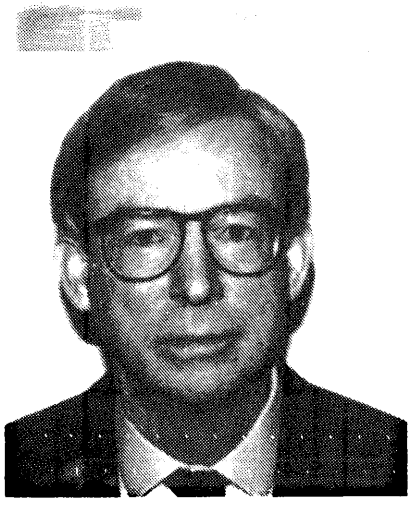
Fairness in a predominantly adversarial system

*By Justice Geoffrey Davies**



Most people who talk or write about problems in our civil justice system say that it is too costly and too slow.

Few would dispute that. Yet to speak of these problems only in terms of cost and delay is to understate them. Worse still, it encourages the common but mistaken view that a nip here, a tuck there, will fix them; or the even more unrealistic view that the provision of more judicial and other court resources will.

It is quite another thing to say that our system is unfair. That statement is likely to meet with antagonism from lawyers and judges who have been raised with the belief that our system is, if not perfect, as near to it as humans can devise. Yet our system operates unfairly in that, both in specific cases and by its general operation, it causes injustice to those affected by it. It is the mind-set of lawyers and judges which are the greatest impediment to change aimed at increasing its fairness.

At the turn of the century, it was mainly men of property and a few corporations who engaged in litigation. Now, almost everyone is a potential litigant. Yet our civil justice system has remained virtually unchanged and is quite unsuited to the huge increase in the number and classes of litigants and in the complexity of litigation. The main reason for this is that it is too labour intensive, resulting in high costs and long delays. These are themselves immediate causes of unfairness and can be exploited to cause further unfairness.

Often, the costs of going to trial are grossly disproportionate to the amount or value in dispute. For a losing party they may exceed that amount or value and for a losing party of average means they may be ruinous. A system that has those consequences cannot be fair.

Excessive delays also increase cost. The longer a case runs, the more it will cost; essential tasks tend to be repeated and marginally relevant ones undertaken. Indirectly, clients' resources may be tied up and income earning opportunities

forsaken because of the length or uncertainty of result of the litigation. Delay may also have an emotional cost. It may also affect the reliability of the result. Memories become less reliable and reconstruction tends to replace recollection.

Our justice system encourages an 'adversarial imperative', the compulsion of each party to see the other as the enemy. The system is designed along the lines of trial by battle. By focusing on winning and losing, it 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 litigants who can afford better lawyers and greater expenditure of labour and, by leaving the pace and shape of litigation substantially to parties, it permits that advantage to be abused.

Systemic changes can help to eliminate or at least diminish those tendencies, but unless lawyers and judges appreciate the need for fundamental change, they will not have much effect. Lawyers can circumvent changes they do not like and judges, comfortable in an existing system, will tend to construe rule and legislative changes in a restrictive way.

What is needed is a realistic appreciation of the defects in our system, in our fees structure and in our mind-set, which together make dispute resolution so labour intensive and unfair; a recognition that, to achieve a fair system, a new balance must be struck between accuracy of result and cost to the parties and the public; an appreciation that some disputes can and should be prevented; and a recognition that an interest-based solution to a dispute may sometimes benefit both parties more than a rights-based solution will benefit either.

That is no easy task. Resistance to change among lawyers and judges is institutionalised and the adversarial imperative is strong. Moreover, economic pressures upon litigants and their lawyers are making them more adversarial. Proposals which have the effect of reducing the cost of litigation, because they also necessarily have the effect of reducing the amount of money that ends up in lawyers' pockets, are unlikely to be welcomed by many in the profession.

Near perfect justice?

Perhaps the most pervasive and strongest of those mind-sets that inhibit change is a belief that, whatever its faults, our civil justice system delivers near perfect justice or at least as near to perfect as human endeavours can devise. A corollary to that belief is one that any reduction in the labour intensiveness of existing procedures will result in a corresponding reduction in the quality of justice.

However, this fails to take into account cost, the interests of potential litigants and the public interest. Even if substantial cost reduction diminishes the accuracy of result it may nevertheless be necessary, in order to enable citizens of average means to have their disputes resolved fairly, to strike a new balance between accuracy of result, on the one hand and, on the other, cost and the interests of others.

Our system, for a number of reasons, involves serious risk of inaccuracy, both at the fact finding and at the application of law stages of the judgment process. Lawyers, to some extent, recognise this and acknowledge there is often no one certain result to litigation, but rather a range of likely results.

It also involves serious risk of unfairness of procedure. Lawyers are not equal in ability and, generally, those who are perceived to be better command higher fees. So the richer litigant can afford the better lawyer and pay for more time to be spent on case preparation. Fairness of procedure in our system assumes equality of bargaining power, which rarely exists.

Even between the parties to a dispute, the corollary that any reduction in the labour intensiveness of existing procedures will result in a corresponding reduction in the quality of justice is not always true. Let me give two examples, thought by many to be radical reforms. The first is the use of court-appointed experts. The second is to require mutual disclosure of relevant witnesses, favourable and unfavourable. These reforms are likely to reduce court time and costs, by avoiding duplication of evidence gathering. They are also likely to increase the accuracy of result by making

witnesses less partisan and by making available all relevant witnesses known to either party. They will also increase fairness of procedure by making the resources of the richer litigant available to the poorer one.

Even if we ignore the unfairness that our system may allow between parties of unequal wealth, it is impossible, in determining what is fair, to leave out cost, for a system that yields a fair result in accordance with legal rights and a procedure that is fair between the parties, but at a cost which a disputant of average means cannot afford or which is grossly disproportionate to the amount involved, will not be fair. Secondly, a system that yields a fair result between the parties to a dispute may be unfair to other litigants waiting in line or may be contrary to the public interest in the most efficient use of court resources. These wider matters must be borne in mind in considering whether any system is fair.

So the question is not whether less labour intensive procedures must be adopted, but where the balance must lie between, on the one hand, accuracy of result and, on the other, cost, delay and fairness to the parties and the public interest in the best use of a scarce public resource. If, in our system, there are many cases in which the costs of the losing party exceed the amount or value involved in the dispute and if repeat litigants have their costs subsidised by the public through tax deductions in disputes with first time litigants, to give but two examples, it is plain that the balance must shift substantially in favour of a simpler, more evenly balanced system. We must move to a less though still predominantly adversarial system to make it more readily accessible. My point is not so much where that balance lies, but that there is no real prospect of achieving it if lawyers and judges cling to plainly erroneous beliefs that our system already delivers near perfect justice.

No stone unturned

Legal education, professional ethics, financial pressures and community expectations of an unqualified right to 'a day in court' all contribute to the adversarial imperative. Associated with this is the 'no stone unturned' mentality; the compulsion to take every step that could conceivably advance the prospects of victory or reduce the risk of defeat.

It is, I think, a consequence of our training that few lawyers ever appreciate that a solution reached by the application of legal principles to the facts found may not be in the best interests of either party to a dispute and that there may be another solution which will better advance those interests. Where they consider alternative means of dispute resolution, such as mediation, many lawyers tend to perceive it as a compromise because of the uncertainty and cost of litigation.

Civil justice reform is as much about changing mind-sets such as these as it is about changing procedural rules. Making less labour intensive and less adversarial procedures available will not achieve substantial reform unless those who use them are persuaded of the need to change. Combating those mind-sets and the economic pressures on lawyers to adhere to them requires a combination of incentives and sanctions.

Possible solutions

Several courses can be taken to induce the necessary change in attitude by lawyers and litigants. The first is to change the education of lawyers and judges; a long term project, which is unlikely to produce significant short term change.

However, more immediate results will be produced by providing economic incentives to resolve disputes by means which are less labour intensive than litigation; if disputes cannot be resolved otherwise than by litigation, to provide economic incentives to lawyers and litigants to resolve them by the least costly and quickest means; and to impose economic sanctions on those who unreasonably build up costs or delay.

If it is in the public interest to provide economic incentives to resolve disputes by means less labour intensive than litigation, it is contrary to the public interest that, for repeat litigants, the costs of litigation should remain tax deductible. There would be more sense in subsidising, by tax deduction, the costs of both parties of resolving a dispute by agreement or by some simpler adjudicatory procedure.

Under our existing cost system, the economic interests of lawyers are inconsistent with those of their clients. It is therefore in the interests of litigants to provide economic incentives to their lawyers to resolve disputes early. There is a good deal

to be said for allowing a fee uplift, perhaps up to 100 per cent of scale fee, for early but fair resolution, the uplift decreasing with time. Requiring justification of such an uplift to a court assessor should reduce the risk of abuse by lawyers.

Whilst fee uplifts are unlikely to be controversial, at least among lawyers, any suggestion of economic sanctions upon parties and, especially, their lawyers is bound to excite opposition. Nevertheless there is much to be said for rules providing for costs sanctions upon parties and their lawyers who, in the opinion of the court, unreasonably build up costs or delay.

One of the causes of the 'no stone unturned' mentality is the fear, which has some justification, that if some stone is left unturned, it may be a crucial omission which renders the lawyer liable to his or her client. That fear is likely to inhibit lawyers from using cost or time saving proceedings that might affect the result. It should not be difficult to draft legislation to overcome this problem.

Another possible solution is to change many of the professional ethical rules, which accept and even encourage adversarial attitudes of confrontation and concealment, to rules that require greater cooperation and candour and to impose sanctions for their breach. I intend no criticism of the legal profession with this statement. These rules are simply a product of the system, but if the system is to change, so must those rules.

Finally, litigants need to be better informed of the likely outcomes, options and costs for the resolution of disputes. Lawyers who fail to perform their obligations should incur cost penalties.

The starting point of civil justice reform in Australia must be the acceptance by lawyers and judges of a new concept, within a predominantly adversarial system, of fair dispute resolution; one that involves greater frankness between disputants and their lawyers, which is less adversarial and accepts that costs, the rights of others and the public interest are relevant considerations. It is only if this is accepted that a system will evolve which enables disputes to be resolved without undue delay, at a reasonable cost and with little or no diminution in the quality of the result.

If lawyers accept this, their clients will too. But, if courts and lawyers do not provide quicker and cheaper dispute resolution they will cease to be used and will consequently lose both their authority and their status.

** Justice Geoffrey Davies is a judge of the Queensland Court of Appeal.*

This article is an edited version of a paper given to a conference, held in Brisbane in July which was co-hosted by the Australian Law Reform Commission and the National Institute for Law Ethics and Public Affairs. The full paper will be published in a book Beyond the Adversarial System, to be released by Federation Press in Autumn 1998.