"THE LITIGATION EXPLOSION"

by

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Delivered 28 July 1991

CURRENT LITIGATION CLIMATE

1. Social Change

Surprisingly there is quite extensive academic
United States as to whether there is in fact a litigation explosion. [cf Youmans "Research Guide to the Litigation Explosion" 79 Law Library Jnl 707 (1987)]. Whatever may be the negative arguments in the United States there can be no doubt that, in Australia, this is the only expression appropriate for the increase in litigious activity. There are three social reasons that account for this situation.

First, there has been a perceptible and increasing tendency in the common law countries for citizens to replace self reliance with a willingness to turn to the courts for relief whenever things work out badly. This is well illustrated in cases where an investment goes sour. The disappointed investor today frequently brings action against the promoters of the venture, the bank, or other financier, any stock broker or accountant, or solicitor or any other advisor who may have been involved. Second, the general improvement in education and living standards seems to have produced people more anxious and prepared to assert what they conceive to be their rights. Third, the spread of insurance. It is now much more likely that a successful action will result in the receipt of money even in the case of a judgment obtained against a person with modest means. The deterrent of futility in litigation has been substantially reduced.

As a commentator in the April 1991 issue of the Law Quarterly Review, speaking of the decision of the House of Lords in Anns, put it-

> "In common with the 'sue Uncle or Nanny' or 'sue the nearest deep pocket' tendencies of transatlantic tort law (like the policeman sued for the miscreant's crimes, the host for his departed guest's accident, the auditor or regulator for the financial rogue's, the lending or granting authority for valuation or survey deficiencies and, in the construction industry, the architect or engineer for the contractor's defaults), Anns primarily targeted the wrong defendant, namely the 'deep pocket' by-law authority. (Furthermore, in this writer's opinion this 'deep pocket' factor in many cases also led to an undue readiness of the courts themselves to reach factual findings of negligence and blame against by-law authorities.) Thus developers or builders with profit in mind, who might understandably seek to persuade local authorities' officers to accept economical designs, could now do so with every chance of deflecting their own primary responsibility elsewhere should the approved designs fail. Anns, in real life, in many cases substituted the by-law authority for the primary defaulter, or at the very least, if the latter was still solvent and worth suing, REDUCED his burden through contributions."

2. Change in the Common Law.

The principal reason for the increase in litigation has been the expanding scope of coverage by the law creating an ever more caring legal climate. Even where the legal duty remains the same, as in the requirement for the exercise of reasonable care and skill, as Moffitt J pointed out in Pacific Acceptance Corporation Ltd v Forsyth 92 W.N 29 p 74 the content of what reasonable care and skill requires may well change very substantially in the light of evolving social and business conditions, or changed understanding of standards, which may be

much more exacting today. For example the standard of care expected from auditors has increased exponentially in the last quarter of a century.

It used to be almost unknown to sue one's insurance broker. Yet look at the comment on the decision of Ormiston J in Helicopter Resources Pty Ltd v Sun Alliance Aust Ltd:-

> "The judge's findings will strike fear in the hearts of many brokers who must treat the decision as another example of the need for them to know their client's business and to pass on to insurers all matters relevant to the risks being insured. In particular brokers should be warned by the following comments:-
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> > 'If his client may be at risk of having his insurance cover avoided for non-disclosure, the broker must have a duty to inform himself of sufficient of the business activities of his client to carry out his duties adequately and in particular to prevent the avoidance of liability under any policy written. More especially is this the case in this field where no formal proposal was made by the client. The broker cannot, of course, discover everything, but he must attempt to discover those elements in the activities of the client which might put its cover in jeopardy."

As well there has been the change in the common law seeking to adapt duties and obligations to what are conceived to be the requirements of today's circumstances. One obvious example is decision of the House of Lords in Hedley & Byrne making negligent statements actionable in certain circumstances and leading to the possibility of recovery where the loss suffered has been purely economic. The law of

restitution was unknown twenty five years ago. In Australia there has been the ever increasing tendency of the courts to import into the field of legal relationship the concept of unconscionability. The law now expects, in a wide variety of circumstances, that persons, including the State, will behave towards one and another in a way which it regards as proper and acceptable conduct. The decision of the High Court in Commercial Bank v Amadio, where it was held that the bank owed a duty to the guarantors, the parents of the principal debtor, who were inveigled by their offspring into providing a guarantee is a striking illustration. However other illustrations abound. Professor Finn has explained in a series of articles the evolution of the law in this regard. [cf "Commerce, The Common Law and Morality" (1989) Melb U.L.R. 87; "Australian Developments in Common and Commercial Law" 1990 JBL 265].

3. Statutory Change

There has been a "legislation explosion" which in turn has fuelled a "litigation explosion". Some may think it a matter for regret that no thought is given to this consequence of legislation when Parliament is considering a Bill.

Even when the legislation does not, at first blush, appear to cater for particular circumstances the imagination of lawyers has been such as to make it into fertile field of litigation. Probably the outstanding example has been s 52

of the Trade Practices Act and the corresponding State Act provisions. I would think it fair to say that it was never contemplated that the provision should be used in order to bring about a completely changed legal climate for commercial behaviour in ordinary business transactions. It was conceived simply as a consumer protection provision. Before the Act was passed it was a favourite pastime for academic lawyers, particularly those with a civil law background, to debate whether or not in common law countries there is a doctrine of good faith in business relationships. In a backhanded way, and without real thought, good faith has been established as the law of Australia by the Trade Practices Act. There is today hardly a case for breach of contract where the provisions of the Act are not sought to be invoked and relied upon. A striking instance of the influence of the Act may be seen in the decision of Sir Nicolas Browne-Wilkinson in Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd 1989 3 AER 65.

Professor Finn described it thus:-

> "The importance of the Act is twofold. (i) It has the now acknowledged capacity to marginalise the significance of large areas of existing tortious, contractual and equitable doctrine. If I may give one example. Without entering into the merits of the various judgments in Bangue Keyser Ullman v Skandia, I do not think it open to serious doubt that the facts of that case would have sustained a damages action under section 52. (ii) And perhaps of greater immediate interest, the Act is contriving the legal climate in which doctrinal

development is occurring. The Waltons decisions on estoppel doubtless heralds a marked change in Australian law. But the case itself could just as easily have been brought under section 52. What I am suggesting is that legislative innovation - and particularly that which is setting general standards of acceptable conduct in our relationships and dealings with others - is influencing, even if only osmotically, common law evolution."

Again s 68A of the Act, in restricting the scope of coverage of contractual clauses for the limitation of liability will increasingly affect business.

In a similar vein, provisions such as the Contracts Review Act now enable borrowers or guarantors to have a peg to hang their hats on in seeking to resist recovery of moneys lent, whether to them, or to their corporate shell.

We are on the threshold of further legislation in relation to product liability which will seek to thrust the onus of proof on the manufacturer to show that a product was not defective. It needs no words from me to suggest that the likely increase of litigation in this field is immense.

With the increasing concern about the environment and spread of technology, litigation arising from, or relating to, environmental risks will be a whole new field for lawyers and therefore the courts.

A slightly different manifestation of legislative concern has been the proliferation of specialist tribunals such as the

Land and Environment Court and the Dust Diseases Tribunal. Their very existence is a guarantee of additional use.

4. The Anatomy and Conduct of Cases.

Concurrently with changes in the law of the kind I have mentioned, there has been a vast change in the shape of litigation. This is for two reasons. As the amounts in issue become larger, plaintiffs seek to join every possible defendant to the claim in order to try and ensure that they succeed at least against one of them. In turn, these defendants are anxious to spread the burden and to share the blame, if any, with as many others as possible. As has been pointed out in a recent Discussion Paper, published by the Attorney General, on Latent Damage, the allocation of responsibilities and liabilities in an enterprise is often not the result of a co-ordinated coherent scheme but springs from various legal arrangements that may be entered into between parties. A good example is provided by building disputes. The plaintiff often has no knowledge of the potential funds available to a possible defendant. Joining as many parties as possible improves the plaintiff's chances of finding a defendant with adequate funds. Defendants will similarly join other parties to the action to maximise the chances that any award given will be shared in proportion to responsibility. The precise division of damages and costs is blurred if one or more of the defendants is without sufficient funds to meet its share of the judgment.

Remaining defendants against whom some liability is proved must then carry the whole of the judgment awarded irrespective of the extent of liability. Accordingly the joinder of additional parties by defendants makes it less likely that the financial failure of the particular defendant will lead to onerous demands upon them.

Partly because of the multiplicity of parties, but also because of the great difficulty in ascertainment of the precise circumstances, cases tend to be much longer. Litigation concerning asbestos affected persons, persons affected by other toxic torts such as the Dalkon Shield, are striking examples of the way that difficult multi party litigation can blossom.

The collapse of the Australian economy has made its contribution to the increase in litigation. The recent judgment of Cole J in Spedley Securities Limited v Yuill contains graphic details of the litigation spawned by the collapse of merely one corporation. Those figures can be multiplied manifold by other corporate collapses. Because of the nature of today's corporations, usually a holding company, with unlimited numbers of subsidiaries, we have the necessary, but unproductive, experience of liquidator of subsidiary A, fighting the liquidator of subsidiary B. Admittedly they act on behalf of the respective creditors of the two subsidiaries, who are not necessarily identical, but

in the process they expend large sums of money and necessarily impose further requirements on court time.

Coupled with the corporate collapses and related to them is the economic position of the Australian community which has resulted in more cases being fought to the end, every possible and impossible point being taken, obviously fewer settlements, and cases taking much longer. When I started looking after the Commercial List, the average length of cases was perhaps two days. These days, the average is getting to a week. There are a great number of two week cases, and we are now no longer in the situation where only occasionally do we get a case that might take three, four, five, six weeks. They are becoming a regular feature of life. Admittedly the agreements from which they spring are often more complex, the available points of law are more numerous, with the photocopier and the computer there is more information available for scrutiny. Nonetheless is the result now any more fair or just?

Lastly, although it is admitted on all hands that the facilities provided and the assistance given is not really adequate, legal aid has made some contribution to the increase in litigation.

I have not attempted to discuss the requirements imposed on the court system by the criminal work, but one only has to

look at the run of the mill drug conspiracy trial lasting weeks, and in some cases months, to understand the awesome proportions of the strain they impose on the administration of justice. The picture thus presented is frightening in its complexities and needs to be addressed in a more structured way than has heretofore been done.

THE ATTITUDE OF THE COURTS

The most outstanding change in the court system, endeavouring to meet the strains imposed upon it, has been the adoption of the theory of case flow management. For long it was the accepted theory of adversarial litigation that parties invoking the assistance of the courts should be permitted to proceed at a pace dictated by their own, or at least, their legal advisors' convenience or ability to perform. As well no effort was made to formulate, or narrow, the issues prior to the commencement of the hearing or to ensure, in any way, that any particular proceeding commenced within the court system will thereafter proceed as expeditiously as cheaply and with the least possible imposition on the system. Today, at least in the Supreme Court of New South Wales, it is accepted that the court has a vital concern in achieving these aims, and by means of Directions Hearings parties and their advisors are required to adhere to such steps as the court may think appropriate in order to achieve them.

There are self evident constraints and difficulties in this regard. It is universally accepted fact that some 90 percent of proceedings, will be disposed of without a final contested hearing. Nobody has yet been able to work out how to identify the 10 percent of cases that require court intervention for their ultimate disposition. The further difficulty is that the more steps are taken by means of Direction Hearings and other interlocutory processes, in applying case management to disputes, the more money will be expended without necessarily either expediting the point of time at which the dispute would in any event have settled or increasing the number of settlements. Let me give an illustration. The bulk of the work in the Common Law Division of the Supreme Court is in claims for damages for personal injuries. In motor vehicle litigation resources are devoted on both sides, to obtain the same information relating to damages thereby incurring two sets of expenditures. A lot of that could be avoided if the plaintiff were required to annex to the initiating process, or file at that time an affidavit, annexing Doctors' reports, group certificates and all the necessary material to enable damages to be calculated. However this would all cost additional money. What is a justifiable requirement for expenditure of money and energy at that early stage of litigation which would achieve an earlier settlement and not be disproportionate to the amounts saved in court costs and such like? Nobody really has worked out an answer to that question based on a cost benefit study.

Take a more drastic proposition. Require every plaintiff to submit to a medical examination by a court appointed expert instead of the plethora of Doctors' reports on each side. I would have thought that the saving in costs, not to mention the saving on the emotional energy expended by the plaintiffs on visits to Doctors, would be quite striking. I will not pause to set out the arguments for and against such a proposal. Nonetheless it is worthy of thought.

Take another example from a different field. In actions against auditors for alleged negligence which are almost as of course today, the plaintiff, usually the liquidator, engages a well known firm of accountants who expend hundreds, perhaps thousands, of hours on reworking the impeached audit. The solicitors for the underwriter instruct a different firm of accountants to do the same work. I would have thought that any self respecting management consultant would advise the court to engage, at the expense of the parties, an independent firm of accounts who would produce the one report instead of the two sets of reports from the contending parties. What do you then when the dissatisfied party wants to challenge the report? Do you permit that?

Another field in which the courts are showing the first stirrings of imposing controls is on the length of cases.

Complaints in the past have been frequent. Action has been scant. Recently, in La Banque Financiere de la Cite v. Westgate Insurance Co Ltd 1990 2 AER 947, Lord Templeman gave some statistics. The hearing before the primary judge "endured" for 38 days. 23 days were spent in the Court of Appeal. The House of Lords was occupied six and a half days. The primary judge's judgment was 36 pages in Lloyds Law Reports, Lord Justice Slade in the Court of Appeal delivered a 58 page judgment. Lord Templeman says, (ib. p.388) this cannot go on, he refers to earlier cases where judges had complained of lengths of cases and the number of judgments cited and mentions, as is the case, that proceedings in which litigants indulge in over-elaboration give difficulties to judges at all levels of the judicial hierachy. He puts the point (p 959):-

> "A litigant faced with expense and delay on the part of his opponent which threaten to rival the excesses of Jarndyce v. Jarndyce must perforce compromise or withdraw with a real grievance. In the present case, the burdens placed on Mr. Justice Steyn and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the lengths of the hearings or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the Courts below to alleviate the ordeal, but the history is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisors are able to conduct their case in all respects in the way which seems best to them. The results, not infrequently, are torrents of words, written and oral, which are oppressive and which the Judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the Judge taking time to read in advance pleadings, documents certified by Counsel to be necessary, proofs of

> witnesses certified by Counsel to be necessary, and short skeleton arguments of Counsel, and for the judge then, after a short discussion, in open Court, to limit the time and scope of oral evidence, and the time and scope of oral argument. The appellate Courts should be unwilling to entertain complaints concerning the results of this practice."

He said this in mid-1990.

Just about the same time, the Full Court of the Family Court gave judgment in the Marriage of Collins (1990) 14 Fam.LR 162. At first instance, Mr. Justice Nygh, with a real purpose in ensuring fairness in litigation, felt that he had to limit the time that would be taken by the case, and he did exactly what Lord Templeman suggested should be done, although he could not possibly have read the judgment which came out only at the same time as the subsequent Full Court decision. Nygh J limited the time for cross-examination and for the totality of the hearing. The Full Court stated (ib.p.174) that the "imposition of an arbitrary time limited on one or both of the parties is however quite a different matter .... The question of a time limit in Court proceedings has, naturally enough, rarely if ever arisen as it would normally be out of contemplation." (my emphasis). Their Honours continued (p.175): "On ordinary circumstances the imposition of an arbitrary limit upon the presentation of a party's case would amount to such a fundamental denial of natural justice as to lead inevitably to an order for a retrial." It is instructive to see the difference in approach between the Templeman view of how one needs to proceed, and the view that was taken in the Full Court

of the Family Court. Nygh, J. was upheld only because the Counsel who was appearing before him, in the view of the Full Court, did not object sufficiently strenuously. There was an application for leave to appeal to the High Court. In the course of argument, Mr. Justice Deane said "Well perhaps the Full Court of the Family Court needs to take a new look at limiting the length of these types of proceedings", which is a very polite way, I think, of telling the Full Court of the Family Court that the course taken by Nygh, J. was the appropriate course. The proceedings throw up quite vividly the collision that there exists between the traditional concept, that it is part of the demands, or requirements, of natural justice that a judge must allow a party to present its case in full, no matter what, and the demands of ordinary justice that a litigant should not be allowed to be bled white, or to be oppressed by a wealthy party, taking as long as it likes in the conduct of the litigious process.

It imposes a super human burden on a trial judge to decide where the line should be drawn. It also, imposes a very real burden on the profession. We all know that lawyers have an obligation, within ethical limits, to take every point to conduct a case in the best interests of the client. The profession needs to consider whether it owes a duty, not just to the client, not just to the court, but to the whole concept of administration of justice. It is no part of the concept of administration of justice that a lawyer conduct a case as long

as the money lasts, or conduct the case in order to wear out the opponent financially. Particularly in commercial situations - say in guarantee cases - where one gets a judicial overview of encounters between parties who stand in an unequal financial position, the court, I think, does have an obligation to ensure that in the process of the conduct of the case, it is not made an instrument of oppression. Equally the guarantor should not use the court process simply to postpone the evil hour. We should consider whether the duties of lawyers need new definition.

THE FUTURE EXPECTATIONS OF CONSUMERS OF LEGAL SERVICES

The primary wish of each and every litigant is to win. However, a close second is the desire to win as quickly and as cheaply as possible. What the courts and the profession have to do is to devise the necessary steps for coming as close as possible to the achievement of those two often inconsistent claims.

What the community and the legal profession have signally failed to do has been to re-define and re-evaluate the aim of curial litigation. It is a glib answer to say that the system is designed to achieve justice between the parties. It must be accepted that because there is no such thing in the judiciary as infallibility, justice is what four out the seven judges of the High Court think is the right answer. As we all know, a

litigant may win, at first instance, on appeal, and even secure the views of three members of the High Court, yet still ultimately lose. If we cannot have perfection, how far short of perfection are we prepared to go? In the quest for perfection we have piled procedure upon procedure, complication upon complication, expenditure upon expenditure. Yet, sometimes we still get the answer wrong.

This is no doubt heresy to all those who think that the adversary system of litigation is the most perfect means ever devised to determine the truth. That it may, on the way to the truth, lead to financial suicide does not appear to be taken into account. Take discovery. It is deeply embedded in the adversary system that every document which may be relevant to the dispute needs to be discovered. Now it is an undoubted fact that once in a million there may be a case in which turning up the back of an otherwise innocuous envelope may reveal something which will swing the balance to one party of the other. Does that chance justify the expenditure of time and effort involved in discovery. In searching for what is fair between the parties should each party be allowed to call an unlimited number of witnesses, to tender an unlimited number of documents, to exhaust every interlocutory process available, in order to ensure that the result is as near to perfection as possible? Alternatively, is it better and more appropriate that what should be done and permitted to be done is what is required in order to produce a <u>fair</u> result between the

parties? It has been pointed out that the risk of fallibility can lead in either of two opposite directions. It may make us more determined than ever to insist on the most meticulous trial procedures,or, since the trial outcome will not always be fair because of fading memories, inability to express something correctly, should we insist upon time consuming and costly procedures simply because they offer some slight chance of promoting fairness. That question, it seems to me, is at the heart of what should be the debate in the community. It is not being asked, much less discussed. That, I think, is what consumers expect of the legal profession.

A major defect in the present system appears to be insufficient preparation and thought prior to the hearing. How else can one explain the number of settlements at the door of the court. The greatest indictment of the system and of lawyers is the recurring cry in courtrooms across the country, after a matter has been called on. "Your Honour may we have a few minutes?" Why was it not possible to settle the action prior to that point? Every time this happens the legal system and lawyers have let the community down. The waste in money is equalled only by the frustration and annoyance of the participants other than the lawyers immediately involved. In its submission to the Senate Cost of Justice Inquiry the New South Wales Bar Association said that it is seldom practicable to carefully consider the evidence and applicable legal principles "other

than shortly before the commencement of the matter when all of the available material has been assembled....More often than not, at this stage, negotiations in earnest between the parties begins."

The community expects a better system for exploring the chances of, and arriving at, settlements. The courts need to play a more immediate role in the mediation. Lawyers are fond of claiming that if a settlement is possible they will achieve it. Without entering into controversy it must be true that an experienced third party, with no interest in the outcome, should be able to assist the process.

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