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THE CASE FOR A PARADIGM SHIFT IN CIVIL AND COMMERCIAL DISPUTE RESOLUTION – MOVING FROM FEAR TO LOVE: A SOLICITOR'S PERSPECTIVE

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The current system for resolving commercial and civil disputes produces enormous community disharmony and emotional pain. Intense feelings of anger, sadness and fear often arise from the systems and processes designed to resolve disputes. These feelings and emotions may be seriously under estimated and arise from the experiences of the participants – clients, lawyers and judicial officers. In order to explain this phenomenon it is argued that it is necessary to examine the fundamental context or paradigm underlying the current adversarial system. Upon examination it emerges that the current system is based on fear – fear of losing, fear of money, fear of failure and fear of lack of control over outcomes. The current system determines disputes in an adversarial often combative fashion but rarely satisfies or heals them. It is argued that efforts to reform will not prove effective until they embrace a paradigm shift away from fear to its opposite – love.

Introduction

> *A person needing a heart/lung transplant was given a choice between a lawyer's heart when the lawyer was around 60 years old and a heart from a young 25 year old. The person chose the lawyer's heart that was 60 years old. The surgeon said "Well why would you want the lawyer's heart, 60 years old?" The person said "Because it is brand-new, it has never been used".*

1. When was the last time you heard a commercial litigation lawyer encouraged by a judge or mediator in a commercial list matter or mediation to use their heart, feelings or intuition, to bring their humanity to bear in seeking truth and a real resolution of a legal dispute and its underlying causes? When did you last hear a commercial litigation lawyer advise his or her client to that effect? The answer is probably never.

2. In this paper, I share some of my experiences as a commercial litigation lawyer and present what I believe is the case for a shift in the underlying context or paradigm in the current civil and commercial dispute resolution systems which exist in Australia and elsewhere in the common law world. I do this in the hope that I will contribute to the discussion taking place concerning the development of therapeutic jurisprudence and other legal reform movements and initiatives.

My Background

3. In the past 21 years since completing a law degree, I have practiced law in the areas of commercial and common law litigation, insolvency and general commercial law (non-litigation). For the last 16 years I have practiced in my own legal firm as a sole practitioner employing up to 14 staff including up to 8 professional staff. The majority of my time has been engaged in commercial and civil litigation.

4. Initially I practiced commercial litigation with a large national law firm in Melbourne. I was introduced to the notion that commercial litigation was apparently superior to other litigation particularly criminal and family law litigation. I was impressed by this elitism and being an ambitious person, aspired to practice to my full potential. I was shocked to discover the high stress levels endured by my senior colleagues and to see successful partners frequently burn-out and leave practice in their 30's or early 40's. Preferring the autonomy of a small firm, I established my own practice in 1990.

5. Since 1990, my firm has opened approximately 4,300 files of which approximately 75% have involved commercial or insolvency disputes. Amongst these there have been cases involving disputes between directors, partners, contractual and trade practices matters and disputes involving financiers and insolvency practitioners. Many of these cases have been extremely hard fought, some in multiple jurisdictions expanding to encompass several litigants. Most of my clients have been small business people, enterprises and professionals.

6. I am extremely grateful for the benefits, opportunities and experiences of legal practice, many of which have been positive. I have enjoyed a variety of legal work which has been interesting and stimulating. Legal practice has provided me with a good income. Above all, I am grateful for the privilege and opportunity of being entrusted with custody of people's legal disputes and the many enduring friendships which I have made with clients and others who have entered my life as a result of legal practice.

7. I also recall the many less positive aspects of practice. There have been many problems, stresses and challenges thrown up by legal practice. Mistakes, which are easy to make in often complex and unpredictable litigation, are usually punished savagely by clients, opponents and Courts. Clients may be unforgiving, refuse to pay for work performed or worse, threaten or actually lodge a complaint with the relevant governing professional body. Lawyers competing for success and client approval, often highlight the mistakes of opponents and their lawyers for the benefit of their clients. Courts, particularly superior Courts, are not in my experience, forgiving of mistakes and are often critical of the approach to a case by either or both of the parties and their lawyers. Criticisms are made with the benefit of hindsight. Judgment (pardon the pun) abounds. The ability to succeed relies on lawyers painstakingly analysing all possible options and selecting a strategy which is likely to prevail. The object is to keep clients happy. Clients are often not happy unless they win.

8. I have experienced some remarkable cases: I recall acting in a partnership dispute between 2 small business partners. In 6 months the dispute expanded to encompass 26 separate Western Australia Supreme Court actions. Another

client opened more than 70 separate dispute files over 12 months during the course of the financial decline of its businesses. I estimate that approximately 12 of my clients have been responsible for approximately 600 separate dispute files. I have pursued and defended commercial warfare on behalf of these clients on multiple dispute fronts. These wars have often continued for years. As in all commercial litigation, the ultimate objective is to recover or avoid paying money or a remedy which, usually, has a monetary value.

9. In 1998, with the assistance of 2 other colleagues and the Subiaco City Council, I established the Subiaco Community Legal Service, a free legal service offering free initial consultations with a lawyer. Since that time the Service has offered approximately 1,800 consultations. I draw on my experiences from that service in this paper.

10. Together with many loyal and hardworking employees, I established and expanded my firm in the 1990's. About 75% of the work undertaken was commercial litigation. Most of the clients coming to my firm came by word of mouth, believing that I was an aggressive litigator and that by aggressively pursuing their cases for them, they would win.

11. I worked hard and constantly strived for higher standards. Having learnt of the unpleasant fallout from making a mistake or having an unhappy client, I became mistake intolerant. Under increasing time constraints, I became even more impatient than I was in my life before law. I reflect now that my self esteem was increasingly linked to success at work. I was at times extremely unforgiving on myself and my staff, often exploding at people. My firm experienced high staff turnover. I didn't know it but I hated myself. I spread my unhappiness to others.

12. In 1999 I experienced symptoms of depression. I consulted a doctor who recommended medication. As an alternative to medication, I engaged a personal coach who assisted me to look at my life and related unhappiness from a different perspective.[1] She encouraged me to examine the underlying paradigm of my life and to change that paradigm. By doing this and by focusing on my own wellbeing, I made many improvements to my life and happiness. I moved through my symptoms of depression. Supported by friends and key staff I changed myself and my workplace. I am now proud of my workplace and my happy staff.

13. In the same way that a paradigm shift enabled me to transform my life, I believe that a paradigm shift in the sphere of civil and commercial dispute resolution will enable a positive transformation to occur. The case for such a paradigm shift, rather than piecemeal or incremental change is, I believe, compelling.

What is a Paradigm?

14. The word "Paradigm" comes from the Latin *"Paradigma"*, which comes from the Greek word *"Paradeigma"*. It means "*an example, pattern or model that serves as an explanation"* or *"a philosophical and theoretical framework of a scientific school or discipline within which theories, laws and generalisations and the experiments performed in support of them are formulated* [2].

[1] I acknowledge my coach Lorna Patten and her company Open Up Communication Pty Ltd for many of the ideas for change in my life mentioned in this paper including the 3 guiding principles mentioned later.
[2] Merriam – Webster online Dictionary, http://www.m-w.com/cgi-bin/dictionary?paradigm viewed 29 May 2005.

15. In this paper "Paradigm" is meant as the underlying example, pattern or model in respect of which laws are formulated or explained.

16. Paradigms are usually associated with large-scale patterns. When such patterns change to another pattern then a paradigm shift occurs. Several hundred years ago, a pervasive paradigm was that the world was flat. This paradigm shifted after scientists and explorers disputed it. It is said that paradigm shifts are underway in relation to S*ustainability, Values and Lifestyles and World Order* (following the end of the Cold War).

The Case for a Paradigm Shift in Civil and Commercial Dispute Resolution

Submission One – The Current System Has Unacceptably High Adverse Consequences on All of Us

17. In my opinion the current system adversely affects lawyers, judicial officers, clients and directly or indirectly affects the rest of the community. I do not assert that the current system has no positive features or historical relevance. It does. My contention is that the adverse effects on the participants and the broader community warrant fundamental change. I outline what I perceive as the current adverse effects below.

Lawyers

18. In my experience, a high percentage of lawyers are dissatisfied with their careers and aspire to either change career or retire as soon as they are able to afford to. Competition between lawyers and law firms contributes to a culture in which lawyers are reluctant to publicly express their career dissatisfaction. However, dissatisfaction is in my experience often expressed between trusted colleagues and friends or professional groups, in which there is more perceived freedom to express these feelings. There is a lack of any comprehensive studies of the causes of lawyer dissatisfaction. In undertaking any such study I would suggest that lawyers' spouses and firm administrative staff be interviewed as I believe they bear witness to the daily complaints from lawyers.

19. In Western Australia in 2004, the Law Society of Western Australia and the profession's annual risk-management workshop focused on the high incidence of stress and depression amongst lawyers. In October 2004, the Law Society of Western Australia launched LawCare (WA), the centrepiece of a program of care for lawyers. This was done in response to concerns about lawyers' health and enjoyment of life and growing evidence of comparatively high levels of depression, poor health and emotional problems amongst lawyers.[3]

20. A West Australian clinical psychologist, Jennifer Wright, has observed that lawyers are very likely to develop symptoms of depression. Although most of her clients were women, she speculated that the incidence of depression was equally high amongst men but was probably reflective of:

> *"…the gender tendency to ignore symptoms, deny vulnerabilities, and show a reluctance to seek professional help. Men, possibly more than women prefer to self-medicate with alcohol and other substances. By the*

[3] Gains, A, 'Caring for the Profession', Brief, 31:9, Perth, Western Australia (2004)

time they seek professional help, many male clients seem about to explode with stress.'"[4]

21. American studies indicate higher than normal rates of dissatisfaction, unhappiness and depression among members of the legal profession. A poll conducted in the United States in 1992 found that 52% of practicing lawyers described themselves as 'dissatisfied'.[5] A John Hopkins University Research Survey found that out of 105 professions studied, lawyers are the most depressed group in the United States, suffering from depression at a rate 3.6 times higher than employed persons generally. This was despite lawyers having now surpassed doctors as the highest paid professionals in the United States. [6]

22. Whilst there is a lack of comprehensive studies in Australia, it appears to be accepted that depression is widespread among firms in Australia.[7] Those studies which have been undertaken indicate that the position is no better in Australia than in the United States. The 2004 Australian Young Lawyers Survey, commissioned by the Law Council of Australia, indicated that almost half of the young lawyers' surveyed did not see themselves practicing law in 5 years time or were unsure. Further, of those lawyers admitted to practice in 2002, 52.5% reported that they were leaving their current job in the next 12 months. [8]

23. It is therefore submitted that lawyers are possibly the most stressed, unhappy, dissatisfied and depressed group in the community.

Judicial Officers

24. I believe that, as judicial officers are lawyers, many of the problems experienced by lawyers are shared by them.

25. High Court of Australia Justice, the Honourable Michael Kirby AC CMG in an article on judicial stress, described judicial officers as being in a "stress denying profession". He suggested that whilst stress is prevalent, neither judge nor advocate is supposed to admit it or, less, write about it. He said that the legal profession is subject to the cultural inhibitions inherited from the English tradition of the Bench and Bar and may have been reinforced by the Australian phlegmatic self image. Justice Kirby said that:

> *"…daily exposure to sharp differences, disputes and argumentation render judicial officers especially vulnerable as a group"*.[9]

26. Justice Kirby refers to recent articles as evidencing that stress has widespread effects amongst law students, lawyers, judges and their clients. It appears that the cultural denial is evidenced by the lack of attention to the subject.

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[4] Wright, J 'Coping With the Costs of Success', Brief, 31:9, Perth, Western Australia (2004)
[5] Fax poll referred to in Martin E.P Seligman *Authentic Happiness* (2002), Verkuil, P & Kang, T 'Why Lawyers are Unhappy', (2005) DeakinLaw Rev 4 [7]
[6] Referred to in Seligman, M.E.P. (2002). Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment. (New York: Free Press/Simon and Schuster)
[7] Gibbs, K, *Depression Widespread, Firms Admit*' (Lawyers Weekly), http://www.lawyersweekly.com.au/articles/f2/0c0372f2.asp viewed 4 May 2006.
[8] McConvill, J and Edney, R, *How Happiness Can Save the Practice of Law* (Online opinion), http://www.onlineopinion.com.au/view.asp?article=3437 viewed 11 May 2006.
[9] The Hon. Justice Michael Kirby A C CMG 'Judicial Stress' *Annual Conference of the Local Courts of NSW* (Sydney, 2 June 1995)

27. A recent paper has examined the emotional labour or management of emotions required of Magistrates in their every day work and the difficulties this poses for them. It suggests that in the adversarial legal system, where one or more of the participants will lose, the distress of the losing party will create emotional stress for the judicial officer.[10]

28. I wonder whether the problems currently endured by judicial officers are also contributing to the difficulties apparently being experienced in recent years in recruiting judicial officers.

Clients

29. I am unaware of any recent empirical data regarding client satisfaction with the current system. My own experience is that clients will express satisfaction where they consider the process is fair and the outcome meets or exceeds their expectations. The problem with this is that in our adversarial system, often one party loses and the other party gains. There is no net gain. This has been referred to as a 'zero-sum game'.[11]

30. My experience of litigation leads me to agree with the words attributed to Geoffrey Robertson QC to the effect that: *'…the adversary system…does make justice a game'*.[12] In this game the winner usually takes all. Losing clients are often dissatisfied and may blame their lawyer and seek to avoid or claw back payment of legal fees. Winning clients can also be dissatisfied. Many litigants are unhappy and angry at the beginning of the file and expect to win. Those clients may be disappointed with the size of the win.

31. It may be that a large number of clients are satisfied with their own lawyers' efforts although there appears to be a lack of studies on this. I doubt whether a client's satisfaction with their lawyer can be taken as satisfaction with the current system. In October 1999, the Law Reform Commission of Western Australia (LRCWA) handed down its report and recommendations following a wide ranging review of the criminal and civil justice system in Western Australia. The Commission gave particular priority to seeking and obtaining submissions from the public, particularly those members of the public with first hand experience as users of the justice system. Submissions affecting the civil justice system included that:

    (a) The system is far too expensive and that high costs prevent most people from pursuing legitimate claims;

    (b) Justice is available only to the particular sections of society who can afford it, with the middle majority of the community left uncatered for and who are therefore denied justice;

    (c) Given the high costs of litigation, clients should initially make use of the mediation system;

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[10] Roach Anleu,S and Mac,K, 'Magistrates' Everyday Work and Emotional Labour', Society, 32:4, (December 2005)
[11] Seligman, M et al, n 5
[12] Whitton, E, *21 Reasons you won't get Justice from the Adversarial Court System* (On line opinion) http://www.onlineopinion.com.au/view.asp?article=268 viewed 6 May 2005. See words attributed to Geoffrey Robertson QC.

(d) The legal profession is held in low regard with the community perception of lawyers being that they are lacking integrity and are primarily motivated by greed;

(e) Many clients are angry at treatment received during their involvement with the system;

(f) Many clients believe that lawyers prolong or delay cases for their own financial benefit;

(g) The legal process disempowers people in that control of cases is taken from clients and placed with lawyers;

(h) Lawyers prefer to win the adversarial contest rather than seek justice or truth; and

(i) Judicial officers in Western Australia should have a duty to try to discover the truth.

32. Many clients and people in the broader community believe the current civil litigation system is not fair. The Australian Law Reform Commission has examined fairness in federal civil litigation and acknowledges that a perceived lack of fairness is a key cause of client dissatisfaction. It said that fairness is premised on having two equally matched sides, which does not always occur and depends on the resources of the parties.[13] In examining how fair the adversarial system is, the Commission observed that:

32.1 Fairness might be achieved if there were equality between the parties to the contest;

32.2 A trial may not determine the truth, because parties choose not to put all relevant material before the judge;

32.3 Fairness might involve allowing the participation of parties rather than their legal representatives;

32.4 Fairness might be enhanced by blending the current system to include other approaches such as inquisitorial and conciliation approaches; and

32.5 Processes which increase the cost of representation may mitigate against fairness.

Effects on the Broader Community

33. Although there is little empirical data about community expectations of the litigation system[14] the anti therapeutic effects of the adversarial system as recognised by health experts and the community generally have been

[13] ALRC *Review of the Adversarial System of Litigation – Issues Paper 22* (Brisbane, 1997) para 14.1
[14] ALRC, n 13, para 14.19

acknowledged in a recent Australian Parliamentary Report.[15] It seems commonly accepted that unhappy or depressed lawyers affect themselves, their firms, their clients, their families and even the community generally. As United States Psychology Professor Martin Seligman has said:

> *'the unhappiness and discontent of lawyers is well documented and much lamented. Since lawyers are members of a 'public profession' their dysfunction entails societal as well as personal, costs."* [16]

34. Despite a lack of studies, I suggest that the overall effect on the community must be significant if the numbers of unhappy and depressed lawyers, judicial officers and clients are added to their staff, spouses, direct family members and friends. This effect must filter through the whole community even if indirectly. In my own case, my unhappiness, anger and sadness impacted on my staff, spouse, child, extended family and friends. The emotions of anger, sadness and fear produced by the current legal system are released every day into the community along with their associated behavioural patterns and ill-health. Surely this must affect others and ripple through the whole Community.

35. Further, I believe that the legal system adversely affects people who need to resolve a dispute but are unable or unwilling to access the current system to do so. These people are I believe the silent victims of the current system. They may become bullied by others or feel unable to assert their legal rights or needs. My experience in the Subiaco Community Legal Service has shown me that there are a great many people who are frightened of lawyers or the Courts or are financially, intellectually, emotionally or otherwise unable to access the legal system. I have given consultations to many people, often aged persons, who believe that they will lose "all their money" if they consult a lawyer or take a matter to Court. We are all bound by commercial and civil laws. The behaviour and reputation of the legal system and its direct participants affects all people, directly or indirectly.

36. In expressing my opinions on the current adversarial system, I do not say that it has no positive aspects. As I have experienced at times, legal practice can be and is for many lawyers stimulating and rewarding. Successful outcomes, happy clients and satisfaction at a job well done, and being generously rewarded for it, have kept me and (no doubt) countless thousands of other lawyers around the world in practice. The respect and responsibility accorded to lawyers has also been a factor which has drawn me to and kept me in legal practice. No doubt it has fed my need for approval from others (false ego). Many lawyers obtain a great deal of satisfaction from the perception that they are, in their work, fighting just causes for clients. A large number of lawyers obtain satisfaction from undertaking pro-bono work for people who are unable to access the legal system. Having acknowledged these things, I respectfully contend that, even with the limited research undertaken to date, the current legal system has an unacceptably high adverse effect on its participants and the community generally.

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[15] Parliament of the Commonwealth of Australia, House Standing Committee on Family and Community Affairs, *Every Picture Tells A Story: Inquiry Into Child Custody Arrangements in the Event of Family Separation* (Canberra, 2003)

[16] Seligman, M et al, n 5

Submission 2 – The Multiple Causes of the Current System's Problems can be Explained by the Underlying Paradigm: Fear

37. If, as I have suggested above, a paradigm is an underlying example, pattern or model within which theories, laws and generalisations are explained,[17] what is the paradigm underlying the current system. To identify the current paradigm, I believe we need first to identify the causes of the current problems.

Causes of Lawyer Dissatisfaction

38. In my experience, lawyer dissatisfaction including my own, stems from a few main causes, including:

    38.1 Mistake intolerance or perfectionism. This frequently caused me to be dissatisfied and unhappy with myself and my staff who attempt to work to unrealistic standards. I believe I became intolerant at times with people around me including my staff and family. I have a number of young lawyer colleagues who frequently complain to me of extreme behaviours by their principals and unrealistically high expectations of them, causing unhappiness and dissatisfaction. Avoiding mistakes is an obsession amongst commercial litigators (and I suspect in other areas of law). As a young practitioner I recall being admonished by a senior barrister for delegating to my then experienced secretary the task of correcting a few minor typographical changes to an affidavit and returning it to him without me checking it first. The culture of perfectionism makes it difficult to delegate, relieve pressure and work in teams.

    38.2 Overwork and a lack of balance. This has caused me to experience high levels of stress throughout my years of practice. I believe I had, until my life review (and possibly still have to some extent), a "need" to succeed for my client or to exceed my clients' expectations and to avoid criticism. Taking on too much work has undoubtedly contributed to my stress. Some of this has been caused because it is difficult to foreshadow, when accepting instructions from clients, exactly how much work will be required and when. The amount of work on a particular case is often determined by the attitude and tactics of the opposing party. In recent years, the introduction of pro-active case management regimes into the rules of civil procedure of many Courts, have given the Court broad powers to make orders regarding the progress of legal actions. In my experience, these case management powers, have generally increased the amount of work being performed in cases and the intensity of the litigation. Previously a plaintiff had the primary responsibility for determining the conduct and progress of their case. In my view these procedural changes have in commercial litigation matters, favoured wealthier clients and larger law firms with greater resources. Further, my over-work issues were also contributed to by my fears of being able to pay my staff, rising practice costs and undoubtedly, my own desire to make a profit: greed.

    38.3 Competition and the desire to win for clients. The loss of a trial or contested hearing would, despite an outwardly unemotional response from me, usually cause me to doubt myself and leave me feeling

[17] See definitions in n1 and 2.

> unhappy. Despite warning my clients of the risks of losing, some of them have, I believe, blamed me for the loss. Unsuccessful or disappointed clients have criticised me, threatened to make complaints and subjected my work or my invoices to professional scrutiny or refused to pay my bills. Sometimes a threat, complaint or review of an account ("taxation of costs" as it is called in Western Australia) can arise years after the work was completed, take months or years to resolve and require that a lawyer undertake large amounts of unpaid work. In one instance, a complaint was made against me 5 years after I ceased acting for the client. Fortunately, I have had very few complaints made against me and none have been sustained. These experiences have however added to my workload, overall stress and wellbeing. I know that many of my colleagues have had similar experiences.

39. Factors identified in the materials reviewed by me confirm that my own experiences are not unusual and include long hours, time pressure, billing pressure, client pressure, increased legal complexity, aversion to risk and disillusionment with the law itself.[18] Further, Competitiveness within and between firms is identified as a major cause of stress and health problems. [19] In one article it was reported that some law firm partners do not want to go on leave because they are concerned that when they come back they will not have the same clients.[20] It has been said that:

> *"the single-minded drive toward winning the competition…will make young lawyers not only less useful citizens…but also less good as lawyers, less sympathetic towards other people's troubles and less valuable to their clients".* [21]

40. In a recent article "Why Lawyers Are Unhappy,"[22] it is suggested that the growing unhappiness of lawyers stems from three causes. Firstly, lawyers are selected for their pessimism (or "prudence") and this generalises to the rest of their lives. This is explained as pessimism not in the colloquial sense but rather as a pessimistic "explanatory style" in which there is a tendency to view bad events as unchangeable rather than an optimist who sees set backs as temporary. The authors suggest that the qualities that make a good lawyer including the ability to foresee all of the bad things that might happen for a client, may also burden the lawyer with a tendency to see how bad things might be for themselves in their own lives. Secondly, it is suggested that lawyer unhappiness, particularly in young lawyers, is caused by low decision latitude in which a person has or believes that they have little or no choices. Thirdly, they suggest that the adversary process is a "zero-sum game" (referred to above) in which one side's gain often represents the other side's loss. Lawyers, they say, are trained to be aggressive and competitive precisely because they must win the litigation game. They say that when the practice of law is tied up with a large number of zero-sum games *"…it will produce predictable emotional consequences for the practitioner, who will be anxious, angry and sad for much of his professional life."*[23]

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[18] Gains, A, n 5 & 6; Naylor, M 'Depression in Lawyers', Brief, 31:9, Perth, Western Australia (2004); Wright, J, n 6.
[19] See for example Gains, A, n 5; Wright, J, n 6; Gibbs, K, n 7.
[20] Gibbs, K, n 7.
[21] See Linowitz, Sol, 'The Betrayed Profession, Lawyering at the end of the 20th Century" (1994) in Gains, A, n 5
[22] Gains, A, n 5.
[23] Gains, A, n 5, p 7

Causes of Judicial Officer Dissatisfaction

41. One of the causes of stress amongst Magistrates has been suggested as the emotional labour or management of emotions which is a part of their daily work. This arises, it is said, in the adversarial legal system, from one or more of the participants having lost.[24]

42. In his article "Judicial Stress"[25] Justice Kirby analyses the typical causes of stress as including the nature of the work including being placed in the spot light, loneliness of office (he says an element of distance and remove are a usual part of judicial life). He refers to a "role expectation" and stresses caused by the judicial tradition. Judicial officers are expected to be wise and to act in a way that is unobtrusive and acceptable. Other factors mentioned included a drop in income, lack of feedback (and lack of appreciation), increased workload, inability to delegate and social isolation. He also refers to judicial officers being more accountable to the public than in earlier times with them being singled out in the media for perceived mistakes or departures from popular wisdom.

43. Justice Ronald Sackville of the Australian Federal Court has expressed the opinion that the greater intensity and degree of present day media attacks make life less attractive for judges. [26] In a recent article concerning the judicature, reference was made to the susceptibility of judges to criticism, particularly from the media and their inability to defend themselves in public. Reference is also made to attacks from appellate judges on judges lower down the food chain.[27] Further, it is clear that judicial officers are called on to regularly express opinions on each others' decisions or views. Competition between judicial officers and judicial clashes also give rise to stress and discord. [28]

Causes of Client and Community Dissatisfaction

44. Reference has been made above to the causes of client and community dissatisfaction[29].

Fear Underlies the Current System and its Problems

45. I believe there is a direct or indirect link between fear and the causes of the major problems in the current system. In the table below I have extracted some of the main causes of dissatisfaction and problems with the current system as referred to above, and identified the link which, in my view, they have to fear.

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[24] Roach Anleu, S and Mac, K, n 10.
[25] Kirby, Justice Michael, n 9.
[26] Ackland, R, Australian Press Council Annual Address – 31 March 2005 – *Much Ado About Nothing – The True State of the Judicature* comments attributed to Justice Ronald Sackville on the 7:30 Report on 24 March 2005 (ABC Television).
[27] Ackland, R, n 26.
[28] Justice Kirby referred in his paper to some well recorded clashes including that between Mr Justice Starke in his dealings with Mr Justice Evatt in the High Court of Australia in the 1930s. Kirby, Justice Michael, n 9.
[29] See paragraphs 29-36 above.

Role of Fear in the Current Commercial Litigation System's Problems		
No.	**Cause of Problems**	**Underlying Role of Fear**
	Lawyers & Judicial Officers	
1.	Mistake intolerance or over-prudence.	Fear of losing or criticism.
2.	Over work.	Fear of money or the lack of it and fear of failure.
3.	Competition within firms and between firms.	Fear of failure and the effects of failure.
4.	Low decision latitude amongst junior lawyers.	Fear of delegating to junior lawyers/fear of mistakes and failure.
5.	Zero-sum game.	Fear of losing/failure.
6.	Client pressure.	Fear of criticism.
7.	Legal complexity and struggle to achieve or maintain competence.	Inadequacy – fear of failure and lack of control.
	Judicial Officers	
8.	Media criticism or criticism by appellate Court judges.	Fear of criticism/failure.
9.	Emotional "labour".	Fear of criticism – expectation.
10.	Role expectation – pressure to be "wise".	Fear of failure.
11.	Loneliness.	Role expectation – fear of criticism – fear of allowing judges to speak out.
	Clients	
12.	Excessive legal costs.	Fear of money or lack of it.
13.	Lawyers delay cases and run system for their own benefit.	Anger and fear of not being in control.
14.	Zero sum game.	Fear of losing.
15.	The system is a game and does not seek "truth".	Fear of fighting or lack of control.
	Broader Community	

16.	Adversarial nature of system.	Fear of "fighting" and fear of losing.
17.	Inability to fund or access the legal system.	Multiple causes including fear of the legal profession and lack of control.

46. In summary, it is my contention that the current system is based on a paradigm of fear, of victim and vanquished, in which people compete for supremacy and survival. In this paradigm, stress and strain abound.

Submission 3 - The Current System Determines Legal Disputes but Does not Resolve the Underlying Issues

Purpose

47. The law exists to maintain social order and thereby to serve society. Lawyers have been described as custodians of civilisation. As Lord Maugham said, Lawyers are the custodians of civilisation and there can be no higher or nobler duty than that.[30] At an address at a ceremony for the admission of barristers and solicitors, a senior Australian judge said that there was no point qualifying as a lawyer unless you are interested in justice.[31]

48. The pursuit of justice is undoubtedly a noble objective. I believe that justice requires the pursuit of truth, to the deepest possible level. However, the current process is in my view, two-dimensional and sets parties against each other rather than being of a nature which encourages people to cooperatively investigate their disputes, the deeper issues involved in them and their underlying objects.

Mediation

49. A recent trend in Australian and other common law systems has been increased use of pre-trial conciliation and mediation processes. Mediation may be considered by some as the solution to problems in the civil litigation system. At first glance, the statistics on mediations are impressive. In his paper[32], the Honourable Justice Ralph Simmons of the West Australian Supreme Court examines the use and effectiveness of pre-judgement court-annexed mediation. His paper added to earlier papers by the then WA Chief Justice, the Honourable David Malcolm[33] and senior WA Supreme Court Registrar, Sandra Boyle.[34] Justice Simmons referred to a lack of authoritative and accurate research on the outcomes and reasons for success of mediations. A settlement rate for Court-annexed mediation in the Supreme Court of Western Australia has been assessed at about 60% which is suggested as being in line with data from other Courts. Published statistics on alternative dispute resolution in the whole of Australia[35] indicate a success rate of 70% or greater for mediations in the

[30] Quoted by the Honourable Justice Nettle; 'Ethics – the Adversarial System and Business Practice' address to the University of Melbourne Law School, 3 November 2004.
[31] The Honourable Callaway J.A 31 March 2003 referred to by Justice Nettle (see Nettle, n 31).
[32] The Honourable Justice Ralph Simmons DS, 'The Practicalities of Mediation in the Supreme Court of Western Australia: the Current State of Play.
[33] Chief Justice David Malcolm, Paper for the National Alternative Depute Resolution Advisory Council forum, Perth (2002), *Alternative Dispute Resolution Bulletin.*
[34] Boyle, S 'Experiences of Mediation in the Supreme Court: What Salome was Hiding' [2005] MurUEJL 10
[35] National Alternative Dispute Resolution Advisory Council, ADR statistics-published statistics on Alternative Dispute Resolution in Australia (2003)

Supreme Court of Western Australia and 60% in the Supreme Court of New South Wales with a further 12% of cases being settled prior to hearing.

50. Although mediations are producing high settlement rates, I respectfully suggest that mediations are themselves not the answer to the problems with the current system. Despite the admirable intention of creating a confidential "without prejudice" environment in order to encourage open and honest settlement discussions, lawyers control the mediation process taking extreme care to prevent their clients from releasing any sensitive information or evidence which might be later used against them. Although admissions or statements made in a mediation are unable to be relied on by the other party in Court proceedings, they can be used to advantage by the other party if the proceedings do not settle, either in developing strategy or in cross-examination, for example. Accordingly, communications are still stifled in mediations. Parties who achieve settlement at mediation, often do so reluctantly and without there being any true resolution of the underlying issues giving rise to the dispute. Often settlement is agreed to because it is the lesser of two evils, the other being to continue with the case. In these cases the mediation succeeds only in avoiding further litigation. Fear of incurring further legal costs or losing the trial are, in my experience, often the real reason that mediations succeed, not because any resolution of the underlying issues has been achieved.

51. I do not say that mediations are themselves bad. To the contrary, they present a unique opportunity for resolution of a legal dispute without a costly and stressful trial. I do however believe that the paradigm in which the mediation takes place is one of fear which does not allow for a true and meaningful dispute resolution to take place in which the parties' real issues, in relation to the dispute, are explored and resolved.

Examples of Cases where Underlying Issues are Ignored in my Practice

52. A large number of the commercial disputes litigated by me and my firm over the past 20 years have involved insolvency issues. In many of these cases, my clients' objective was to avoid personal bankruptcy or liquidation of their companies. The reason for this was often to avoid the shame and embarrassment associated with insolvency. Often there were no assets left to protect. Many of these clients did not wish to confront the reality of their financial positions or take responsibility for past decisions. Often their opponents did not accept the likelihood of a non recovery from an impecunious opponent and continued to prosecute their case aggressively. All possible ethical strategies were employed to win the case including bringing pressure to bear on opposing parties and their lawyers. It is now unfortunately common for lawyers to use a mistake by an opposing lawyer or a perceived conflict of interest to weaken their opponents' cases. Many partnership, shareholder or director disputes are, in my view, more to do with the anger people have with each other and pride, than the commercial remedies they seek in their litigation. Often personality issues and a fear of owning up to a mistake are the major reason a dispute leads to litigation. The legal issues in these cases (contract, trade practices, corporate and equitable) have nothing to do with the deeper issues. At the end of these cases the clients' underlying fear and behaviour which led to the dispute in the first place is not resolved. If the underlying issues which cause commercial disputes such as the ones in my examples were fully resolved, a large amount of future litigation could be avoided. The savings in public resources (Court time) and the diminution of stress in the community would be enormous.

53. My view is that the community will never be completely satisfied with the current system until the underlying emotions and issues are addressed in the legal process. The current system does not do this. By the English tradition, lawyers and judicial officers (at least in my experience in commercial matters) deliberately avoid delving into clients' emotions or underlying issues. I can recall being advised by a senior barrister early on in my career against becoming too "close" to a client. On the one hand, my work requires me to work closely with my clients.

54. Any cursory examination of Court lists would in my view show that, like my own practice, a minority of people are responsible for a majority of the cases. In my experience, some people use the system as a way of exerting power and control. Others use it to avoid taking responsibility for something. Because underlying issues are not resolved, certain people continue to litigate which results in the proliferation of litigation.

55. There are laws in Australia and elsewhere designed to stop vexatious litigants. In my experience, these laws are not designed to and do not capture repeat litigants in our system whose underlying personal issues lead them into frequent litigation.

Submission 4 - Current Reform Movements are Incremental: Paradigm Shift is Needed

56. There are several movements seeking change to the legal system including therapeutic jurisprudence, restorative justice, preventive law, mediation, specialised Courts, holistic law, collaborative law and creative problem-solving. These movements have been described as aiming for a 'more comprehensive, humane and psychologically optimal way of handling legal matters'.[36] I do not propose to explain the development of these movements in this paper. I respectfully acknowledge that very significant improvements are being made to our system by these movements. To my knowledge, none of these movements have made their way to civil and commercial litigation in Australia.

57. Magistrate Michael King has recently asserted that Therapeutic Jurisprudence **("TJ")** has broad-ranging application to all areas of Court and legal practice, including commercial and civil dispute resolution, and to legal education[37]. As a commercial litigation lawyer I wholeheartedly agree that TJ principles have application in commercial and civil litigation.

58. TJ is a way of looking at the law.[38] It asserts that the law and legal processes can be designed to promote the wellbeing of litigants and clients and contribute to the resolution of problems underlying the legal issue.[39]

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[36] Daicoff, S 'The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement' in Stolle DP Wexler DB and Winick BJ (eds), *Practicing Therapeutic Jurisprudence* (Carolina Academic Press, 2002) p465

[37] King, Michael S. "Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education" 15 *Journal of Judicial Administration* 129, (2006).

[38] Wexler DB and Winick BJ (eds), 'Law in a Therapeutic Key' (Carolina Academic Press, Durham, 1995): Winick BJ and Wexler DB (eds), 'Judging in a Therapeutic Key' (Carolina Academic Press Durham, 2003).

[39] King, MS, n 37

59. I agree with Arie Frieberg's conclusion that TJ, as a concept, remains somewhat "imprecise and ambiguous".[40] Frieberg observes that it is an approach rather than a theory and suggests that it has no pre-existing hypothesis, that its research does not seek to prove but to explore and that paradoxically this vagueness or ambiguity is also its strength.[41]

60. My respectful assessment is that TJ has not yet sought to identify its paradigm. It seeks changes on a number of fronts to legal processes in ways which are aimed to promote wellbeing. The lack of an identified hypothesis or paradigm observed by Freiberg [42] may have, to date, been a strength. In my view, the opportunity exists to co-ordinate and expedite the process of change in all aspects of the legal system including civil litigation by replacing the current paradigm of fear with a new civilised and humane one.

61. The need for a new underlying framework for the legal system has been recently suggested by American Psychologists.[43] They contend that the principles of Positive Psychology be applied as a new framework for developing and evaluating the law. In this new framework a proposed law or process would be evaluated by the extent to which it promotes happiness. They argue that the context of happiness ought to be adopted unless it is established that either there is a more important human goal than happiness or that human beings are so diverse that generalisations can't be made about what makes them happy.[44]

Submission 5 – The Opportunity Exists for Healing in Commercial and Civil Dispute Resolution (and elsewhere) – Moving From Fear to Love

62. Following my depression and life review, my life coach encouraged me to change the underlying paradigm of my life from one based on fear to one based on love. In my new paradigm, I commit to taking responsibility for my life and what happens in it. There is no place for blame and judgment in this new paradigm based on love. I have three guiding principles.

63. Firstly, I commit to loving myself. This does not mean falsely indulging or elevating myself above others. It means a commitment to not running myself down, to looking after myself and to keeping myself happy and healthy. It means that I cannot truly help a person until I first help myself and that if I do, the other person will not be grateful to me for it. In the context of dispute resolution, this principle means that people would strive to achieve what they truly want. They would get support from lawyers and others to achieve their needs but retain control over the process. In a fear based paradigm, clients' issues are taken over by lawyers, often subjugating the client, not empowering him or her. Clients, like all people, respond to being empowered.

64. Secondly, I strive to be truthful with myself and others to the greatest depth possible. I am encouraged to acknowledge my feelings and emotions (and other peoples) as pointers to what my (or their) underlying truth about something is. When I reach another's truth I experience happiness and relief. This is the point

[40] Frieberg, A 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism' 2002 Law in Context Journal 20(2) p6-23.
[41] Frieberg, ,A, n 40
[42] Frieberg, A, n 40
[43] Frieberg, A, n 40
[44] Seligman, M et al, n 10.

at which I believe people's communications become their most satisfying and people fulfil their basic need to connect with each other. This is the point at which disputes are resolved as people express their true needs, desires and feelings (the cause of the underlying issue). In a paradigm based on love, there is mutual respect for another's truth, beliefs and feelings. Peace and understanding result when two people share their deepest truth with each other.

65. Thirdly, I remind myself that I have freedom to make choices in my life according to my truth about what I want. According to this principle, when things happen in my life that I do not want or like, I am free to choose something different, something that I truly want. Blaming other things or people is the antithesis of this principle. By avoiding blame (a fear based response) and allowing myself freedom to choose again (at this time) I avoid dwelling on the past and remain in the present. The current dispute resolution system is about blame and judgment which are characteristics of fear. In a paradigm based on love, people would be encouraged to focus on what they want now and why. If they can get these needs met then their dispute will be fully resolved in a way which no Court or judgment can do.

66. These guiding principles of my suggested new paradigm are, I admit, difficult for mere mortals to apply. They are not however, rules with which to judge people who do not comply with them. They are principles which people strive to achieve in their daily lives, moment by moment.

67. If the legal system were to embrace a paradigm shift of the kind suggested, I believe it would experience the kind of positive transformation which I (and many others) have experienced in my own personal and professional life. This is not to say that I have found it easy to implement my new paradigm and its principles in my career. I have not. I find it a formidable challenge. In part I have avoided what feels like a clash of paradigms by moving away from commercial litigation work to non-litigation work and alternative dispute resolution.

68. By arranging for "paradigm" training for myself and my staff, many positive outcomes have been achieved. My workplace is a more caring and supportive one than it previously was. I am more accepting of myself and others. In my communications with other people, I remind myself that other people's emotions and feelings are as important as their words. This has enabled me to communicate at a deeper level with myself and others. More effective communication results in more harmony and less disputes. Above all I have better and more satisfying relationships with my clients, staff and in my life generally.

69. In recent years, I have used what I have learnt about emotions and feelings to assist me in legal practice, by obtaining a deeper understanding of my clients' needs and wishes. By doing this I believe I am able to better assist my clients to identify and pursue their deeper goals.

70. There are, apparently, lawyers who have succeeded[45] in implementing radically different principles in their practice to a greater extent than me. In his recent paper Magistrate Michael S King[46] quotes Dallis lawyer John McShane as follows:

[45] McShane J V, 'The Need for Healing' (2003) 89 (5) ABA Journal referred to by King MS, n 37
[46] Seligman, M et al, n 10.

> *"For 26 years, I have sought to practice as a lawyer/healer wherever possible. My approach is to use non-judgmental care based interviewing techniques assist the client in recognising the underlying problem, secure the client's commitment to healing, and then use a multidisciplinary team approach that seeks to enhance the client's wellbeing while producing the optimal legal outcome."*[47]

71. In summary, there is in my view, a huge, largely unexplored opportunity to implement reform in commercial and civil dispute resolution. By failing to address underlying issues, lawyers and the judiciary miss out on a unique opportunity to really help people improve their lives. A change in paradigm from fear to love offers a positive transformation of the current system at all levels. My experience is that it will provide a framework or paradigm to resolve dysfunction and unhappiness. It is a radical response which I believe is warranted by the extent of the current problems.

Conclusion

72. The problems with the current system referred to in this paper are proof that it is not working. Everybody seems to agree that the system can and should be continuously reviewed and improved. My opinion is that a paradigm shift is required if there is to be any major improvement in the system and that until that is done, the current problems will continue to exist and will possibly increase.

73. I have asserted that the current system's problems largely stem from the fact that it is based on a prevailing paradigm of fear. I have suggested that the current movements towards reform lack a fundamental context or paradigm by which they might be measured or evaluated. A new paradigm has been suggested for the legal system by American psychologists who uphold a new school of "positive psychology". They suggest that the attainment of happiness ought be the framework by which laws and processes are measured.

74. The things which I believe people ought to strive for in the legal system include happiness but also extend to peace, acceptance and truth. If "happiness", as intended by the proponents of Positive Psychology, incorporate these concepts then I cannot conceive any better paradigm for the legal system. If it does not then the other word which does, in my understanding, is "love". I have offered the three guiding principles of my new paradigm.

75. In re-reading this paper I observe my own process. The cerebral "lawyer" part of me has sought to make statements which are logical, supported by some authority and which might therefore survive criticism. In other words, I fear criticism. My feelings tell me that if I do not speak my heart-felt truth about the legal system, all of you who read it, will not emotionally connect with it, as I hope you will. That is my real aim in writing this paper. My heart-felt truth is that in my life I wish to make a positive difference to people, to help them and to connect with them (you). When I do this I am happiest. I believe all of you at core feel the same as me. My heart felt truth is that when our legal system embraces our humanity, it will shift paradigms from fear to its opposite – love.

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[47] McShane, JV, n 45, p 59.

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