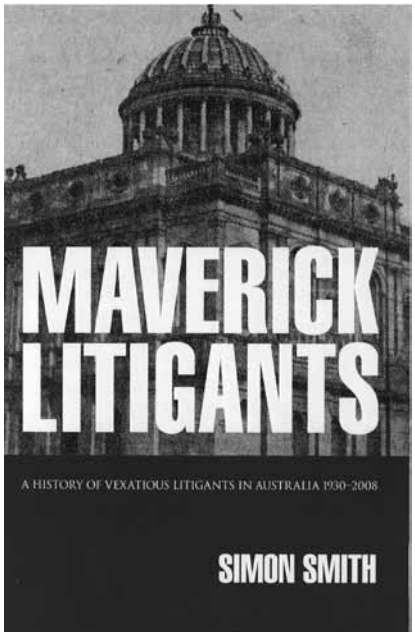
Maverick Litigants – A History of Vexatious Litigants in Australia 1930–2008

By Simon Smith | Maverick Publications | 2009[1]



Murray Gleeson has often reminded audiences that the rule of law is not the rule of lawyers. As this intriguing work reminds us, litigants are necessary for litigation and advocates are not.

The question of the vexatious litigant is a profound one. Accessibility to law is a necessary criterion of its civilising influence. The decision by a society to bar someone from accessing it is no slight question.

When a medieval society 'outlawed' someone , they were not making a fashion statement about green leotards, but a collective finding that one of its members had forfeited its aegis. As clause 39 of the Great Charter provides:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

All of which is very well, I hear you say, but have you ever been against someone who should be declared? Indeed, and that is the dilemma, the more so in a society in which the litigant in person is in greater number than before. Family law in particular has no shortage of such persons.

While the inherent power of a superior court may give sufficient power to deal with litigants whose causes tend against both due administration and due justice, the UK statutory formula – granting a discretion to superior court judges upon evidence that a person is habitually and persistently doing things they should not – found favour in Australian jurisdictions from the commencement of the twentieth century.

Simon Smith declares his hand in his opening paragraph. The book, he writes 'has been fun', adding that an early job as a lawyer at a busy community legal centre meant that he was part of the vexatious litigant circuit:

> Well-meaning Supreme Court judges would refer persistent litigants direct to me for free grass-roots advice, presumably in the hope that I would either advise successfully against further action or take the case on and shape it for final determination. I was never successful.

As the title of the book suggests, Smith is sympathetic to the species and to the view expressed by a member of the House of Commons (J F Oswald, a silk and author on the law of contempt):

> [Oswald opposed the enactment because] it infringed the first principle of public justice, namely, that it should be free to all alike. The Queen's Courts were public Courts, and all classes of litigants were entitled to free and unimpeded access thereto. The clause might lead to abuse: the courts had already ample power to summarily and inexpensively stop any vexatious or frivolous action.

The book has two parts, the first is a social and legal study of the beast, and the second with six vignettes of persons declared. Whether each justifies the Shavian conclusion that all progress depends on the unreasonable man is moot, but I was particularly taken with the tale of Constance May Bienvenu, an animal rights activist who fell foul of an – arguably – hidebound RSPCA.

The toll vexatious litigants can take on their loved ones is not often

realised, and against the tide I was delighted to read that Bienvenu's husband, who died five years after her, established a foundation in his and his wife's name for charitable purposes, it being a condition that no donations were made to the RSPCA.

Yet it is difficult to improve on Elsa Davis. Later, she would have regular spots on the Mike Walsh and Don Lane Shows, but her beginnings as an out of control litigant began with her acquiring the status of sister-in-law to sometime chief justice and governor-general of Australia, Sir Isaac Isaacs.

Of the latter's contribution to the sorry state of affairs, one commentator would write 'It was saddening to see a man of Isaac's eminence in law and public life behaving with a venom and lack of reason that would have been deplorable even in a vexatious litigant.'

Smith's focus is Victoria, although he is generous in his assessment of New South Wales: notwithstanding its 'rich tradition of persistent litigants', it has started declarations late and has made them rarely.

Until recently. While only eleven vexatious litigants were declared under section 84 of the 1970 Supreme Court Act, six more have been made since the commencement of the *Vexatious Proceedings Act 2008*.

I am not sure whether Smith makes good his case. But the story is an important one, and one which the numbers suggest is not going away. We lawyers have a peculiar obligation to question the withdrawal of anyone's access to law. It is a worthy paradox that those who most interfere with the administration of justice are those most in need of its application. Whether the deft finality of a declaration is appropriate is something that will always require close scrutiny.

Reviewed by David Ash

Endnotes

1. The reviewer got his copy from the 'publications for sale' list of the Royal Historical Society of Victoria, www.historyvictoria.org.au/pdf/publicationslist.pdf. The book is reasonably priced. Get in while stocks last.