advocacy

The Litigant in Person (Part 2)

"Unrepresented litigants present our courts with significant difficulties" - Kirby P.[1]

On the last occasion I discussed some of the problems that arise for counsel because of the presence of a litigant in person. The topic is large and I offer some further observations.

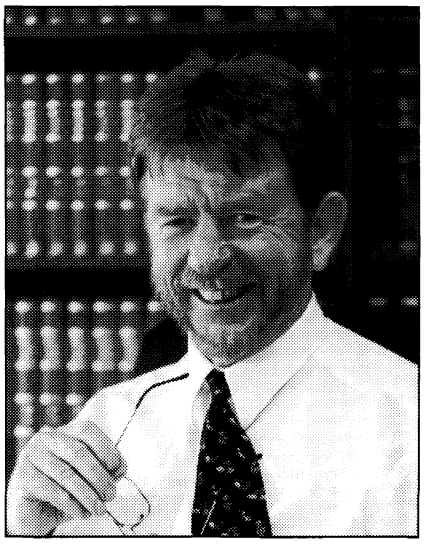
Difficulties are likely to arise long before you get to court. You can expect problems with pleadings and especially obtaining a satisfactory definition of the issues to be addressed at the ultimate hearing. In many cases the pleadings will be confused and contain irrelevant and embarrassing allegations and assertions of "fact". The causes of action are unlikely to be clearly identified. When a pleading is challenged the court may be expected to allow significant leeway to the litigant to enable the pleading to be placed into an intelligible form. It is not uncommon for the court to take a more generous view of what is an adequate pleading simply to ensure the matter gets on for hearing and an arguable case is not lost on a pleading point. The court may be expected to be more forgiving of procedural and evidentiary errors made by a litigant in person. Whether that should be so may be a matter for legitimate debate but counsel will have to deal with the reality.

Further, difficulties may arise because of the duty owed by counsel to the court. There is a duty of candour owed to the court in the presentation of the facts and of the law. As is well known, that duty may at times involve counsel acting to the disadvantage of his or her client. Counsel must not mislead the court but that is "an amorphous obligation and one that creates a difficult burden for counsel appearing against a litigant in person. The capacity of silence to be characterised as misleading in a variety of circumstances is well recognised."[2]

In the Northern Territory case of *Laferla v Birdon Sands Pty Ltd* (1998 unreported) Mildren J said:

> "It is sometimes thought that counsel owes a duty to the unrepresented litigant to ensure that he is assisted to properly put his case to the court. In my opinion counsel owes no duty to the unrepresented litigant. There is surprisingly little written about this topic, as it applies to this type of situation, but the practice of the Bar has always been to draw to the court's attention any matter which will assist the court to decide the case in accordance with law and to ensure a fair trial. Thus, counsel is required to put before the court any relevant decision of which he is aware and which he believes to be immediately in point, regardless of whether it be for or against his contention. This is so in all cases, regardless of whether a party is represented, but it is interesting that Sir William Boulton in his work *"Conduct and Etiquette at the Bar"*, 6th edition at page 75, observed that the rule 'must be observed with particular care in ex parte proceedings and where an opposite party is appearing in person'. Similarly, if a litigant in person fails to call evidence about some matter which is essential to his case, this would be a matter that counsel should bring to the court's attention so that the court can explain that to the litigant and the option is then open to him."

The last sentence of those comments of Mildren J was doubted by Byrne and Leggat.[3] They referred to the Professional Conduct Rules and suggested that his Honour demanded too much of counsel in seeking to impose an obligation to bring to the attention of the court the failure by a litigant to have called evidence in relation to a matter essential to his or her case. This is not the place to enter into a consideration of which view is correct. The extent of the obligation falling upon counsel may have to be further considered at some time in the future. In the meantime it would be prudent to bear in mind the views expressed by Mildren J in *Laferla* on the obligations upon counsel when appearing against a litigant in person.



Hon Justice Riley

A further problem that may arise for counsel opposed to a litigant in person occurs where the trial Judge intervenes in the proceedings under an apparent feeling of obligation to assist the party who is unrepresented and in an effort to ensure that the party is not disadvantaged. At some point the intervention of the Judge may become excessive and lead to error occurring. It will be a matter for judgment as to when that point is reached. There is an obligation upon counsel to object to the Judge intervening to the point where the Judge is no longer seen to be maintaining a position of neutrality in the litigation and is not simply ensuring that a fair trial occurs. As is pointed out by Byrne and Leggat,[4] failure to object to the trial Judge's excessive interventions may constitute a waiver or may estop a subsequent complaint. Counsel should raise with the trial Judge the prospect that the intervention of the Judge is such that proceedings may become unfair to the other side or that those proceedings may, at least, no longer be seen to be fair. If such conduct on the part of the Judge continues then counsel should make an application to the trial Judge to

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disqualify himself or herself.

In any private dealings counsel may have with a litigant in person outside of the courtroom, great care should be exercised. This will be especially so if "without prejudice" discussions are to be undertaken. The capacity for misunderstanding and subsequent misrepresentation is obvious. It may be difficult to ascertain the extent to which the litigant has correctly understood what is being put. Of some concern may be the extent to which the litigant misconstrues what is said. The repercussions for counsel of any misunderstanding may be serious and ongoing. In my view it is prudent for any discussions between counsel and the litigant in person to be witnessed by someone who can subsequently be called upon to confirm what took place. Where possible, notes should be kept.

The realisation that your opponent is a litigant in person is a matter that will cause you to revisit your approach to the case that you have to prepare and present. A fresh and different approach will be called for.

Endnotes

1 Wentworth v Rogers (No 5) (1986) 6 NSWLR 534 at 537 Bar Review 41 at 45
2 Byrne and Leggat: Litigants in Person - Procedural and Ethical Issues for Barristers (1999) 19 Australian Bar Review 41 at 45
3 Byrne and Leggat (supra) at 46
4 Byrne and Leggat (supra) at 44

Ceremonial sittings

"Nevertheless, as the Attorney has mentioned, Your Honour is certain to have to confront many unusual and serious issues, not the least being the involvement of a large number of Aboriginal people in the criminal justice system in this Territory.

"In conclusion may I observe that in one respect, this court is not unique and that is that like most other superior courts there has always been a close a supportive relationship between the Bar and the Bench. I wish to assure Your Honour that we at the Bar will strive to maintain that relationship during your time as Chief Justice.

"So once again, Your Honour, congratulations and welcome. We look forward to working with you in this unique court, in this unique jurisdiction."

Law Society Northern Territory President, Ms Merran Short

"It is with great pleasure that I address the court on this historic day, the swearing in of Chief Justice Brian Ross Martin. How nice it is to see so many familiar faces from the Territory's legal profession, both past and present and the Chief Justice's support crew, including his wife and his children, Joanna and Stuart."

"Martin CJ is highly regarded and very well respected in the legal profession. The commencement of Brian Martin's term as Chief Justice has been greatly anticipated and his appointment has been well received by the local profession.

"The Northern Territory currently enjoys a strong, stable and well respected judiciary which has a reputation for judicial independence. The Law Society believes that under Martin CJ's leadership, the judiciary and the Territory's profession will continue to thrive.

"Over the years, the Law Society has enjoyed a close working relationship with the various Chief Justices of the Northern Territory, from 1979, when Sir William Forster was the first appointee to the newly created position. The Law Society looks forward to continuing its close working relationship with the judiciary and we believe that Martin CJ will continue the tradition of strong leadership in the courts.

"On behalf of the Law Society and the legal profession I would like to congratulate Martin CJ on his appointment and welcome him and his wife Leigh to the Northern Territory, for the start of what we are sure will be a long and happy association."

Director of Public Prosecutions, Mr Rex Wild QC

"I have had the pleasure of knowing His Honour the new Chief Justice over a period of some years. During the years of 1997 and 1999 when Your Honour was the Commonwealth Director we had many interesting and friendly discussions on matters of law and matters of wine and other things."

"Your Honour, one of the memories that we Directors have of Your Honour is the fine cabinet that you had available to you in Adelaide when we came to visit you for one of our conferences. Your Honour's cupboard was stocked as we recall with entirely South Australian wines, but that is very proper and they were all very nice drinking as I remember those that I was able to sample.

"Your Honour had an illustrious career as a prosecutor. The Attorney said that our reputation was that you were firm but fair. A newspaper report during the time of your occupancy of the role of Chief Prosecutor described you in these terms: The softest part of the Crown prosecutor is his teeth.

"Your Honour, I have been asked to speak on behalf of my office, the Director of Public Prosecutions and staff of it, many of whom are present here today and we welcome you very much to the office, we welcome your wife Leigh and family. Your Honour, if you are tough but fair, we could not ask for more."

Chief Justice Brian Martin

" Your Honour the Administrator, ladies and gentlemen, thank you for the warmth of your welcome to me and to my wife Leigh and I am not just referring to weather or the fact that this morning somebody chose to damage the air-conditioning in the court building. People from all walks of life have been very kind and supportive during our short time in Darwin. By your attendance