Why Representation and Resources are Critical to Access to Justice in Minor Civil Jurisdictions:

The Experience of Advisory Services in Minor Civil Claims

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ABSTRACT

This article argues that appropriate involvement of the legal profession in minor civil proceedings, rather than its exclusion, will best facilitate efficient proceedings and ensure rectitude of outcome. We recommend that initiatives are implemented to: (i) ensure that legal advice is more accessible to parties; (ii) provide more targeted, matter specific advice regarding the utility, process and benefits of ADR to individuals involved in litigation; and (iii) facilitate the provision of unbundled legal advice on an 'as needs' basis. These recommendations partly derive from the experience of the authors in administering *pro bono* legal advisory clinics in the Adelaide Magistrates Court and the work of the litigation research unit within the Law School of the University of Adelaide.

I. INTRODUCTION

This article derives from a submission made by the authors to the Productivity Commission's *Access to Justice Arrangements Issues Paper.*[1] Our focus is on the question of access to justice in minor civil jurisdictions. Our arguments and recommendations are based on over a decade of experience operating the Magistrates Court Legal Advice Service ("MCLAS"), a free legal clinic run by the University of Adelaide Law School,[2] and the work of the Advocacy and Justice Unit,[3] a research unit of the Faculty of the Professions at the University of Adelaide.

We here critique reforms that are intended to create more efficient and streamlined processes in minor civil jurisdictions by limiting involvement of the legal profession. We examine the consequences of these reforms for access to justice in minor civil claims, and argue that appropriate involvement of the legal profession in minor civil claims can contribute to, rather than diminish, efficient and just outcomes.

We conclude with recommendations for the practical implementation of what we advocate.

II. THE PROBLEM OF ACCESS TO JUSTICE IN MINOR CIVIL JURISDICTIONS

The Honourable Justice Ronald Sackville observed that:

> *… like other catchphrases, such as 'fairness' and 'accountability' … the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people.*[4]

We contend that access to justice means more than access to a courtroom. It also means access to a system which enables participants to understand the legal and factual issues involved in their dispute and to reach a fair and equitable outcome. We believe that barriers to accessing justice arise in minor civil jurisdictions where litigants must represent themselves. In South Australia, the upper limit for a minor civil claim is $25,000. This is, in any terms, a significant sum and may mean the difference

between feeding a family, getting to work, saving a business, or filing for bankruptcy.

MCLAS is a *pro bono* legal clinic for unrepresented litigants in the minor civil claims jurisdiction of the South Australian Magistrates Court. The service provides advice on process, merit, compromise and case management to approximately 120 litigants each year. Free advice is offered by selected undergraduate students supervised by a solicitor. In almost all cases, it is our experience that the parties do not understand the legal issues involved in the matter they seek to agitate. This affects both their capacity to bring the case to an effective trial and to reach satisfactory outcomes through alternative dispute resolution. The barriers presented by lack of understanding are uniformly noted across self-represented jurisdictions in Australia and internationally.[5]

Jurisdictions such as the minor civil claims jurisdiction of the South Australian Magistrates Court, and numerous Commonwealth and State Tribunals, are designed to minimise involvement of lawyers. The policy goals of these jurisdictions are to minimise the costs of litigation for participants and to streamline proceedings by reducing preliminary legal arguments or arguments on procedural or evidential points of law which do not go to the final outcome of the actual issue in dispute.[6] To this end, many of these courts and tribunals act in an inquisitorial rather than adversarial manner, with tribunal members or magistrates having explicit powers to inquire and direct parties during the hearing.[7]

There are good reasons for 'de-legalising' and simplifying minor civil claims jurisdictions; the most obvious being that the low value and (often) very simple nature of claims does not warrant legal representation expenses that may easily exceed the value in dispute. The difficulty with this proposition is that for those cases where the law and court process remain complex, it is too difficult for litigants to manage alone.[8] The unrepresented litigant faces difficulties in: recognising legal issues; identifying law relevant to resolving the dispute; understanding ADR and trial procedure. We next examine these difficulties with a view to answering the broader question - is restricting the involvement of legal practitioners in minor claims jurisdictions facilitating access to justice?

III. RECOGNISING THE LEGAL ISSUE

In 2012 the Australia Institute reported that 88 per cent of Australians agreed that 'the legal system is too complicated to understand properly';[9] a conclusion which is supported in a number of recent investigations in Australia and overseas.[10] Whilst parties to litigation may have a broad understanding of what is 'right and wrong' they often do not have the capacity to identify the legal principles that underpin this intuition nor the capacity to understand which facts are legally relevant to their claim.

As a consequence, we have found that many claims do not resolve early because parties have unrealistic views of their prospects of success.

This lack of understanding results in wasted court time and party dissatisfaction with process.[11] Even in an inquisitorial process, by the time a magistrate identifies particular evidence as being useful, it is often too late for it to be located or used. Too often litigants attend for hearing without relevant evidence or witnesses, or the capacity to even identify important facts or legal argument. Nerves, confusion, and the lack of understanding or capacity to articulate a case can also impede justice being achieved.

IV. INEXPERIENCE OF LITIGANTS

A range of primarily online information is available to parties about the general processes to be followed in most jurisdictions.[12] The Magistrates Court in South Australia also requires parties to attend a directions hearing where a Deputy Registrar attempts to isolate the legal issues involved in the dispute and directs the parties to focus on these. Often the Registrars will suggest that the parties seek legal support from MCLAS or a lawyer if the issues are sufficiently complex.

The ready availability of information and the support offered by the court go some way to addressing the real disadvantage that many litigants face in coming to grips with the law. However recent surveys of litigants in Australia suggest that this is not enough and more dynamic and interactive support is needed.[13]

V. RELEVANCE OF LAW

Many cases in small claims jurisdictions will be resolved by parties with little reference to legal principle. But it is a fallacy that the law is not important in minor claims jurisdictions. In a significant proportion of cases, a just

outcome requires articulation of legal rights and the calling of evidence or fact to support claimed rights. Justice is not served by parties landing in court ill-equipped to understand the legal parameters of their case and unprepared to argue it effectively. Nor is it served by parties compromising their claim without understanding its strength.

Despite the comparatively small amounts in dispute, the legal issues in minor civil jurisdictions can be as complex as in any other court and are often complicated by difficult factual circumstances.[14] Litigants in such cases often need legal advice to assist them to understand the law governing the dispute. They may also require advice regarding a case management strategy in light of the legal and evidentiary issues. Such assistance would invariably include advice about early settlement and compromise. As we have mentioned, most cases in the small claims jurisdiction are resolved through negotiation and compromise. Often settlement in these claims is the product of the parties being more concerned with personal, commercial and business outcomes than they are with achieving an outcome that is correct under the law. But these considerations also drive outcomes and the decisions of parties in complex and substantial litigation. Parties concerned with small claims should have equal opportunity as those claiming larger sums to understand how the law relates to their dispute. Understanding how the law relates to a dispute is critical to a party 'accessing justice' because it is the means by which a party can understand what the law, to which society adheres, considers relevant, fair and reasonable bases to resolve the dispute. A party should have the opportunity to gain that understanding from legal professionals so the party can consider, in light of that understanding, the outcomes they wish to achieve and the methods by which they might be achieved, be it through adjudicative or compromise based processes. Understanding how the law affects a dispute, even if the legally correct outcome is secondary to the outcome primarily desired by the party, should and must be the expectation of a society governed by the rule of law.

The consequence of restrictions on lawyers' role in a system that remains legally and procedurally complex is to diminish the extent to which hearings allow for clear and full exploration of the relevant legal issues and factual circumstances in a manner that individuals can appreciate and understand. A trial at which parties could, but for the lack of basic legal understanding, have more clearly made their case, is unlikely to give rise to a just outcome.

Similarly, a compromise settlement that is expedient at the expense of legal rights is not a fair outcome. That proceedings may be concluded more quickly, is a hollow achievement if they have not afforded justice.

VI. UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION

In the experience of the MCLAS, of equal importance as readiness for trial, is the need for parties to be able to realistically assess their case early in the dispute so as to facilitate engagement with ADR processes. The focus of minor claims jurisdictions is often on early settlement.[15] However, ADR literacy in the community is low, with few first-time litigants understanding the processes, the way to prepare or the way ADR might work in their case.

The resources to facilitate early settlement consist almost entirely of written pamphlets and written instructional material. There is an assumption that parties will want to talk to each other to resolve the dispute pre-trial. The experience of MCLAS is that this assumption is wrong. Parties are very often averse to talking to each

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other; they distrust each other, they lack the vocabulary to negotiate effectively, and do not appreciate that compromise is part of negotiation.

Parties also fail to understand that mediation is not a 'mini-trial' but a process in which discussion and compromise is key. Parties often believe that negotiation must be positional and based on 'zero-sum outcomes' and are ill-equipped to engage in more imaginative and extensive bargaining.

We find that giving litigants at MCLAS more detailed and practical explanations of ADR, couched in terms of how it might work in *their* case, usually results in willingness or even enthusiasm to negotiate or mediate. There is a systemic barrier to be overcome to persuade people to prepare for and engage in effective mediation. Once in the hands of a skilled mediator, parties will very often negotiate a reasoned settlement; getting parties to the mediator is the real challenge.

VII. CONCLUSION

We have sought to briefly identify a number of misconceptions about minor claims. It is the experience of MCLAS and the authors, borne out by recent investigations in this area, that there are a number of challenges that remain to be met in lawyer-free jurisdictions if they are to offer a consistently credible dispute resolution process and just outcomes. Based on this experience, we recommend the following to ensure meaningful access to justice for minor claimants in South Australia.

A. Recommendation One: Ensuring parties receive adequate legal advice

Assisting litigants to understand the legal and factual issues at the outset is critically influential in enabling them to effectively progress (or compromise) their case. Being able to articulate the nature of the case with reference to simple legal principle and relevant fact both confines the matters to be pursued and provides a roadmap for litigants to follow.

B. Recommendation Two: Providing parties with better education regarding ADR

Current information about ADR does not address fundamental issues relevant to its nature or assist parties to effectively prepare for ADR. Personalised discussion about ADR is often required; lawyers are critical in providing education on ADR and hence meaningful and just resolution.

C. Recommendation Three: Facilitating the provision of legal advice 'as needs'

We appreciate that minor claims may require more limited legal advice than claims where sums are greater. The traditional structure of legal advice, where a lawyer is responsible for a client's whole case, inhibits provision of limited, issue-specific advice. Services like MCLAS provide 'as needs' services. A typical MCLAS case might involve these services:

- hearing the background to a litigant's case,
- discussing settlement options,
- helping to draft pleadings or letters or offers of settlement, and
- providing step-by-step guidance outlining: the law, the issues, and the prospects of success, information about how ADR processes could work, an explanation of the facts needed to support the client's legal position, and the evidence they should gather.

In some cases much more work is needed. But in the majority of cases this approach is sufficient to assist a litigant to be prepared for negotiation or trial.

There are very few community based legal services that offer this type of 'as needs' legal support. Duty solicitor services that provide advice, drafting, and pre-trial counselling are an effective option, but restricted by legal aid thresholds. Private solicitors are understandably reluctant to act on limited retainers for reasons of risk management.[16]

Structures that enable lawyers to provide 'as needs' services while also addressing risk management issues, such as unbundled legal services, provide a workable option which should be pursued so as to ensure the legal profession can provide appropriate services to minor claimants.[17] If such legal services are appropriately accessible, and lawyers are able to provide 'as needs' advice, many clients could see the benefit of paying a small sum to assist them navigate the court system efficiently and effectively. Paying for whole-of-case representation over a disputed sum of $20,000 is unlikely to be cost effective. Paying for limited or task specific legal advice for a $20,000 claim is much more likely to be attractive to the uninformed litigant.

In sum, exclusion of lawyers from Australian legal process is not the answer to achieve cost effective justice. Attention should be directed to refining the role of lawyers within the process to ensure access to justice means more than having 'your day in court'. This would require the support of Law Societies and the profession, and may require recasting of professional practice rules to facilitate a more flexible approach to meeting client needs. Easy assumptions about the importance and complexity of minor civil cases and about the efficacy of measures designed to inform litigants about law and process need to be challenged. Experience and recent evaluative studies suggest that whilst inroads have been made, challenges still remain.

REFERENCES

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1. David Caruso, Margaret Castles, Anne Hewitt, the Magistrates Court Legal Advice Service (MCLAS) and the Advocacy and Justice Unit, Submission to Productivity Commission, *Access to Justice Arrangements Issues Paper*, 31 October 2013.
2. The minor civil jurisdiction of the Magistrates Court in South Australia is fixed at $25 000. Most other minor civil jurisdictions in Australia are fixed at $10 000.
3. Now the Litigation Law Unit.
4. Justice Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Keynote address to the NSW Law and Justice Foundation's Access to Justice Roundtable, NSW Parliament House, July 2002) <http://www.lawfoundation.net.au/ljf/site/articleIDs/52183CCAB00DB476CA2572730018E0C8/$file/AJR_book.pdf> 19.
5. Elizabeth Richardson and Tania Sourdin, 'Mind the Gap: Making Evidence Based Decisions about Self-Represented Litigants' (2013) 22 *Journal of Judicial Administration* 191, 192; Deputy Chief Justice Faulks, 'Self-Represented Litigants: Tackling the Challenge' (Managing People in Court Conference: National Judicial College of Australia and the Australian National University, February 2013) 4–5.
6. The costs of accessing justice are broadly recognised to be of concern in Australia. For example, in its submission to the Productivity Commission the Law Council of Australia stated '[i]t is clear that the cost of accessing the justice system impacts significantly on the capacity of many people to seek justice on equal terms': Law Council of Australia, Submission No 11 to the Productivity Commission, *Access to Justice Arrangements Issues Paper*, 13 November 2013, 37 (136).
7. *Magistrates Court Act 1991* (SA) s 38.
8. Justice Faulks emphasises this fundamental structural challenge when he suggests that the only way to manage the self represented litigant is to get them a lawyer, make them into a lawyer, or change the system, so that they don't need to have or be a lawyer to manage it: Faulks above n 6, 2.
9. Richard Dennis, Josh Fear and Emily Millane, 'Justice for All: Giving Australians Greater Access to the Legal System' (The Australia Institute Issue Paper No 8, 2012) 22.
10. Julie Macfarlane, 'The National Self Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants' (Treasurer's Advisory Group on Access to Justice Working Group Report, May 2013) 552; Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self Represented Litigants – The Dark Side' (2014) *Access to Justice* (Paper 32) 10; Deborah L Rhode, 'Whatever Happened to Access to Justice' (2008–2009) 42 *Loyola of Los Angeles Law Review* 869, 881.
11. Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury, 'Queensland's Self–Representation Services: A Model for Other Courts and Tribunals' (2011) 20 *Journal of Judicial Administration* 225, 227 report that 82 out of 100 clients at the QPILCH self-representation service did not proceed to court.
12. For example, see the following online information for unrepresented litigants in the Small Claims Division of the South Australian Magistrate's Court: Courts Administration Authority of South Australia, '$25 000 or Less' <http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/MinorClaims/Pages/default.aspx>.
13. Woodyatt, Thompson and Pendlebury, above n 11.
14. Examples in the MCLAS include employer liability for negligent acts of employee, the legal duty of a local council for damage to property from falling trees in a public space, and questions of evidence and proof in complicated contract and indemnity disputes.
15. In the Magistrates Court of SA mediation, conciliation, arbitration and settlement options are considered in *Magistrates Court (Civil) Rules 2013* (SA) rr 73(2).
16. Faulks above n 5, 10; Andrea de Smidt and Kate Dodgson, 'Unbundling Our Way to Outcomes: QPILCH's Self Representation Service at QCAT, Two Years On' (2012) 21 *Journal of Judicial Administration* 246, 247.
17. Rhode, above n 10, 897–8.