

INQUIRY INTO VEXATIOUS LITIGANTS

Preamble

1. I was asked by the Chief Judge of the County Court, Michael Rozenes, to assist the Law Reform Committee of the Victorian Parliament in its enquiry into vexatious litigants by expressing my views on the subject as a sitting Judge of the County Court.
2. The views I have expressed below are those held by me as an individual Judge rather than necessarily representing the views of other Judges.

Introduction

3. It is a common and well held view that the justice system must be accessible to all citizens of the State whether they are represented or self represented.
4. The system in the County Court like any court system is governed by an Act and by Rules.
5. Practitioners who have litigation practices are familiar with the general requirements of the court system and of the availability of the court website, practice notes and publications of the Law Institute and the Victorian Bar. Self represented litigants are not.
6. The registry of the County Court is geared to providing an efficient and seamless delivery of a service at first instance where initiating process is filed and has been directed through the system to Judges in charge of lists through

whom directions are made at an interlocutory stage for the purpose of expeditiously and cheaply resolving the litigation.

7. The registry of the County Court is not similarly geared to dealing with self represented litigants who take up inordinate amounts of the time of registry staff and will impose upon registry staff to give advice both of a procedural and legal nature.
8. It is not self represented litigants per se who pose the most serious problem to registry staff and to Judges, but self represented litigants who have little or no capacity to understand the nature of the litigation they have embarked upon, the function of a court and the powers of a Judge, and who make demands which are unrealistic and when those unrealistic demands are not met their frustration is taken out on registry staff often leading to more litigation.
9. It is proposed that this response will be limited to recent experience in the County Court of litigants who behave in this way who might attract the description "vexatious litigant", but probably the description "querulous litigant".

The Vexatious/Querulous Litigant

10. Typically such litigants have not been able to engage a legal practitioner to act on their behalf because either there is no cause of action which is actionable in a court or the litigants have evidenced a propensity to be difficult, demanding and unmanageable.

11. These litigants commence their own legal proceeding which are usually characterised by an inability to comprehend the general conventions which govern litigation let alone the law. These litigants only see the result which they want and then interpret any perceived adverse reaction to the litigation, as they have formulated it, to be unjust and "the system" working against them.

12. It is the perception of what these litigants believe the litigation will provide which is at the heart of the problem which registry staff and Judges alike are unable to deal with because it is often impossible to have these litigants behave and think rationally and accept that the result may go against them.

13. This perception leads to frequent visits to the registry and frequent applications before Judges in the course of the litigation. The occasions of this kind increase as these litigants become more empowered by registry staff and Judges because when they appear they are almost always given more time than will ordinarily be given to other litigants who are represented in an

often fruitless attempt to have these litigants understand what is required in prosecuting litigation and to have them behave rationally.

A Case in Point

14. This litigant was involved in an event which gave rise to a claim actionable in the County Court.

15. A Statement of Claim was drawn by the litigant which did not plead a cause of action against the tortfeasor, but was a long and turgid piece of writing more consistent with a claim that this litigant's rights had been violated.

16. Some of the features of the way in which this litigant prosecuted the litigation were:

- a. Serving subpoenas on a high ranking Police.
- b. Serving subpoenas on high ranking bureaucrats.
- c. Serving subpoenas on Ministers of the Crown.
- d. Making repeated allegations against a range of Police, bureaucrats and Ministers which had no foundation.
- e. Applying for interlocutory relief repeatedly which was almost always absurd, for instance, applying to a Judge who was appointed to hear this litigant's case that he order that this litigant be given a fair trial!
- f. Demands that the court order the attendance of witnesses.

- g. Demands that the court order that the defendant produce evidence to aid this litigant in the presentation of this litigant's case.
- h. Applications to disqualify Judges who this litigant perceived not to be sympathetic to this litigant's cause.
- i. Episodic angry outbursts at registry staff who this litigant perceived to be obstructive in not meeting this litigant's demands.

17. The results of behaviour of this kind have led to registry staff becoming apprehensive when this litigant has appeared at the registry counter, many of whom now refuse to deal with her, leading to the requirement for a very senior member of registry staff to be taken away from more pressing business in order to deal with this litigant on each occasion that this litigant appears at the registry counter.

18. Each time this litigant has decided to make an interlocutory application this litigant has engaged in unnecessary and pointless correspondence with registry staff and the Judge appointed to hear this litigant's trial in circumstances where none of the interlocutory applications has had any merit and should not have been made yet this litigant was given a mention date and time which intruded significantly upon that Judge's obligation to undertake the ordinary work of the court.

19. One of the reasons why this litigant was given that degree of courtesy and latitude was because it was easier to appease this litigant where it was quite apparent that it was impossible to have this litigant understand how to conduct litigation in a conventional way.

20. This litigant had initiated proceedings in other courts including the state Court of Appeal and the Federal Court arising out of the same event on which this litigant's original cause of action was based.

How Do Courts to Deal with Such Litigants

21. The court system is not designed to cope with these types of litigants. The relative infrequency of litigants of this kind in courts tends to see courts suffer them. The result is that these litigants absorb significant amounts of the time of registry staff and Judges depriving other litigants of the attention which their litigation deserves.

22. Judges are acutely aware that the sometimes bizarre presentation of these litigants can distract the Judge from spending the time necessary to determine whether these litigants actually have a viable cause of action.

23. Judges are very concerned to ensure that these litigants are given a fair trial. By not assisting these litigants in outlining their causes of action and presenting their case there might be a perception of a denial of justice, but

that has to be balanced against the Judge not assisting these litigants to such an extent that it works to the disadvantage of the other litigant.

24. There is a tendency now to allow these litigants to run their litigation on the basis that it is better to allow that to occur and to have the litigation brought to a natural conclusion even though the cause of action may be without any merit.

25. This approach is obviously flawed and is a potential dereliction of the obligation of a Judge to control litigation, to manage it and resources properly, however, in the absence of any mechanism to control the behaviour of these litigants and to have them conform to a conventional approach to prosecuting litigation it is the only viable approach available to avoid denying a person access to the courts and Justice.

What is the solution?

26. These litigants need to be identified at the outset and dealt with by Registry staff who are trained to identify these types of litigants and what to expect of their behaviour once litigation has commenced.

27. Judges need to be trained in the same way, and in particular, Judges need to control these litigants and to channel their energies directly to what the

litigation requires rather than appeasing them by allowing the litigation to simply drift on.

28. The only way these two outcomes can be achieved is to limit the number of registry staff who deal with these litigants and limit the number of Judges who deal with them.

29. Control and channelling must not be seen as subverting these litigants in the prosecution of litigation which may well have merit, but a balance must be achieved because there is another litigant who is the target of the litigation who is suffering increased cost and expense in litigation which might be pointless or in litigation which is unnecessarily drawn out.

30. Education of this litigant in the litigation process should be paramount. The following steps might achieve that result:

- j. provision of written materials which explain the court process.
- k. a video illustrating:
 - i. the necessity to formulate a cause of action properly.
 - ii. the necessity to become familiar with the Rules and any relevant legislation touching on the cause of action
 - iii. attendance at the Registry counter and dealing with counter staff.
 - iv. how to prepare for an appearance in court.

v. the role of a Judge.

31. The message driven by all of this must be that departure from the conventional approach will not be tolerated, and if an attempt is made by these litigants to do that a Judge then has an opportunity to say to these litigants that they have been given materials which demonstrate how they should behave enabling the Judge to be more confident in being direct in controlling and managing these litigants.
32. Unless a Judge has such a platform created from which direction, control and management can be undertaken then these litigants cannot not be controlled.
33. It is common that these litigants will perceive injustice where there is none and will immediately think of an appeal. It is critically important that appellate courts develop the same approach otherwise the way in which these litigants are dealt with in the County Court might be misunderstood by an appellate court.
34. Too often these litigants' propensities are not identified until they have initiated litigation in tribunals, courts and courts of appeal and consequently develop a reputation. The treatment of these litigant by courts becomes symptomatic rather than dealing with the source of the vexation. This is why

an early identification of a litigant type is critically important so that registry staff and Judges are forewarned and forearmed.

35. The County Court should have available to it a basis upon which an opinion can be expressed by an appointed committee of Judges that these litigants are potentially vexatious and an opinion should be forwarded directly to the Attorney- General for his consideration to determine whether an application should be made to declare these litigants vexatious.

36. The present system whereby a vexatious litigant must make application for leave of a Judge to bring litigation is a sufficient safeguard against vexation. However, it should not be an ex parte application. It should be an application on notice to the Attorney- General who should appear and contest all applications of this kind otherwise the Judge hearing the application is put in an unenviable position of not being assisted in determining whether there is any merit in the proposed litigation and whether leave to proceed should be granted.

37. Furthermore, it is imperative that the Attorney- General undertake the role just mentioned because as the chief law officer it should be his obligation to protect the courts from abuse at the hands of these litigants.

His Honour Judge Philip Misso

County Court of Victoria