Dr. Christine Parker is an ARC Australian Research Fellow, Associate Professor and Reader at the University of Melbourne. She has written and researched extensively on legal ethics. On February 12, 2008 Dr. Parker was the speaker in the UBC Faculty of Law 2008 J. Donald Mawhinney Lecture on Professional Ethics. In her presentation entitled “Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms”, she spoke to members of the profession at the Law Courts Inn about Australia's move into the incorporation and listing on the stock exchange of law firms.

The United Kingdom is planning on allowing the same in the near future which will put pressure on other countries to follow suit.

All business organizations have the choice to undermine or support ethical practices and Dr. Parker argues that incorporation and listing of large law firms might force big firms to become better at dealing with the juxtaposition of a profitable legal practice and legal ethics.

She argues that big law firms already act within a business model. Partnerships are run for profit. Lawyers are aware of how they contribute to such profits. Their hourly rates and their ability to bring in new clients indicate their place in the profit-making hierarchy. With the fragmentation of the market for legal services - competition from in-house counsel, clients shopping around for best rates and unbundling of legal services - more and more firms will have to carefully consider their commercial choices.

Slater & Gordon - a well known class action / personal injury/labor union firm - was listed on the Australian Stock Exchange in 2007. Dr. Parker sees their business organization as a model for the ethical transition of law firms from partnerships to publicly listed companies.

When they prepared their initial public offering (IPO), one of the things they had to consider was how their ethical responsibilities - to the law, to the courts, to access to justice, and loyalty to their individual clients - would translate into the marketplace. In conjunction with corporate and legal regulators, Slater & Gordon prepared and included these in their prospectus:

Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company's business as an Incorporated Legal Practice. There could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of the Shareholders or the short-term profitability of the Company.

The Board considers good corporate governance is vital to the success of Slater & Gordon. Adherence to good corporate governance standards will assist the Company in:

- fulfilling Slater & Gordon's duties to the Court and to clients;
- providing meaningful employment to employees;
- providing services of value to clients; and
- generating rewards to Shareholders, in a way that contributes to the welfare of the community.

To the extent that there is a conflict or potential conflict between those duties, that conflict shall be resolved as follows:

- the duty to the Court will prevail over all other duties; and
- the duty to the client will prevail over the Company's other corporate responsibilities and duty to shareholders.

As firms grow - whether they are incorporated or not - they need to design not only commercial infrastructure but ethical infrastructure as well. In Australia, the Law Society includes ethics management as part of each firm's practice. As well as assessing other aspects of practice, firms assess their ethical infrastructure and practice and must report on this to the Law Society.

The Australian Law Society has a list of 10 areas to be addressed when assessing appropriate management systems. They are:

1. Negligence - (providing for competent work practices)
2. Communication (providing for effective, timely and courteous communication)
3. Delay (providing for timely review, delivery and follow up of legal services)
4. Liens/file transfers (providing for timely resolution of document/file transfers)
5. Cost disclosure / billing practices/termination of

(continued on page 4)
The use of a trust at trial in *Arnold v. Teno*, and by the British Columbia Court of Appeal in *Thornton v. Prince George School District No. 57*, this claim has been employed in a large number of cases. Last month, we began study of trust claims by looking at what principles do the courts consider when awarding damages for in trust claims.

2. What sort of evidence do the courts look at to substantiate in trust claims?

Before a court will award damages in trust for nursing services rendered to a plaintiff by a relative, the court must be satisfied that the services claimed to have been provided to the plaintiff by the relative were of a type that is compensable. In other words, there must be evidence before the court of the nature of services that were performed. The court must be satisfied on this evidence that the services given were above and beyond what is normally to be expected as part of the parental or spousal relationship. This point was made by the trial judge in Pickering:

Mrs. Pickering rendered services to Steven over and above which is normally expected of a wife. I need not go into detail but, shortly put, she not only cared for his needs but “baby-sat” him night and day for a period of two years. She devoted most of her time to looking after him. Were those services not volunteered it would have been necessary to hire others to perform them. I therefore award the sum of $15,000 for special damages to Stephen to be held by him in trust and paid over to Donna Pickering.

In various other cases, the courts were not persuaded by the evidence adduced at trial that the services given to the plaintiff were outside the normal course of familial relationships and hence, declined to make an award in trust for the value of the services. In *Thornton*, for example, the Court of Appeal accepted that although compensable nursing services were provided to the plaintiff by his mother, the plaintiff’s father had not performed any special care-giving services for his son. The plaintiff’s in trust claim for his father’s care-giving services was denied because there was no proof that what the father had done was anything more than a father’s natural affection for his son. Likewise in *Hosseini-Nejad (Guardian ad litem of) v. Roy* the *Huddart J.A. and Lambert J.A. concluded that the only reason that the trial judge had refused to award damages in trust for the value of services rendered was because there was insufficient evidence put forward by the plaintiff that the services were given outside the normal course of the mother-son relationship.

It is not necessary for the plaintiff to prove that the services rendered by the relative amounted to a full-time job. Rather, the plaintiff must merely establish that there has been a loss, whether it be the cost to the care-giving family member or the cost of obtaining the services independently, which he or she has suffered as a result of the injury.

In order for the court to quantify the plaintiff’s loss, certain evidence is required. The court must determine two things. First, what would have been the cost of the services provided had a professional been hired? Second, what was the actual expense or loss of wages incurred by the relative in providing the services?

In cases such as *Crane and McCloskey v. Lynn* where the actual loss to the care-giving relative is higher than the cost of care by a professional care-giver, the court requires expert evidence as to the actual cost of providing the professional services. In *McCloskey*, the court heard expert evidence as to the cost of care in Ontario. Based on this hourly figure, the court made an in trust award for domestic services provided by the care-giving relative to the plaintiff to the date of trial. In *McTavish v. MacGillivray* the court also relied on expert evidence which estimated the cost to replace the services formerly provided by the plaintiff at $10.00 per hour. Using this hourly wage, and the evidence that the work replaced amounted to 10 hours per week, the judge fixed the in trust damage award at $20,800. Where, however, there is no evidence before the court as to the hourly cost of these types of services, the court may make an award using the statutory minimum wage level as a guide as it did in *Quinn v. LaFortune*.

In cases where the loss to the care-giving family member is lower than the actual cost of providing the nursing services, the court also needs evidence to support this claim before it will make an award of damages in trust. Basically, the court needs proof that the amount claimed in trust was legitimately incurred by the relative in the provision of services to the plaintiff. !
What is Really Wrong with Legal Language?

Linguists identify legalese as a distinctive dialect. One reason this has come about is that legalese has not evolved in step with modern English. Language is constantly evolving with daily usage. But legal language has been conservative and somewhat static.

- Legalese uses outdated grammar and sentence structures. It also tends to use improper or non-standard punctuation, passive voice, and awkward pronoun references.
- Legalese is wordy, turgid, and impersonal.
- Legalese uses outdated vocabulary.
- Legalese suffers from an excessive use of jargon and technical terms. When used with foreign words, they have a right to have public access to documents written to their level of comprehension.
- It clings to foreign words, especially French and Latin.

The point I am making is that legalese is an outmoded legal institution which law schools teach us to use. Legalese is a block to communication with clients; it has made lawyers the butt of jokes for centuries. Chaucer ridiculed lawyers for their language.

Plain language takes account of the empirical research of the past 30 years about how the mind works - how people read and assimilate information. It pays attention to format and design. Plain language legal documents have headings and formatting that provide for quick access to each idea. They are also designed for easy computerized reproduction.

Plain language does not normally reduce the level of writing to that needed to reach the 38% of the population who have difficulty reading. Nor does it take as its audience the 15% of the population with above average intelligence.

So what do you want us to do?

The Canadian Bar Association and the Canadian Banker's Association formed a Joint Committee on Plain Language two years ago. It has now submitted its final report that contains many recommendations. The CBA will be called upon to endorse the report and its recommendations and to participate in a national Plain Language Coalition. Form a Plain Language Committee of your Section:

- to assist the CBA in its plain language activities or
- to help the CLE, for example, to review or contribute plain language precedents to course materials and the practice materials we publish
- to encourage your members to recognize that they are professional writers and need to improve or update their writing skills.

Cheryl Stephens spoke to the CBA Wills and Estates Section, Vancouver, BC last November 27, 1990. She is the author of Modern Litigation Correspondence. For private training queries, contact <dom@lawcourtscenter.com>.
In British Columbia, adults who are vulnerable or are in need of protection due to mental incapacity are protected by a series of Acts, each one addressing different areas and providing different options.

In October 2007, Bill 29, the Adult Guardianship and Planning Statutes Amendment Act, 2007, was passed and received Royal Assent on November 22, 2007. Although this legislation does not yet have force and effect, it is anticipated that this will take place in the fall of 2008.

The intention of this statute is to modernize and harmonize the various laws in British Columbia relating to adult guardianship and representation.

Representatives of the Canadian Paralegal Institute were invited to attend a meeting on February 1, 2008 hosted by the Ministries of Attorney General and Health to consider and discuss matters relating to implementation of the new legislation, and the education of the public and related professions. The meeting was attended by a broad spectrum of stakeholders, each presenting their own concerns with respect to the subject.

The meeting was chaired by the Deputy Attorney General, Mr. Alan Seckel, Q.C., who emphasized the importance of this opportunity to place the interests of all parties on the table at an early date.

Mr. Seckel established the goal of the meeting as implementation of the provisions of Bill 29 through education of the public and the various professionals interacting with those members of the public.

There was considerable discussion of the guiding principles to be applied to the process of educating the public about the new legislation and the associated forms and procedures, the main focus being accessibility, clear intention and plain language.

As part of its mandate to provide current and relevant programs to the profession, the Law Courts Center and the Canadian Paralegal Institute anticipate offering as part of its curriculum a course on the new legislation and how it will impact the support and services offered by law firms to new and existing clients.

Furthermore, they have committed to share their expertise as adult educators in helping the public understand this Act.

As the adult guardianship legislation covers a broad array of legal applications, take the time to review the statutes and ensure that all staff are prepared for the anticipated activation of the legislation this fall.

Dee Rogers is the assistant director for programs at Law Courts Center and at the Canadian Paralegal Institute.

The Practice of Law in the Future - Business, Profession or Both?

Dr. Parker’s argument comes down to the fact that law is both a business and profession. This needs to be recognized by law firms (as was done by Slater & Gordon in preparing their prospectus) as well as everyone else, including the public, courts and regulators.

Acknowledging the business aspects of practicing law as part of the profession means that they can be dealt with and properly regulated.