the treating medical specialists and other patients proved invaluable as this process, time and again, raised new issues.

In these cases, a leading Australian occupational therapist was prepared to travel to Japan early on to examine each plaintiff. Her reports gave real insight particularly on the cultural issues relevant to care arrangements that had a major impact on assessment of quantum. As with all major para/quad cases, care costs were the major factor. The increased cost of care in Japan and the cultural need for levels of

care beyond that applying in Australia were all factors addressed in detail by the occupational therapist.

## Documentation

Japan is the home of documentation. It seems the Japanese want to document everything. This process, however, extends to distributing the documentation to all interested parties. Meetings are then arranged to discuss the documentation so consensus can be reached. Finally (if you are successful) agreement by consensus is announced. The documentation process starts again to document the agreed position to be signed and counter signed by all in the process.

This process stands at odds with the Australian lawyer's discipline to reduce all information into a statement in our own format for the individual client/witness to sign. The temptation is to try to short circuit this extended documentation process. Don't bother - this time honoured system is not going to change just for you.

Japanese medical reports are always short and to the point. Typically they include many diagrams detailing the location of subjective complaints of pain. Japanese doctors just don't have the time to commit to detailed reports but will freely discuss treatment issues - often in the best British or Midwest accent - depending on where the doctor did his/her postgraduate degree.

## Independent Medical Specialists

Should I obtain independent reports from specialists in Japan or fly over Australian specialists? That question was answered for me by the difficulty in locating Australian specialists willing to travel to Japan and the cost of those willing to go.

By sheer good luck (and use of the fail safe Japanese referral system) I ended up with two internationally distinguished medical specialists working in teaching



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hospitals close to where the clients were living (close - as in a 2 hour train ride away). These specialists had extensive clinical experience in the assessment of seriously injured patients. They were also comfortable using the internationally recognised American Medical Association "Guides to Permanent Impairment".

The consultant orthopaedic surgeon was able to give great insight into the health issues for elderly Japanese patients as well as on life expectancy issues. Of course, we had to use Japanese Life Tables. Interestingly, these tables were drawn to take no account of the massive loss of life from the 1995 Kobe Earthquake - considered a one off event. These tables showed a life expectancy for the clients over three years greater than similarly aged Australians.

#### Use of a Japanese Law Firm

Everyone said "Of course, you'll have to retain a major Japanese law firm". It was obvious I had to deal with a plethora of likely witnesses - accountants, care providers, medical and para medical health care providers, architects, local government health and welfare officials, rehabilitation providers, rehabilitation equipment retailers etc. I decided to take the risk - and save our money.

In retrospect, contact with witnesses,

through a Japan based intermediary, always caused problems. The answer always seemed to be to try and make personal contact with the witness - ideally through a personal introduction. Once business cards and pleasantries were exchanged then assistance was overwhelming. All that was left was to stay in close and constant communication.

As soon as an intermediary came between us and the prospective witness - misunderstandings, delays and problems generally arose.

#### Case management guidelines

With extensive pro-active cooperation from the insurers' solicitors and the trial judge, directions were given for evidence to be given in chief through written witness statements with cross examination to be conducted by video conference. The volume of evidence and translation issues made it common sense for this course to be adopted.

It was crucial to keep abreast of exchange rate fluctuations whilst preparing the various statements of loss and damage with respect to each claim and throughout the protracted settlement documentation. Loss in Japan calculated in YEN needed to be calculated in \$A for court documents. During the 3 years from accident to settlement, the exchange rate oscillated between

62 and 80 YEN to the \$A.

The website <http://www.xe.net/ucc/> for the International Currency Converter "updated every 3 minutes" was a godsend to accurately claim YEN losses in \$A.

#### In summary

In summary, the challenges were met. The clients are happy. They have been reasonably compensated.

Not surprisingly, however, the (now grey-haired) solicitor is exhausted. I learnt a lot... about how to be patient and about our own legal process. That came from having to explain it constantly into another language and culture.

One thought remains. The responsibility to act for a foreign national seriously injured in our country is daunting but it is a responsibility to which we, as a profession, must rise. Seldom is a person in more need.

#### Further information/assistance

APLA Members wishing to access further information on these matters, interpreter services in Australia and medical specialist referrals in Japan please feel free to contact me. ■

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## Book Review: Torts Tomorrow: A Tribute to John Flemming

**Bill Madden, Sydney**

**Edited by Nicholas Mullany and Allen Linden**

LBC Information Services, Sydney, 1998

*This hard cover book of about 350 pages consists of a collection of some 17 essays. The majority of the essays address a topical issue in the law of torts. Examples include liability in tort of public bodies, joint and separate liability and informed consent.*

The later papers look toward the future of tort law addressing the evolution of new torts and the role of tort law in empowering the injured.

The book, though hardly light reading, is clearly structured and well written.

Although the work is primarily of academic and general interest, its analysis of controversial areas with careful references to decided cases, articles and other materials makes the book of value for the practitioner. ■

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