EQUAL ACCESS TO JUSTICE

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Introduction

It has long troubled me that civil litigation becomes a game played on the lawyers' playing field which all too often is won and lost on penalties or when one of the players retires hurt. Litigants are caught up in the game only to find that it is played at their expense and may not ultimately resolve the problem that brought them to the lawyers in the first place. All too often they end up worse off than before they commenced their quest for justice. I have never been truly involved in high-powered litigation between the big players who can assess the risks and make commercial decisions. Instead I identify with the needs of ordinary members of society who expect the legal system to provide solutions to their disputes in an understanding manner. I take satisfaction in my daily work from the situations that I am able to resolve without too much pain to the parties. It is in this context that I consider the special needs of those people who by reason of disabilities encounter a handicap in society but do not expect this to be reinforced by the legal system. I wonder if our civil justice system can offer a more appropriate response to their needs.

The Woolf Reforms

Lord Woolf has done a service to society by standing back from the game and asking fundamental questions which many litigation lawyers are too involved to address. He has recognised that all litigation does not need to be played by the same rules and that the manner in which the game is played may be of considerable relevance to the attainment of justice. Increasingly, those who encounter our courts must be coped with as litigants in person because they cannot afford a lawyer. Being unable to access the system may be a greater injustice than coping with a system that is imperfect.

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But now that the euphoria over the proposed new climate of civil justice has died down the lawyers are again taking over the debate and seeking to justify the old approach. Their well articulated concerns based upon considerable experience of the existing system are in danger of diverting us from the need for fundamental change that has been recognised by society and articulated by Lord Woolf on its behalf. Most individuals encounter our courts only once in a lifetime, if at all, so they are not able to define their expectations, but it is necessary for someone to speak up on their behalf and practising lawyers cannot always be relied upon to do so.

This initiative has given me the confidence to express views that I would not have dared to give voice to before. The bulk of civil litigation is conducted before, or regulated by, the district bench of which I happen to be a member so my observations may have some relevance. When small claims come before me, and even procedural matters in larger claims, I am inclined to ask the parties to pause for a moment and consider what they are each trying to achieve and whether there may be other means of achieving this than a contested hearing. I therefore take comfort in the encouragement towards alternative dispute resolution or mediation. I welcome the interventionist approach that is already available in arbitration or Children Act 1989 cases. I am doubtful whether the litigators can be relied upon to captain the game in the best overall interests of the parties. I consider that the judge must be more than just an umpire whose role is to maintain the rules, prevent fouls and add up the score when the game is over. To the parties it is no game at all but a serious business.

_Dispaced Litigants_

This change in approach to litigation is of particular relevance when people with disabilities are involved. Under community care policies they are more visible in society and are becoming more frequent attenders in our courts. They often seek social justice as well as legal justice (I question whether in reality there should be a difference) but are unlikely to achieve this under the present system. It is not part of the culture of adversarial proceedings for the judge to delay the contest whilst the court acts as a gateway to community care services, notwithstanding that appropriate support for the disabled litigant may remove the source of the litigation. For example, the underlying reason for debt