Access to Justice — A New South Wales Perspective

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Who uses the courts — the rich, the poor, or both? A survey conducted in the Supreme Court of New South Wales in 1993 sought to answer this question — and produced some surprising results. This paper, by the Chief Justice of the High Court of Australia, outlines the findings of the survey, and also comments on some of the points made by Lord Browne-Wilkinson in his paper on access to justice: supra p 181.

MANY of Lord Browne-Wilkinson's observations on the costs of civil justice,[1] prompted as they were by some of the recommendations made in England by Lord Woolf,[2] are of direct relevance to the New South Wales system of civil justice. Those observations are based upon a great deal of personal experience, and reflect the fact that the problems to be addressed are practical problems, which are much more likely to be solved, or at least alleviated, by pragmatism rather than by ideology.

It is important to recognise not only the essentially practical nature of the issues but also their complexity. His Lordship points out that the cost of modern litigation is high and increasing, and that it appears to be beyond the means of most ordinary people. That proposition is correct, but the whole picture is somewhat more complex. There may be a lesson to be learned from one aspect of that complexity.

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1. N Browne-Wilkinson 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' supra pp 181-191.
2. HK Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

A few years ago, at my request, the Civil Justice Research Centre, which is associated with the Law Foundation of New South Wales, undertook an empirical study of the financial status of litigants in the Common Law Division of the Supreme Court of New South Wales.[3] The reason for the request was what appeared to be a curious anomaly. Everyone seemed to agree that the cost of litigation was beyond the means of ordinary people. However, it was not easy to reconcile this with two facts. First, as Chief Justice of New South Wales, I seemed to be spending a great deal of my time wrestling with problems arising out of enormously overcrowded court lists. If most people could not afford to sue — if ordinary people in the community were denied access to justice — how did the courts come to be so busy? There was also a related concern. If justice were made more accessible, and if by some master stroke of reform we were able to produce the result that ordinary people could afford to go to court, then surely the court system, already struggling to cope at a time when, we are told, there is very limited access to justice, would face collapse. If there is, at the present time, within the community a great but unsatisfied desire to sue, what will happen to the court system if we make it possible for ordinary people to satisfy their desire? Have reformers and governments really thought through the consequences of substantially increasing access to justice?

Secondly, the proposition that only people who are very rich, or who are very poor and can therefore obtain legal aid, are able to sue did not appear to match my personal observations of the characteristics of litigants in the Supreme Court of New South Wales. Of course, the very rich can, and have always been able to, sue. As for the very poor, the assumption that they can readily obtain legal aid for civil proceedings is not warranted. In recent years the legal aid budget in New South Wales has been stretched to the limit, and has been spent mostly on legal aid for people charged with criminal offences. There is, I believe, only a relatively modest amount of legal aid made available for civil cases. Where, then, are all the litigants coming from? The overcrowded court lists in the Supreme Court and the District Court of New South Wales do not appear to be occupied by people who are very rich.

The Civil Justice Research Centre made a study of the financial profile of plaintiffs in cases awaiting trial in the Common Law Division of the Supreme Court. The study was relatively easy to conduct because we had reasonable access to information about these people. Most actions in the Common Law Division are claims for damages for personal injuries, and most people making such claims are ordinarily obliged to give particulars of their earnings. The study showed that the financial profile of the plaintiffs matched very closely the financial profile of

3. T Matruglio *So Who Does Use the Court?* (Canberra: Civil Justice Research Centre, 1993).

ordinary citizens in the community. The litigants who were coming to the Common Law Division of the Supreme Court in such numbers that it was taking years for their cases to be brought on for hearing were neither very rich nor very poor; they were just ordinary people. I have noticed that these findings, contrary as they are to received wisdom and to what appears to be common sense, are rarely referred to in discussions on access to justice. Perhaps they are regarded as inconvenient.

Most lawyers in New South Wales could give at least part of the explanation. It is that actions for damages for personal injuries in that State have traditionally been conducted by solicitors upon an informal contingency fee basis. Solicitors handling that kind of work for plaintiffs have generally been willing to take the work on the basis that if the case was lost they would not expect to recover their fees. The success rate of such cases is so high that it is good business to do so. Whether another part of the explanation concerns the role of insurance in tort law is a more complex issue, but it should not be overlooked.

It would be interesting to know what the results would be if a similar survey were carried out in respect of litigants in the Equity Division of the Supreme Court. I have no doubt that a survey of litigants in the Commercial Division would demonstrate that almost all of them fell into the 'very rich' category, although some of them might also be classified as people who before long will be very poor.

Do the results of the Common Law Division survey suggest that contingency fees ought to be encouraged? Or does the state of the Common Law Division backlog suggest that they ought to be discouraged? The same question can be considered from another point of view. If the costs of litigation are substantially reduced, who will take advantage of that? If access to justice is substantially increased, who will exercise it?

None of this is intended to deny the proposition, which I am convinced is true, that civil litigation is far too expensive, and that the result of this is serious injustice to many people. It is only necessary to consider people who, for one reason or another, are forced into court. I suppose there are kinds of litigation which are the legal equivalent of elective surgery, but most people who find themselves, for example, before the Family Court are there under compulsion of circumstances.

Nor should we be too dismissive of the position of those whom we classify as 'very rich'. In practice, this class of litigant consists mainly of corporations. For them, litigation is a cost of business, and most of them pass, or try to pass, their costs on to others. Thus, when we see two large trading corporations engaged in a protracted commercial dispute, and assume that they can afford the fees they are paying to their lawyers, we should give some thought to the possibility that they will ultimately recover their legal expenses, like their other business expenses, from consumers; that is, from the public.

As judges we have a direct concern in the fairness, efficiency and cost of civil justice, and, to the extent to which it is in our power to reduce unfairness and make

the system more effective and accessible, we have a responsibility to do so. However, we should, if only in the interests of our own sanity, have a realistic appreciation of the limits of our capacity to deal with these problems.

Lord Browne-Wilkinson's observations about case management, and the need to ensure that well-intentioned efforts to minimise a problem do not make it worse, reflect an accurate understanding of the basis upon which modern lawyers charge for their services. That is a matter to which I will return. I sometimes wonder, however, whether judges who give directions to parties, in an attempt to control and expedite litigation, always understand the rate at which the meter ticks over in charging for the services they require to be performed.

His Lordship's thought-provoking references to the German system of justice raise another question in my mind. For a reason I cannot now explain, I associate Germany, amongst other things, with litigation insurance. I wonder to what extent the possibility of insuring people against the costs of litigation has been explored. I also wonder what the consequence for the court system would be if, as a result of insurance arrangements or otherwise, civil litigation became substantially more affordable than it is at the present time. As his Lordship points out, the number of judges per head of population in Germany far exceeds the corresponding numbers in England and Australia. It is hard to accept that it would be possible substantially to increase access to justice, and to permit many more people to commence litigation than are able to do so at the present time, without substantially increasing the size of the court system, including the number of judges. Lord Browne-Wilkinson, closer to European legal systems than we are, has given us this useful reminder. Australians who speak about Continental legal systems rarely, if ever, mention how many more judges there are in those systems than in our own.

In the hope that it may add to the discussion of this important topic, I have formulated, in a fairly shorthand fashion, a few propositions on some issues that may be worthy of consideration.

THE CIVIL JUSTICE SYSTEM

To describe the administration of civil justice in this country or, I suspect, England, as a 'system' may create a false impression. It conveys the idea of a group of participants (judges, lawyers, administrators and litigants) working towards a common objective — presumably the fair, efficient, expeditious, and relatively inexpensive, resolution of civil disputes. In truth, what happens in practice is nothing like that. The so-called stakeholders in the 'system' have in many respects conflicting, rather than common, interests. They are not working together. Indeed, it is not in their interests to do so.

Let me take one commonplace example. The idea that all litigants want their cases heard and determined as quickly as possible is appealing. As a broad

generalisation, that proposition may be true of most plaintiffs. It would be a risky assumption to make about many defendants. Without going into particular examples, there may be some defendants whose interests lie in increasing the cost and delay of litigation, and in making sure that people who contemplate suing them understand that they will be in for a long and expensive haul.

In his paper, Lord Browne-Wilkinson doubts that lawyers raised in an adversarial system will see cooperation as a primary virtue. I agree. However, I would not confine the observation to lawyers. In my time at the Bar and on the Bench, I have come across some extremely adversarial and distinctly uncooperative litigants. Some of the most adversarial and uncooperative litigants I have encountered have not been represented by any lawyer at all. And many lawyers who are regarded as exponents and exploiters of the adversarial system in practice devote a large part of their energies to restraining their clients' enthusiasm for conflict. Consider how often judges urge unrepresented litigants to consult a lawyer, in the hope that the lawyer will cool the litigant's ardour. Judges know that neither lawyers nor litigants are docile subjects for 'management'.

THEORY AND PRACTICE

The provision of standard services, such as routine conveyancing and probate matters, and perhaps the provision of advocacy services in relation to minor or routine litigation, may involve activities of a kind to which the theory of competition policy can be readily applied in practice. The same, however, is not true of many of the services provided by advocates and other lawyers, especially in relation to substantial litigation. There are a number of reasons for this. It is sufficient for present purposes to mention two.

First, there is, or at least appears to clients to be, a high degree of product differentiation in the services that are provided. The skills of advocates are so different, and the marginal advantage, or perceived marginal advantage, which a client obtains from engaging the services of a particular advocate may be such, that the price the client is willing to pay for those services may be relatively unaffected by competitive considerations.

Secondly, competition theory stresses the importance of adequate information being made available to suppliers and consumers of services. Hence the significance attached to advertising. In relation to litigious services that assumption of adequate information is rarely true. There may be a few individual consumers of legal services, such as large corporations, who have their own, well informed, in-house lawyers, who are in a position to judge such things as whether they are being over-serviced. Most litigants, however, have little idea of the extent of their need for legal services once they become engaged in litigation. Most litigants are in no position to judge whether the degree of time and attention being devoted to their cases is excessive

or insufficient. Most litigants, for example, have no idea of how much time and effort should be put into the process of discovery. To take an even more basic example, most litigants have no idea whether the bill they receive for copying paper is reasonable or whether the copying was necessary. Competition is important, but some of the assumptions made by theorists, when applied to the provision of legal services in litigation, are unsafe.

TIME CHARGING

My views on this subject are well known. Charging for professional legal services on the basis of the time taken to render those services rewards delay, inefficiency and slow thinking. Time costing is an appropriate mechanism, in-house, for checking upon the efficiency of a lawyer's operations. It is not, I believe, an appropriate basis for charging for professional services.

The results of time charging are obvious and inevitable. They have particular importance in relation to proposals for case management. Insofar as case management involves judges directing lawyers to do things, judges need to bear in mind that most work lawyers do is now charged for on a time basis. Time charging is of particular significance in a process, such as litigation, which exemplifies Parkinson's law: work expands to fill the available time. When people are being paid on the basis of time spent, why wouldn't it?

STANDARDISATION AND DIVERSIFICATION

There is a common assumption that standardisation of legal practice and procedure as between various jurisdictions, or within jurisdictions, is an end in itself. That is an over-simplification, often made with a view to the convenience of administrators rather than the benefit of litigants. There ought to be standardisation where standardisation is appropriate, and diversity where diversity is appropriate.

The reason we have different levels of courts in our court system is based upon a recognition of the importance of appropriate diversity, and it originated in an attempt to save money for litigants. The reason for the creation of the District Court of New South Wales was that ordinary people would not have to litigate in the same way that banks, insurance companies and oil companies litigate in relation to major commercial disputes.

In my view, there should be, within the New South Wales court system, a suitable variety of tribunals for dispute resolution, and a judge or judges with the function of directing the traffic to the appropriate destination. Coupled with this there should be an increased emphasis on summary disposal of proceedings which are amenable to such treatment. I suggest that one of the major differences between litigation in continental European countries and litigation in common law

jurisdictions may be that in continental countries many more cases are disposed of in summary fashion. I agree with those judges of the Supreme Court of New South Wales who have expressed the view that our current rules about summary disposal of proceedings are unduly inflexible and restrictive. This consideration is related in turn to one mentioned earlier: it is in the interests of some litigants to extend, rather than shorten, litigation.

ACCESS TO LITIGATION

Much of the discussion of the cost of civil litigation equates access to justice with access to litigation. I regard that as an error. However, even assuming it to be correct, what sorts of people are seeking increased access to litigation? Whom do they want to sue? What kinds of litigation would they commence if the existing barriers were lowered? Has it occurred to anybody as a possibility that a lot of them might want to sue the government? Only when the answers to questions such as these are known can we predict the size and shape of the future court system that would be necessary to cope with more readily accessible litigation. I am not presently aware of empirical studies directed at finding the answers to these questions. It is one thing to make a study of people who, for one reason or another, have been able to afford to come to the courts. The focus, however, ought to be on people who have not been able to do so. The assumption behind the proposition that access to justice is presently being denied to the community seems to be that there are a large number of frustrated potential litigants. Shouldn't somebody be investigating the validity of that assumption? If it is correct, it has some far-reaching implications for governments and courts.

It may be that, in truth, there is not some huge additional crowd of litigants waiting at the gates of the court system but presently unable or unwilling to enter. Rhetoric about 'access to justice' may be misleading in that respect. It may be that, one way or another, most people who now want to sue manage to do so, although at excessive and unfair cost. If that is the case then reducing the burden of such cost would not threaten the system with collapse. It would simply make the system more just.