The Litigant in Person

"Litigation takes the place of sex at middle age"
- Gore Vidal

In cases where a litigant appears in person rather than with legal representation, problems are usually created for the court and for any counsel appearing in the matter.

Whilst many who choose to be litigants in person may be rational, intelligent and thoughtful, that will not always be the case. It is not unusual to find such people are obsessed by a grievance to the point of lacking any semblance of balance or objectivity regarding the issue. Even in cases where it would be unfair to characterise the litigant as obsessed, he or she may be so close to the problem as to be unable to take an objective view of it. Dealing with such a person requires both patience and skill.

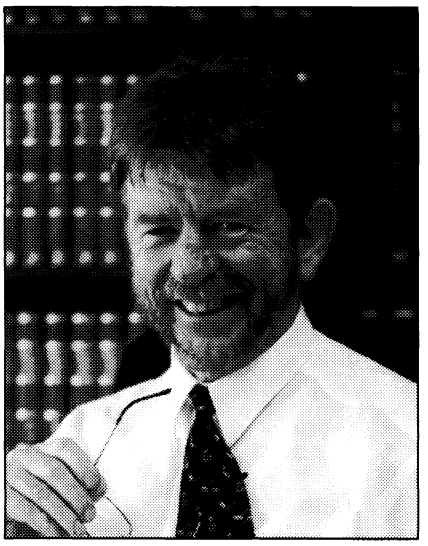
Although a particular self-represented litigant may have a good appreciation of the court procedures and a realistic view of what may be achieved in the action, that is often not the case. The litigant is unlikely to have any real idea of his or her rights or obligations. They are likely to be confused by the procedures and the language. In many cases the litigant will take the view that all he or she need do is tell their story without regard to, or even knowledge of, the need for an identified cause of action or compliance with rules of evidence. A simple statement of the grievance will suffice. The underlying assumption of the litigant is that such matters can be left to the court to sort out and the court can be trusted to rummage through the information provided and deliver justice.

It is generally accepted that a person who is self-represented in proceedings before a court is ordinarily at a disadvantage because of his or her lack of representation.[1] Litigation involving a litigant in person is usually conducted in a less efficient manner than other litigation and tends to be prolonged and convoluted.[2] When counsel is confronted by a litigant in person, different and sometimes awkward problems arise. Preparation for the case and presentation of the case is likely to be markedly different from what would be expected if the litigant was represented.

In the criminal sphere the Judge or Magistrate has a duty to ensure that the person charged receives a fair trial. An obligation of a similar kind arises in civil proceedings. In order to ensure a fair trial the trial Judge is obliged to walk a line between assisting the litigant by providing information that will enable him or her to determine how best to conduct the case and not offering the litigant inappropriate "advice, guidance or representation". The Judge must be sure that a litigant is sufficiently informed so as to ensure that he or she is able to obtain a fair trial, but must not cross the line by creating the impression that the neutrality of the Judge has been compromised.

In criminal proceedings where the accused is self-represented the prosecutor is to some extent in a similar position to the Judge. As Deane J observed in *Dietrich v R* the prosecutor has a duty to act fairly, however:

> *".... it is not part of the function of a prosecutor to advise an accused before the commencement of a trial about the legal issues which might arise in the trial, about what evidence will or will not be admissible in relation to them, about what inquiries should be made to ascertain what evidence is available, about what available evidence should be called, about possible defences, about the possible consequences of cross-examination, about the desirability or otherwise of giving sworn evidence or about any of a multitude of other questions which counsel appearing for an accused must consider".*[3]



Hon Justice Riley

In *Dietrich v R* Toohey J discussed the role of the prosecutor in such cases and said (354):

> *"While the prosecutor must act fairly towards the accused and can offer some assistance, the prosecutor cannot tell the accused how to conduct his or her defence. Indeed, a prosecutor would need to tread carefully in dealing with the accused in order to avoid compromising the prosecutorial role."*

Difficulties often arise for prosecutors and, in civil proceedings, counsel appearing against the litigant in person, because the court, almost of necessity, looks to opposing counsel for assistance in understanding the case of the self-represented litigant. In order to gain an understanding of the case and carry out its function the court seeks assistance from the only legally qualified person at the Bar table. The problems for counsel who is placed in that position by the court are immediately apparent. How far should (or must) counsel go in identifying, disclosing and stating clearly the case for the litigant in person? The problem will be particularly acute if the litigant in person has not thus far addressed or

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raised causes of action or defences that may be available and which the opposing counsel would rather not meet or about which counsel may not have sufficient information. In such circumstances, counsel will be in danger of making submissions contrary to the best interests of the client he or she represents. In a criminal matter the prosecutor may be effectively (and possibly most reluctantly) providing advice to the self-represented accused in the process of discussing with the Judge what options may or may not be available to the accused. The same may be the case in civil proceedings. For example, in trying to make sense of a discursive statement of claim drawn by a self represented plaintiff, counsel for the defence may identify courses of action of which the draftsman was not aware. In discussions with the court care is required to avoid being seen to provide advice to the litigant in person. What happens if the advice is wrong or if the prosecutor or other counsel is not aware of important matters known only to the accused or other party? What happens if the self represented litigant changes approach in reliance upon something said by counsel and disaster follows?

The dangers in dealing with a litigant who is not bound by the same rules of conduct and who, through ignorance or lack of experience, may be misled or, alternatively, may cynically take unfair advantage of your actions which were designed to assist, is a problem for the advocate. Caution is required at every step.①

(Endnotes)

1 Dietrich v R (1992) 177 CLR 292 at 344-345
2 Cachia v Hanes (1993-1994) 179 CLR 403 at 415
3 Dietrich v R (supra) at 335

Incarceration rates

Earlier this year, the Australian Bureau of Statistics (ABS) released figures that reveal that Indigenous Territorians are 11 times more likely to go to jail than their non-indigenous counterparts.

Shadow Indigenous Affairs Minister John Elferink pointed out that the ratio of Indigenous to non-indigenous people incarcerated had increased markedly since the CLP left office in 2001. *See the graph below.*

"Labor continually claimed the CLP's law and order policies were racists with a main intent of jailing large numbers of Aboriginies," Mr Elferink said.

"Territorians and in particular Aboriginal Territorians deserve an explanation why the high jump in Aboriginal imprisonments. The Martin Labor Government has failed to reduce the over representation of Aboriginal Territorians in our jails and it needs to explain why," he said.

In a similar vein, the recently released 2003 report for the Productivity Commission painted an alarming picture. Per capita of population, the Northern Territory has double the national average for victims of assault and five times the national average for victims of murder. Imprisonment rates are three and a half times that national average per capita.

Russell Goldflam from NT Legal Aid Commission in Alice Springs addressed these statistics in a speech he made at the recent ceremonial sittings for Chief Justice Brian Martin.

"Imprisonment rates here are on the increase and sentences imposed by this court [the Supreme Court] for serious crimes also appear to be on the rise," Mr Goldflam said.

"Mandatory sentencing for property crimes has been tried and abandoned in our jurisdiction, which is a rather curious thing given that the single offence category in which the Northern Territory lags behind the rest of the country is victims of crimes against property.

"But we stand out head and shoulders as the most policed, the most prosecuted, the most convicted and the most imprisoned population in the nation. And of course as the most criminally offensive population in the nation.

"The causes of this appalling state of affairs are of course by and large ones which cannot be directly remedied by Your Honour [Chief Justice Brian Martin] or by Your Honour's brethren in the courts.

"Nevertheless the legal profession and the community look to our courts not just to apply the law, not just to dispense justice, although we hope that occurs on a regular indeed continuous basis, but also to provide legal and dare I say moral leadership at a time when there is a genuine and general sense that law and order is not just a political football to be kicked around at election time, but as an issue symptomatic of a profound crisis in Northern Territory society."①