Reforming Civil Litigation

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‘This is what has to be remembered about the law; beneath that cold, harsh, impersonal exterior beats a cold, harsh, impersonal heart.’
David Frost, British Journalist, TV Personality

‘Avoid lawsuits beyond all things; they pervert your conscience, impair your health, and dissipate your property.’
Jean de la Bruyere, French Philosopher & Essayist

‘A lawyer will do anything to win a case, sometimes he will even tell the truth.’ Patrick Murray, American Politician

Preface

In 1967 I was in the second year of my law degree. I appeared in a moot in constitutional law. Mr Russell Fox QC kindly acted as judge. In my submission I cited to him a legal textbook. There was then a convention that one could cite a textbook only if the author was deceased. Mr Fox therefore put the question to me: 'Mr Enright, is the author of that text dead'. I replied 'Not physically Your Honour'. Only as a raw and pretentious ungraduated can one descend to that level of humour and at the same time think he is clever.

A decade or more on I ran into Evan Whitton and engaged him enthusiastically on the subject of rugby, which was then actually worth watching. Later we drifted to other matters including his journalistic work on crime for which he was widely praised. In discussing politics and the inertia for reform we coined a phrase that politicians were mindless because too often the whole show was just party hacks responding to party whips.

Years on my path crossed the paths of each of these men. As my interest in litigation reform developed I read from the books that these men had written. Russell Fox wrote *Justice in the Twenty First Century*.[1] Evan Whitton has written several forthright books on law and criminal justice including *Our Corrupt Legal System*.[2] As my interest in litigation reform grew I contacted Evan Whitton and renewed our acquaintance. I was quickly captivated by his knowledge, enthusiasm and commitment to reform.

I am indebted to both of these men for their example and to Evan Whitton for his unfailing personal support. As the saying goes, those who come afterwards stand of the shoulders of those who have gone before.

This book is a spin off from my research into legal method. In that research I tried to devise methods for performing the various tasks with law that are needed in a law school. In other words it was focussing on the academic side of law. My goal was both to systematise and to simplify the academic tasks in working with law. In this book I have focussed on the major tasks with litigation.

My main reason for examining litigation in more detail came from my attempts to explain to students the fundamentals of the most common form of litigation, namely litigation that involved a dispute of facts. I soon realised that the model that I devised for this purpose, the model for litigation, had an interesting spin

1. Details of this book are in the Bibliography.
2. Details of this and Evan Whitton's other books are in the Bibliography.

off – on paper at least, it seemed to provide the basis for a simple yet highly effective system of pleading for cases involving a dispute of facts (as most cases do). This is why the system of pleading proposed in Chapter 11 is squarely based on this model.

Most of my proposals are not based on dedicated empirical research. Instead, I have focused on areas that have been regarded as problems and proposed what seem to be to be rational and workable solutions. That said, there is an obvious caution. As the saying goes, all innovation is experimental. Therefore when making change it is necessary to do so in a way that provides some testing of the underlying ideas. The ideal means of testing, which would apply to some of the proposals in this book, is to have judges try them out on a small scale. By appropriate monitoring, analysis and further trial and error it should be possible to determine if the proposals can be made to work.

So, I now say thank you – to Russell Fox for his enthusiastic and thoughtful contribution to reform, to my mentor Evan Whitton for his support and encouragement as well as the ideas from his books, to my editor Alana Henderson for her dedication and skill, to my friend Terry O'Donohue for his reading and editing of the manuscript, and to my family for their unfailing love and support.

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Chris's areas of speciality are legal reasoning and legal method. His major publications are the following:

Legal Reasoning (2011)
Legal Method (2011)
Legal Writing (2011)
Proof of Facts (2011)
Legal Research (forthcoming)
A Model for Interpreting Statutes (forthcoming)

These books are published by Maitland Press.

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1. CA refers to Court of Appeal.

Labels

Introduction

Discussion in this text explains legal method by reference to models. Sometimes discussion refers to any item such as a statute or a meaning of an ambiguous provision. On other occasions, though, it refers to a collection, list, range or set of items. Here the labelling system is explained for the benefit of readers. The explanation sets out the general use of labels. It is possible that there may be variations for special cases. Where this happens the text will indicate that it is a special case or it will be obvious from the context.

General Form

Labels

To designate an item in an abstract way the label or name of the item commences with a capital letter. Major examples are Element, Statute and Meaning.

Numbers

Abstracted items in a set, range, list or collection are numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Capital Letters

Where an item is illustrative of some possibility it is designated with a capital letter, for example Meaning X. A second such item could be designated with some other letter, for example, Meaning Y.

Special Devices

Range of Items

A range, set, collection or list of items is conveniently designated by the first and last member linked with a hyphen. For example, where a legal rule has four elements the list or range of elements can be designated as Elements 1-4.

Use of 'n'

In a particular instance there will be a specific number of items in a set. For example a particular legal rule might be composed of five elements so that the range of elements would be designated as Elements 1-5. In contrast to this there is the case of a general model that tries to represent all cases of a set. Obviously the number of items in the set will vary from case to case. This is catered for the by designating the last item in the list by using the standard mathematical designation 'n'. This means, for example, that the list or range of elements of any legal rule can be represented as Elements 1-n.

Use of '0'

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, using the obvious example, with the proposed making of a statute where one option is just not to enact a statute. In this case the option is labelled with the symbol for nought, namely '0'. Thus the option not to enact a statute is designated as Statute 0. Statute 0 represents the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2, 3 etc are options for different versions of statutes on the topic.

Use of '≡'and '≈'
In some places the text refers to one thing being the equivalent of another, or in plain language 'matching'. For example, legislation is enacted to achieve a desired effect and if it is achieved the desired effect matches the actual effect. In diagrams this relationship is represented by ≡ which is the standard mathematical notation for equivalence. However, there is an alternative, namely that in practice the best actual effect is not the equivalent of the desired effect but is an approximation. This is indicated by the 'approximately equal to' symbol (≈).

Two or More Versions of an Item
If there are two or more versions of an item they are distinguished by additional letters or numbers as the case requires. For example:
(1) If Element 2 has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.
(2) If there are two versions of Fact 2 in a case, one propounded by the plaintiff and the other put forward by the defendant they can be designated 'P' and 'D' to signify the plaintiff's and the defendant's versions. Thus the two versions are Fact 2P and Fact 2D.

Subdivisions of an Item
Subdivisions of an item can be designated with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, they can be designated Element 2.1, Element 2.2, and Element 2.3. This process can keep going. Thus, if Element 2.2 has two subdivisions they can be designated Element 2.2.1 and Element 2.2.2.

Corresponding Items
Sometimes there are sets with corresponding items. This can occur for a number of reasons:
(1) For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect (if the statute is enacted or the meaning is declared by a court to be legally correct).
(2) In the model for using law, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category.
(3) In the model for proving facts (which is contained within the model for using law) facts and evidence correspond because each fact is proved or potentially provable by a piece of evidence.

Corresponding items are labelled with the same number. To illustrate this:
(1) Statutes and meanings causing effects. Statute 0 causes Effect 0, Statute 1 causes Effect 1, Statute 2 causes Effect 2 and so on. Meaning 1 causes Effect 1, Meaning 2 causes Effect 2 and so on. Similarly, Statute X (or Meaning X) causes Effect X while Statute Y (or Meaning Y) causes Effect Y.
(2) Facts satisfying elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
(3) Evidence proving facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

Labels of correspondence can also be used to make collective statements. For example, Statutes 0-n cause Effects 0-n, and Evidence 1-n proves Facts 1-n. These collective statements

are to be construed according to the maxim *reddendo singula singulis*. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so that each item in the first list is paired with the corresponding item in the second list.

Tables

As has been stated a list of items can be designated by reference to the first and last item. For example, the meanings of any ambiguous provision can be designated as Meanings 1-n. Lists such as these are often represented in a table. For example, Meanings 1-n can be represented in a table in the following way:

Meanings
Meaning 1
Meaning 2
Meaning n
Figure 1 Meanings

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when n = 2. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities. This is why an item numbered '2' is included in all similar lists.

Diagrams

Tables can be amalgamated to become a diagram. A diagram generally has two or more columns and rows. Generally a column has a heading. In discussion the book refers to these as follows:

Columns: by their number from the left hand side to the right hand side – Column 1, Column 2 and so on – even though the column label and number are not displayed in the diagram.

Rows: by their number from the top to the bottom – Row 1, Row 2 and so on – even though the row label and number are not displayed in the diagram

To illustrate the use of a diagram, the meanings of an ambiguous provision and the effect that each would cause if declared legally correct by a court are set out in the diagram below, being Figure 2. In this diagram Column 1 shows the meanings and Column 3 shows the effect that each meaning causes. Column 2 contains an arrow pointing from Column 1 to Column 3 indicating that each meaning in Column 1 causes the corresponding effect in Column 3:

Meanings	→	**Effects**
Meaning 1		Effect 1
Meaning 2		Effect 2
Meaning n		Effect n
Figure 2 Meanings and Effects		

Probability

A number of symbols are used for probability:
P(A) = probability that event A occurs
P(B) = probability that event B occurs
P(A ∪ B) = probability that event A or event B occurs (A union B)
P(A ∩ B) = probability that event A and event B both occur (A intersection B)
P(A') = probability that event A does not occur

P(A | B) = probability that event A occurs given that event B has occurred already (conditional probability)
P(B | A) = probability that event B occurs given that event A has occurred already (conditional probability)
P(B | A') = probability that event B occurs given that event A has not occurred already (conditional probability)

ϕ (the empty set) = an impossible event
S (the sample space) = an event that is certain to occur

Summary

Chapter 1 Introduction

This book sets out a range of proposals for reforming civil litigation to make it more effective or more efficient. As with any new proposals it is advisable to test or trial them in some way before full introduction.

Chapter 2 Barriers to Reform

The greatest barrier to reforming the legal system is constructed of lawyers. Judges, barristers and solicitors are generally steadfastly against change. It is a matter of speculation as to why this is the case. However, a possible motive arises because any proposal to make law more financially accessible will potentially lower the income of lawyers. Lawyers tend to be good with words, but money speaks a language that most of us understand all too well. Moreover, making cases simpler makes law look less complex—when law is seen to be less complex it makes it harder for lawyers to charge high fees.

Chapters 3-5 Defining the Goals: Effectiveness and Efficiency

The core goals for any entity that performs a task are: effectiveness and efficiency. Ideally a court is as effective as it can be with maximum efficiency. In some cases though, it may be necessary to make a trade off between effectiveness and efficiency by taking the course of action that yields the highest net benefit.

Effectiveness

The measure of effectiveness of a court is how accurately it resolves the issues before it:

Facts. A court has to determine the true facts of a case in the face of competing versions of the facts

Law. A court has to determine the correct interpretation of a statute when a provision in the statute is ambiguous. Where the dispute concerns common law the court has to decide the best version.

Discretion. A court has to determine the best way to exercise discretion when that is an issue in a case.

There is a short and simple point about effectiveness and courts. Generally, it is not possible to determine the effectiveness of a court since there is no usable scale for measuring effectiveness.

Efficiency

There are two primary measures of efficiency in relation to litigation namely time and money. How long does the case take? How much does the case cost the

parties and the government? In practice both costs and delay are considered endemic problems in litigation.

Chapter 6 Structural Change

Courts

Australia has a multiplicity of court systems, which adds to cost and confusion. A simple reform would be to abandon the present courts spread through the jurisdictions. In its place create a uniform Australian judicial system with one set of courts and tribunals for the whole of Australia. This will reduce the public and private costs of litigation.

Statutes

A federal form of government with one central government and nine regional (state and territorial) governments creates a major oversupply of statute law. This adds to the cost of justice and to the cost of the legislative and the administrative arms of government. One solution is a unitary system of government, which would require abolishing the states. This is probably not politically feasible at present. A fallback option is to aim to make law across the jurisdictions as uniform as possible, especially in the areas where litigation abounds.

Chapter 7 Technological Change

Some technological changes will make it simpler and quicker to dispose of a case. There are three connected proposals:

1. Documenting the Case. Require the parties to document their respective cases.
2. Electronic Documents. Have the documents in electronic form.
3. Computer Systems. Use a computer system to organise and retrieve information.

Chapter 8 Systemic Change

Australia generally operates its courts using an adversarial system. Under this system the conduct of the case is in the hands of the parties. Several jurisdictions in Europe use an inquisitorial system in which the judge actively handles the case with appropriate inputs from the lawyers for the parties. In France this is based on a code of civil procedure, Civil Code of France, which was designed to achieve maximum effectiveness and efficiency.

Basic observation of the two systems is: cases in France are disposed of well and at far lower cost and with far less delay than there is in our system. This makes a strong case for Australia to abandon the adversarial system and to adopt an inquisitorial system.

Chapter 9 Organising the Case

With some isolated exceptions that pose few problems, every legal rule, including the rules that authorise one person to sue another, have a standard structure based on the application of the rule and the consequences of the rule.

Application of the Rule

Legal rules have elements that determine when or to what classes of fact the rule applies. Each element designates a class of facts. If the legal rule is to apply to a given set of facts, there must be facts within the set that fall within each of the classes of facts to which the element of rule specifies. So if we label the elements as Element 1, Element 2 and so on it is necessary that there is a fact that fits within these elements. To highlight how the rule functions we can label the facts in a manner that corresponds to the elements. Thus, Fact 1 is the label for a fact that satisfies or fits within Element 1, Fact 2 is the label for a fact that satisfies or fits within Element 2, and so on. For the rule to apply the general formula is that Facts 1-n satisfy or fit within Elements 1-n. Lawyers call the facts that satisfy the elements of cause of action the material facts.

Proof of the Facts

Most legal disputes are based on disputes of fact. Each party tries to prove the key facts of their case with evidence. A plaintiff has to prove Facts 1-n but excluding those facts on which the parties agree. Evidence for each fact can be labelled with a corresponding number. So Evidence 1 is the evidence that is capable of proving Fact 1, Evidence 2 is the evidence that is capable of proving Fact 2 and so on. Collectively Evidence 1-n is the evidence capable of proving Facts 1-n.

Consequence of the Rule

In litigation when a court finds that a legal rule applies to the facts of the case it makes the orders on the parties. These orders are the consequences of the rule applying to facts. In civil cases the common consequence is an award of damage to an injured party. In a criminal case the consequences involve punishment of a guilty party.

Diagram

The author calls this arrangement of elements, consequences, facts and evidence ‘the model for litigation’. A basic version can be set out in a diagram in the following way:

Law	←	**Facts**	←	**Evidence**
Element 1		Fact 1		Evidence 1
Element 2		Fact 2		Evidence 2
Element n		Fact n		Evidence n
↓				
Consequences				

Figure 1. Model for Litigation: Basic Version

Chapter 10 Pleading Case

In their pleadings each party attempts to describe their case in outline. If they do this properly, the points of disagreement, i.e. the issues in the case, will become apparent. Unfortunately this does not happen, mainly because lawyers have little sense of how to organise a case. This has at least two consequences:
1. The issues are not clear to the parties and to the court until the case has progressed for some time.
2. As a consequence, the information in the case is not well organised and is often not organised at all.

To rectify this, I propose a system of pleading for a case involving a dispute of facts. This system of pleading is based on the model for litigation that is described above. Essentially, a plaintiff sets out the basis of their case in the their pleadings and asks the defendant to indicate where and how they disagree with the plaintiff's case. On this basis the plaintiff's pleadings will set out the following:
1. The elements of the legal rule.
2. A statement of the basic facts of their case that obviously includes each of the material facts.
3. A précis of the evidence that they can use to prove each material fact. (This could come later in the proceedings and may need amendment as parties further investigate the facts of the case in response to the issues.)
4. A statement showing how there is a material fact to satisfy each element of the cause of action.

In their reply the defendant indicates where they disagree with the plaintiff's assertion and give their version. The defendant's pleadings should include a statement of the basic facts of their case that canvasses where necessary the material facts.

Once the pleadings are complete it is clear where the issues lie. Parties then prepare a joint statement for the court that sets out the issues.

To assist the court, if the case has to go to trial the parties can amalgamate their respective statements of facts. Where the parties agree, this will state the facts. Where the parties disagree, it will state this and state the separate accounts of the disputed facts. Footnotes can refer to the evidence that the parties will use to prove their facts.

This amalgamated statement of facts has two obvious uses:
1. It guides the parties and the court at the hearing of the case (if it comes to that).
2. It becomes the major part of the text of the court's judgment. Essentially, all the court has to add is state for each set of disputed facts which version it judges to be the truth.

Chapter 11 Assembling the Evidence

If the case has to go to trial the parties hold an evidence conference where they can have a judge or a court officer presiding if requested by one party. At this conference they do several things:
1. They make clear or confirm the facts on which they agree and disagree.
2. They set forth the evidence that they already possess that they will use to prove disputed facts.
3. They will indicate what type of evidence they need that is likely to be in the other party's possession or control; they will then request that this party hand over the evidence.
4. They can reconsider the possibility of settlement.
5. The parties will file an evidence statement indicating in outline what evidence they will use to prove the disputed facts. There will be an advantage if the rules of court required parties to go further and to file a statement from each witness stating their evidence as a means of putting the evidence before the court.

Chapter 12 Managing the Submissions

A way to improve the effectiveness and efficiency of a case involving questions of law is to introduce some techniques from project management to deal with the dependencies that occur in the process of interpreting law. The dependency here takes this form: it is not possible to commence some steps in the process of interpreting a statute until the previous step has been completed. This is generally the case because what is to be done in the next step builds on what was done in the preceding step.

To identify these dependencies it is first necessary to state the steps for interpreting a statute:
* Step 1 Organising the Rule
* Step 2 Identifying the Issues
* Step 3 Identifying the Meanings and Effects

* Step 4 Identifying the Purpose and Object
* Step 5 Identifying the Correct Meaning
* Step 6 Proclaiming the Decision

To summarise, there is a dependency when it is not possible to start or at least complete one step until the prior step is complete. On this basis there are two sets of dependencies:
1. A dependency linking Steps 1, 2 and 3.
2. A dependency linking Steps 4, 5 and 6.

Under present arrangements a court typically has one hearing where it deals with Steps 1 to 5. The problem in having one hearing comes from the dependency. For example, it is not possible to identify the meanings of the ambiguous provision and their predicted effects in Step 3 until Step 2 has finished and the issue has been identified. By holding just one hearing there is no account of the dependencies. Consequently, if any step in the range Steps 2-4 is not done properly if will undermine the efforts of the parties and the court for interpreting the statute.

The way to proceed for Steps 1-5 is to take one step at a time. In other words, do not proceed to the next step until the current step has been taken satisfactorily. A way to facilitate this is to conduct the hearing by electronic submissions instead of court appearances. In each of these hearings it should be possible to go back and forth between the parties and the court to ensure that the item is fully and properly managed.

Chapter 13 Mending the Lawyers

Mending the lawyers encompasses a proposal for three changes. These involve legal training, the duties of lawyers and judicial appointment.

Legal Training

Avoid both the duplication (27 law schools) and the quality problems of current degrees (courtesy of changes flowing from the reforms initiated by John Dawkins) by handing the training of lawyers to the legal profession. Law degrees are in broad terms a homogeneous product. Therefore the legal profession could run one law degree on line for the whole of Australia. In order to implement quality three things are necessary:
1. Admit to the degree those who have the requisite ability. A good entrance exam would be a test based on the comprehensive online grammar course run by University College in London.
2. The path to both quality and effective learning is to prepare textbooks or lecture notes that set out the relevant principles and do so in a structured

manner. It will be prudent to direct a lot of quality control toward developing a clear and readable text of high standard.
3. Include in the syllabus some items that are currently absent from current law degrees or dealt with sparsely, namely a proper introduction to the legal system and proper training in both legal reasoning and legal skills.
4. Ensure that the examinations set a sufficiently high standard. A time-honoured means is to appoint external examiners to review and audit student answers after they have been marked.

Duties of Lawyers
Impose a duty on lawyers in litigation to act in the interests of a fair and speedy resolution of a case as well as in the interests of their client.

Judicial Appointment
Adopt the continental system of making judging a separate career. Once a person is chosen they undergo the requisite training and work experience.

Chapter 14 Providing Low Cost Legal Representation

There are two related problems that now beset courts: there are not enough legal aid resources to meet the demand for them; and many litigants are unrepresented. There is a partial solution that is a compromise but that will alleviate the problem to a significant extent. There are two strands:
1. Limited Scope Representation. Provide limited scope representation (LSR) in some cases as an alternative to full on legal aid. This does not involve appearing for a party in court. Instead it involves preparing a party's case in documented form according to the model for litigation. Once the case is prepared in documented form it can be filed in the court or tribunal. This scheme will need to be done with the approval and cooperation of the relevant courts and tribunals. It will also work better if the courts and tribunals adopt rules of pleading that allow, and preferably require, parties to plead their case according to the model for litigation that is explained in Chapter 9.
2. Internship for Trainee Lawyers. Make working in legal aid for say, two or three months (or possibly more) a part of the practical legal training (PLT) for lawyers.

This scheme reduces the cost of legal aid in two ways:
1. It reduces costs by not providing full legal representation. At the same time it ensures that a party's case is presented to the court or tribunal in documented form.
2. Since it uses trainee lawyers it reduces labour costs. At the same time it provides real world hands-on training for new lawyers. This is a positive externality of the scheme.

Chapter 1
Introduction

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Introduction

This book sets out a number of proposals for reforming civil litigation. While civil litigation is the designated target, they may apply to criminal cases—but there is no guarantee. Put simply, there are both areas of similarity and areas of difference between civil and criminal cases. Consequently, criminal adaptation must be preceded by careful thought.

Origin

The proposals in this book for improving civil litigation did not follow a direct path. Nor did I set out on the road to reform it. This is how it happened.

At the start of my academic career I chanced upon research into legal method (where the aim was to systematise and simplify the tasks that law students and lawyers do with law). I commenced this research because in my first year of teaching some of my students asked for advice on 'how to answer a problem question'. To the best of my knowledge there was little that lawyers had written on it (which reflects something that I later observed more fully, namely that lawyers and law teachers tend to be 'skills-averse').[1]

One of the main leaps from legal method for students to proposals for improving litigation was the model for litigation, which I stumbled on during my research. Initially I developed this for explaining to law students the basic way in which litigation worked in a case founded on issues of fact. But after recovering from the stumble, it became clear that the structure that I had chanced upon provided a framework for organising the case. For this reason, it was a natural base for devising a system of pleading. It was so obvious that a whole micro-second

1. Some year later some lawyers did develop a method for answering problem questions that is known by as the IRAC method. In my view it is deeply flawed; by way of illustration of the basis for this criticism I point out that it does not reflect any understanding of the fact that most legal rules are framed as conditional statement. This proposition must lie at the basis of a method for answering problem questions. For my method see Christopher Enright (2012) 'How to Answer a Problem Question'.

passed between seeing the structure and recognising how applicable it was to pleadings.

Outline

To assist the reader this chapter presents a simple outline of the remainder of the book. It is set out in the following diagram:

Chapter 2	**Barriers to Change**
	This describes the major barriers to change, which come largely from the culture of the legal profession.
Chapters 3-5	**Goals of Courts**
	The rationale for change is that present arrangements of resources do not achieve the desired functioning of any institution, namely that they achieve their goals with effectiveness and efficiency. This means that discussion logically starts with examining two related topics:
	1. The goals of courts
	2. The impediments to achieving those goals with effectiveness and efficiency.
Chapters 6-15	**Possibilities for Change**
	These chapters take the various possibilities for change one at a time. The chapters explain how change could be made that would improve the effectiveness or efficiency of courts.

Figure 1.1 Outline of the Book

Summary

There is a summary of this book in the section 'Summary'. It is located in the preliminary pages.

Parties to Litigation

Parties who initiate a case, and parties who respond to a case once initiated, go under a variety of names as indicated in the following table:

Initiating Party	Responding Party	Use[2]
Plaintiff	Defendant	Civil cases
Pursuer	Defender	Civil cases in Scotland
Applicant	Respondent	Appeals and tribunals
Prosecutor	Defendant	Criminal cases

Figure 1.2 Parties to Litigation

2. The descriptions of use of these labels are illustrative and broad brush.

Labels

The diagrams and models that are used in this book have labels devised by the author. For an explanation of these see Labels in the preliminary pages.

Chapter 2
Law for Litigation

Introduction

This chapter explains the four types of law involved in litigation. To conduct litigation for a client it is necessary to understand the role that each of these four types of law plays in the adjudication of a case. These four types of law are here labelled as action, establishment, jurisdictional and procedural provisions. Action provisions are central because they create a cause of action. The other three provisions–establishment, jurisdictional and procedural provisions–are ancillary because they provide for hearing the cause of action.

Action Provisions

Introduction

There needs to be a legal rule that authorises the plaintiff's cause of action. This rule is an action provision. It contains two specific types of provision namely substantive and remedial.

Substantive Provisions

Substantive provisions set out the elements of the cause of action. These elements do the following:

1. The elements of a legal rule define the types of fact to which a rule applies. Each element is a category of fact. A legal rule applies to a set of facts when the set of facts contains facts that fall within each category delineated by the elements. When a fact in a case falls within that category it 'satisfies' the element in questions. Facts that satisfy an element are labelled material facts.
2. In defining the type of facts to which the rule applies the elements also define the wrong for which the plaintiff can sue.

There are two follow up points to make:

1.In a disputed case a plaintiff needs to prove the material facts, although in practice often only some facts will be in dispute between the parties.
2. When a plaintiff has satisfied all the elements of the cause of action they have made out their substantive case. That means that they can obtain a remedy against the defendant.

As explained below, action provisions are the foundations of the model for litigation. When the litigation takes place in a court, an action provision is described as a cause of action. For convenience, this article uses the term 'cause of action' interchangeably with 'action provision' regardless of where a case will be adjudicated.

Remedial Provisions

Remedial provisions indicate the consequences that follow when the elements of the cause of action are satisfied. In doing this, they define the remedy that seeks to right the wrong that the defendant has caused to the plaintiff.

Establishment Provisions

Where a law has created authority to make an adjudicative decision it is necessary for some court, tribunal or office holder to have authority to adjudicate the case. But before this can happen, it is necessary for some statute to establish this court, tribunal or office. An example of such a statute is s5 of the *Federal Court of Australia Act 1976*, which establishes the Federal Court of Australia. It says: 'A federal court, to be known as the Federal Court of Australia, is created by this Act'.

Jurisdictional Provisions

As stated above, some statutory provision needs to confer jurisdiction or authority on some court, tribunal or office holder to hear and adjudicate the case. There is an illustration of such a provision in s24(1) of the *Spam Act 2003* (Cth). It says: 'If the Federal Court is satisfied that a person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.'

Procedural Provisions

Procedural provisions set down the rules for bringing and hearing a case. Procedural law consists of three main branches of law which are traditionally called 'procedure', 'pleading' and 'evidence':

1. Procedure tells a party, a court or tribunal the steps that they must take or may take in order to bring, defend or hear an action.
2. Pleading is the part of procedure that tells a person the documents that they must prepare, file and serve to set out the details of their allegation, or defence to an allegation.
3. Evidence tells a party how they can prove their case. The law of evidence tells a party what is and is not admissible as evidence to prove facts.

Procedure, therefore, provides the rules of the contest for the parties, and for the court or tribunal. Procedures may be judicial or administrative, they may be optional or mandatory, and may be followed by, or required of, a court, a tribunal, a body, an office holder or a citizen. They may be general provisions for all cases, special provisions for a particular type of case or a mixture. Usually the steps are in sequence or have consequences. Hence the best way to learn and understand procedural law is to know the sequence and the consequences.

Chapter 3
Barriers to Reform

Introduction
Legal Skills
Pleadings
Discovery
Looking to the Future

The business of the law is to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. When viewed by this light it becomes a coherent scheme and not the 'monstrous maze' the laity are apt to think.[1]

Whenever 'access to justice' is pitched as a reasonable-sounding national concern it is invariably put in terms of more resources: more legal aid, more lawyers and more judges. It is rarely, if ever, put in terms of making useful justice reforms that undo the self-serving agenda of the legal profession.[2]

Introduction

There are barriers to reform. They are called lawyers. Lawyers benefit from the current system by the fees that they earn, the power that they wield, the influence that they exercise and the mystique that they create by their failure to explain legal concepts in clear language.[3] Their strong adversarial culture and their self-interest make them unreceptive to proposals for reform that will reduce their earnings from litigation.[4] Evan Whitton argues 'they function like a typical cartel since they act primarily in their own interest'.[5] Some illustrations of how lawyers are so impervious to reason and reform now follow.

Legal Skills

Law schools by and large do not teach skills. Lawyers are generally skills-averse. While any competent surgeon could explain what they do in an operation and why they do it, I have not yet heard or read an appellate judge describe in a coherent manner how they interpret a statute. This is despite their numerous

1. Charles Dickens *Bleak House* Chapter 39
2. Ackland (2013)
3. Whitton (2009)
4. Enright (2012) 'Tactical Adversarialism and Protective Adversarialism'
5. Whitton (2009) pp 30-31

published articles that attempt to do so and the fact that the bulk of the work of appellate judges consists of interpreting statutes.
Not having articulated skills brings advantages to lawyers. Cases take longer and reap more revenue for them. Lack of skills makes the process less transparent and limits the capacity of outsiders to understand exactly what lawyers are doing. In this way it provides some immunity against adverse criticism.

At one time, I contacted the barrister who was responsible for organising continuing legal education seminars for barristers. I explained to him that I had developed a step-by-step model for interpreting statutes. I offered to give a seminar to barristers free of charge. He rejected the offer and was rather contemptuous in doing so. He has since been appointed as a judge.

Pleadings

Currently in litigation, lawyers supposedly describe and define their client's case in their pleadings. In truth, as numerous commentators agree, pleadings frequently do a poor job in this regard. Not surprisingly, these defects have been widely recognised.

Australian Law Reform Commission

On 29 November 1995, the then Attorney-General, the Hon. Michael Lavarch MP commissioned the Australian Law Reform Commission to conduct an inquiry into the federal civil justice system.[6] The Commission was asked 'to focus particular attention on a number of issues relating to the causes of excessive costs and delay', which included pleadings. In 2000, the Australian Law Reform Commission published its report on the federal civil justice system.[7] In that report the Commission lamented that pleadings were 'too often general in scope and inadequately particularised so that there is no narrowing of issues.'[8] In a similar vein Justice John Perry said that 'too often the process [of pleading] becomes a meaningless and wordy ritual, the result tending to obscure

6. Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is 'sometimes' achieved, but 'not often.'
7. Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is 'sometimes' achieved, but 'not often.'
8. Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is 'sometimes' achieved, but 'not often.'

rather than illuminate the issues.'[9] Indeed, so well recognised is the problem that 'it is rare for there to be a discussion of civil litigation without criticism of the rules and practices of pleadings.'[10]

How did the Australian Law Reform Commission respond in relation to pleadings? It made recommendations that lawyers should have some basis for allegations made in pleadings. Apart from that it did nothing; specifically it did not make any recommendation to revise the form and content of pleadings.[11]

My Reform Proposal

Publication of a Book

In 2007 I published a book *Pleading for Change: Managing Litigation by Managing Information*. This proposed a simple and effective system of pleadings that, on paper at least, would ensure that pleadings were effective.[12]

Judicial Response to the Proposals for Reform

I sent a copy of this book to the Chief Justice of each major court in Australia. I attached a covering note, stating that I believed that reforming the pleadings in the manner I suggested might reduce cost and delay in litigation. One Chief Justice wrote a brief note of thanks. The rest were silent. Yet they continued to go through the ritual of publically lamenting the cost and delay that seem endemic in litigation.

Research into Pleadings

I applied to the Chief Justice of one Supreme Court to look at the archives of decided cases. The aim of this research was to see if using my system of pleading would have reduced cost and delay. The short of it was that Court procrastinated until the message became clear – I was not welcome. For this reason I abandoned the research proposal.

Lawyers and Pleading

Lawyers seem little worried by the problems with pleadings. Indeed, part of the traditional practice is to plead a case in a way that leaves their opponent guessing–lawyers do this for tactical advantage. And even if the other side does not plead their case properly, the lawyer does not argue that as a matter of natural justice the court should order them to amend their pleadings so that they do make their case clear. At the same time, lawyers continue to charge the

9. Dunstone (1997) p vii
10. Australian Law Reform Commission (2000) para [7.165]
11. Australian Law Reform Commission (2000)
12. Chapter 11 Pleading the Case sets out this system.

hourly rate to their client for handling a case even though they are not clear about the issues that generated the case.

Discovery

A major problem in litigation is discovery of documents. Each party has an obligation to disclose to the other side, the documents that they possess that are relevant to the case. The current system involves delivering a haystack of documents to the other side and they have to search for 'the needle', being the handful of documents (20 as a round average guesstimate) that are crucial to the case. This entails huge delay and costs (for example $1million or more in a large case).

Recently, the Australian Law Reform Commission conducted an inquiry into discovery. I put in a submission that essentially said as follows:
1. Pleadings. Reform the pleadings [in the manner I indicate in a later chapter[13]] to ensure that the issues are defined early in proceedings. If necessary, have the judge intervene as per case management to ensure that this happens. When parties plead their case according to the model that I propose, the issues should become clear once the pleadings have finished.
2. Evidence Conference. Once pleadings are completed, set down an evidence conference. This allows each party to indicate the evidence or type of evidence that they need to prove their case that the other party is likely to possess. In other words, instead of asking for a haystack and searching for the needle as happens under the current procedures for discovery, ask the other side to hand over the needle by identifying the type of evidence that is needed.
3. Questions. If necessary, allow a party to question the other party on the existence and whereabouts of the types of evidence that might be relevant.

After I made this submission, four relevant things happened:
1. The government changed the composition of the Law Reform Commission.
2. It left in place the chairperson who although a distinguished lawyer, was not a litigation specialist.
3. It replaced the other part time members with four judges who were appointed as part time members. Like other Australian judges these judges had so far been unable to solve the problem with discovery.
4. In its report on discovery the Australian Law Reform Commission handled the core proposal in my submission in a simple way. It completely ignored the core proposal.

Looking to the Future

There is a lesson here that may consist of two pieces of general advice:

13. Chapter 11 Pleading the Case

1. Do not leave proposal for law reform entirely in the hands of lawyers. Contrary to popular wisdom poachers do not always make better game keepers.
2. Reasoning by analogy from these events indicates that it would be foolhardy to allow lawyers the right to regulate themselves, because their self-interest seems too easily to exceed their sense of duty.

Chapter 4
Defining the Goals of Courts

Introduction

Function of Courts

Courts are the constitutionally appointed mechanisms for formally resolving disputes. There are three kinds of disputes:

1. Disputes over how a law should be interpreted.
2. Disputes over how a discretion should be exercised.
3. Disputes over the correct view of the facts of a case. This type of dispute occupies a very major part of the court system.

Goals of an Institution

Any institution such as a court that has been formed for a purpose logically should have two sets of goals. In simple form, these are:

Effectiveness. It achieves the task it is set to do in the best possible way.

Efficiency. It accomplishes this task by achieving this result in the best possible way.

There can, however, be a trade off between effectiveness and efficiency. On this basis the best course of action, that is, the best combination of effectiveness and efficiency, is the one that yields the highest net benefit.

Effectiveness

Effectiveness for a court involves performing as well as possible the three core tasks that courts perform when deciding a case:

1. Resolving Issues of Fact. Effectiveness involves making the best possible finding of facts where best is measured by reference to truthfulness.
2. Resolving Issues of Law. Effectiveness involves making the best possible interpretation of law in relation to any issues of interpretation arise. The best interpretation of a statute under provisions in all of the Australian jurisdictions is that one that will best achieve the purpose or object for which the legislature enacted the statute.
3. Resolving Issues of Discretion. Effectiveness involves making the best exercise of any discretion. The best exercise of discretion is the one that will best achieve the purpose or object for which the legislature enacted the statute.

Efficiency

A court system achieves maximum efficiency when it achieves its goals at the least cost.

Net Benefit

While this basic analysis of 'effectiveness plus efficiency' is useful for focusing on the two key aspects of goals, it has a downside because it simplifies the reasoning. The point is that there can be an argument that justice will be done better if a society seeks an optimal outcome based on a trade-off between effectiveness and efficiency. This is done by calculating or predicting as best as possible the net benefit of possible outcomes and choosing the outcome that yields the highest net benefit. Net benefit consists of total costs minus total benefits. There is, however, a problem with this, namely incommensurability. There are many items where it is nigh impossible to value on any scale of values – it is therefore impossible to add and subtract the values of each individual outcome as is needed to calculate net benefit.[1]

1. Christopher Enright (2011) *Legal Reasoning* Chapter 12 Measurement of Net Benefit

Chapter 5
Effectiveness of Courts

Introduction

Effectiveness in dispute resolution can be achieved in three ways:
1. Avoidance. The dispute may be avoided altogether by putting in place some avoidance mechanism. This is the perfect form of effectiveness.
2. Settlement. The case might be settled. This is a second best method. Parties usually agree to settle when they believe the settlement is beneficial. It comes at some cost, the amount of cost depending on how early or late in proceedings settlement occurs.
3. Trial. The case is resolved by a trial and the ensuing judgment of the court. This is third best for two reasons. (i) Litigation does not necessarily resolve issues fairly. (ii) There are problems with effectiveness. In disputes of fact there is no guarantee that courts can find the truth. In disputes of law there is no guarantee that a court can make the best interpretation of the ambiguous provision that caused the dispute. (Although it is not directly relevant here, there are also problems with efficiency because litigation involves costs in terms of money, delay, stress and disruption.[1])

Avoidance

Introduction

Avoidance of a dispute achieves a perfect outcome in terms of effectiveness in that no dispute arises. As the trauma surgeon says, the easiest case to treat is the one that comes from the accident that does not happen. Whether avoidance satisfies the goal of efficiency depends on the cost of the avoidance mechanism. Thus, if avoidance is low cost and litigation is high cost, then avoidance is efficient. It is obviously less likely to be efficient if the avoidance is high cost and the litigation low cost (which in the real world is unlikely to be a common occurrence).

1. Chapter 4 Efficiency of Courts

Prevention

One Australian firm, Minter Ellison, had gone down the path of prevention in a large way. Prevention, however, is only part of a larger package that includes compliance, information management and risk sharing, which has enhanced the business, profitability and reputation of the firm.[2] Prevention involves somewhat logically, a feedback loop. This entails examining how the incident occurred that gave rise to the litigation then devising and implementing measures to reduce the currency of incidents in the future. As the author of this innovation, Nigel McBride, explained the approach: 'It's not good enough anymore to park the ambulance down the bottom of the hill and say when the car goes through the fence we'll pick up the pieces and charge you. What they want you to do is to teach them how to build the fence at the top of the bend as well, and do both. So you're actually offering a front-end proactive business-focused solution, not simply saying 'we'll be your lawyers when it all goes wrong'.[3]

Social Insurance

Schemes of social insurance can avoid litigation. Or they can provide sufficient compensation to dissuade an injured person from litigation. An example was the National Compensation Scheme for motor accidents that the Whitlam Labor government proposed but could not establish and the provisions in each Australian jurisdiction for workers' compensation. According to Professor Terence Ison, there are defects in relying on tort litigation as a means of compensation, all of which generally make social insurance a better alternative. These defects are: '(1) that the fault principle [that is required for tort liability] is irrelevant to social needs, (2) the problems of evidence and causation frequently make the result of a claim dependent on fortuitous circumstances, (3) that the assessment of damages is largely intuitive [as distinct from being rule based and rational], (4) that minor injuries tend to be over-compensated and serious injuries under-compensated, (5) that compensation depends less on the conduct of the parties than on the availability of liability insurance or a prosperous defendant, (6) that the processing of claims involves inordinate delay, (7) that the system compensates only a minority of injury victims and rarely compensates at all those who are disabled by disease, and (8) that only half of the income of the system is actually devoted to compensation, the remainder being absorbed by the costs of administration.'[4] A further defect is that, because our economy makes us all interconnected, even if we are not directly contributing towards insurance we are probably doing so indirectly: as we buy goods and services the money we pay to the seller flows through the economy and eventually enriches one or more insurance firms.

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2. Gibbs (2007)
3. Gibbs (2007) p 29
4. Ison (1969) p 614

Settlement

A settlement is always effective in that it brings the dispute to an end. However, there is a second aspect to effectiveness: whether it provides a fair solution to the problem that gave rise to the litigation. There is no way of making it absolutely certain that every settlement will be fair but there are ways that will tend in that direction. First, each party must have access to competent legal advice. Second, parties must have a reasonable understanding of the nature of the dispute.

Procedures proposed in this book seek to make parties well informed with low cost procedures. It is possible to create a rule that for a settlement conference, each party must produce a statement of the basic facts of their case. Another possible rule for the settlement process is that one party can ask another party to clarify or amplify their account of the facts and to indicate in a broad way the evidence that is available to prove vital facts. In this way, bit-by-bit parties investigate their case – but do so only to the extent required to further the settlement process so they do not incur unnecessary up front costs.

Trial

There are two aspects to the effectiveness of a trial in disputes of fact:
1. Final Binding Decision. A trial is effective in resolving the dispute in that a court makes a final decision binding on the parties.
2. Accuracy of Fact-finding. Effectiveness also depends on how accurately the court finds the facts of the case. Does it find the truth or not?

Trial: Binding Decision

Introduction

A trial is successful in resolving a dispute of facts between parties in that the court decides the facts and gives a judgment for one or other party. This decision is binding. Any party can take the case further by exercising any mechanism for appeal and review. But apart from this, under the common law rules of *res judicata* and *issue estoppel* the decision of the court is final. The matter and the issues in it cannot be the subject of fresh litigation. In this sense the decision is final. The decision of the court is binding on the parties who must abide by it.

Res Judicata

Res judicata is Latin means ‘the adjudicated case’, that is, the court has heard and decided the case. It tends to be used in relation to civil proceedings. The

criminal equivalent is 'double jeopardy'[5] in the United States,[6] and 'autrefois convict and autrefois acquit'[7] in Australia[8] and England.[9]
Res judicata is shorthand for *res judicata pro veritate accipitur*: a case that has been decided is accepted as the truth. The doctrine or maxim says that 'once the case has been decided, it cannot be re-litigated by the original parties [because in] the eyes of the law the rights and duties of the parties have been conclusively and finally determined'.[10]

Res judicata applies to two types of issues in a case: issues actually raised and issue deemed to be raised:
1. Issues Actually Raised. Res judicata applies to issues actually raised in the case.
2. Issues Deemed to be Raised. Res judicata applies to issues which the parties did not raise but 'which the parties, exercising reasonable diligence, might have brought forward at the time'.[11] In other words, it would have been unreasonable not to plead the issue of fact or law in the case, so the law deems these issues to have been raised. This is known as Anshun estoppel, named after a major case in which the doctrine was articulated.[12]

Issue Estoppel

Estoppel in its most basic sense refers to the situation where a person is, because justice demands it, prevented in legal argument from asserting a fact even though the fact is true. Sometimes, as here, it just means a party is prevented or

5. There was a movie in 1999 *Double Jeopardy* that raised a fascinating conundrum about double jeopardy. A woman's husband disappeared in circumstances that cast some suspicion on her. She was convicted of his homicide. Later the husband was found to be alive. He had faked his death and done it in such a way that it did raise a strong suspicion that she was responsible. At one stage someone suggested to the wronged woman that if she wanted revenge she could kill her husband in cold blood but escape conviction because of the double jeopardy rule.
6. In the United States there is a constitutional guarantee against double jeopardy. The *double jeopardy* rule arises from the Fifth Amendment to the United States Constitution. The relevant parts says: '[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb'. See, for example, *Fong Foo v United States* 369 US 141 (1962).
7. See, for example, *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219.
8. *Davern v Messel* (1984) 155 CLR 21; 53 ALR 1
9. *Connelly v DPP* [1964] AC 1254. The common law rule has now been modified in England by the *Criminal Justice Act 2003*.
10. *Allen v McCurry* 449 US 90, 94, 101 SCt 411 (1980)
11. *Henderson v Henderson* (1843) 3 Hare 100, 114-115; 67 ER 313, 319. See Colbran et al (2009) p 364.
12. *Port of Melbourne Authority v Anshun* (No 2) (1981) 147 CLR 589. See Colbran et al (2009) pp 364-369.

prohibited in some way from doing something.

When two parties litigate, the court will determine issues of fact and law. The doctrine of issue estoppel says that these parties cannot re-litigate the same issue.[13] This is *res judicata* applied to an issue, as distinct from the whole case.[14]

Trial: Resolving Issues of Fact

Introduction

Effectiveness also depends on how accurately the court finds the facts of the case. As the United States Supreme Court has said on several occasions: 'the central purpose of a trial is determination of the truth'.[15] In his text *Proof of Facts* the author has set forth a rational method for a court to resolve issues of law.[16]

There are two potential problems in resolving issues of facts:
1. Having the Evidence. A court ideally needs all of the relevant evidence. Failing that it needs as much of the relevant evidences as can be obtained.
2. Weighing the Evidence. Once the court has the evidence (that is, as much evidence as can be obtained) it has to weigh the evidence in order to decide as best it can the truth.

Having the Evidence

Introduction

Courts do not have any 'first-hand knowledge of the events or situations about which they have to decide what happened' because a court hearing a case did not itself witness the events that make up the case.[17] This is the fundamental problem because no one can know the truth, that is the facts of an event, that they have not personally observed. Apart from the special case of judicial observation, a court has no knowledge of the true facts beyond the evidence given by the parties. Therefore the court depends on evidence to find out the truth of the matter. Here lies one of the problems; while evidence may tell the court the truth, there are several reasons why a court may not have all of the evidence before it.

Limitations on Investigating Facts

There is no foolproof way for a lawyer to investigate the facts of a case. As the saying goes, 'you do not know what you do not know'. Admittedly, in some

13. *Blair v Curran* (1939) 62 LR 464, *Ashe v Swenson* 397 US 436 (1970)
14. *Parkin v James* (1905) 2 CLR 315
15. *Estes v Texas* 381 US 532, 540 (1965); *Tehan v United States; ex rel Schott* 382 US 406, 416 (1966); *United States v Wade* 388 US 218, 256 (1967)
16. Christopher Enright (2011) *Proof of Facts*
17. Twining (1984) p 266

cases the facts operate in an ascertainable framework and can generally be uncovered by a proper search, but this is not always the case.

Power of a Party to Conceal Evidence

Under the adversarial system a party has some power to conceal evidence by resorting to any of three devices:

1. A party is not obliged to call every witness so they can choose not to call a witness who may give evidence unfavourable to their case.[18]
2. The techniques for cross-examination used by trial lawyers emphasise the need for the cross examiner to control proceedings so that, as far as possible, a witness does not have an opportunity to give adverse evidence. One technique is for a cross examiner not to ask a question unless they know the answer or can deal with any possible answer that the witness gives. A second technique is not to allow a witness to explain an answer, notwithstanding that the search for truth demands that they are given an opportunity and that the witness has taken an oath to tell the 'whole truth'.
3. The present law and practice relating to disclosure of a party's case and discovery of that case by the other party is not totally effective in bringing to light evidence that one party possesses that can be helpful to the other party.

Weighing the Evidence

I doubt whether many psychologists realise the extent to which the law operates upon assumptions, which they may disagree with or question. The need for a constant dialogue between the lawyer and the psychologist is apparent. Our objective must be wherever possible to ensure that the perceived truth is the real truth.[19]

Introduction

Loosely but conveniently, lawyers speak of a court making a finding of facts. From a practical point of view, facts are conclusively established for the purposes of a case only when a court makes a finding of fact in its judgment.

However, there is no guarantee that a court's finding of facts will be correct. In consequence of this, even an experienced litigation lawyer cannot operate with any certain expectation that any fact will be 'found' by the court from the

18. The rule laid down in *Jones v Dunkel* (1959) 101 CLR 198 permits a court to conclude that the witness's evidence would not have helped the plaintiff's case where that witness is not called. Note, however, that the inference is only that the evidence would not have helped the plaintiff's case. The inference is not that the evidence would be adverse to the plaintiff's case. Where the witness's absence can be explained the inference will not be drawn. Examples are where the witness is overseas, dead or sick. However, this only applies when the court knows the existence of a witness who has not been called.
19. McClennan (2008)

evidence. The reason for this is that there is not a lot of science involved in weighing evidence. There are two aspects to this:
1. Limitations in the method that courts use
2. Inability to rectify these flaws by trial and error learning.

Model for Proof of Facts

In his text *Proof of Facts* the author has set forth a rational method or model for a court to use in finding facts.[20] It has four steps being starting point, versions of truth, probability of truth and finishing point.

Step 1: Starting Point
This is the province of the rule as to the burden or onus of proof. At the commencement of a case, nothing is taken to be proved except for those facts admitted by a party or agreed to by both parties. The party who initiates the case has it all before them.

Step 2: Versions of Truth
This involves each party presenting their version of the facts to the court. They seek to prove these facts by evidence.

Step 3: Probability of Truth
This involves the court, aided by submissions from the parties, assessing the probability that each version of the facts is correct.

Step 4: Finishing Point
This requires the court to measure the probability determined in Step 3 of the initiating party's case being true with the standard of proof that the law requires of that party. If the party makes or betters the standard they win the case. If they fail to make the standard they lose the case. The standard of proof is the finishing point for the initiating party because if they make their case to this point they have won.

Limitations in the Method

These steps are perfectly logical. Step 3, however, raises a problem, which is now described. The starting point is that there are three forms of reasoning that can be used, namely, cognitive science, induction and trial and error learning. The problem is that these are not capable of providing a certain result when determining the probability of truth. Consequently, there is no comprehensive cut and dried science that enables anyone, including a judge or jury, to accurately determine the probability that evidence is the truth.

20. Christopher Enright (2011) *Proof of Facts* Chapter 3 Model for Proof of Facts

Cognitive Science

Where evidence is based on human observation, the problem is that observation and memory can be inadequate and frail. Also, consciously or unconsciously, a witness can give a false account of what they observed. In the outcome, evidence is flawed: evidence may have told of X when it should have said Y; evidence may have added P when P was not there; evidence may have omitted Q when Q was there.

In order to assess whether to believe observation evidence a court has to rely on cognitive science.[21] Neuroscience has certainly made major advances in recent times. An example is discovery that the human brain is far more malleable than was previously thought to be the case.[22]

That said, there is still a problem because cognitive science has not yet reached the point where it can be used to determine on all occasions and in all circumstances whether someone is or is not telling the truth. Moreover, where the truth has not been told it cannot give a firm answer as to where the real truth lies.

These limits to cognitive science impose limits on a court's effectiveness in finding facts because there is little science involved. Put simply, cognitive science cannot provide a certain and comprehensive method for assessing the probability of truth of disputed facts.[23]

Induction

Induction is another major means of establishing truth.[24] It can be used either to fill a gap in the facts or as a supplementary or additional means of assessing the truth of observational evidence. Essentially it asks whether evidence squares with the way that people usually or rationally behave.

While induction is a useful means of reasoning, it is not infallible. Courts do not possess perfect knowledge of the behaviour patterns of people. Further, not all people always behave according to the pattern.

Trial and Error Learning

Trial and error learning involves trying ways of doing something enough times until one achieves a desired result. Obviously the method that achieved the

21. Christopher Enright (2011) *Proof of Facts* Chapter 6 Probability of Proof: Specific Facts
22. Doidge (2007)
23. Christopher Enright (2011) *Proof of Facts*
24. Christopher Enright (2011) *Proof of Facts* Chapter 6 Probability of Proof: Specific Facts

desired result is an effective way of performing the desired task. Then may follow more trials to improve the technique. Once the technique has been developed or developed and improved it is feasible to teach it to those whose function it is to perform the task in question. By this means trial and error learning advances our techniques for performing a task.

Outline of Trial and Error Learning

The justice system would benefit if trial and error learning can make fact-finding more accurate and more predictable. Unfortunately in this context trial and error learning has limitations. To explain this, consider how trial and error learning needs to work to be relevant to fact finding. There are five steps:

Step 1. Trial. A court uses or trials some method for ascertaining the truth.

Step 2. Result. This method enables the court to make a finding of facts.

Step 3. Assessment of Outcomes. The court then assesses whether the method worked. To do this it needs to determine whether the finding of facts that it made constitutes the truth.

Step 4.1 Continue with the Method. If the method yields the truth the court continues with the method. The court may conduct further trial and error research to understand why it works. If the court does achieve greater understanding of why the method works it may use this understanding to refine and enhance the method.

Step 4.2 Replace the Method. If the method does not yield the truth the court will not continue with the method. It will seek another method. In doing so it may see if it can understand why the first trial did not work.

Step 5. New Method. The court adopts and trials the new method. To do this it repeats Steps 1 – 4. If a trial does not yield a finding of facts that is true the court also needs to repeat Step 5.

Problem with Trial and Error Learning

In some fields such as management and medicine it is possible to learn by trial and error. Experience shows that some things work and some things do not work. A firm makes or does not make a profit. Profit is measurable in dollars and years. A patient lives or dies, they recover or they do not recover. If they partly recover some sort of measure is possible even if it is only qualitative. This, for example is the basis of performance review as in strategic management or an M and M (morbidity and mortality) conference of surgeons.

Trial and error learning is possible in these fields because they possess a requisite characteristic – one can observe and to a reasonable extent assess outcomes. Specifically, following the trial it is possible to see or assess whether the method that was tried either succeeded or failed. The reader will see that this comprises Step 3. Assessment of Outcomes, in the model above. Knowing whether there was success or failure is crucial to using the method because knowing these generate learning.

Trial and error learning is not possible in fact-finding because generally it is not possible for anyone, including judges, to know the truth of past facts that they have not personally observed. Consequently, it is not possible for a court to know if it was right or wrong in its finding of fact. Thus, there is no generally available yardstick to determine how good or bad every decision is. In short form this is the underlying reasoning: it is not possible to learn by trial and error when it is not possible to detect error.

Since this proposition is crucial, let us restate it. Trial and error learning has a necessary precondition – it must be possible for a trialist to identify which of two outcomes their trial has delivered, namely, that they have made an error or that they have not made an error. Unless a trialist knows this, they can neither reject a method that leads to error because it fails to achieve the desired result nor persist with a method that leads to a desired result. This is the case because once a court has decided what it thinks are the facts of the case and the case is finished, there is no generally operant mechanism for appraising the result. Of course, there are occasions when later developments such as, the finding of new evidence or a witness recanting on their testimony in a practical sense, indicates fairly conclusively where the truth probably lay. But these special and unusual cases aside, there is no certain knowledge. Consequently, there is no criterion or gold standard against which to measure how well or how badly a court found facts in a particular case.[25] This is why there are no statistics on how often courts err when they find facts. This is also why there are such constraints on the degree to which research on fact-finding by a court can make any progress.

Conclusion 1: High Uncertainty

The preceding discussion establishes an important proposition: a judge or juror, viewing all of the evidence, cannot know what is true and what is not true. The truth has probably been diminished by not being fully presented and by the telling of things that are not the truth. While a judge or juror or other decision maker knows that it is likely that the truth has been diminished, they do not know this for sure, they do not know which part of the evidence is not true, nor do they know which parts of the truth have and have not been told. At best they rely on what is variously called ‘human judgment’, ‘commonsense’ and ‘horse sense’. For this reason no human system can furnish an absolute guarantee of truth.

Thus, a trial is a ‘forensic lottery,’[26] which means that going to court is an uncertain business. Similarly, any legal advice is uncertain about the prospects

25. Eggleston (1975) p 431
26. Twining (1984) p 71

of success in litigation. At best before trial, a lawyer, even an experienced litigation lawyer, can make only an informed guess as to the ultimately established 'correct' version of the facts.

Conclusion 2: Limitations to Effectiveness

Since the process of fact-finding is uncertain, there are limitations on the effectiveness of litigation. It cannot guarantee that it finds the truth. Since these limitations are inherent in the nature of the task, it is not possible to overcome them by taking more time over a decision. Greater use of flawed tools does not necessarily give a better outcome.

Chapter 6
Efficiency of Courts

Introduction
Meaning of Efficiency
Problems with Efficiency
Causes of the Problems
Solutions to the Problems

Introduction

There are four aspects to the question of the efficiency of courts:
1. The meaning of efficiency.
2. The problems that courts have with efficiency.
3. A consideration of the causes of the problems.
4. A consideration of the solutions to the problems.

Meaning of Efficiency

A person achieves extreme efficiency when they perform a task with minimum cost and in minimum time (that is, with the least delay). The least time for a litigated law case has three dimensions: bringing on the trial at the earliest time, spending minimal time conducting the trial and the lapse of minimal time from the end of trial to the handing down of the judgment.

Problems with Efficiency

Efficiency raises problems with litigation because cost and delay are currently rampant. There are frequent expressions of concern about the major problems of cost and delay in litigation, much of it expressed by the judges themselves. These judges include three successive Chief Justices of the High Court of Australia. In 1994 Sir Anthony Mason (1987-1995), declared that the 'justice system' was 'costly, inaccessible and beset with delays.'[1] In 1997, Sir Gerard Brennan (1995-1998), similarly declared that the 'Australian system of administering justice [was] in crisis' due to costs and delays.[2] The Honourable Murray Gleeson (1998-2008) has echoed his predecessors' views, pointing out that '[c]ost and delay' are problems that are 'endemic to all legal systems.'[3] These distinguished jurists, however, are just some of the voices who have spoken out on the problems of both cost and delay.[4]

1. Mason (1994) pp 1-2
2. Brennan (1997) p 139
3. Gleeson (2002A) p 24
4. See also Street (1987), Haynes (1983)

Justice that is overpriced and overdue is not justice at all. This is a problem because adjudicating cases is not some luxury good that consumers can do without. Rather, it 'is a special kind of service provided by the government'[5] because it is a citizen's constitutional right to have access to justice in the courts.[6] Justice, therefore, should be affordable and prompt, not exorbitantly expensive and inordinately delayed. Clause 40 of *Magna Charta*, formulated in 1215, succinctly frames this constitutional obligation owed by the state to its citizenry as it boldly proclaims: 'To no one will we sell, to no one will we refuse or delay, right or justice.'

Delay

Inevitably there will be some delay because litigation takes time. Consequently, legitimate concern is directed only towards improper delay, which consists of 'delay beyond that necessary for the process involved.'[7] Delay is possible in any stage of a case from the time when the claim arises by action of the defendant to the conclusion of the case when the court hands down its judgment.[8] In fact, once a case is commenced, delay occurs in each of the three stages of a case:

1. Delay from initiation of proceedings to commencement of the trial.
2. Delay from the commencement of a trial to its conclusion. In fact the tendency nowadays is for the hearing of matters to take longer than was previously the case.[9]
3. Delay from the conclusion of the trial to the handing down by the court of its judgment.[10]

Due to these delays, courts are 'overburdened'[11] so that cases pile up in a backlog.[12] In consequence the 'litigation process is, par excellence, a process of bottlenecks.'[13] Delay, as Dennis Mahoney QC put it so well and so succinctly, 'stinks in the nose of the community' which the courts serve.[14] No one, for

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5. Langbroek and Okkerman (2000) p 80
6. Ison (1985-86), Guest (1980), Mendelsohn (1961)
7. Mahoney (1983) p 33
8. Mahoney (1983) pp 30, 33
9. Langbroek and Okkerman (2000) p 87
10. *Goose v Wilson Sandford* (1998) (Court of Appeal, UK) *Times Law Report* 19 February where the court said in relation to delay in receiving a judgment: 'Compelling parties to await judgment for an indefinitely extended period prolonged, and probably increased, the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law.'
11. Brennan (1997) p 139
12. Langbroek and Okkerman (2000) p 82
13. Mahoney (1983) p 40
14. Mahoney (1983) p 33

example, 'is able to justify a 12-18 months delay between setting the case down for trial and the trial of it.'[15] 'Justice delayed', as the saying goes, 'is justice denied', while justice dragged out is justice dragged down.

Delay occurs because the available resources are not capable of processing cases quickly enough. Thus there are two sides to the problem: the demand for cases to be processed and heard, and the supply of resources to meet this demand.

Demand for litigation is increasing and the increase is manifest in two ways:
1. There is an increase in the number of cases,[16] which is out of proportion to the growth of population.[17] Possibly this has happened because to an increasing extent people are regarding law as the solvent of most or even of all social problems.[18]
2. Litigated cases are increasingly more complex and so take increasingly more time to try.[19]

Supply is limited because 'justice is not an infinite commodity.'[20] There 'is a limit to the amount of time that can be given to each case,'[21] just as there are limited economic resources that can be devoted to the judicial system.

Supply of resources depends in the first instance on the budget allocated to a court to fund its activities.[22] When that has been done, the question must then be asked as to how efficiently the allocated resources are used. This depends on a number of factors such as the skill and motivation of judges and court officials and the competence and diligence of solicitors and barristers.[23] A most significant factor in this regard is whether the practices and procedure of the court are conducive to efficient disposal of cases.[24] Not surprisingly, this attracts much of the attention in the literature.

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15. Mahoney (1983) p 30
16. Langbroek and Okkerman (2000) p 78
17. Mahoney (1983) p 36
18. Mahoney (1983) p 36
19. Langbroek and Okkerman (2000) p 87
20. Doyle (1999) p 740
21. Doyle (1999) p 740
22. See Lavarch (1999) in Stacey and Lavarch (1999)
23. Mahoney (1983) p 31. Clients have some difficulty in judging how efficient a lawyer is because of information asymmetry as the economists call it. Ordinarily the law person knows little of the substance of the work of a trained person such as a lawyer and so is in no position to judge if the service they provides is prompt and competent.
24. Doyle (1999) at p 737, who refers to 'the efficiency' with which judges 'conduct hearings.'

Costs

People in a free and democratic society regard justice not as a privilege but a right.[25]

Introduction

There are costs involved in settlement. There are also costs involved in litigating a dispute in court.

Settlement

As a general proposition, from the point of view of efficiency, settlement is better than going to trial and an earlier settlement is better than a later settlement. There is an obvious reason for this proposition: the longer a dispute runs, the greater the financial and non-financial costs to the parties. So, the earlier the dispute is settled, the greater the saving in costs.

This reasoning reflects the notion that litigation is very much a 'dead activity' from the point of view of productivity. The direct benefit of litigation is resolution of a dispute, so the earlier the better. The only benefit of its continuance is to become a 'make work scheme' for lawyers.

Litigation

Litigation costs money for the parties, principally in fees for solicitors and barristers, but also for things such as filing fees, travel to and from court, out of town accommodation if the case is heard away from home, and loss of income from not attending to work because of the demands of a case.

Costs have now reached the stage, according to Sir Gerard Brennan, where 'litigation is beyond the reach of practically everyone but the affluent, the corporate or the legally aided litigant.'[26] One consequence of this is that there is an increasing trend for litigants to represent themselves. So great is this trend, that there is now, according to Richard Ackland, an 'avalanche' of unrepresented litigants.[27]

Causes of the Problems

There are several possible causes of these problems. Firstly, courts have not yet found proper procedures and methods for resolving issues of law, fact and discretion. Part of the problem ensuing from this is lack of effectiveness[28] and part is lack of efficiency. Secondly, courts have not yet developed an

25. Western Australia Law Reform Commission (1999) Chapter 1 par [1.4]
26. Brennan (1997) p 139
27. Ackland (2002)
28. Chapter 4 Effectiveness of Courts

understanding of management to enable them to adopt procedures for dealing with cases efficiently. In part, at least, this is a result of not having found proper methods for resolving issues of law, fact and discretion. If you do not know how to go about something properly because you do not fully and explicitly understand what the task involves it, is near impossible to design proper procedures that will generate efficiency. Thirdly, courts have not yet devised proper procedures for managing information.

Solutions to the Problems

Insanity is doing what you have always done but expecting different results.[29]

Many approaches have been suggested to the problems of cost and delay,[30] including:

- Appointing more judges
- Increasing the number of sitting days
- Increasing the daily sitting hours
- Granting fewer adjournments
- Reforming the rules of evidence[31]
- Reforming the rules of procedure[32]
- Abolishing the federated court system[33] and replacing it with cross vesting (a partial simplification)[34] or a unified Australian judicial system (a total simplification)[35]
- Placing greater reliance on alternative dispute resolution[36]
- Replacing the adversary system by an inquisitorial system[37]
- Managing case flow[38]
- Managing cases[39]
- Sending 'hurry up' notices to lawyers
- Increased judicial control over proceedings (which in consequence become less adversarial)[40]

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29. This is a popular saying.
30. Edit (1987)
31. Aronson (1992A), Aronson (1992B), Giles (1990)
32. Aronson (1992A), Aronson (1992B)
33. Edit (1978), Street (1978)
34. Baker (1987), Crawford and Mason (1988)
35. Burt (1982), Byers (1984), Edit (1978), Ellicott (1978), Moffitt (1983), Nedsley (1983), Street (1982), Kirby (1988A)
36. Banks (1987), Newton (1987), Matheson (1983)
37. Certoma (1982), Cairns (1992), Findlay (1983-1985), Down (1998), Sampford, Blencowe, Condiln (1999), Sheppard (1982), Stacey and Lavarch (1999)
38. Sallman (1989) Sallman (1995), Mahoney and Sipes (1985)
39. Peckham (1981), Flanders (1998)

Some of these have been tried and there have been some successes, but cost and delay are still problems. This text will canvas some of the better prospects in later discussion.

40. Sallman (1989), Scott (1983), McGarvie (1989), Sheppard (1982), Brazil (1981), Marks (1993)

Chapter 7
Structural Change

Introduction
Courts
Legislation

Introduction

There are two aspects to structural change for reducing the cost of litigation:
1. Simplifying the court system.
2. Having uniform legislation across Australia.

Courts

Australia has 10 major jurisdictions – the Commonwealth, the six states and the three major territories, namely the Australian Capital Territory, the Northern Territory and Norfolk Island. There are two major sources of costs in the present arrangement of courts in these 10 major jurisdictions. These costs arise from two sources of diversity:
1. Separate Court Systems. Each jurisdiction has its own court system.
2. Hierarchy of Courts. Each jurisdiction has a hierarchy of courts, which in many cases have different rules of procedure.

This diversity generates costs. These include the cost of lawyers learning the rules for separate courts, the cost for writers to write the rules, and the lack of economies of scale. On the other side of the coin it is difficult to justify this diversity. The main beneficiaries of it are the governments of these jurisdictions. While the Governor-General and Governor formally appoint judges it is the government in power that nominates the person for appointment. Governments use this in several ways. They can do the following:
- Reward faithful service.
- Appoint people favourable to their outlook.
- Use appointment to the bench to move an unwanted lawyer from the political sphere.

Separate Court Systems

There are two possible remedies to the problem caused by the existence of separate judicial systems: government can introduce a uniform set of procedural rules that apply in each jurisdiction, or they can co-operate to introduce a national court system.

Uniform Procedural Rules

Harmonisation of procedural rules would eliminate unnecessary duplication, especially when it involves variations of detail that do not essentially involve a variation in substance.[1] It makes it easier for lawyers to move between courts so that they do not have to take time to learn a new set of rules. Harmonisation also, in principle at least, improves the quality of commentary and practice texts on the procedural rules because authors and publishers do not have to cope with so many jurisdictions. Logically, regulators should use harmonisation only to avoid unnecessary variations. If they avoid necessary variations they will reduce effectiveness and efficiency.

One initiative in this regard was the harmonisation of the Corporations Rules in 2000. This means, for example, 'that a lawyer in Perth will be able to conduct winding-up or takeover litigation in Brisbane using standard documentation.'[2]

National Court System.

A second option is to introduce a national court system. The idea is to create one comprehensive judicial system for the whole of Australia. There would be transaction costs in making the change. After that there would be a great and continuing saving in operational costs.

There are two significant points about diversity. First, the major sources of diversity among people in Australia do not arise from territorial location; second in principle courts do not set out to make decisions that the public will like but to do justice impartially and according to law. For both of these reasons there is no argument based on diversity for retaining a separate court system in each jurisdiction.

Hierarchy of Courts

Governments can potentially achieve vertical harmonisation within one jurisdiction when they impose totally or substantially uniform procedures throughout two or more courts in the hierarchy. New South Wales, for example, has attempted this by enacting the *Civil Procedure Act 2005* (NSW). Section 4(1) enacts a general provision, subject to an exception in s4(2). It provides that Parts 3-9 of the Act apply to each court referred to in Schedule 1 in relation to civil proceedings of a kind referred to in that Schedule in respect of that court. Schedule 1, which is set out in the appendix to this chapter, includes all civil proceedings in the Supreme Court, the District Court and the Local Court. It includes all civil proceedings in the Dust Diseases Tribunal and all civil

1. In some cases, though, procedural rules may include variations made for special purposes – see Silberman (1989)
2. Australian Law Reform Commission Report (2000) par 7.159

proceedings in Class 1, 2, 3, 4 or 8 of the Court's jurisdiction of the Land and Environment Court.

Section 8 of the *Civil Procedure Act 2005* establishes a Uniform Rules Committee. Its aim is to flesh out the uniform provisions of the Act by creating uniform rules. These are the core provisions:

- Section 9 authorises this Committee to make rules for giving effect to the Act. Rules 9, 10 and 11 make these rules uniform, for the most part, throughout New South Wales courts.
- Section 17(1) authorises the Committee to approve forms for civil procedure.
- Section 17(3) provides that it is compulsory for the form to be used by the court and litigants.
- Section 17(2) provides that copies of the approved forms are to be made available for public inspection at each registry of the court concerned and on the court's internet website. This power to make rules has been exercised enactment of the *Uniform Civil Procedure Rules 2005* (UCPR).
- Section 4(2) allows for exceptions. It provides that the uniform rules may exclude any class of civil proceedings from the operation of all or any of the provisions of Parts 3-9.

There is, however, a danger with harmonising rules as between Supreme, District and Magistrates courts. '[L]ower courts may acquire more formal and elaborate rules than existed previously.'[3] Again, this is likely to reduce effectiveness. It may even reduce efficiency by using inappropriate procedures for a task. In biblical terms 'it is old wine in new bottles'.

Legislation

If statutes were uniform across Australia there would be a reduction in the costs of litigation. These are several ways of achieving these:

1. Commonwealth Statutes. In area where the Commonwealth has legislative authority there can be one uniform law on a subject across the whole of Australia.
2. Joint Enterprises. The Commonwealth and states can combine to produce a uniform law. A prominent but relatively isolated illustration is the *Corporations Act 2001*.
3. Abolition of the Federation. The ultimate solution is to abolish state governments. One way to do this would be to reconstitute local councils as regional governments. On the east coast of Australia the string of valleys and rivers provide natural borders for regions.

3. Australian Law Reform Commission Report (2000) par 7.160

This proposal is probably on the wrong side of the fence that marks out the terms of this inquiry. Before moving on one final point to note – diversity in Australia for the most part is not based on differences between the various jurisdictions but on differences within them.

Chapter 8
Technological Change

Introduction

Some technological changes will make it simpler and quicker to dispose of a case. There are three connected proposals:

1. Documenting the Case. Require the parties to document their respective cases.
2. Electronic Documents. Have the documents in electronic form.
3. Computer Systems. Use a computer system to organise and retrieve information.

Documenting the Case

The proposal is to document the entire cases as the major means of presenting the case, as distinct from relying substantially on oral submissions.

How to Document the Case

Document a case has three aspects:

1. Pleadings. The pleadings need to be documented. At the same time as the pleadings lay out the case for each party and the issues that generated the litigation, they also provide a simple framework for organising the case. This is because the proposed pleadings to a basic structure that underlies litigation.[1]
2. Evidence. Oral evidence is given by written statement.
3. Submissions. Parties make their submissions in writing. Written submissions are potentially better than oral submissions because parties can edit and revise them.

Formatting Documents

This system works best when the documents are properly formatted. There are four major aspects:

1. Numbered Paragraphs. One vital aspect is that the documents have numbered paragraphs to facilitate reference to parts of the documents.
2. Headings. Where appropriate documents should use headings, and if needs be various levels of sub-headings to portray the structure of the document.

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1. Chapter 9 Organising the Case

3. Table of Contents. If the document has headings then the author can and should use the headings to construct a table of contents.
4. Tables for Organising Information. Sometimes to organise and present information it helps to put information in a table rather than in narrative form. For example, if there is some complicated web that embraces the parties and witnesses it is useful to prepare a table that names the parties and witnesses and, where relevant, indicates their relationship to other persons in the case and their role in the facts. Sometimes, the table may be best placed at the front of the document or in an appendix rather than in the body of the document.

Legal Aid

Documenting the case and filing the documents in court is a low cost method of presenting a party's case. It is much cheaper than providing representation in court where witnesses give their evidence orally and a lawyer makes oral submissions on behalf of their client. In this way, it lessens the work in presenting the case since a party just files the documents. This idea is incorporated into a proposal for providing low cost legal aid.[2]

Electronic Documents

2. The documents need to be in electronic form. The proposal is to document cases in electronic form. This brings several advantages to litigation:
1. It simplifies filing and reduces the cost of filing.
2. It enables litigants to search documents electronically.
3. It facilitates amending documents.
4. It enables parties and the court to copy material electronically–for example a judge may wish to reproduce all or part of a party's submission in a judgment.

Computer Systems

Courts can use a computer system to organise the case. Dr Pamela Gray devised a system to do this as part of her work for a PhD.[3] Her son Xenogene Gray, who is a computational physicist, programmed the system. The core logic that underlies this system is the syllogism that is at the basis of litigation. The starting point is that any legal rule (which is a cause of action because it entitles someone to sue) takes the following form: Facts that fall within the classes delineated by the elements of this rule cause legal consequences (as imposed by a court in litigation).

This proposition becomes the major premise for the syllogism. It is the basis of the syllogism. Here now is the syllogism:

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2. Chapter 15 Reducing the Cost of Legal Aid
3. http://en.wikipedia.org/wiki/EGanges

Major Premise	Facts that fall within the classes delineated by the elements of this rule cause legal consequences X.
Minor Premise	The facts in this case fall within the classes delineated by the elements of this rule.
Conclusion	These facts cause legal consequences X.

Figure 8.1 Syllogism for a Cause of Action

Chapter 9
Systemic Change

Ye shall know them by their fruits.[1]

[The] general public and lawyers differ about whether justice means truth or justice means process.[2]

Introduction

Some lawyers regard litigation as a form of venture capitalism.[3]

Jurists commonly draw a distinction between two contrasting systems of justice: adversarial and inquisitorial systems.[4] Common law legal systems tend to use procedures in court that are substantially adversarial while civil law systems tend to use procedures in court that are substantially inquisitorial.[5]

Like many terms creating commonly used distinctions, these terms are not totally precise—although the broad distinction between the two concepts is clear. The essence of adversarialism is that the dispute is largely in the hands of the parties so that the court is merely a referee of the contest. Two or more adversaries fight the contest while the court is a passive referee of the contest, as distinct from being actively involved. Adversarialism is a 'prove it' system because the court ultimately decides which party has proved their case according to the required standard. In the adversarial system justice means 'process' as in following the process.[6]

By contrast, in a full blown inquisitorial system the conduct of the case is largely under the control of the court. The court itself inquires into the facts of the case to determine the truth in order to make its decision.[7] The inquisitorial

1. *King James Bible* Matthew 7:16
2. Asimow (2000)
3. A Sydney solicitor made this comment in a conversation with the author.
4. The Australian Law Reform Commission (2000) incorporated a discussion of the adversary system – see pars [1.111]-[1.134].
5. For some of the criticisms and problems of the system see – Pizzi and Marafioti (1992) pp 22-3, Eggleston (1975) p 430; Parker (1997); Whitton (1994); Whitton (1998).
6. Asimow (2000)
7. In fact, the two systems also use two different styles of legal reasoning – the

system is not a 'prove it system' but a 'what really happened system'. In the inquisitorial system, justice means truth.[8]

These simple descriptions capture the essence of each system. To explain the systems in more detail it will assist to continue in this vein by describing each system in pure form. There now follows a simplified and stereotypical analysis of the two systems. This begins with a simple framework that provides a basis for an analysis of the two systems, by highlighting their key features.

Nature of the Inquisitorial System

In the inquisitorial system the conduct of the case is largely in the hands of a judge who has been specially trained for their judicial role. Lawyers do not make lengthy cross-examinations or lengthy addresses.

One important feature of the inquisitorial system in France and some other countries is their law of evidence. In the standard adversarial system there is a voluminous set of rules of evidence of great detail and complexity. They present an obstacle course for parties and their lawyers. By contrast in these inquisitorial systems there are few technical rules of evidence. For the most part courts admit relevant evidence. Problems with evidence that common law deals with by excluding the evidence the inquisitorial system deals with by evaluating the probative force of the evidence. In other words, problems with evidence do not lead to technical rules of admissibility but become factors in weighing how much weight the court should give to the evidence.

Nature of the Adversarial System

The *Macquarie Concise Dictionary* (2nd ed) defines 'adversary' in the following ways: 'unfriendly opponent; an opponent in a contest; a contestant'. Two prepositions capture the idea. It is in military mode one foe 'against' another, or in sporting terms one side 'versus' another. Conflict is the keynote. Not surprisingly, critics of the system deplore the extent to which games and tactics determine the outcome.

Reason indicates that the best way to form a legal system is first to determine its goals and then to devise the best means of securing those goals. History, however, got the call because one of the early means of determining a dispute

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common law style and the civil law style. Sometimes these styles of reasoning are incorporated within the respective terms adversarial and inquisitorial even though they are connected by association rather than by logic. Since this extension is not relevant to our purposes we do not pursue it.

8. Asimow (2000)

was trial by battle. It is the historical forerunner to the adversarial system.[9] The idea is that it is a contest between two sides. It was a fight to the death where the winner was the last man standing.

In the extreme form of the system, conduct of the dispute is entirely in the hands of the parties, typically through their hired guns, namely their counsel. Parties determine whom they call as witnesses, the order in which they call them and the questions that they ask them. Parties make submissions to the court on how it should reach its decision. All that the court does is listen and decide. As Lord Denning put it: 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries'.[10]

In common law jurisdictions many lawyers are culturally attached to, if not addicted to, the notion of adversarialism. If wigs and gowns robe the bodies of barristers, a fervent commitment to adversarialism often garbs their souls. This commitment tends to feature in discussions about reforming aspects of court procedure by their propounding the notion that any lessening of adversarialism diminishes justice.[11]

Which System is Best?

Australian courts for the most part operate on a system that is substantially adversarial. In the context of discussing means to reduce cost and delay the question of 'which system is best?' is commonly asked.

In this regard, one of the key problems with the adversarial system is that to a considerable extent it leaves control of the case in court in the hands of the lawyers for the parties. Lawyers generally charge by the hour. Consequently, they have no cost incentive to reduce delays. Indeed there is a moral hazard in that the more a lawyer can draw out a case, the higher the fee they will earn. For this reason, the adversary system is often blamed for excesses in costs and delays.[12] The obvious conclusion is that at the very least it is necessary to reduce the adversarial component of the current system; possibly it may be best to eliminate it entirely.

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9. Rubin (2003)
10. *Jones v National Coal Board* [1957] 2 QB 55, 63 per Denning LJ
11. Fox (2000) pp 130-133
12. For example Russell Fox says that the 'spirit of aggressiveness and hostility that it engenders' is 'unhelpful in maintaining steady progress towards a just resolution [of the dispute], as well as being 'productive of high costs and excessive delays'. See Fox (2000) p 123

A judge who is properly trained and who conducts a hearing on an inquisitorial basis can do the job of deciding the case as effectively as can a judge under an adversarial system.[13] The case would take lesser time, probably much lesser time than it would under an adversarial system.

Notwithstanding these problems with the adversarial system and the advantages of the inquisitorial system, there are some who ardently defend the common law adversarial system. For example, Chief Judge at Common Law Justice Peter McClennan has said as follows in defence of the common law system: 'There can be little doubt that the common law model, which endorses the adversarial method for the resolution of disputes, has proved effective. Many lawyers including judges would reject any suggestion that it needs to change to meet contemporary demands.'[14] An obvious question to ask is how His Honour can assert that '[t]here can be little doubt that the common law model, which endorses the adversarial method for the resolution of disputes, has proved effective', especially in the face of the major problems of costs, delay and unrepresented litigants that now blight the system.[15]

In summary, the argument for using the inquisitorial system has two propositions:
1. Substantive Justice. The inquisitorial system does substantive justice as well as the adversarial system.
2. Procedural Justice. The inquisitorial system does procedural justice far better than does the adversarial system. This is the case for two reasons:
2.1 It can decide a case in much shorter time than does the adversarial system.[16]
2.2 It incurs lesser costs for a case than does the adversarial system. An inquisitorial system can do this because avoids the chief factors that create a moral hazard that blights the adversarial system. This factor is that within generous limits lawyers control the amount of time – the number of hours – that a case takes. Since lawyers set their own fees and charge by the hour, cases for them can be a money-making scheme.

13. Fox (2000) pp 50-53
14 McClennan (2008)
15 McClennan (2008)
16. Fox (2000) pp 50-53

Chapter 10
Organising the Case

Introduction
Basic Model for Litigation
Operational Model for Litigation
Illustration of the Model for Litigation

Introduction

There is a simple way to organise litigation in a manner that makes it more efficient. This organisation creates a framework that represents the major components and the major tasks in litigation that involves a dispute of facts. The author refers to this framework as the model for litigation.

The background to the model is this. The type of rule that allows one party to sue another is called a cause of action. A cause of action possesses the basic structure that most other rules possess. As explained in more detail below a legal rule consists of a conditional statement that combines elements and consequences. In litigation their operate is based on a naturally occurring relationship between elements, facts and evidence:
1. Each element of a legal rule describes a category of fact.
2. The conditional statement that comprises the legal rule is so framed that a legal rule applies to a set of facts when the set includes facts that fall within each of the categories of facts that the element delineate.
3. When all the elements apply to the facts in the set of facts (or to put this in another way, all of the elements are satisfied by the appropriate facts) the rule applies to the set of facts.
4. When the rule applies to the set of facts it brings consequences to the parties.
5. In the course of a case a party will typically have to prove one or more of the facts that are needed to satisfy one or more elements of the cause of action. A party proves a fact by evidence.

Basic Model for Litigation

Introduction

A good way to explain the model for litigation is first to present a simple version that does two things:
1. It reveals the basic workings of the model.
2. It provides a good basis for explaining the basic functions of the components of the model.

Model for Litigation

Here is the diagram that sets out the basic version of the model for litigation:

1	2	3	4	5
Law	←	**Facts**	←	**Evidence**
Element 1		Fact 1		Evidence 1
Element 2		Fact 2		Evidence 2
Element n		Fact n		Evidence n
↓				
Consequences				
Consequence 1		ConFact 1		Evidence 1
Consequence 2		ConFact 2		Evidence 2
Consequence n		ConFact n		Evidence n

Figure 10.1 Model for Litigation: Basic Version

Explanation of the Model

Outline

The model for litigation explains the basic function of litigation that involves a dispute of facts (which is by far the most common form of dispute). It rests on the simple but vital relationship between five items:

1. Elements. The elements of the cause of action define the material facts, which in turn identify when the legal rule applies.
2. Material Facts. [The core facts of the case are the material facts.] The material facts of the case are so called because a plaintiff must establish each one of them to win the case.
3. Evidence. When a material fact is in dispute a plaintiff needs evidence in order to prove it.
4. Consequences. When a plaintiff makes out their case by establishing each material fact, the legal consequences provided by the cause of action then follow. Generally these involve a court granting some sort of remedy to the plaintiff.
5. Conditional Statement. The rule that comprises the cause of action is framed as a conditional statement: when a set of facts contain facts that satisfy each element of the cause of action the rule applies to those facts. When it applies it visits the parties with the consequences that the rule specifies.

Function

This functions in the following way:

1. Column 1. Column 1 sets out the cause of action, the law or the legal rule that is involved. The rule consists of elements and consequences. These are Elements 1–n and Consequences 1–n.

2. Column 3. Column 3 in the top part sets out the facts that satisfy the elements of the legal rule. These are Facts 1–n. The right facts (commonly called the material facts, relevant facts or the essential facts) satisfy each element of the legal rule. The diagram signifies this by the arrow in Column 2 linking Column 3 (Facts) to Column 1 (Law).
3. Column 5. Column 5 contains the evidence that can establish the facts. In litigation a lawyer uses evidence to prove disputed facts. The evidence is labelled Evidence 1-n such that Evidence 1 is the evidence that is capable of proving Fact 1, Evidence 2 is the evidence that is capable of proving Fact 2 and so on. Thus Evidence 1-n is the evidence that is capable of proving Facts 1–n. The diagram signifies this by the arrow in Column 4 linking Column 5 (Evidence) to Column 3 (Facts).
4. Achieving the Consequences. To win a case a plaintiff needs to satisfy each element in the legal rule that constitutes the cause of action. These are labelled Elements 1–n. A plaintiff satisfies an element by producing or proving (if there is a dispute) the relevant material fact for that element. These facts are labelled Facts 1–n. The evidence for these facts is labelled Evidence 1–n.
5. Nature of the Consequences. In civil cases consequences consist of the remedies that the court grants to a successful plaintiff. In criminal cases the consequences consist of the punishment that the court imposes on a convicted defendant.
6. Components of the Consequences. Consequences may have components. These are labelled Consequences 1–n. There are two obvious ways in which consequences can have components. First, a remedy may have components. For example, the remedy of damages is made up of a number of components or types of damages. Second, there may be two or more remedies for a wrongful act.
7. ConFacts. To obtain a designated legal consequence it may be necessary to establish some relevant facts. ConFacts 1–n are set out in the bottom half of Column 3. ConFacts 1–n are the facts that support Consequences 1–n. For example in personal injury case a plaintiff who claims loss of wages has to assert the loss of wages through being off work and has to prove being off work and the amount of those wages.
8. ConEvidence. To prove ConFacts a party needs evidence. Figure 1 labels the evidence to prove ConFacts 1–n as ConEvidence 1–n. ConEvidence 1–n is located in the bottom half of Column 5.

Components of the Model

Essentially, the model for litigation is built on foundations located within the structure of action provisions. These foundations are created by structures that legal rules naturally possess. Subject to limited exceptions that are of no concern here, each legal rule possesses a standard structure that contains the following components:

1. Elements of the legal rule, which can be divided into sub-elements.
2. Facts, which satisfy the elements.
3. Evidence, which is used to prove facts in litigation.
4. Consequences, which apply when the each element of the legal rule is satisfied by the appropriate facts.

Elements

Nature of Elements

To start the explanation of elements some background is necessary. A legal rule is framed as a conditional statement–when certain types of facts occur, consequences apply to the parties involved.[1] These consequences are the remedies that the court provides to a successful plaintiff (or in the case of a transaction, the change in their legal position that happens to parties when a transaction is successfully concluded). In the diagram for the model these are labelled Consequences.

Key Propositions

There are some key propositions about elements. Elements of a legal rule delineate that part of the world, the facts, to which the legal rule applies and which it therefore regulates. To perform this task each element delineates a category or type of fact, so that the relationship of an element to a fact that fits or satisfies the element is that of the general to the particular. This means that a legal rule applies to a set of facts when the set of facts contains facts that fall within the categories of facts delineated by each element. That is to say, there are facts in the set to satisfy each element. Conversely, if a plaintiff fails to satisfy all of the elements, even failing with just one element, the law does not apply, so the plaintiff does not obtain their desired outcome. Let us stress the rule involved here: to obtain the legal consequences provided by a cause of action a plaintiff (or parties to a transaction) must establish each and every element of the legal rule that constitutes the cause of action.

Labels

In short, each element describes a required type of fact for the rule to apply. Elements are labelled Element 1, Element 2 and so on. The elements in a rule are collectively designated Elements 1–n. To obtain the Consequences, therefore, the plaintiff must satisfy Elements 1–n.

As will be explained below, a neat way to label sub-elements with a system that is akin to decimal places. On this basis the sub-elements of Element 3 consist of Element 3.1, Element 3.2 and so on.

1. Christopher Enright (2011) *Legal Reasoning* Chapter 3 Structuring Legal Rules

Nature of Sub-Elements

Elements can be divided into various levels of sub-elements if the law creating the cause of action so requires. These levels create a hierarchy.

To illustrate, let us take Element 2 as an example, and see how it could divide into sub-elements. If Element 2 was divided into n sub-elements, being Elements 2.1-2.n the table above could be expanded to accommodate this situation. Here now is a table showing the sub-elements of Element 2. These are labelled Element 2.1, Element 2.2 and Element 2.n, so that the range is Elements 2.1-2.n:

1	2	3	4	5
Element 2	←	**Fact 2**	←	**Evidence**
Element 2.1		Fact 2.1		Evidence 2.1
Element 2.2		Fact 2.2		Evidence 2.2
Element 2.n		Fact 2.n		Evidence 2.n

Figure 10.2 Sub-Elements

To recap, in this diagram the sub-elements of Element 2 are labelled Element 2.1, Element 2.2 and Element 2.n, constituting the range Element 2.1-2.n. Moreover, further division is possible (if the law so requires it) because a sub-element at any level can always be further subdivided, so that the division and subdivision create a more elaborate hierarchy. For example, Element 2.3 might divide into Elements 2.3.1-2.3.n. This process of subdividing elements continues until the law constituting the cause of action is fully and faithfully represented in the hierarchy.[2]

As demonstrated, when an element is divided into sub-elements, each sub-element needs to be satisfied by the appropriate fact. Thus, Facts 2.1-2.n satisfy Elements 2.1-2.n. Similarly, in litigation each of these facts is proved by evidence so that Facts 2.1-2.n are proved by Evidence 2.1-2.n.

Consequences

While elements identify the part of the world that the rule seeks to change, the way in which the rule directly and legally changes the world is through the consequences it imposes on the parties when it applies to a set of facts. This is why a legal rule must also state the consequences it visits upon the parties. Consequences are designated Consequences 1–n or just Consequences for short.

Column 1 of the model shows the legal consequences that follow when each element is satisfied by the facts in a case. Consequences are the remedies that the court provides to a successful plaintiff.

2. Christopher Enright (2011) *Legal Method* Chapters 3-4

Consequences of a legal rule are themselves divided into elements, which in their full form are labelled Consequences 1–n. Sometimes, however, discussion of the model refers just to Consequences which is a convenient shorthand. Consequences need elements for two reasons:
1. There may be more than one remedy. For example, a successful plaintiff in trespass may obtain both damages and an injunction.
2. A remedy may be divided into parts. An example is the remedy of damages, because there are various heads of damages, each of which becomes an element. Each head of damage is calculated as a lump sum of money. All the heads of damages taken together become the total amount of damages, which constitute the full Consequences.

Consequences often need to be matched with facts that need to be established by evidence. For example, a plaintiff who claims damages needs to prove the amount of their loss for each category of loss for which damages provides compensation. There are two special entities related to Consequences:
1. Facts for Consequence are labelled 'ConFacts'.
2. Evidence that might prove ConFacts is labelled 'ConEvidence'.

Facts

Nature of Facts

Facts are relevant because each legal rule is made to apply to a defined class of facts. Facts are constituted by something that happens or exists such as an act, action, event or an incident, by a state of affairs, a condition (including a state of mind) or a quality that exists, or by something else of this kind.[3] Potentially, a fact can be past, present or future.[4] In the obvious case, a fact is positive, for example something happened, something exists or some item possessed some quality; but it can also be negative in that the event did not happen, the thing does not exist or the item did not possess the quality in question.

Relationship to Law

There is a precise relationship between law and fact. Essentially, this relationship comes about because the elements of a rule define the facts or circumstances that determine when the rule applies. This happens because each element consists of a generalisation of some fact. Thus the relationship of law to fact is that of the general to the particular: elements of a law or a legal rule state a category of facts. This means that the elements are satisfied when a fact occurs that falls within this category.

3. *Jegatheeswaran v Minister for Immigration* [2001] FCA 865 (9 July 2001) par [52]
4. *Jegatheeswaran v Minister for Immigration* [2001] FCA 865 (9 July 2001) par [52]

Satisfying Elements

To be successful, a party must satisfy each element of the cause of action. But how do parties satisfy these elements? Parties establish an element by facts, as indicated by the arrow between Column 1 and Column 3. Each element of a law delineates a category of facts, and requires that there be a fact in this category to satisfy the element. Parties, therefore, satisfy Element 1–n by establishing the appropriate facts. These are conveniently labelled Fact 1, Fact 2, and Fact n respectively, so that Fact 1 satisfies Element 1, Fact 2 satisfies Element 2 and Fact n satisfies Element n. Collectively, the facts can be designated as Facts 1–n. In summary, then, Elements 1–n are satisfied by Facts 1–n.

Clearly in litigation there are other facts in the case besides Facts 1–n. These may play some ancillary role in a contested case in proving Facts 1–n but they are otherwise legally irrelevant. Facts 1–n, by contrast, are the core of the plaintiff's case. A party's success will rise or fall according to their ability to prove these facts. For this reason lawyers refer to Facts 1–n as material facts, relevant facts or essential facts.

There are also facts for consequences. In the model for using law ConFacts 1–n satisfy Consequences 1–n.

Evidence

In litigation parties prove facts by evidence, as indicated by the arrow pointing from Column 5 to Column 3. Evidence to prove Fact 1, Fact 2, and Fact n is conveniently labelled Evidence 1, Evidence 2, and Evidence n respectively. Conveniently and simply we say that Evidence 1 'proves' Fact 1, Evidence 2 proves Fact 2 and so on. This, however, is shorthand for two propositions. Before trial, Evidence X is the evidence that is capable of proving Fact X and that a party will use in an attempt to prove Fact X. So Evidence 1–n constitutes the 'holding yard' for the available evidence for proving the facts. After the trial, if a party has been successful, Evidence X is the evidence that actually proved Fact X. But to repeat, our shorthand for this is to say that Evidence X 'proves' Fact X.[5]

Collectively the evidence can be designated as Evidence 1–n. In summary, therefore, Evidence 1–n proves Facts 1–n. For the consequences, ConEvidence 1–n proves ConFacts 1–n .

The expression 'evidence' is used in this context to designate all of the methods for proving facts. These various methods fall into three categories:[6]

5. Christopher Enright (2011) *Legal Method* Chapter 25 Model for Proving Facts
6. Christopher Enright (2011) *Legal Method* Chapter 25 Model for Proving Facts

1. Observation. In the obvious case a witness is the source of observational evidence. Observational evidence can also come from equipment or from the records of an organisation. Finally, a court can observe some facts for itself.
2. Inference. Inference can be based on patterns of behaviour (which incorporates induction) or causation (which incorporates deduction).
3. Deeming Provisions. Facts can be legally deemed to be true. This can happen in any of five ways–by agreement, by admission, by presumption, by judicial notice or by statute.

Observational evidence by a witness is one of the most common forms of evidence. It refers to an account of facts that a witness gives on the basis that they have observed those facts with one of the five senses (namely sight, touch, smell, hearing, and taste). To further explain and also illustrate this, consider a typical piece of evidence, where Sally, the witness says: 'I saw the defendant walk on Jeremy's land'. This reveals the two components of observational evidence:
1. Alleged Facts. It consists of alleged facts. In the example, the defendant walked on Jeremy's land.
2. Cognitive Claim. It consists of a cognitive claim to truth of these facts. In the example, the witness Sally claims that the defendant walked on Jeremy's land because she 'saw' it happen.
In view of this, it can be seen that the relationship of fact and observational evidence is that evidence consists of facts with the addition of a claim that the facts are true based on some observation.

Conditional Statement

So far the legal rule has two components: elements that identify the facts to which it applies; and consequences that prescribe how it will change the position of the parties to a case when the rule applies to them. To ensure the operation of the rule, something has to impose these consequences on the facts. Legislators do this by framing a legal rule as a conditional statement. It takes the following form: 'If facts occur that fall within the classes of facts delineated by the elements, the consequences designated by the rule apply to those facts'.

Operational Model for Litigation

The basic version of the model for litigation has three operative columns (ignoring the in-between columns with arrows). These columns cover elements of the law, facts and evidence. The operational version adds a fourth column for notes on operational matters. This version of the model enables a lawyer to attach notes to a particular set of elements, facts and evidence.

There is obviously a vast range of operational matters that a lawyer might want to record. For example, the witness may be timid, it may be necessary or

advisable to issue a subpoena, the witness needs an interpreter, or there may be some special rule of evidence that could apply. Here now is the operational version of the model:

1	2	3	4	5	6	7
Law	←	**Facts**	←	**Evidence**	←	**Operations**
Element 1		Fact 1		Evidence 1		Add in here beside any row a note of any relevant matters relevant to the items in the row. Some examples are: * a special rule of evidence * need for a subpoena * need for an interpreter
Element 2		Fact 2		Evidence 2		
Element n		Fact n		Evidence n		
↓						
Consequences						
Consequences 1		ConFact 1		ConEvidence 1		
Consequences 2		ConFact 2		ConEvidence 2		
Consequences n		ConFact n		ConEvidence n		

Figure 10.3 Model for Litigation: Operational Version

Illustration of the Model

Introduction

Fundamentally, the model illustrates the overall picture of how litigation functions. For the plaintiff to win they must prove facts constituting or satisfying each element of the cause of action. In the model a plaintiff must prove Facts 1–n to satisfy Elements 1–n. A plaintiff seeks to prove Facts 1–n by Evidence 1–n (unless the defendant admits some of the facts to be true, which frequently occurs). Therefore, a defendant wins on the facts by rebutting the plaintiff's proof of at least one of the facts necessary to satisfy the elements of their case. This can be done, as explained below, by disputing law or facts, or both.

Because the model explains the overall task it can be a fairly comprehensive and constant guide to litigation. It can help in most aspects because it structures and therefore directs the task. For example, it provides a lawyer with a list of the elements of the cause of action. This indicates the type of facts that must be established to prove the case because the elements are generalisations of these facts. It also alerts the lawyer to the need to present evidence to prove the facts that will satisfy each element.

Obviously the model is a mechanism for organising a case by providing a framework that arranges information in an amenable form. This can be illustrated with a hypothetical case involving a plaintiff Stuart Little and a defendant Mary Grand.

Interview with the Lawyer

Stuart Little has a grievance. He visits his lawyer and describes his grievance in the following way: 'I live at 12 Big Street, Smallville. Mary Grand lives two houses up the street from me in No 16. She has always been envious of my garden. On Wednesday, 5 April Mary's envy finally got the better of her. At 12.00 hours (high noon) she entered my garden in the front yard, walked across my prize lawn in her hobnailed boots and took a lemon from the lemon tree, leaving by the front gate. I have never given her permission to do this. I have obtained a valuation of my loss from Grassy Green who runs a nursery. The lemon would be worth $3. It will cost $38 to repair my lawn – with those boots it is no wonder Mary cannot tap dance.' [Stuart writes an occasional column on the performing arts for the local newspaper, the *Smallville Examiner*.]

Researching the Law

The lawyer then does some research and finds the following account of the tort of trespass to land in a textbook entitled *Walker on Trespass*. The learned author says as follows: 'Trespass is an ancient action although it is not much used now. Trespass protects land owners and holders. A plaintiff commits trespass when they intentionally interfere with land without permission. Trespass is actionable by a plaintiff who has a right to possess the land. Defences to trespass are provided by common law and statute. A successful plaintiff will obtain damages. Damages are awarded to compensate for the invasion or interference *per se* calculated according to the circumstances, and to compensate for actual loss occasioned by the trespass. Additionally, a plaintiff may, at the discretion of the court, be awarded an injunction. Generally to obtain an injunction a plaintiff needs to show that there is a reasonable possibility that the trespass will be repeated.'

Investigating the Facts

The lawyer then investigates the facts. During the investigation she finds that none of the defences apply. She also discovers the following:

1. Stuart owns the house at 12 Big Street Smallville. He lives there with his wife, Gladys, and his triplets, Faith, Hope and Charity, who are studying theology at Notre Dame University.
2. Sally is a neighbour in No 14, which is the house between Stuart and Mary. Just before midday on the day of the trespass, Sally saw Mary walking past Sally's house towards Stuart's house. However, since she was peering through the curtains at the time Sally did not see whether Mary entered Stuart's front yard. About five minutes later, Sally saw Mary walking in the opposite direction toward her own house at No 16. Mary was carrying a lemon that she was tossing in the air at the same time displaying a triumphant look on her face.
3. On Wednesday evening at about 18.30 hours, Mary was seen in the Boiler Room at the Railway Hotel by 'Front Line' Freddy, who reports on sheep dog

trials for the *Smallville Examiner* newspaper. Freddy heard Mary say: 'I finally fixed that obnoxious man Little Stuart as I call him. I will keep doing what I did until he takes that smug look off his face'.

4. On Saturday morning at 10.15 hours, Nosey Parker saw Mary bringing a lemon meringue tart to her parish fete. The fete was held in the grounds of the Church of St Jude the Obscure in Smallville.

Organising the Law

To prepare and assess this case the lawyer can utilise the organising framework provided by the model for litigation. To initiate this, it is first necessary to divide the cause of action, trespass to land, into its elements and consequences. These elements and consequences can be presented in the following table, showing the element as a sentence along with a number and a label:

Elements		
Element 1	Land	There is land.
Element 2	Possession	The plaintiff has a right to possess the land.
Element 3	Interference	The defendant interferes with the land.
Element 4	Intention	The defendant interferes with the land intentionally.
Element 5	Permission	The plaintiff has not given the defendant permission to interfere with the land.
Element 6	Defences	There are no defences available to the defendant.[7]
↓		
Consequences		
Consequences 1	Damages	(i) Interference. These damages are calculated by reference to the circumstances of the interference. (ii) Loss. These damages compensate the plaintiff for their actual loss.
Consequences 2	Injunction	Generally to obtain an injunction a plaintiff needs to show that there is a reasonable possibility that the trespass will be repeated.

Figure 10.4 Elements and Consequences of Trespass to Land

Organising the Case

We can now proceed to organise this case according to the model for litigation. This illustrates two major concepts:

1. How each element of the cause of action is satisfied by the appropriate fact.
2. How each fact needs to be proved by evidence if the other party does not admit it.

7. Defences could be fleshed out more but it is not done. None of the defences apply here and a fuller account is omitted in the interests of brevity and simplicity.

1	2	3
Law	**Facts**	**Evidence**
1. Land	The house and land at 12 Big Street Smallville	Stuart Little can tender the house and land in evidence.
2. Possession	Stuart Little owns and lives in the house. It is his family home.	(i) Stuart Little can tender the title documents for his house to prove ownership. (ii) Stuart Little can give evidence himself that he lives in the house and that it is his family home.
3. Interference	Mary Grand enters Stuart Little's yard and takes a lemon from his lemon tree.	Wednesday, 5 April about 12.00 (i) Sally in No 14 Big Street sees Mary Grand from No 16 walking towards Stuart Little's house at No 12. (ii) Five minutes later Sally sees Mary walking back towards her own house at No 16. Mary was carrying a lemon that she was tossing in the air, at the same time displaying a triumphant look on her face. Wednesday, 5 April about 18.30 (iii) Front Line Freddy hears Mary say: 'I finally fixed that obnoxious man Little Stuart as I call him'. Saturday, 8 April about 10.15 (iv) Nosey Parker saw Mary bringing a lemon meringue tart to her parish fete, held in the grounds of the Church of St Jude the Obscure in Smallville.
4. Intention	Mary Grand interferes with the land intentionally.	This intention can be inferred from the circumstances of the interference.
5. Permission	Stuart Little has not given Mary Grand permission to do this.	Stuart Little can give direct evidence that he did not give Mary Grand permission to do as she did.
Consequences		
1. Damages	A. Interference Entering the plaintiff's yard, walking across the lawn, plucking and taking a lemon from the lemon tree and then leaving. B. Loss (a) Damage to the lawn: $38. (b) Loss of the lemon: $3	A. Interference Evidence of the interference is given above in connection with Element (3) Interference. B. Loss Grassy Green who runs a nursery can give evidence that damages are calculated as follows: (a) Repair of the lawn – $38 (b) Replacement of the lemon – $3
2. Injunction	Stuart fears repetition of the trespass.	Wednesday, 5 April About 18.30 Front Line Freddy hears Mary say: 'I finally fixed that obnoxious man Little Stuart as I call him. I will keep doing what I did until he takes that smug look off his face'.

Figure 10.5 Model for Litigation: Organisation of a Case

Chapter 11
Pleading the Case

Introduction

Nature of Pleadings

Pleadings are the documents that each party prepares to achieve two major objectives:
1. To set out the basis of the party's case.
2. To define and describe the issues in dispute in the case.
If the pleadings accomplish these tasks they benefit the other party or parties in the case as well as the court that will decide the case if the case goes to trial.

Problems with Pleadings

Courts: Defects with Pleadings

The requirements for pleadings are laid down in the rules of court for each court. In some cases may be backed up by common law principles.

In practice there are defects with pleadings stemming from a number of causes– from the rules prescribing how they should be done, from the way that parties do them, the form that pleadings need to take, and lax enforcement by courts. These defects are of several kinds:
1. Pleadings fail to achieve their objectives of setting out the basis of each party's case and of defining and describing the issues that are in dispute in the case:
1.1 The Australian Law Reform Commission commented on pleadings.[1] It said that pleadings are 'too often general in scope and inadequately particularised so that there is no narrowing of issues. This is said to be part of a

1. Australian Law Reform Commission (2000) para [7.166]. A similar point is made by Mahoney (2003) in Sheard (2003) p 106 who says that with narrative pleadings at least, the task of defining issues of fact is 'sometimes' achieved, but 'not often.'

culture in which parties commence proceedings too early, without sufficient preparation or attempts at negotiation.[2]' Alternatively it is a deliberate attempt to obscure the issues in order to baffle an opponent or to prolong the litigation.

1.2 The Honourable Russell Fox commented that a plaintiff's initial pleading often 'covers all eventualities and puts the case in as many alternative ways and incorporates as many theories of recovery as possible. The defence is [then] correspondingly wide.'[3]

1.3 Justice John Perry said that 'too often the process [of pleading] becomes a meaningless and wordy ritual, the result tending to obscure rather than illuminate the issues.'[4]

2. Pleadings 'permit tactical manoeuvres leading to increased litigation costs'.[5] In the same vein the ALRC said as follows: 'Lawyers frequently use pleadings tactically and, for example, fail to admit matters pleaded that they know to be true or make allegations that they know they cannot prove at a hearing.'[6]

3. Pleadings are a cause of labour intensiveness in Australia. This obviously generates an increase in costs.[7]

4. Pleadings do not provide a basis for organising information that a case generates.

5. '[I]nexact pleading is rarely the subject of sanction and frequent amendment of pleadings is allowed by courts.[8]

So widespread are the problems with pleading that it 'is rare for there to be a discussion of civil litigation without criticism of the rules and practices of pleadings.'[9] Yet the authorities ignore the problem.

First, Australian courts seem to be in no hurry to rectify this problem. The rules of pleading issued by Australian courts sometimes make little attempt to indicate

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2. Meadows (1998) p 46; Clayton Utz *Submission 341*.
3. Fox (2000) p 127
4. Dunstone (1997) p vii
5. Australian Law Reform Commission (2000) par [7.166]. It cited Review of the Federal Justice System, DP 62 (Australian Government Publishing Service, 1999) para 10.91, *Beech Petroleum NL v Johnson* (1991) 105 ALR 456 at 466 per von Doussa J; *White v Overland* [2001] FCA 1333 at [4] per Allsop J; *Fieldturf Inc v Balsam Pacific* [2003] FCA 809 at [6] per Finkelstein J; *Glover v Australian Ultra Concrete Floors* [2003] NSWCA 80 at [60] per Ipp JA.
6. Aronson and Hunter (1992), *Litigation: Evidence and procedure* 5th ed Butterworths Sydney 1995, 102; Wilson (1996); Arthur Robinson *Submission 189*.
7. ALRC (2000) par 7.166, citing Beaton-Wells (1998) pp 39 and 45.
8. Arthur Robinson *Submission 189*. Trial judges often allow amendments of pleadings due to the influence of appeal court rulings such as *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR [146.]
9. Australian Law Reform Commission (2000) para [7.165]

what is required of parties. Indeed in the worst case the rules bear no evidence of intelligent design.

Second, in 2000 the Australian Law Reform Commission published its report in response to terms of reference directing the Commission to consider 'the need for a simpler, cheaper and more accessible legal system'. The report was entitled *Managing justice: A review of the federal civil justice system* (ALRC 89). In this report the Australian Law Reform Commission identified the problems described above.[10] How did the Australian Law Reform Commission respond in relation to pleadings? It made recommendations that lawyers should have some basis for allegations made in pleadings. Apart from that it did nothing.[11]

Tribunals: Absence of Pleadings

There is a tendency for the rules regulating tribunals to not require formal pleadings. This generally has two deleterious consequences. First, it absolves parties from any duty to describe and explain their case clearly and simply to the tribunal. This is hardly a recipe for low cost and high quality justice. Second, in a contested case it means that the party may not satisfy the duty imposed by the rules of natural justice to inform the other party of their case.

Abolition of pleadings seems to be justified by the desire to run the tribunal in an informal manner so that it is not intimidating to participants. For example, s33(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that 'the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit'. In the same vein s98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that the Tribunal 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit'.

There is a simple truth about abolition of pleadings. While legislation can state that parties do not have to plead their case it is inevitable that in some form or other, parties will plead their case–they cannot run a hearing properly without saying, explicitly or implicitly, what constitutes their case. So, parties will plead their case — overtly, covertly, well or badly. To try to ensure that litigation is just, not too delayed and not too costly it is best if parties plead their case

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10 Australian Law Reform Commission (2000) paras [7.165]- [7.166]. A similar point is made by Mahoney (2003) in Sheard 2003 p 106 who says that with narrative pleadings at least, the task of defining issues of fact is "sometimes" achieved, but "not often." See also Dunstone (1997) p vii

11. Australian Law Reform Commission (2000)

overtly and well in preference to doing so covertly and badly. In other words they should use formal pleadings. As the discussion below demonstrates, it is possible to plead a case clearly, briefly and simply when it is based on the model for litigation.

Conclusion

There is an obvious conclusion from this discussion. Reform of pleadings is both overlooked and overdue.

Reforming Pleadings

Benefits of Reform

Introducing a proper system of pleadings based on the model for litigation will bring at least three consequences to proceedings that are each an advantage by reducing cost and delay at all stages of the proceedings:

1. Description of Each Party's Case. Pleadings properly and succinctly describe the case that each party will present.
2. Identification of Issues. Pleadings identify the issues in the case early in the proceedings and do so simply and precisely.[12] In identifying the issues the pleadings make two vital matters abundantly clear:
    2.1 Agreed Facts. It makes clear the facts that the parties agree are true.
    2.2 Disputed Material Facts. It makes clear the material facts that the parties dispute. In doing this it identifies the version of the disputed fact that each party proposes. These disputed facts define the issues of fact in the case.
3. Framework for Organising Information. Pleadings set up a framework for organising the information in the case for all concerned, that is, the parties to the case and the court. This enables all of the participants, the parties and the court, to be efficient in their respective tasks of presenting and deciding the case. Part of this organisation is to make clear the places where the parties agree and where they disagree (being the places where they are in dispute). Advantages accrue from organising information because any case generates documented information. Even a small case will generate a significant amount. Large cases can generate very large amounts.

The proposed system is a major advance on what now exists. Since the present rules, provisions and practices for pleading do not structure or organise each party's case properly, they often fail to produce pleadings that make clear the case that each party has and the issues that have caused the dispute.

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12. The present system of pleadings frequently fails to do this. As Susannah Moran (2009) pointed out, this prompted Joanne Rees, a professional adviser on litigation, to advise law firms that a good approach for reducing costs is 'to narrow down the issues at the beginning'.

Basis of Reformed Pleadings

Introduction

The proposed method of pleading possesses two advantages–it is highly effective and very simple. Ideally, this system or some system like it would become standard for all courts and tribunals.[13] Until this happens a litigant who want to use the system of pleadings proposed here has the following possibilities. First, the rules of court may be framed broadly enough to encompass pleadings of this kind. Second, it is permissible to plead according to the model in an informal way. There is then nothing to stop a party sending a copy of these pleadings to another party then requesting them to furnish them with information. Third, in activities with the case that are not controlled by rules–such as organising the case in the office or making submissions to the court–a party can use the method proposed here.[14]

This method of pleading is founded on four propositions. These underpin the pleadings to ensure that they do their function and provide a template for organising the case.

Proposition 1. Structure of Pleadings

The model for litigation portrays a structure for litigation based on a dispute of facts that is both natural and simple. This structure is a natural framework for pleadings. The author refers to it as the model for litigation.[15] It will achieve at least three major advantages, which are enmeshed:

1. Description of Each Party's Case. It will describe each party's case.
2. Identification of Issues. It aids the court in identifying the issues and in obtaining a full purview of the case.
3. Information Management. It enables a court to better manage the large amount of information that a case generates. Presently this information seems to lie in a tangled heap. Yet the model for litigation provides a simple, logical and comprehensive framework for litigation that enables parties and the court to do the following:

2.1 They can label and store information in a structured form.

2.2 By labelling and storing information in a structured form, they enable quick and easy retrieval.

2.3 By managing information better, courts should be able to manage litigation better so that they reduce cost and delay.

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13. There is a proposal to this effect in Christopher Enright (2011) 'A Model for Litigation'.
14. This method of pleading is based on a model for litigation. See Christopher Enright (2011) 'A Model for Litigation'. That article contains a worked example showing how the model can organise information in a hypothetical case.
15. Chapter 9 Organising the Case explains this model.

Proposition 2. Relationship of Law and Facts

The elements of a legal rule define the class of facts that are material facts for a case arising under the rule. Each element is a generalisation of one of these material facts.

Proposition 3. Visibility of the Relationship

It is usually clear whether a fact falls within an element because the relationship between the fact and the element is highly visible. If a fact fits the element each will bear the same label or description.

Proposition 4. Elements as a Check List

The elements of a legal rule that underlies a case constitute a checklist for determining whether the facts in a case fall within, or satisfy, the legal rule. This is so because a legal rule applies when each element is satisfied by a material fact within the set of facts. Satisfying each element of the rule that authorises the decision constitutes both the necessary and sufficient conditions for an initiating party to make out their case.

Proposition 5. Importance of Evidence

Pleadings should refer to evidence, at least in summary form, and even if at a later rather than an earlier stage of proceedings. There are three reasons for this:

1. It demonstrates that each party has reasonable ground for their allegation.
2. It helps the parties in reaching a settlement by negotiation or mediation.
3. It guides the court or tribunal at the hearing.

However, a party may not know the entirety of their evidence until the case is some way advanced so any requirement to disclose evidence needs to take this into account.

Method of Pleading

This text now sets out a simple method of pleadings. It is based on a model for litigation developed by the author.[16] As already noted, and restated now for emphasis, it greatly facilitates the work of a court if documents are filed with the court in electronic form.

Plaintiff's Pleadings

Setting Out the Case

The suggested pleadings for the plaintiff consist of four items:

1. Statement of Elements. The plaintiff sets out the elements of the cause of action.

16. Christopher Enright (2011) 'A Model for Litigation'. Chapter 9 Organising the Case explains this model.

2. Statement of Facts. The plaintiff sets out a statement of the material or key facts. This statement has numbered paragraphs.
3. Statement of Evidence. The plaintiff sets out a brief statement of the evidence that they possess to prove the material facts. The plaintiff can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.
4. Statement of Case. In their statement of case the plaintiff lists the elements of the cause of action. They then indicate the fact or facts that satisfy each element. As they do this they note the number or numbers of the paragraph(s) in the statement of facts where each material fact is stated.

Request to the Defendant

At the end of the statement of their case the plaintiff makes a request of the defendant:
1. Defendant's Case. State your case using the same framework.
2. Agreement or Disagreement. Indicate if you agree or disagree with the following – the statement of the elements, the statement of facts and the statement of case. If you disagree please indicate the alternative version that you propose.

Defendant's Pleadings

The pleadings for the defendant consist of four items:
1. Statement of Elements. The defendant indicates if they agree or disagree with the plaintiff's formulation of the elements. If they disagree they need to indicate their version of the elements. Any disagreement between the parties on the elements of the cause of action is may be due to an issue of law that the court needs to resolve.
2. Statement of Facts. The defendant gives their statement of facts, which must cover the same ground as the plaintiff, even if it goes further.
3. Statement of Evidence. The defendant sets out a brief statement of the evidence that they possess to prove the disputed material facts. The defendant can amplify this statement when it becomes relevant, for example in mediation proceedings or in the process of preparing for trial.
4. Statement of Case. In their statement of case the defendant lists the elements of the cause of action. They then respond to the plaintiff's case in the following way.

4.1 Agreement. They indicate the elements in relation to which they agree with the plaintiff's case.

4.2 Disagreement. They indicate the elements in relation to which they disagree with the plaintiff's case. For these elements they describe briefly their version of the material facts and cite the place in their statement of facts where that version of the facts is set out in more detail.

Statement of Evidence

At an appropriate stage each party should prepare a comprehensive statement of their evidence in chief. This includes:

1. Statements of all witnesses with numbered paragraphs.
2. A reference to and adequate description of all other types of evidence that the party will produce.
3. An indication of the material facts that the evidence is capable of proving.

This statement of evidence needs to have an organised system of labelling to facilitate references.

Documenting the Overall Case

Introduction

Together the parties can use the pleadings to provide a documented account of the whole case to assist the court and themselves in managing the case at the hearing and to assist the court in writing its judgment. Parties do this by amalgamating the information that is in their pleadings and jointly preparing the necessary documents. The documented case consists of three major parts–a statement of elements, a statement of facts and a statement of issues.

Statement of Elements

This sets out the elements of the case. If there is disagreement about the elements the statement indicates this and indicates the versions that each party has presented. This becomes an issue of law for the court to resolve.

Statement of Facts

Parties amalgamate their individual statements of facts to produce one coherent statement. Facts in this statement will either be agreed or disputed:

* Agreed Facts. Where the parties agree on facts the statement just states the facts.
* Disagreed Facts. Where the parties dispute a fact the statement notes the disagreement then states each party's versions of the facts.

Statement of Issues

This indicates and describes each issue of fact in the following way:

1. Element. The statement identifies the element in relation to which the issue arises.
2. Facts. The statement identifies the competing versions of the facts.
3. Evidence. The statement identifies in basic form the evidence that each party can use in their attempt to prove their version of the disputed facts.

Assisting the Court

By documenting the case in this way the parties make clear to the court the key

information about the case:
* Background. There is an account of key background information in the form of the Statement of Elements and the Statement of Facts.
* Foreground. There is an account of key foreground information in terms of the statement of issues that includes the three major ingredients–the element that is in dispute, the competing versions of the facts and the evidence that each party can use to prove their version of the disputed facts.
All of this sets up the court to focus immediately on resolving the issues.

Advantages

This method of pleading has several advantages:
1. Simple to use.
2. Creates a structured account of the case that is easy to read and understand.
3. Forces out the issue early in the case.
4. Provides a template for organising the information in the case.
5. Facilitates the party's presentation of their case.
6. Facilitates the court's hearing the case.
7. Facilitates formulation of the judgment. The amalgamated statement of facts is the core of the text of any judgment.

Chapter 12
Assembling the Evidence

In almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control.[1]

Introduction

Present practices for general discovery involve a plaintiff in effect saying to a defendant: 'Give me all you have got on this case.' Then follows bins of documents delivered or a swarm of documents delivered electronically. The recipient then has to search these documents to find the relevant ones. This is akin to receiving a haystack and searching for a needle.[2]

This procedure generates great expense and delay in itself and the opportunity for abuse. Yet a common experience is that among thousands of documents delivered only a few dozen at most are relevant, and among these a mere handful are of special relevance.

There is, however, an alternative method. To continue with the metaphor of haystack and needles, this entails a party directly requesting the needle rather than searching the haystack for it.

This technique has six defining characteristics:
1. Discovery by Issue. It does not entail general discovery, but discovery for each of the issues of fact that cause the dispute.
2. Identification of Issues. If parties are going to engage in discovery by reference to issues of fact, it is important that those issues are identified

1. ALRC Report par [6.67], citing Law Council *Submission 126* for the ALRC Report; Braun (1998), Arthur Robinson *Submission 189* for the ALRC Report.
2. There is an argument that one party's giving another party a pile of documents with no explanation of their relevance is a failure to carry out the duty imposed on them by the rules of natural justice. This duty requires a party to be informed of the case that they have to answer so that they can properly prepare their own case. Failure to explain the relevance of the documents to the case fails to perform this duty. One consequence of this reasoning is that any rule of court to the contrary would be ultra vires being in violation of a fundamental constitutional principle.

correctly and early. The renovated system of pleading (described in a previous chapter[3]) enables the parties to identify the issues of fact, generally after the first exchange of pleadings. It also makes those issues crystal clear. In the outcome, the problem of vast excesses of documents should be avoided by the structure built into the system of pleading. If a document does not fit into this structure or connect with it in some way, it is not relevant to the substantive presentation of the case.

3. Powers of the Court. Conferring sufficient powers on the courts to make any orders that are necessary to effect proper discovery.

4. Holistic Disclosure. The process for discovery is subsumed within a process that involves all means of disclosure. Because all disclosure is done together the parties and the court can see the full picture, and in particular see how all the pieces of evidence relate to each other. It also creates efficiency by avoiding several separate processes for the various types of disclosure.

5. Examination of Parties. Both the court and the other party can question a party or a non-party about the existence and location of evidence including evidence that they hold. These procedures seek to ensure that all relevant evidence is before the court. At the same time the procedure should significantly limit if not eliminate in many cases the ability of parties to play 'hide and seek' with the evidence. It aims to have all evidence on the table so that it is in full view of the parties and the court.

6. Control by the Court. While the parties may commence the conference on their own and even take it to the end, the court has ultimate control. Even when the parties have, to their mutual satisfaction, conducted the conference on their own, there should be a requirement that the court has to sign it off. This limits, one hopes severely, the scope for tactical adversarialism while ensuring that the evidence gathered makes for a fair and efficient hearing.

Evidence Conference

Introduction

Nature

Generally, it is easier to look at a task in holistic terms rather than bits and pieces of it. This is likely to be true for evidence. This is why the proposal for discovery subsumes discovery within an evidence conference where the parties under the guidance of the court do two things:

1. They explain how they plan to prove their case. In this way the evidence conference becomes in brief form a rehearsal or dry run for the eventual hearing of the case in courts.

3. Chapter 11 Pleading the Case

2. They assemble all of the evidence to be used in the case. In other words all disclosure – discovery, inspection, notices to admit, interrogatories and so on, is carried out at the evidence conference.[4]

Most of the major courts in Australia are able to hold a hearing where they can lawfully give parties directions that are aimed at assisting the court and the parties to resolve the case. It makes great sense to make the evidence conference a hearing where the court is able to exercise its power to give directions to the parties.

Supervision

Initially, the parties can conduct the evidence conference themselves. This means that the evidence conference may commence with a series of unsupervised exchanges between the parties who take the process as far as they can with cooperation, agreement and negotiation. The idea is that they transact as much business as they can without court intervention. If parties can carry out the whole conference without court assistance the court still comes at the end to ensure that the parties have properly assembled the case. In the alternative, parties do as much of the business as they can on their own then call in the court to finish the conference.[5]

Duty to Disclose

Under these revised procedures parties are under a duty to make full disclosure of information.[6] This duty lasts throughout the hearing so it is not fully discharged at the evidence conference.

Purpose of Proceedings

The purpose of this conference is to facilitate the trial by identifying every available piece of evidence that can be used for each issue of fact and to reveal the nature of that evidence to the other party and to the court. For these purposes, evidence encompasses all types of evidence, including therefore, observation by witnesses, inference from facts, recorded evidence such as a surveillance camera and voice recorders, electronic information such as email, real evidence such as objects and documents, and expert evidence. At this conference, parties will be under a legal obligation to produce or provide

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4. In England a working party proposed a similar system for long trials – see Judiciary of England and Wales (2007) Recommendation A4.
5. In Victorian Law Reform Commission (2008) at pp 460-461 the Commission noted that there 'was widespread support' in submissions it received for courts exercising more control over discovery processes'. It the VLRC made recommendations to this effect in its report at pp 470-471.
6. Schwarzer (1991)

evidence or information regardless of whether it is favourable or adverse to their case. If they cannot produce evidence that one would expect them to possess they can be questioned as to why they cannot produce it. Their answers are noted and become part of the evidence in the case. After the conference each party prepares a Statement of Evidence where they indicate the evidence that they will use at trial. In addition, the court may direct a party to call certain evidence or the court may call the evidence of its own motion.

Directions

As stated, the courts can call on their powers to issue directions to the parties for the purpose of expediting the resolution of the case. For example the Federal Court can hold a directions hearing pursuant to powers conferred by Order 10 of the Federal Court Rules. By this means, the evidence conference combines the functions and powers for the various processes for disclosure such as discovery, interrogatories and requests to admit facts along with any other necessary functions and powers for assembling evidence. These would include the right to ask for and receive information about whether a party has documents, evidence or information in their possession, or if they know anything about their existence or location. The idea is to 'tie a party down' so that one of two things happens: either they produce a document and advise about information, or they give an explanation as to why they cannot do so.

Total Disclosure

The hearing combines all processes for disclosure–discovery, interrogatories, notices to admit and so on–into one overall process for assembling evidence. The idea is that all information comes out together and comes out as part of an organised framework for the facts of the case. At the same time there is considerable efficiency in dealing with all of these processes together

Judicial Control

The fundamental principle is that the court controls the conference. This avoids tactical adversarialism, which might otherwise hinder the process of identifying and gathering the appropriate evidence. Nevertheless, if a party wishes to bring additional evidence the court must allow it to accord with the requirements of natural justice (which underpin and justify protective adversarialism).

While the court retains ultimate control, it makes good sense to allow the parties initially to transact the business of the conference without judicial supervision if they so choose. They may, however, agree to some other supervision to facilitate the process. If the parties initially proceed on their own but find that they are locked in disagreement, either party can ask for court supervision.

When parties proceed without judicial supervision for all or part of the conference the court must be given an opportunity to view the assembled evidence to determine if it is satisfactory for the hearing of the case. If it is not, the court gives appropriate directions to the parties.

Issues

At this point of the case the parties have identified the issues through the pleadings. This enables the conference to limit its concern to evidence of facts that are in issue. Given this, the conference can now proceed through each issue in turn by assembling the evidence for each issue. By proceeding issue-by-issue it should always be clear as to which issue of fact a piece of evidence relates.

Nature of Disclosure

There are two aspects of disclosure:
1. Parties indicate the relevance of the evidence.
2. If necessary, they make the evidence available in some way to the party who needs it.

Nature of Disclosure: Explaining Relevance of Evidence

As noted above, under present practices with general discovery the responding party produces a heap of documents, which the requesting party then has to search to find the relevant documents. Unfortunately, it will not always be easy and may even be impossible to find the relevant documents. To counter this problem, the proposed system requires the party who discloses that they possess or know the existence of evidence to use their best endeavours to explain how the evidence is relevant to the issue. Failure to give this information is arguably a breach of the rules of natural justice.

This is how it can be done. As a party produces a document or information they provide commentary or annotation to show how it fits into the narrative of facts that they have already provided. It may also be that to do this properly it is necessary to expand the narrative of facts to accommodate the document or information. If this is the case, then the party in question must expand the narrative of facts accordingly in their Statement of Facts.

There is good reason for imposing this requirement. The party producing the information or document is the one who best knows (or who in all likelihood best knows) its connection to the case. Therefore, they should be the ones to tell how it relates. It is after all, both ludicrous and self-contradictory for a party to disclose information and fact and not be required to use their best endeavours to indicate how it relates to the case. Under the present system there is sometimes no requirement for this to occur. The result is confusion, delay and expense, all

of which might be avoided by a simple explanation from the one party who knows.

Nature of Disclosure: Making the Evidence Available

There are several processes involved regarding the evidence for each issue.

Evidence for Party's Own Case

Each party presents their own case. They do so in the following way:
1. List of Evidence. They list the evidence that they intend to use to prove and disprove the facts in issue.
2. Summary of Evidence. They prepare a summary of that evidence.
3. Use of Evidence. The party explains the part that each piece of evidence plays in proving or disproving a disputed fact.

In short, the party explains how they will prove their case and disprove their opponent's case. In doing so they make their case clear to all. Doing this should also indicate what other evidence, including documents or information, is needed for or is relevant to their case.

Evidence for Other Party's Case

Each party voluntarily produces evidence that they know of or possess that would be part of the case for the other party in relation to a particular issue. This will include documents, recorded evidence and objects and extend to information. The party indicates the nature of the evidence.

If they actually hold the evidence they make it available to the other party in some appropriate form. They might do this for example, by furnishing a copy or by allowing them to inspect and test a piece of equipment and record the results in some manner (for example, a video). Where the party does not hold the evidence themselves they indicate to the best of their knowledge where the evidence is and how it can be accessed. They must also use their best endeavours to facilitate access.

Examination of Parties Concerning Evidence

Each party and the court can question the other party or a non-party about the existence or location of evidence or information of any kind relating to the issue.[7] In this examination, the court or a party could ask an open question such as: 'Do you know of any other evidence or information that might prove the truth of the facts material to this issue?'

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7. In VLRC Report at p 473 the Commission recommended oral examination in connection with discovery 'to ascertain information about the existence, location and organisation of documents that may be discoverable'.

Information
If the party inquired about information that consisted of something that happened, they could ask for the names and contact details of any persons who witnessed the event. They could also ask more specific question or line of questions. Here are some examples:
Example 1. 'Did customers ever make complaints about X? What complaints did they make? How did you respond? Did you record those complaints and your response?'
Example 2. 'Do you keep a record of X? What procedures do you have for investigating a failure in X? Was this failure in X discussed? Is there a record of this discussion? Have you asked people to record their recollections of any discussion?'

Evidence
A party may ask the other party about the existence or location of evidence such as documents or objects. The other party can respond in any of three ways:
1. They admit to possessing the evidence and produce it.
2. They advise of the existence of the evidence. To the extent that they are able, they advise the requesting party as to the existence, location and means to obtain the evidence. As part of this disclosure they reveal the identity and contact particulars of any relevant third party.
3. They say that they know nothing.

If the evidence is such that the requested party is expected to know something about it, the requesting party or the court can question them further. For example, if the party fails to produce evidence that they would normally or reasonably be expected to hold, the requesting party can ask them to explain why they do not hold it.

Overall, the idea is both to establish the likelihood that there is as yet uncovered evidence, and to find the evidence. This may force out the evidence. It may force out a denial that any evidence of that kind exists. It may force an admission that the party just does not know. It may force the party to admit that to the best of their knowledge they do not possess or know of any evidence other than the evidence they have produced or identified at the conference.

All of these questions and the answers to them should be made legally admissible at the trial on the basis of their relevance to credit. This puts pressure on the parties to answer truthfully.

Observing the Rules of Natural Justice

Parties must abide by the rules of natural justice. These are pertinent when one party discloses evidence or the existence of evidence to the other party. As the party does this they must use their best endeavours to inform the other party of anything they know about the relevance of the evidence to the case. The party must indicate, if requested, the part that each piece of evidence or information could play in proving or disproving a disputed fact. If necessary, the party disclosing the information amends their statement of facts in a way that demonstrates the relevance of the evidence. In the same vein, they may also need to put an appropriate label on a document or object to make clear the role that it plays in the case.

Orders and Undertakings

When all evidence has been identified, the parties may need to revise their account of how they will prove their case. The court then attends to any follow up business such as production of documents not yet handed over, production of objects for testing and inspection and the issue of subpoenas.

In some cases, it may be possible to obtain the appropriate result by agreed arrangements. For example, if a party is required to produce a document, it may be possible well before the trial to have the party agree to obtain a certified copy that is handed to an agent of the requesting party. By consent that copy is accepted in evidence. This avoids the issue of a subpoena.

Outcome

At the minimum, the evidence conference should identify the evidence that parties can use to prove their case for each contested material fact. Where necessary it should make the appropriate arrangements and orders for production of evidence.

It is possible that the conference may also achieve other goals:

1. Narrow or better define an issue of fact.
2. Identify the evidence that is available like a rehearsal for the trial. This should facilitate trial.
3. Cause a party to concede that a fact that so far has been contested is true and thus not dispute it at any trial.
4. Indicate an issue that the court could try initially on its own on the basis that resolving this issue might resolve the case.
5. It is likely that this conference alerts the parties to the relative strengths of their case. This may cause a rethink about settlement.[8]

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8. Justice McGarvie noted this possible consequence of discovery in *Australian Dairy Corporation v Murray Goulburn Co-op Ltd* [1990] VR 355, 369.

Finally, at this conference there may be a saving in time, money and energy if the focus was on identifying the strongest piece or pieces of evidence. An attempt to be exhaustive might achieve more perfect justice in the decision but less than perfect justice in terms of cost and delay.[9]

Statement of Evidence

After the evidence has been identified and, where applicable handed over, the parties prepare a revised outline of the proof of their case for each issue. To illustrate, assume in an action for trespass to land the first issue is whether the defendant has actually entered the plaintiff's land. Here is how the outline of proof could look:

Penny Holding v Michael Walker **Action for trespass to land**	
Issue 1: Entry onto Land	
Plaintiff's Version	
The plaintiff alleges that on 17 March 2009 at about 10.45 hours the defendant, Michael Walker, entered her land from Banks St via a gate. He damaged the lawn as he walked across it and stole a lemon from her lemon tree. He then departed into Banks St.	
Plaintiff's Evidence	
P2.1 Nosey Parker. At 10.40 hours from a distance of 25 metres Nosey Parker sees Michael Walker walking along south along Banks St towards the gate on the plaintiff's land. P2.2 Squizzy Jones. At 10.50 hours from a distance of 40 metres Squizzy Jones sees Michael Walker walking along south along Banks St away from the gate on the plaintiff's land. He was throwing something in the air that could have been a lemon. He had a triumphant look on his face. P2.3 Penny Holder. The plaintiff, Penny Holder, saw boot prints on the ground shortly after the trespass. The prints show boots of Size 13, which is the size Michael Walker wears. P2.4 Plaster Cast – Mary Fittem. The plaintiff had Mary Fittem make a plaster cast of one left and one right boot print.	
Defendant's Version	
The defendant alleges that he did not enter the land. At 08.00 hours the defendant drove his car 80 kilometres to the town of Shady Tree. He arrived at	

9. This notion is implanted in some legislation. Rule 1 of the US *Federal Rules of Civil Procedure* require 'just, speedy and inexpensive' resolution of disputes. In a similar vein, s56 of the *Civil Procedure Act 2005* (NSW) says that its overriding purpose is to secure 'just, speedy and inexpensive' resolution of disputes.

10.15 hours. He purchased a newspaper and went to the Paragon Café in High St. He ordered and ate breakfast. He left the café at 17 March 2010 at 11.15 hours. He then drove home.
Defendant's Evidence
D2.1 Michael Walker. Michael Walker can give evidence of his own actions on the day. D2.2 Holly Go Lightly. Holly Go Lightly is a waiter at the Paragon Café. The defendant spoke to her on 1 June 2010 and asked if she recalled his making a visit to the cafe. She believed that his face was familiar and that he had visited the café while she was working at some earlier time that could have been a few months ago.

Chapter 13
Managing the Submissions

Introduction
Nature of Dependency
Management of Dependency

Introduction

Hearing and deciding a case that involves a question of law is in some ways like a project, as management scholars use that term. A case is like a project because it incorporates the key feature that drives project management, namely dependency. Much of the process of project management is directed towards managing an array of dependencies.

Nature of Dependency

Types of Dependency

There are four types of dependency based on combinations of start and finish. These are finish-to-start, finish-to-finish, start-to-start and start-to-finish. The following table explains these dependencies:

Label	Relationship	Illustration
Finish to Start F→S	B does not start before A finishes. A finishes. Then B starts.	Foundations dug then the concrete is poured.
Finish to Finish F→F	B does not finish before A finishes. A finishes. Then B Finishes.	Last chapter finishes so the entire book is written.
Start to Start S→S	B does not start before A starts. A starts. Then B starts.	Project work starts so the project management starts.
Start to Finish S→F	B does not finish before A starts. A starts. Then B finishes.	Prior shift finishes when the new shift starts.

Figure 13.1 Dependency

Sources of Dependency

There are three sources of dependencies – causal (logical), resource constraints and discretionary (preferential).

Causal (Logical)

Dependency can be causal or logical. Here are two examples:

* It is impossible to edit a text before it is written
* It is illogical to pour concrete before you dig the foundations

Resource Constraints
Dependency can be based on constraints arising from limitations on resources. Here is an example: it is logically possible to paint four walls in a room simultaneously—but it is not possible if there is only one painter.

Discretionary (Preferential)
Dependency can be grounded in a discretion or preference. This is not much used in project management. An example is that Mary wants to paint the living room before painting the dining room, although she could do it the other way round if she so chose.

Management of Dependency

Introduction

Hearing and deciding a case involves dependency because in places it is necessary for one task to finish in order to commence another. This makes a good reason to consider using one of the main techniques of project management, proceeding in dependent stages, for the task of interpreting law.

From a management perspective there is a dependency when one part of an operation cannot start or finish until another part has started or finished. Where there are dependencies, it is necessary to organise the process to take the dependencies into account and thus ensure that they pose only the minimum possible restraints on performing the task at which the operation is directed.

Since there are dependencies in the hearing of a case, obviously a court can help the flow of a case. It can incorporate appropriate principles of project management in order to handle the dependencies in the most appropriate way.

Identifying the Dependencies

The author's model for interpreting statutes is set out in a book.[1] It incorporates six steps:
* Step 1 Organising the Rule
* Step 2 Identifying the Issues
* Step 3 Identifying the Meanings and Effects
* Step 4 Identifying the Purpose and Object
* Step 5 Identifying the Correct Meaning

Dependency links each successive step. There are two sets of dependencies:
1. Dependencies linking Steps 1, 2 and 3.
2. Dependencies linking Steps 4 and 5.

1. Christopher Enright (2013) *A Method for Interpreting Statutes* Chapter 7 Model for Interpreting Statutes

To explain these links, assume that a legislature has enacted Statute X. The purpose of Statute X is to cause Effect X.

Dependency Linking Steps 1, 2 and 3

Step 1 Organising the Rule → Step 2 Identifying the Issues

Organising a legal rule entails breaking the rule into its elements and consequences. Identifying issues involves checking each element and each consequence against each of the facts to determine whether there is ambiguity– because where there is ambiguity there is an issue. Therefore it is not possible to identify the issues until one has organised the legal rule.

Step 2 Identifying the Issues → Step 3 Identifying the Meanings and Effects

Identifying issues involves checking each element and each consequence against each of the facts to identify ambiguities. Identifying the meanings and effects involves two tasks:

1. Meanings. Identifying the meanings of any word or phrase in an element or consequences that are ambiguous. It is not possible for lawyers and the court to do this until Step 2 has identified where the ambiguities reside. Meanings can be labelled Meaning 1, Meaning 2 and so on.
2. Effects. Making a prediction for each meaning. Take each meaning in turn. For each meaning predict what effect Statute X would cause if the court were to decide that meaning was the legally correct meaning of the ambiguous provision. One can label these effects to correspond with their meanings: Meaning 1 is predicted to cause Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. So, if there are three meanings collectively, Meanings 1-3 are predicted to cause Effects 1-3. Dependency comes into this process because it is not possible to predict effects in Step 3 until one has identified the meanings in Step 2.

Dependency Linking Steps 4 and 5

Step 4 Identifying the Purpose and Object → Step 5 Identifying the Correct Meaning

Step 4 involves identifying the purpose and object of the statute, in this case, the purpose and object of Statute X. This purpose and object is labelled Effect X. In practice it may not be possible to predict the purpose and object with great precision but a court can only do its best.

Assume that the court has identified the purpose and object of Statute X. This is labelled Effect X. Assume, as was done above, the ambiguous provision has three meanings—Meanings 1, 2 and 3, that were predicted to cause Effects 1, 2 and 3.

Now consider Step 5, which entails identifying the correct meaning of the ambiguous provision. Each of the three meanings, Meanings 1-3, is predicted to

cause an effect, these effects being labelled Effects 1, 2 and 3. The aim of interpretation is to identify the legally correct meaning of the ambiguous provision. There are two means of identification:
1. Assessing the Effects. Effects 1, 2 and 3 are the predicted effects of Statute X if the court were to choose Meaning 1, Meaning 2 or Meaning 3 as the legally correct meaning. Now the legally correct meaning is the meaning that will best achieve the intended purpose and object of Statute X, namely Effect X. To determine this, the court has to measure how well each of the three effects, namely Effects 1, 2 and 3, are similar to Effect X. Whichever is the most similar is the legally correct meaning according to the purpose and object rule. It is the meaning that would best achieve the purpose and object of Statute X.
2. Precedent. It is possible that an earlier court has already gone through the process of determining which meaning of the ambiguous provision is legally correct. If this decision is a binding precedent, the present court is obliged to follow it. If decision is a persuasive precedent, the present court can choose to follow it.

This analysis of the process for determining the legally correct meaning of the ambiguous provision demonstrates the dependency of Step 5 on Step 4. In the absence of a precedent it is impossible to determine in Step 5 which meaning is legally correct without first having performed Step 4 and identified the purpose and object of the statute.

Dealing With the Dependencies

Introduction

The fundamental point is that there are two sets of dependencies located in the task of interpreting a statute:
1. There are dependencies linking Steps 1, 2 and 3.
2. There are dependencies linking Steps 4 and 5.

Clearly, courts need to devise procedures that will enable them to handle dependencies in the best possible way. It may take some time and some trial and error to settle, albeit in a broad way, procedures for arguing and resolving questions of statutory interpretation. This chapter now makes some general suggestions about submissions that can be of value in dealing with dependencies. These involve written submissions, electronic submissions and rounds of submissions.

Some proposals for dealing specifically with dependencies are: electronic dialogue, virtual hearings, oral hearings, fixing one part at a time, taking a holistic view of the case, allowing resubmissions and holding a final live hearing.

Electronic Dialogue

Allow the court and parties scope for electronic dialogue to clarify submissions, to raise points that require attention and to improve the quality of submissions.

Virtual Hearings

Bring the parties together. A way to do this is to hold virtual hearings using either written electronic submissions or live video links or some combination of these. To save judicial time, it may be possible to deputise an experienced practitioner to supervise these virtual hearings.

Oral Hearings

Hold oral hearing if necessary. Resolving an issue might require much interaction among the court and the parties.

One Part at a Time

Allow for the dependencies by proceeding through each part one at a time. Initially give each part a separate hearing. Sort out one part before proceeding to the next part.[2] However, be prepared to revisit an earlier stage if a later insight shows that this is necessary because some earlier step has to be revised. For example, the issues and the ambiguities that cause them need to be settled before the reasoning stage can begin. If this is not done, the reasoning stage will be flawed since it will not be built on firm foundations.

Holistic View of the Case

Develop a mindset that sees the case as a whole and at the same time sees clearly the role that each part plays in the whole proceeding.

Allowing Resubmissions

Allow resubmissions to correct, to clarify and to raise fresh points, but do so within limits.[3] On the one hand, it can happen that in the light of later developments it is possible to see that an earlier stage was not properly performed, e.g. identification of the ambiguity or parties or the court may have fresh insights; on the other hand, avoid endless re-argument and prolonging of a case

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2. To emphasise the rationale for proceeding in this way, a court is best placed to receive arguments from litigants when they have identified and defined the issues and the options that they generate.

3. For this hearing have the parties prepare their arguments or reasons in written form and then do two things. They file and serve them on the other party to the case. They rewrite their own reasons in the light of the reasons put forward by the opposing party and file them in court.

Final Live Hearing

There may be some advantage in finishing with a brief oral hearing backed by written submissions. At the live hearing parties have the opportunity to address matters in their reasons on which the court seeks enlightenment by asking question and to deal with matters raised by the other party in their submitted reasons. It will obviously be possible to allow parties the opportunity to make a final electronic submission of reasons that put their case in final form in the light of proceedings at the live hearing. This submission could also incorporate those insights that might otherwise be excluded as 'l'esprit de l'escalier'.[4]

4. Literally 'l'esprit de l'escalier' or 'l'esprit d'escalier' means insight, reply or wit on the staircase. In practical language it means thinking of the right reply or comeback too late to say it because the discussion is over. As Wikipedia explain it, the expression originated from Denis Diderot, a French encyclopedist and philosopher in his *Paradoxe Sur le Comédien* (1773). Didero was at dinner at the home of statesman Jacques Necker. Someone made a remark to Diderot that left him speechless at the time. There was good reason for being speechless. As Diderot explained it '*l'homme sensible, comme moi, tout entier à ce qu'on lui objecte, perd la tête et ne se retrouve qu'au bas de l'escalier*' (a sensitive man, such as myself, who is overwhelmed by the argument levelled against him becomes confused and can only think clearly again [when he reaches] the bottom of the stairs'). Reaching the bottom of the stairs makes sense when one knows the layout of the kind of *hôtel particulier* or mansion to which Diderot had been invited. The practice was to locate the reception rooms were located on the *étage noble*, the noble story, which was one floor above the ground floor. When one left the dinner party or gathering one went downstairs to leave through the front door. (Those who speak American English sometimes also call this phenomenon 'elevator wit'.)

Chapter 14
Mending the Lawyers

Introduction

This chapter discusses mending the ways of lawyers. There are three sets of proposals:

1. Law Degrees. Revise the arrangements for offering law degrees and improve both the content and teaching of degrees.
2. Barristers and Solicitors. Impose duties on barristers and solicitors relating to using their best endeavour to bring the case to a just and timely conclusion.
3. Judges. Abolish the present practice of appointing judges from the practising profession. Instead make judicial office a separate career path that incorporates proper specialist training in areas of law relevant to the judge's future case loads and proper specialist training in the techniques of adjudication.

Law Degrees

There is a case for revising the way in which lawyers receive their academic training in law (as distinct from their practical legal training). As background, it is necessary to explain the nature of current legal training.

Nature of Current Legal Training

Universities provide formal training in substantive law resulting in an undergraduate law degree at a university. This is commonly a Bachelor of Laws degree (LLB). The title of the degree uses the plural form 'laws'. This was the case because in medieval times, the degree trained students in both civil law and canon law. Some lawyers study for additional legal qualifications. Commonly, the next law degree is a Master of Laws, which can be used to improve their legal knowledge and aptitude or to study an area of law in which they wish to specialise.

Revising Training

There are two aspects to revising training–some general comments and a specific proposal for offering law degrees.

Revising Training: General Comments

Introduction

The following comments about the quality of legal training are based to some extent on first hand observation and to some extent on second hand accounts or inference. Stated shortly, there is probably room to improve the quality of undergraduate law degrees.

Content of Courses

There needs to be improvement in the content of these courses. Two related areas that need special attention are: legal reasoning and legal skills, since they suffer from major neglect in the law degrees that are currently offered.

Standard of Courses

There needs to be improvement in the standard required of students for graduating. Here is the problem:

1. Currently each university determines the salaries of the Vice Chancellor and the senior administrators.
2. Universities determine the standards for admission, which in many cases are so low that universities admit students who are not necessarily university material. An illustration is the running down of standards where universities admit fee paying overseas students who have difficulty studying because of their poor and even very poor ability with written and spoken English.
3. Universities charge substantial fees for their courses. Australian students are able to meet these fees because the majority of Australian resident students are eligible for a student loan to cover their fees under schemes such as HECS and FeeHelp that make long term loans to students.
4. These circumstances create a moral hazard–those who run universities have a financial incentive to admit as many students as they can to enhance revenue in order to enhance their salaries. For these people, a university is a ‘money tree’ where the fruit that they pluck comes from the schemes that make loans to students. Universities are enveloped by a tsunami of fees of many thousands of dollars. They are dominated by a financial incentive. Any consideration of quality will diminish the intake of students and in many cases diminish it severely. Money may be ‘illiterate’ but it talks, and when it offers enrichment, it talks most persuasively. A way to try to reverse some of the moral hazard is to take away from universities power to set the salaries of their officers, including their Vice Chancellors; instead have the Commonwealth government set the salaries.

There are, it must be said, in place some administrative practices that are formally described as quality control measures. My experience from several universities indicates that the quality control mechanisms do a poor job of

imposing and maintaining standards. While they create colour and movement they neglect the three factors that make for quality. These are the following:
1. The quality of the intake of students. As the proverb says, you cannot make a silk purse out of a sow's ear.
2. The quality of the textbook that students need to read and understand in order to pass their final examination. A textbook needs two major qualities to be good: depth and readability. Depth determines the degree of understanding that students will gain from the textbook. Where a textbook possesses the quality of readability it can take students as deep as they have to go. Many textbooks are not of good quality since writing clearly is, sadly, a rather rare attribute. Further, this problem with textbooks is made worse by the current practices of universities in awarding a low amount of research points to an academic for writing a textbook, no matter how long or how well written it is. So, at the same time as Universities publicly extol their commitment to good teaching, they diminish the incentive for staff to make it happen. It is no wonder that universities employ so many staff for public relations!
3. The rigour of the final examination is determined by two factors: its content and the depth of understanding that a student requires in order to pass the examination. There is little or no quality control over final examinations. By contrast in years past when universities has real standards it was a common practice to appoint external examiners in an attempt to ensure rigour and quality in assessment.

In short, lack of quality is a problem located at the front gate of each university. It starts when the university opens the front gate to many people who are not capable of university study. This problem peaks when the university sends a student out the front gate holding the testamur of a degree that certifies, but certifies wrongly, that the student has mastered the relevant discipline.

Moreover, the quality control body in the Commonwealth government charge an institution a substantial sum of money to be 'quality certified'. This is perverse given that the resulting attempts to control quality are so ineffectual. At the same time the fees that the body charges to make a quality assessment on an entrant to the tertiary education market impose a significant barrier to entry of proper providers, including those with real standards, into the tertiary education market.

Revising Training: Laws Degrees

Introduction

This discussion proposes a new model for the undergraduate law degree. It does not directly address postgraduate law degrees. However, the underlying principles could be adapted to postgraduate degrees.

Institutions Offering Degrees

The primary purpose of a law degree is to equip the graduate with knowledge and skills to enable them to practise law. Currently there are 27 law schools in Australia that offer undergraduate training in law for would-be legal practitioners. These are caught up in the problems with standards that Universities have, which are described above.

There is a piece of management wisdom that says that 'one should allocate a task to the person or body that has the most interest in seeing that it is done well'. (As economists would say, this person or body has the greatest incentive to achieve excellence.) On this basis, it is worth considering making professional law bodies responsible for offering law degrees. In New South Wales, for example, this could be the Supreme Court, the solicitors' body which is the Law Society of NSW and the barristers' professional body which is the NSW Bar Association. If the government were to proceed in this way, it could have all of these bodies join forces to establish one undergraduate law degree for the whole of Australia.

This is possible because of two connected factors. First, the content of most law subjects is cut and dried–there are rules set down by the state and students have to know them. Although issues of interpretation arise, they are not the core of the course; in any event it is possible to package most issues by identifying the ambiguity and the arguments that can be addressed to resolving it. Second, because so much of the content is cut and dried, an undergraduate law degree is, in terms of content, a product that is substantially homogeneous.

Providing just one law degree for the whole of Australia will avoid the duplication that now occurs. There are, as stated above, 27 law schools and each of them has to incur the fixed costs for offering each subject. In other words, the fixed costs of offering each subject are multiplied 27 times. This is not a wise use of resources.

Tertiary education and training in Australia has been in transition for some time. Just where it will and should end up is debatable. That said it is possible to lay down a proposal for a low cost and low maintenance undergraduate or postgraduate law degree. This can be of quality as high as those who offer it care to make it.

Entry to the Undergraduate Degrees

The University of London offers a comprehensive grammar course that is online and free of charge. It incorporates a text explaining the rules of grammar, a glossary and 'test-yourself-questions' for which it provides answers.

An easy form of entrance exam for the proposed law degree is an examination based on this course. A substantial part could be multiple-choice to ease the marking burden (since multiple choice exams can be marked by a computer). Imposing this entry requirement should achieve three outcomes:
1. Those who pass will know and understand English grammar. In consequence their writing skills will have improved.
2. By learning grammar, students learn or enhance the skill of abstraction, which is important for studying law.
3. It would probably ensure that all of those who were admitted to the degree were capable of studying it.

Texts

Providing a Text

The best teaching aid is a well-structured and clearly written textbook that covers the whole syllabus. One way to provide this is to deploy one or more academics to write the text. The law body offering the degree could provide this as follows:
1. Have the academic(s) write the text.
2. Provide the textbook to the students. Include the price of the textbook in the cost of the course.
3. Pay the author(s) a royalty based on the number of students who enrol in the subject.
4. Deliver the textbook on line as an electronic book. A simple way to do this is to set it out on A4 pages. The student can print it double sided and take it to a print shop. For a small price the print shop can put covers on the book and insert a plastic comb or wire binding. All of this keeps down the cost of the book while at the same time providing reasonable remuneration for the author.

Quality Control for a Text

Have stringent quality controls for textbooks because they are so important for good learning. Here are some ways to do this:
1. Identify people in and outside of the discipline who have demonstrated capacity to write clearly. Make sure that they can identify and know how to correct writing that is not clear. Appoint these people to monitor quality control. Have one of them as chief monitor.
2. Stress to authors that the material needs to be organised at both the macro and micro level.
3. Have the monitors edit the texts for clarity.
4. Have an anonymous line where students and others can report by email parts of the text they cannot follow or where they can make suggestions for improvement. Show these comments to the teacher and the monitors for their consideration and possible rectification.
5. Have the monitors regularly scrutinise the following:

5.1 Any electronic notice board used in the course. Each time a student posts a question or comment or asks a question, the monitors should seek to answer this question: does the textbook already answer this question? If it does not, then amend the text accordingly.

5.2 Student feedback from the course. Identify anything there that raises the question as to whether there is a need to rewrite part of the text to overcome a problem or to improve its quality.

Teaching

It would be possible to offer each subject with a number of teaching options. Students would pay a flat fee for enrolment, supply of the textbook and examination in the subject. Over and above that they can opt for one or more teaching options. In some cases the body can or could ask the students to pay an additional fee for the options. These are:

1. Furnish a student with the email address and postcode of other consenting students in the course subject. This enables students to establish study groups and support groups.
2. Have an electronic message board. Here students can post a query and a staff member will answer it, but possibly after allowing students an opportunity for discussion. Periodically, the teacher could tidy up these questions and answers by packing them into some organised form.
3. Students hire their own tutor. University staff could be allowed to do this work provided that they were not examiners in the subject.
4. Some teaching can be offered pro bono. For example law academics and law firms can offer pro bono teaching to indigenous undergraduates or students with special needs.

Judges

Judges prize and fiercely protect their independence. They display an aura of professionalism since they are generally dedicated and hardworking. There are, however, some downsides:

1. Judges are trained neither in legal reasoning nor in legal method.
2. While judges fiercely protect their independence, they are wrapped up with the strong culture of the bar from which most of them come.
3. Judges tend to be resistant and impervious to proposals for change.

In other parts of this proposal, I argue that the Australian legal system would function better as an inquisitorial system and at the same time adopting some of the labour-saving devices of that system, for example, dispensing with complex rules of evidence and substituting for them consideration of the probative value of evidence that might be excluded under the present rules.

One of the features of the inquisitorial system as practised in Europe is that the government does not select judges from the practising profession. Instead, law graduates apply for training as judges. In Australia, this would have beneficial consequences by ensuring that judges are trained both in the skill of judging and in legal reasoning and legal method. It would also break the close bond that now exists between bench and bar.

Barristers and Solicitors

Introduction

One of the platforms on which to create an effective and efficient adjudicative system is to impose appropriate duties on the parties and their representatives (and some jurisdictions have already taken steps in this direction[1]).

General Duty

There should be a general duty on parties, with a corresponding duty on their legal representatives: to make their best endeavours to ensure that the case proceeds as efficiently, as expeditiously and as effectively as is reasonably possible.

Duty of Cooperation

There should be a specific duty on parties and their representatives to cooperate with the other party and the court regarding the proceedings.

Duty of Disclosure

There should be a specific duty on parties and their representatives to make full disclosure to the other party of items within their knowledge such as law, facts, evidence, information or material that are relevant to the case.

Application of Duties

These duties apply to a party regardless as to whether carrying out the duty will be, or may be, favourable or unfavourable to that party's case. The aim is to ensure that each party is properly set up to present their case and that the court has before it the fullest possible material, information and evidence.

Exception

There should be an exception to these duties. This exception is that a party is not bound by one of these duties where there is good reason to be exempt. In these circumstances, the party should disclose to a relevant member of the court in confidence the details of their non-compliance and their reasons for non-compliance.

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1. See, for example, *Federal Court of Australia Act 1976* s37M.

Chapter 15
Reducing the Cost of Legal Aid

Introduction

There is currently a problem with legal aid in Australia. More people need or want legal aid than is available. This chapter proposes a method for providing at least a partial solution to this problem. Essentially, it involves using a combination of three cost-saving measures. These are the following:

1. Limited Scope Representation. Provide limited scope representation (LSR) in some cases as an alternative to full-on legal aid.
2. Preparation of a Documented Case. Prepare a party's case in documented form according to the model for litigation. This will need to be done with the approval and cooperation of the relevant courts and tribunals.
3. Internship for Trainee Lawyers. Make working in legal aid for a period, say of two or three months, part of the practical legal training (PLT) for novice lawyers. Deploy the novices in preparing documented cases for clients. There are two benefits from this – the novices would be on a relatively low wage, which keeps costs down, and at the same time these novices receive intensive and supervised training and experience in the basic tasks for litigation.

Limited Scope Representation

The common practice is for a lawyer to handle all aspects of a party's case from start to finish. By contrast, as the label intimates, limited scope representation (LSR) involves assistance to a litigant with only part of the case.[1]

The proposed scheme provides limited scope representation by drawing and operating on a distinction between two parts of the function of a lawyer who is representing a client: one involves preparing the case and the other involves presenting the case in court. This proposal forsakes any attempt to provide live representation at trial (although the legal aid authority may still provide this representation in select cases). Instead it provides the following assistance:

1. Another area where limited scope representation can work is where a client has repeat business such as collecting unpaid debts. The lawyer can draft the documents or teach the client how to do so and check the documents and also prepare the client for the court case. See Curtis (2007).

1. The legal aid lawyer prepares the client's case in documented form.
2. The client presents their case to a substantial extent by filing their documented case in court. This substitutes for a lawyer's appearing for a client at the hearing in order to present it.

Providing limited scope representation in this form is a major cost-saving measure in two ways. It reduces the number of labour hours that the legal aid scheme must provide for a client and it reduces the cost incurred from paying the lawyers to provide this service to the client.

Preparation of a Documented Case

In this proposal, the assistance involves setting up the party's case according to the method of pleading described in an earlier chapter.[2] This will need to be done with the approval and cooperation of the relevant courts and tribunals.

Essentially, it involves the legal aid lawyer preparing the documents that set out a party's case. These documents include the following:
1. Facts. A statement of the facts as alleged by the party.
2. Issues. A statement of the issues of fact that give rise to the case.
3. Evidence. Statements of evidence from each witness.
4. Claim. A statement of the party's claim indicating why the party should win the case:

4.1 Plaintiff. In the case of a plaintiff the statement shows how the plaintiff has alleged facts that satisfy each element of the cause of action and has evidence that can potentially prove any fact that is disputed.

4.2 Defendant. In the case of a defendant the statement shows how the defendant has alleged facts that, if proved, would defeat the plaintiff by bringing it about that they failed to satisfy at least one element of their claim. At the same time the defendant shows that they have evidence that can potentially prove the facts that are necessary to rebut the plaintiff's claim in this way.

The party then files the documents and conducts their own case. (Obviously there may be other provisions for representing a party in court but this proposal is confined to preparing a documented case.)

Internship for Trainee Lawyers

Using the renovated system of pleading outlined above simplifies the task of preparing a case. It does this by providing a framework or template that indicates each part of the case that a client needs. Since this framework simplifies the task of preparing a client's case, it reduces the level of skill and

2. Chapter 11 Pleading the Case

experience that a lawyer needs to assemble a case. Since the wages of a lawyer depend on their level of skill the proposed scheme reduces wage costs by reducing the level of skill that it requires.

The point is that the legal aid which the scheme provides does not involve complex tasks. Therefore it does not depend on using experienced lawyers in the front line. Instead, it is possible to provide this legal aid using less skilled workers. There are two obvious possibilities:
1. Newly graduated lawyers. One possibility is to incorporate into their practical legal training a period of say three months where they are an intern in a legal aid office.
2. Students who are still engaged in their law studies.

Both graduate lawyers and law students will need some special training prior to commencing work, but it would take little time to inculcate the skills and knowledge. In order to ensure that the legal aid work is of good quality, it will be necessary for experienced lawyers to supervise the work in preparing cases for clients.

In short, the proposed scheme provides a basic form of legal assistance by preparing a documented case for a client. It needs fewer resources per case than does legal aid in the form of full representation for two reasons:
1. There are fewer hours needed to provide the legal aid.
2. If a law student or novice lawyer provides the legal aid there is a lessening of labour costs compared to using an experienced lawyer.

Advantages of the Proposed System

Introduction

There are two aspects to explaining the advantages of the proposed system. First, there is a cost-benefit analysis. Second, there are several advantages that the scheme brings to the parties, to lawyers and law students, and to the courts.

Cost Benefit Analysis

When a lawyer represents a client in a litigated case there are four reasonably distinct functions that they perform. Comparing how the proposed system works regarding these four functions with full legal representation, is an excellent way of highlighting the costs and benefits of the proposed scheme.

These four functions usefully distinguish between a party's material or rational case and their persuasive or rhetorical case. The material case is the bare assertion: these are the facts of a party's case that satisfy the elements of the cause of action and here is the evidence that can prove these facts. The persuasive case of a party entails asking the court to view their case in a way

that makes it more legally persuasive than the case that is presented by the other party. This is the rhetorical part of the case as distinct from the rational part, which comprises the material case.

Here now are the four functions of a lawyer in a litigated case:
1. Preparing the Material Case
2. Preparing the Persuasive Case
3. Presenting the Material Case
4. Presenting the Persuasive Case

Work Load in the Four Basic Functions

The following table indicates the work involved in each of the four functions and the expected benefits. Column 1 shows this for the situation where a party has full representation. Column 2 shows this for the situation where a party has limited scope representation in the manner proposed in the scheme that the author is presenting. Here is the table:

Comparison of Full Representation with Limited Scope Representation	
Column 1	**Column 2**
Preparing the Material Case	
Input	**Output**
Full Representation This entails assembling and documenting the case. Elements. State the elements of the cause of action. Facts. Assemble a statement of the full facts of the case as known and understood at this time. Evidence. Prepare witness statements. Record in a document other types of evidence and indicate the facts that they might prove.	*Full Representation* The party's full case is prepared.
Limited Scope Representation There is more or less the same type and amount of work as there is for full legal representation.	*Limited Scope Representation* The party's full case is prepared.
Preparing the Persuasive Case	
Input	**Output**
Full Representation Being persuasive potentially streams through the whole case. It can even be a matter of tone and tempo. The overall idea is to have a case theory, which is a view of what happened and why it happened as it did. Being persuasive involves selling this to the court. It can involve highlighting questions in	*Full Representation* The party's full persuasive case is prepared so far as it can be constructed before the hearing commences.

examination in chief. It totally permeates cross-examination. The final address is replete with persuasion. So, preparing the persuasive case involves doing as much advanced preparation as circumstances will permit.	
Limited Scope Representation As the scheme is described in this article the lawyer does nothing regarding the party's persuasive case.[3]	*Limited Scope Representation* There is no preparation of the party's persuasive case.
Presenting the Material Case	
Input	**Output**
Full Representation This entails presenting the case in court. It involves calling and examining the party's witnesses, cross examining the witnesses of the other side, and making closing submissions to the court.	*Full Representation* The party's full material case is presented to the court.
Limited Scope Representation The lawyer prepares the party's case in documented form. The party then files the case in court.	*Limited Scope Representation* The party's full material case is presented to the court with a qualification–there is no cross-examination of witnesses.
Presenting the Persuasive Case	
Input	**Output**
Full Representation In the description above of preparing a persuasive case, the article listed and explained the tasks involved in presenting the persuasive case. It is worth mentioning the main tasks again for emphasis. It can involve highlighting questions in examination in chief. It totally permeates cross-examination. It is specifically stated in the final address. In addition, presenting the persuasive case has an opportunistic aspect–opportunities may arise during the case when the lawyer can do something to make their case more persuasive to the court.	*Full Representation* The party's full persuasive case is presented to the court.
Limited Scope Representation As the scheme is described in this article the	*Limited Scope Representation* There is no presentation of the party's

3. There is a possible add-on for this scheme although the article will merely mention it. In special cases a lawyer for a party could prepare a document that seeks to persuade the court of their party's case. However, at the start of the case they are working from limited material, in contrast to the conclusion of the case when it is all before them.

lawyer does nothing specifically regarding the party's persuasive case.[4]	persuasive case. Nevertheless some if not many of the arguments in the party's favour will be obvious to the court.

Figure 15.1 Cost Benefit Analysis: Full Representation Compared to Limited Scope Representation

Summary

It will help readers to digest the message if it is set out in the following table:

	Labour Hours	**Level of Service**
	Input	*Output*
Preparing the Material Case		
Full Representation	Normal	Full service
Limited Scope Representation	Normal	Full service less cross examination
Preparing the Persuasive Case		
Full Representation	Normal	Full service
Limited Scope Representation	Nil	Nil
Presenting the Material Case		
Full Representation	Normal	Standard
Limited Scope Representation	Nil	Standard less cross examination
Presenting the Persuasive Case		
Full Representation	Normal	Standard
Limited Scope Representation	Nil	Nil

Figure 15.2 Summary of Cost Benefit Analysis

The cost (inputs) and benefit (outputs) of this scheme become apparent when comparing limited scope representation with full representation.

1. Labour Input

Limited Scope Representation

The labour input for a case with limited scope representation requires labour for only one of these tasks, namely preparing the material case.

Full Representation

The labour input for a case with full legal representation requires much more labour than is required for limited scope representation. The labour consists of the following:

1. Four major tasks, namely preparing and presenting the material case and the persuasive case.

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4. There is a possible add-on. In special cases a lawyer for a party could prepare a document that seeks to persuade the court of their party's case. However, at the start of the case they are working from limited material, in contrast to the conclusion of the case when it is all before them.

2. Labour input for some ancillary tasks most obviously the labour time caused by waiting in the court precinct for the case to come on, by adjournments and by consultations with the client and with their witnesses.

2. Service Output

Limited Scope Representation

The party has their material case prepared and presented to the court. The party does not have their persuasive case prepared and presented to the court although in a lot of cases some, if not many, of the arguments in the party's favour will be apparent to the court.

Full Representation

The party has both their material case and their persuasive case prepared and presented to the court.

Summary of Benefits and Costs

Benefits

A party who receives limited scope representation has their material case prepared and presented to the court. They do not receive direct assistance on their persuasive case. Nevertheless, they can make a submission and to some extent, even to a considerable extent, the material case speaks for itself.

Costs

There are two forces at work that reduce costs. There is a lesser amount of labour used and it is possible to use lower rather than higher cost labour.

1. Lesser Amount of Labour. Limited Scope Representation uses less labour than full scope representation. As stated, it uses labour for only one of the four basic tasks, namely preparing the party's material case.
2. Lower Cost Labour. Preparing a party's documented case according to a standard template does not require the level of skill and experience as an advocate preparing a case for presentation in court. This means that it is possible to use lower cost rather than higher cost labour.

Outcome

It is not possible to use precise figures to indicate or predict cost reduction but a worked illustration will show the possibilities. Assume that a case cost $X to run will full representation legal aid. With limited scope representation the figure of $X is reduced in two ways:

1. Reduction in Time. Assume that the scheme creates a 40% reduction in the time needed. This means that a case now costs only 60% of $X.
2. Reduction in Price. There is also a reduction in the price of labour through using lower cost labour. Assume that this reduction was 50%. This means that a case now costs 50% of 60% of $X, to wit 30% of $X.

This means that the amount of money that would previously fund one case using full-scale representation will now fund three and one third cases. This is a more than threefold increase in the caseload that a legal aid provider can now carry.

Advantages to Parties

While the otherwise unrepresented parties do not obtain personal representation, they receive a written version of their case which they can submit to the court and which has been prepared by someone who is legally competent. This is itself a material benefit. It also should provide some psychological relief because they can present their case properly to the court.

Advantages to Lawyers and Law Students

Newly graduated lawyers and law students provide a low cost form of labour. They assist parties to the court. They assist the work of the court by preparing a documented case for a party whom they represent. At the same time they earn income and gain valuable supervised practical experience in working with law. This is a positive externality of the scheme.

Indeed, it would be possible to include a placement in a legal aid office as an optional or even compulsory part of practical legal training. This could involve instruction and supervised practice in the following matters:

1. Office management.
2. File management.
3. Interviewing a client.
4. Advising a client.
5. Interviewing a witness.
6. Writing a statement of evidence of a witness.
7. Preparing documents for a client's case.
8. Ethics, with special emphasis on litigation.

Advantages to Courts

The system of pleading provides a comprehensive statement of the case, it identifies the issues from the start and it organises information right from the start. In this way, it facilitates every task that the parties or the court perform: organising the case, negotiating a settlement of the case, presenting the case, hearing the case and writing the judgment. At the same time it relieves courts from the burden of having to assist unrepresented litigants—or at least substantially lightens their burden. It drives the government dollar further by helping courts to be more effective and more efficient.

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