

54TH UIA CONGRESS
Istanbul – Turkey
30 October – 3 November 2010

JUDICIARY WORKING GROUP
1 NOVEMBER 2010

MEGALITIGATION
Judge Judith Gibson
President,
Judiciary Working Group

“Litigation in the mega-law mode is distinctive in the way that mobile high technology warfare between superpowers differs from the set piece battles of an earlier day.”

(Galanter, “Mega-Law and Mega-Lawying in the Contemporary United States”, in “The Sociology of the Professionals: Lawyers, Doctors and Others”, R Dingwall & P Lewis (eds.), London, 1983)

“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew

his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.”

(Dickens, “Bleak House”, cited in *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [3], referred to in *Collier v State of Qld* [2010] QSC 254 at [38]).

Introduction

“Megalitigation”¹ and “megalawyering”², words coined to describe litigation on such a massive scale that individual justice may be at risk, are not new to litigation. In the prolonged-antitrust battle between Howard Hughes and TWA (*Hughes Tool Co v Trans World Airlines* (1972) 409 US 363, 393) Supreme Court Chief Justice Burger labeled the 1.7 million documents (694 feet of shelf space) and 10-foot high briefs “the twentieth-century sequel to *Bleak House*”, noting that 56,000 lawyers’ billing hours added up to \$7.5 million.

In today’s terms, legal costs of this size would barely raise a ripple. Lawyers, litigants and courts in most common law countries, including Australia, are used to long and expensive litigation. However, “megalitigation” is not a word to use only to describe a very long or legally complex civil or criminal action³. Megalitigation is a term that

¹ This term was most famously used in *Seven Network Limited v News Ltd* [2007] FCA 1062 by Sackville J, who at [2] – [6] used the word “mega-litigation” to describe “electronic courtroom” proceedings which had taken 120 days to hear, resulting in 9,530 pages of transcript, thousands of exhibits and a “truly astonishing” (at [4]) 2,500 pages of submissions from both sides of the bar table. The causes and solutions to the problems of “mega-litigation” have also been researched and discussed extra-curially by a number of members of the Australian judiciary, notably the Honourable Justice Pagone, “Lost in Translation: The Judge From Provider to Consumer of Legal Services” in “The Art of Judging”, Southern Cross University Law Review vol. 12, 2008 at p. 160; the Honourable Justice Hayne, “The Vanishing Trial” (2008) *The Judicial Review* 33). The reducing number of trials actually taking place has led to fears for the future of the adversarial trial process if the trial process means litigation is “too horrible to contemplate” (to quote Sackville AJ in “Meeting the Challenges of Complex Litigation: Some Further Questions” (2009) *The Judicial Review* 197). The issue of over-complexity and delay in litigation has also arisen in a number of long-running trials including *Bell Group Limited (in liquidation) v Westpac Banking Corporation (No. 9)* [2008] WASC 239, which led to the drafting of the *Access to Justice (Civil Litigation Reform) Amendment Bill 2009* (Cth). The High Court of Australia has also considered these issues in *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27; (2010) 239 CLR 175.

² Galanter, “Mega-Law and Mega-Lawyering in the Contemporary United States”, in “The Sociology of the Professionals: Lawyers, Doctors and Others”, R Dingwall & P Lewis (eds.), London, 1983, at pp 152 – 176.

³ As to megalitigation in criminal proceedings, see the perceptive remarks of Galanter, *ibid*, at 169: “An approximation of mega-law is found in the occasional criminal defence in which the defendant is wealthy, notorious, or has become a *cause célèbre*.”

has increasingly been used to describe a case where the overuse or misuse of court proceedings means that the case goes off the rails. The main case is either sidelined or conducted alongside “companion litigation” concerning discovery or fees which proceeds alongside, or supersedes, the original substantive controversy.⁴ Simple cases can be made very complex or expensive by, for example, bringing applications for a court to take evidence from a party at an overseas location⁵, or multiple appeals during the trial⁶. The result of overuse of the court system can, on occasion, be that might wins out over right.

The initial response of many lawyers would be that megalitigation means going to court a lot, which is good for business and promotes justice. However, empirical evidence is that the result is less cases, reduced certainty for litigants, more appeals and, on occasions, punishment for the lawyers in question in the form of costs orders against them personally. To cite some of the more recent studies on megalitigation:

- (a) As the Honourable Justice Hayne points out in “The Vanishing Trial”⁷, the reverse is the case; parties are deterred from going to court at all. Justice Hayne attributes this to the increasing complexity, cost and length of trials, which makes parties involved in disputes reluctant to go to court. That is not good news for lawyers or for the justice system generally.

- (b) More litigation does not necessarily mean more justice. Examination of cases where “megalitigation” tactics have been employed tend to show that the party using them is more likely to have a weak case. In *Seven Network Limited v News Ltd*, Sackville J noted with concern that the legal costs (around \$200 million) were likely to exceed the quantum of damages for this hopeless case,

⁴ *Ibid.*, page 165

⁵ For an example of personal injury cases in NSW where substantial legal costs were incurred by the insistence of the plaintiffs; lawyers that their clients’ evidence needed to be taken overseas, see the newspaper articles at footnote 9 below. Galanter notes at p. 172 that the rise of mega-lawyering in the United States in the 1980s that no-fault motor vehicle insurance and no-fault divorce reduced the need for lawyers’ services and that this development, coupled with reduced restrictions on advertising and marketing of legal services led to the use of mega-law procedures by American law firms previously reliant on this work. The “vast batteries” of lawyers brought in to manage the “litigation explosion”, with the result that the legal system is exposed as “indeterminate, manipulable and political” (at p. 173).

⁶ E.g. *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 (11 appeals brought during the trial, which lasted about 5 years as a result)

⁷ (2008) *The Judicial Review* 33.

which his Honour considered was not only wasteful, but bordered on the scandalous (at [10]). In *Seven Network Limited v News Limited* [2009] FCAFC 166 the Full Court dismissed Seven Network's appeal, noting at [1079] the size of the costs involved. Another unfortunate result was that Justice Sackville, one of Australia's finest judges, took early retirement from the bench, saying that hearing this case had caused him to re-assess his priorities⁸. Judge Sackville's address to the Young Lawyers 2010 Annual Civil Litigation Seminar (published in the *Law Society Journal*, June 2010) contains some useful suggestions to reduce the burden of these long cases on judges and on courts.

- (c) Where litigation is both expensive and hopeless, this creates bad publicity for lawyers. Two recent examples in Australia may be given. The first is *Rural and General Insurance Broking Pty Ltd (ACN 093483928) v Australian Prudential Regulation Authority* [2009] ACTSC 67. After years of expensive litigation it turned out there was no cause of action as the statements had never been published to any third party. The trial judge's criticism of the lawyers on both sides was picked up by *The Australian* newspaper in a strong editorial on 14 January 2010⁹.

⁸ <http://www.theaustralian.com.au/business/legal-affairs/c7-mega-litigation-takes-its-toll-as-judge-sackville-retires/story-e6frg97x-111116039713> *The Australian*, 12 April 2008. See also the comments of Elliot J in *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 225 FLR 1; (2008) 70 ACSR 1 at [9761] – [9762], containing both a complaint about the trial length, and an advertisement for Australia's Nepenthe vineyard:

“[9761] From time to time during the last 5 years I felt as if I were confined to an oubliette. There were occasions on which I thought the task of completing this case might be sempiternal. Fortunately, I have not yet been called upon to confront the infinite and, better still, a nepenthe beckons. Part of the nepenthe (which may even bear that name) is likely to involve a yeast-based substance. It will most certainly involve a complete avoidance of making decisions and writing judgments.

[9762] For the moment, in the words of Ovid (with an embellishment from the old Latin Mass): *Iamque opus exegi, Deo gratias.*”

⁹ <http://www.theaustralian.com.au/business/farcical-end-to-five-year-lawsuit/story-e6frg8zx-1225818991670> ; <http://www.theaustralian.com.au/news/opinion/less-than-legal-eagles/story-e6frg71x-1225820170468> , 14 and 15 January 2010; see also <http://www.theaustralian.com.au/business/legal-affairs/judge-feels-strain-of-megalitigation-district-court-judge-judith-gibson/story-e6frg97x-1225822312772> 21 January 2010.

The second example is actually a series of cases run by a firm of solicitors between 2004 and 2008. The lawyers obtained orders from the court for evidence in personal injury cases to be taken “on commission” from plaintiffs who returned to live in China after having a motor vehicle or work accident in Australia. The plaintiffs’ evidence was taken in Hong Kong, Singapore and similar holiday locations although these plaintiffs did not live there and there was no connection between these countries and the accidents the plaintiffs suffered. The newspaper articles¹⁰ which drew attention to these events contained complaints from these clients about these expenses, some of which were taken out of their settlement sums.

- (d) The growth of legal mega-firms who can deal with this kind of massive litigation is leading to a reconfiguration of power and authority in the legal profession, with the result that “uncertainty develops profession and practice”¹¹. This is a particular problem for countries where significant changes to the legal system are already putting the profession under pressure¹².

The purpose of this discussion paper is to look at some of the ways that courts, legislators and the profession are dealing with the challenges of longer and more

¹⁰ <http://www.smh.com.au/news/national/clients-accuse-barristers/2008/06/13/1213321620637.html> 14 June 2008; <http://www.personalinjurylawyers.com.au/news/2008/6/17/treatment-of-the-injured-ridiculous-unjust/> 17 June 2008; <http://www.smh.com.au/news/national/keddies-chief-fined-10000/2008/06/25/1214073313040.html> 25 June 2008; <http://www.brisbanetimes.com.au/news/national/keddies-client-charged-for-saying-thanks/2008/06/30/1214678019792.html> 1 July 2008; <http://www.smh.com.au/national/lawyers-to-face-scrutiny-on-fees-20090415-a7ji.html> 16 April 2009; <http://www.theherald.com.au/news/national/national/general/lavish-legal-costs-leave-trail-of-unhappy-clients/1490346.aspx> 20 April 2009; <http://www.abc.net.au/news/video/2009/08/24/2665454.htm> 24 August 2009;

<http://smh.drive.com.au/search.html?category=Drive%2Fsearch.html&keywords=Keddies> (multiple news stories up to 2010). The purpose of listing all these articles is to show the degree of publicity given to these allegations of lawyers overcharging, which caused damage to the reputation of lawyers and of the legal system. Newspaper articles critical of lawyers’ high fees are not good for the image of lawyers. The NSW Government subsequently set up an inquiry into the way in which legal fees were charged, the idea being to rein in what were seen as excessive legal costs brought about by overservicing or otherwise making straightforward legal proceedings more complex than necessary – in other words, to prevent megalitigation tactics creeping into personal injury proceedings.

¹¹ John Flood, “Megalawyering in the global order: the cultural, social and economic transformation of global legal practice” (1996) *International Journal of the Legal Profession*, 169 at p.200.

¹² See, for example, discussion of megafirms in Japan in Chan, Kay-Wah. "Emergence of Japanese Transnational "Mega" Firms: Is There a Possibility?" *Paper presented at the annual meeting of the The Law and Society Association, Renaissance Hotel, Chicago, Illinois, May 27, 2004.* 2009-05-26 http://www.allacademic.com/meta/p117090_index.html.

complex cases. This is a vast topic, so I have concentrated on an overview of what the approach of the Australian courts has been. The footnotes contain a number of sources for further reading.

Identifying a case that has turned into “megalitigation”

Here are some examples:

- There are multiple applications to the court, seeking repetitious or unreasonable orders, or refusing to agree to reasonable steps. This leads to judges making remarks like:

“The costs to the parties — and the costs to the community in the continued and repeated provision of judicial services to resolve their dispute — is reminiscent of the infamous litigation in *Jarndyce v Jarndyce* immortalised in Charles Dickens’ “Bleak House”.

Regrettably, whilst the Dickens tale may have been partly fiction; the present tale is all fact.” (*Wenkart v Pantzer* [2010] FCA 866 at [4]) per Flick J.

- There is inordinate delay (see, for example, the history of delays set out in *Collier v Queensland* [2010] QSC 254, where the trial judge refers to *Bleak House*). The biggest delay I could find was *Macdonald v Public Trustee* [2010] NSWSC 684 where the Public Trustee delayed in an estate for over 40 years (with the trial judge referring, inevitably, to *Bleak House*). The Public Trustee’s conduct was referred to a number of disciplinary bodies. Such referrals are rare, and are even more rarely acted upon.¹³

¹³ Although not arising from a megalitigation case, a good example of an inquiry recommending perjury charges is the “Inquiry into the City of Joondalup”, 27 September 2005. Despite this 625-page report, and administrators being appointed to the Joondalup Council as part of the fallout, no action was ever taken against the witness who obtained employment at the council by putting in a CV with false qualifications, and who gave evidence in court claiming to have these. Although the defamation case in which this evidence was given was not itself “megalitigation”, it was the catalyst for important costs reforms aimed at preventing misuse of the legal system which are discussed in more detail below.

- Interlocutory steps such as discovery become very onerous because ‘no one has been able to devise a clear and workable solution to the problems created by large and complex litigation’ (‘Mega-Lit: Tangible consequences flow from complex case management’ (2010) 48(5) *Law Society Journal* 47).
- There are repeated, usually unsuccessful, applications to appeal courts which interrupt the hearing e.g. *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510, where there were 11 applications for leave to appeal to the Court of Appeal during the trial. One of these was from an application to amend the defence; the making of this application before the trial judge took 38 days. Defamation litigation is fertile ground for megalitigation of the kind demonstrated in *Rural & General Insurance v APRA* (referred to above) and other cases where adverse publicity was generated because of public concern about misuse of the court process.
- Megalitigation causes particular hardship where these tactics are used, not in commercial disputes, but in Family Court or estate disputes involving family members: see Palmer J in *Sherborne Estate (No 2)*, *Re Vanvalen v Neaves* (2005) 65 NSWLR 268; [2005] NSWSC 1003 (at [16], referring, inter alia, to *Bleak House*);
- Parties and courts have on occasion expressed concern that the case is not being conducted for the benefit of the judge deciding issues but for the titillation of the general public. Such a claim was made in *Fraser-Kirk v David Jones Limited* [2010] FCA 160 (a \$37 million claim for sexual harassment) where Flick J noted at [4]:

“Concern was then expressed that care should be exercised when making submissions to the Court not to make statements which were more in the nature of a “*media release*” than a submission which provided genuine assistance to the Court as to how the proceeding could properly be case-managed and the interests of all parties protected.”

If megalitigation is causing case management problems for parties and for the court, what is the best way forward?

HOW COURTS ARE DEALING WITH MEGALITIGATION TACTICS

(1) Streamlining pre-trial and trial procedure

Following the collapse of the BCCI proceedings against the Bank of England and the Equitable Life litigation, commentators pointed to systemic weakness in the UK commercial cases management procedures. The result was the UK Long Trials Working Party¹⁴, perhaps the most significant analysis of the best way to conduct long trials in common law countries. Key changes include limiting of the length of statements of case, early creation of a judicially settled List of Issues, parameters for disclosure of documents and the content of witness statements and expert reports, the aim being more structured and shorter trials in complex cases. There are also proposals to encourage the greater use of summary judgment and striking out procedures in the Commercial Court and to limit the length of written and oral arguments at trial.

Concerns in Australia about the need for greater speed and efficiency in both the Supreme and District Courts goes back to 2000 when Spigelman CJ introduced Practice Note 108 in the Supreme Court, which recommended that cases should be run on the basis that justice will be “just, quick and cheap”¹⁵. This led to the enactment of a statute for both the Supreme and District Courts, the *Civil Procedure Act* 2005 (NSW). Sections 56 – 62 set out a series of provisions for procedural fairness and efficiency, and specifically states that justice will be “just, quick and cheap” (s 56(1)). These provisions include powers for judges to limit the time for cross-examination, require estimates of hearing time, and ensure that costs are kept proportionate to the sum claimed.

¹⁴ <http://www.judiciary.gov.uk/publications-and-reports/reports/long-trials-working-party-report>

¹⁵ Supreme Court of New South Wales, Practice Note No. 108 - REPEALED – “Cost Orders Against Practitioners”

<http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/8f7d14552294a989ca2572ed000cec1e?OpenDocument>

To my observation, this legislation has a useful “warning” effect, but has made little difference to how lawyers conduct proceedings. For example, there have been very few cases where judges have limited cross-examination and attempts by judges to impose such sanctions are generally received poorly.

Not only were lawyers guilty of delays, but so were courts, and it was not until the High Court’s decision in *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27 that any real change occurred.

The fact situation in *AON* was unremarkable by Australian standards – a party sought to make substantial changes to its pleadings on the day of the hearing and as a result the hearing had to be adjourned. Not only the parties were at fault. Heydon J at [153] ff was particularly critical of the court’s delay of eight months in giving reasons for the granting of the adjournment, and of the six months the Court of Appeal took handing down its judgment.

This kind of delay, not only by litigants but by courts, is a continuing problem in civil litigation in Australia, and I have included comments to this effect by some of the judges in “megalitigation” cases. Following upon these comments, Commonwealth legislation modeled upon the *Civil Procedure Act* was enacted: *Access to Justice (Civil Litigation Reform) Amendment Act 2009* (Cth).

Federal Court judges have taken to the use of this legislation with enthusiasm. A comprehensive analysis of the requirements of the Act, and its history, was undertaken by Flick J in *Fraser-Kirk v David Jones Limited* [2010] FCA 1060. The subject matter of this claim is an action by a publicist employed by an upmarket department store for \$37 million. Flick J dismissed an application by the store employee to refuse to provide the names of other persons allegedly sexually harassed and that particulars be only made “*on the condition that the solicitors acting for the Respondents give confidentiality undertakings*”. This case has attracted a great deal of national and international attention, as Flick J notes at [3], but other million-dollar claims for sexual harassment have been made in other countries, not only in the

United States but also (as the Gillian Switalski case demonstrates) in England¹⁶ so it is not an isolated Australian phenomenon.

Specialist lists or courts¹⁷, run by judges with experience in the relevant field¹⁸, are generally agreed to be an essential pre-requisite but, surprisingly, some courts in Australia do not have specialist lists or, if they do, these lists are not run by specialist judges. Although most courts have a commercial list, some Australian courts (such as the District Court of NSW) do not have a Building and Construction List, or a Practice Note for concurrent expert evidence (although the Supreme Court's procedures can be, and are, often adapted on a case-by-case basis).

(2) Pre-litigation requirements

A number of commentators have looked at ways to adapt steps required to be taken before litigation can be commenced. This is a strategy which has been increasingly used in the United Kingdom since Lord Woolf's 1996 *Access to Justice* report recommended pre-action protocols to promote early but well-informed settlement. The *Civil Procedure Rules* (UK) include 11 pre-action protocols that set out codes of practice in specific areas of litigation, such as personal injury and medical negligence. In many instances, these pre-action protocols provide for the early exchange of information and disclosure of documents to help in clarifying or resolving issues in dispute.

¹⁶ <http://bullybehindyou.blogspot.com/2010/03/legal-bullied-city-lawyer-seeking-19m.html> contains details about Ms Switalski's 19 million pound claim. Certain kinds of litigation seem to attract very large claims; currently this is the case with sexual discrimination actions. Claims in the United States have included the \$54 million payout by Morgan Stanley and the unsuccessful claim brought against Merrill Lynch for \$7.5 million: for a list see <http://webcache.googleusercontent.com/search?q=cache:1Ptdo-Qi9YsJ:www.pcsproud.org.uk/Employment%2520Tribunal%2520Wins.doc+uk+sexual+harassment+proceedings+million+pounds&cd=5&hl=en&ct=clnk&gl=au> This is not to say that all these claims are without merit, or that the very large damages awarded are disproportionate to the harm, which in some cases is severe.

¹⁷ See, for example, Professor A Stauber, "Commercial Court: A Twenty First Century Necessity" (2007) 1 Judicial Studies Institute Journal 154 – 7.

¹⁸ Lord Steyn, in his lecture "Defamation and Privacy" (3rd Annual Boydell Lecture, 26 May 2010), in a section headed "Specialist Judges", gave examples of the problems when judges unfamiliar with defamation law heard cases. Two judges in England who were not specialists in defamation granted injunctions "in ignorance of section 12 of the Human Rights Act" (p. 18). The need for specialist judges in defamation was most recently endorsed by the House of Commons in its February 2010 report on defamation and privacy law reform: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomeds/362/36202.htm>

Lord Jackson's 2009 *Review of Civil Litigation Costs* in the UK found that the rate of settlements had improved but that the pre-action protocols had significantly increased the costs for those litigants whose cases would previously have settled prior to action being commenced. In cases where settlements are unlikely to be reached (e.g. commercial disputes) pre-action protocols had generated additional costs and delays in getting to court for no useful purpose.

Although this procedure has not performed as well as was hoped, Rosalind Croucher of the Australian Law Reform Commission has suggested that requirements for pre-action disclosure of information may reduce the discovery burden¹⁹.

The *Civil Dispute Resolution Bill 2010* (Commonwealth) will oblige parties to take certain steps before litigation can be commenced, and there have been provisions in the *Family Law Rules 2004* which have been used to impose the duty of disclosure on all parts of the proceedings including pre-litigation.

Pre-litigation requirements are unlikely to check a determined litigant, and would be difficult for a court to enforce. This is not a tool that is likely to be useful in combating megalitigation.

(3) “Judicial activism” and case management

The entitlement of a judge to call witnesses, ask questions, rule out evidence not objected to by the parties, curtail cross-examination or otherwise take control of the court is a matter of significant controversy.²⁰

Five “core meanings”²¹ of judicial activism have been identified:

¹⁹ “Alternatives to Discovery – Pre-Action Requirements”, 3 September 2010, <http://talk.alrc.gov.au/?p=53>. See also <http://talk.alrc.gov.au/?p=14> concerning the difficulties for discovery in megalitigation cases.

²⁰ See the Honourable R S French, “Judicial Activism – the boundaries of the judicial role”, (2010) 10 *The Judicial Review*, September, pp 1 – 10.

²¹ K Kmiec, “The origin and current meanings of “judicial activism: flag desecration and abortion” (1989) 6 *California Law Review* 439 at 441.

1. Invalidation of constitutional actions of other branches (legislative or executive);
2. Failure to adhere to precedent;
3. Judicial “legislation”;
4. Departures from accepted interpretive methodology; and
5. Result-oriented judging.

There have been many articles about judicial activism, and it would be fair to say that the term strikes terror in the heart of lawyers, who fear judges bringing their own motions, calling their own witnesses or otherwise running the court in a high handed manner.

However, judicial activism, in the form of control over potential abuse between litigants of unequal (or limited) means could be of assistance in the following problem areas:

1. Prolix cross-examination or trials that take well in excess of the time allocated;
2. Disputes as to how the expert evidence should be taken (e.g. concurrent evidence);
3. Matters involving court resources generally.

It is now accepted practice (*Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWCA 260) that judges may, in extreme cases, put a limit on cross-examination, but this is a practice that is very rarely used. Some helpful remarks about judicial control of trial generally were made in *Ivory v Telstra Corporation Ltd* [2002] QCA 457 at [83] and [85], Wilson JA noted:

“[83] Litigation is an adversarial process. It is the responsibility of a trial judge not only to be impartial and to be seen to be so, but also to maintain control over a trial and the conduct of the parties in the course of the trial.

...

[85] I respectfully agree with the observation of Mahoney JA in *Ley v R De W*

Kennedy (Finance) Pty Ltd [(Court of Appeal, Mahoney JA, 21 May 1975, unreported)] as cited in the later decision of *Raybos Australia Pty Ltd & Anor v Scitec* [*Raybos Australia Pty Ltd & Anor v Scitec Corporation Pty Ltd* (NSW Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986)] that the right of a litigant to present his case -

"must not be seen as giving an absolute right to conduct a case, or to conduct a case in the manner and for the time that such a person chooses, whatever that choice may be. That right must be balanced against the rights of other parties who are involved in the litigation, including the right..... not to be involved in pointless litigation and to have the litigation conducted properly and with reasonable promptitude; and it must be balanced against the right of the public generally not to have the court's time wasted."

What steps will be appropriate, in a particular case, to prevent injustice being done to parties who find themselves involved in litigation conducted in this way, must, of course, be determined in the light of the facts of that a case; but it should be clear that it is proper that steps be taken to that end."

Wilson JA's reference to litigation as a trial process in which the judge must appear to be independent identifies a problem not only with large complex cases that go wrong, but also with small cases where these "megalitigation" tactics make simple matters unnecessarily complex and expensive. The real problem with megalitigation is that judges have been unable to prevent these "megalitigation" techniques of overservicing, overcharging and delay tactics from complicating even comparatively small cases. This has been demonstrated in a study of the efficiency of courts in New South Wales and Baden-Wurtemberg in Germany by Ann Eyland²², who has identified (at p. 20) 6 areas for potential law reform. It is readily apparent, from looking at this list, that in most of these areas reform could be achieved by "judicial activism":

²² Ann Eyland, "Civil Litigation in NSW: Empirical and Analytical Comparisons with Germany: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1511376 .

1. Lack of judicial specialisation, inefficient case allocation and problems with the administration of court files.
2. Inefficient procedural rules concerning pleadings (notably late amendments or complaints about non-compliance which are not raised until just before the trial).
3. Insufficient emphasis on early settlement.
4. Ineffective pre-trial management.
5. Lengthy trials and potential delay in judgment delivery.
6. Focus on party-appointed experts, rather than considering alternatives such as a court-appointed expert or “hot tubbing”.

The biggest single problem with justice in Australia is the enormous legal costs. Where the litigation is substantial, as was the case in the Channel Seven litigation, these costs can dwarf the sum claimed.

(4) Legal costs issues

The concerns over legal costs in defamation proceedings was one of the issues considered by the March 2010 House of Commons report and by the draft bill introduced by Lord Lester (Lord Lester proposed that “no win no fee” briefs in defamation should not be permitted).

Legal costs in personal injury actions were overhauled following the revelation by the *Sydney Morning Herald* of very high legal fees being taken out of the settlements for injured persons, in circumstances where the costs and disbursements were asserted to be excessive.²³

A significant reform was achieved in defamation law when an independent member of the NSW Parliament proposed amendments designed to prevent the bringing of trivial cases where the costs dwarf the damages. His crusade led to the amendment of NSW

²³ See the newspaper articles set out at footnote 9 above.

legislation in 2003 and, when uniform defamation legislation was introduced around Australia, to its extension to all States and Territories²⁴.

What this provision does is quite simple: a defendant who does not make a settlement offer is at risk for indemnity costs, and if either party conducts litigation in an oppressive fashion, that party is at risk for indemnity costs. The terms of the legislation are:

DEFAMATION ACT 2005 - SECT 40

Costs in defamation proceedings

40 Costs in defamation proceedings

(1) In awarding costs in defamation proceedings, the court may have regard to:

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a [settlement offer](#) or agree to a [settlement offer](#) proposed by the plaintiff, or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a [settlement offer](#) made by the defendant.

²⁴ His comments on the reading speech for this important reform can be found at <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LA20051012054>.

(3) In this section:

"settlement offer" means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

Although this provision does not often seem to be used in other courts, in my experience as the defamation list judge in my court for the last 9 years, this has been the most effective brake against oppressively conducted defamation litigation.

(5) A greater role for the profession in case management?

The adversary system is heavily dependent upon lawyers running their own cases efficiently. Some of the ways to ensure this are:

- **Requiring the “good lawyer” to report the “bad lawyer”.** In our commercial list, we use a “usual default order” to require the “good lawyer” to relist the matter if the “bad lawyer” gets behind in the timetable. This stops lawyers accumulating evidence of failure to comply and using it as a bargaining chip, a favourite megalitigation tactic, and means that they actually have to get on with the case.
- **Case management in specialist lists:** This is still a very under-utilised procedure. For example, in our court we do not have a specialized Building and Construction List, and this lengthens the hearing time considerably. Lawyers should agitate for more specialist lists, and take an active role in deciding what should go in the court’s Practice Note, by encouraging their bar associations to have regular meetings with courts about efficiency.
- **The role of the media:** The increasing use of publicists has, according to some commentators, led not only to more defamation actions but more stories in the media about disputes and legal cases. In *Fraser-Kirk* Flick J took a proactive stance about statements being made in court which were media releases rather than submissions. Judges need to be aware of the problem of parties who use court proceedings to garner publicity, although what can be done about it is uncertain.

- **Personal costs orders against lawyers:** Lord Lester and the House of Commons are at loggerheads about whether speculative legal fees are the problem. Whatever the problem, if there is misuse of the court system, costs sanctions may be appropriate. Legislative amendment to income tax legislation to prevent tax deductibility of legal fees in extreme circumstances may also be an option, as may greater use of security for costs. The traditional method of reining in excessive costs and weak cases by personal costs orders against the lawyers involved still remains an effective tool: *Flower & Hart (a firm) v White Industries Qld Pty Ltd* (1999) 168 ALR 183 at 189. In *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 McColl JA set out the following checklist concerning when such orders should be made:

(a) The jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised “with care and discretion and only in clear cases”:

Ridehalgh (at 229), *Re Bendeich* (1994) 53 FCR 422; *Deputy Commissioner of Taxation v Levick* [1999] FCA 1580 ; (1999) 168 ALR 383 per Hill J at [11]; *Levick v Deputy Commissioner of Taxation* [2000] FCA 674 ; (2000) 102 FCR 155 at [44]; *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416 at [8] per White J (with whom Davies and Williams JJA agreed); *De Sousa v Minister for Immigration* (1993) 41 FCR 544; *Money Tree Management Service Pty Ltd v Deputy Commissioner of Taxation (No 3)* [2000] SASC 286;

(b) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or a defence which is plainly doomed to fail:

Ridehalgh (at 233); *Medcalf v Mardell* [2002] UKHL 27 ; [2003] 1 AC 120 at [56] per Lord Hobhouse; *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 (affirmed on appeal, *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* [1999] FCA 773 ; (1999) 87 FCR 134); *Levick v Deputy Commissioner of Taxation*;

cf *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157 ; [2003] 2 Qd R 683;

(c) the legal practitioner is not “the judge of the credibility of the witnesses or the validity of the argument”: *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297; the legal practitioner is not “the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him”: *Myers v Elman* (at 304, per Lord Atkin); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26 ; (2001) 47 ATR 1 at [34] per Callinan J;

(d) A judge considering making a wasted costs order arising out of an advocate’s conduct of court proceedings must make full allowance for the exigencies of acting in that environment; only when, with all allowances made, a legal practitioner’s conduct of court proceedings is quite plainly unjustifiable can it be appropriate to make a wasted costs order: *Ridehalgh* (at 236, 237);

(e) A legal practitioner against whom a claim for a costs order is made must have full and sufficient notice of the complaint and full and sufficient opportunity of answering it: *Myers v Elman* (at 318); *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229);

(f) Where a legal practitioner’s ability to rebut the complaint is hampered by the duty of confidentiality to the client he or she should be given the benefit of the doubt: *Orchard v South Eastern Electricity Board* (at 572); *Ridehalgh* (at 229); in such circumstances “[t]he court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so”: *Medcalf* (at [23] per Lord Bingham);

(g) The procedure to be followed in determining applications for wasted costs must be fair and “as simple and summary as fairness permits ... [h]earings should be measured in hours, and not in days or weeks ... Judges ... must be astute to control what threatens to become a new and costly form of satellite litigation”: *Ridehalgh* (at 238 – 239); *Harley v McDonald* [2001] UKPC 18 ; [2001] 2 AC 678 at 703 [50]; *Medcalf* (at [24]).

- **Convergence between common and continental law systems:** The attraction of shorter trials at lower cost in continental law systems, so graphically illustrated by Ann Eyland’s research paper comparing the NSW District Court to the Baden-Wurtemberg Court, is an indication that many of the methods currently in use in the continental legal system would save time and money, not only for litigants but for the courts which are increasingly struggling to keep up with the burden of long complex trials. The recommendations of Ms Eyland, particularly concerning the greater use of mediation, require careful study by courts, where the court’s power to send parties to mediation exists in legislation but, due to limited facilities, is very rarely used. One of the reasons for the success of the Family Court of Australia in dealing with long and complex cases is, in my view, its willingness to adopt procedures from the inquisitorial system, and the importance placed on mediation. Courts in both systems are actively discussing methods that are being used to stop the trial process going off the rails.

Some concluding remarks

There is no simple answer, for judges and courts, as to how to deal with the pressure of long and complex trials. Where that length and complexity is complicated by unnecessarily prolix conduct of proceedings, “over-discovery” or frivolous appeals, courts are going to have to determine whether they are doing enough to ensure that the legal system is user-friendly for lawyers and litigants, or whether to take a stand about increased efficiency in the preparation and presentation of court proceedings.

I shall conclude this paper by referring to suggestions made by Ronald Sackville AO, the judge in the Channel 7 case, and by Elliot J, who was the judge in the Bell Group case.

In his address to the NSW Young Lawyers (published in the Law Society of NSW's June issue of the *Law society Journal*) Ronald Sackville AO made five suggestions:

1. Make use of the rules of conduct for practitioners to ensure that lawyers are not, in their enthusiasm to assist their clients, breaching the duty to assist the court.
2. Courts should discourage the pleading of what Wilcox J (in *Sun Earth Homes v ABC* (1993) 45 FCR 265 called “unnecessary clutter” i.e. hopeless defences.
3. Intensive case management by specialist judges from an early stage.
4. Confine discovery to documents that adversely affect the case or to documents on which that party relies.
5. Careful use of electronic technology.

In *Bell Group, supra*, at [9733] – [9736], Elliott J made some similar suggestions about how to deal with long and complex cases:

“37.1. The trial: an initial reflection

[9733] I went into this trial believing that, at some point, the parties would settle. I still think it should have settled because, basically, it is only about money. Certainly, the reputation of some individuals was at risk. But the gravity of the risk was blunted by the plaintiffs' decision not to allege conscious wrongdoing by directors and by the interpretation I placed on the pleadings that no case could be brought making similar accusations against individual bank officers. And whatever I may think or say about the actions of individuals 20 years ago is unlikely to provide much guidance to officers of corporations and to those who deal with them about appropriate corporate governance practices or commercial conduct in the early 21st century.

[9734] Throughout the trial I anticipated the delivery by one or other of the parties of a “killer punch” that would be a complete answer to the case brought by the opposing party and to facilitate the writing of a clear, concise and (relatively) simple judgment. Had that occurred I might have been able to say (as Mr Justice Tomlinson said of the aborted BCCI litigation in England) that the case brought by the losing party was a “farce”, that some of the claims in it were “simply bizarre” and that its structural basis was “built on occasion not even on sand, but rather on air”. But the “killer punch” was never delivered and it would be unfair of me (however I might have felt, and still feel, about the desirability of a negotiated end to the litigation) to level similar criticism of the parties here.

[9735] In the end the result was a close run thing, as the summary in the next section will reveal. Neither party has been entirely successful, nor entirely unsuccessful. Regardless of the result, in many ways this litigation put the legal system and its procedures to the test. I would be the last to say that the use which I and the parties made of aspects of the trial process in this case is beyond criticism. There are, I think, valuable lessons to be learned from this case. Those lessons should be identified and made known in the hope that they might prove useful for those who become embroiled in litigation of this nature in the future.

[9736] I had intended to include a section in these reasons covering those matters. But lassitude has set in and the prospect of writing about long trials now lacks appeal. In due course I will write extra-judicially on the subject. For present purposes it is sufficient to make these points:

(1) Governments are unlikely to increase significantly the resources they allocate to courts. I do not believe that large commercial entities should have unlimited access to a disproportionate share of an already scarce resource.

(2) Where a case involves substantial corporate litigants the daily hearing fees should be increased to something closer to the real current

cost to the public of providing the human, physical and technological resources necessary to resolve the dispute.

(3) Most importantly, a panel of judges should be allocated to hear and decide cases of unusual length and complexity. I have no doubt that had two judges been hearing this action it would have occupied much less than half the time.”

I would like to set out some suggestions of my own:

1. Judges should tell parties waving large bundles of documents at the court at the beginning of the case to take out any documents that will not be relied upon. Then, at the end of the case, these bundles should be returned, with an invitation to the opponent to take out any documents not relied upon.
2. Judges should beware of applications being made on the day of the trial. No competent lawyer finds out on the day of the trial that his opponent has not given proper discovery.
3. In pre-trial case management, judges should require the parties to report each other for failure to comply with timetables and if there is more than one failure to comply, issue a “self-executing” order. More use should be made of the requirement to make admissions.
4. Discovery is a very overrated tool. Instead, I would require the parties to serve chronologies of events, with a cross-reference to the relevant document, which the other side could then call for.
5. In trials, judges should be able to limit cross-examination, have agreed time estimates and require the parties to provide skeleton arguments to the court before the conclusion of the evidence. The practice of adjourning cases for written submissions to be prepared is the single greatest waste of time for judges.

Very few cases are so factually complex and legally difficult as to warrant litigants and their lawyers spending far more in legal fees than the sum that is in issue in the proceedings. Where the time and cost involved is so great as to lead to public criticism, the professional standing of lawyers generally is affected. Lawyers, litigants

and judges, all have an interest in court proceedings being conducted in a way that is just, cheap and quick. As judgments are now published on the internet, abuses of the legal system can quickly come to public attention and result in over-reaction by governments attempting to rein in excesses.

The real difficulty is to know what steps the legislature, the profession and the courts should take to deal with this increasing phenomenon. The purpose of this paper is to give a brief overview of “megalitigation” tactics which have caused concern, look at some of the proposals for reform, and invite further discussion of the best way to deal with the conflict between lawyers’ ingenuity and the need for justice to be just, cheap and quick.

J C Gibson

6 October 2010