

SELF-REPRESENTED LITIGANTS*

J W SHAW*

The exponential growth of the number of self-represented litigants before courts and tribunals has been well documented. Legal Aid funding has contracted, in particular for migration or refugee cases and for family law cases. So it is that over the last decade we have seen an increase in self-represented persons to a level of 31% in the Federal Court, a surprising figure given that these statistics apply to a superior court of record. It has also been reported that the Family Court has something more than 40% of those appearing before it unrepresented, and similar data could be found in relation to the Local Court of New South Wales and other tribunals.¹

The common law has long recognised the right of a litigant in civil or criminal matters to appear for themselves. It may be that they cannot afford to have legal representation or alternatively they for some reason, which most informed observers would not regard as soundly based, have no inclination to do so. That right should be generally respected. As Sully J has said in: *R v Mohammed v Ali Khan*;²

“Certainly, the Court is not entitled to treat them to their disadvantage by way of signalling in any fashion frustration or displeasure of any other kind deriving from the persistent refusal of the two particular accused to accept the persistent advice of the Court, given hitherto, that it would be very much in their own best interests to obtain proper professional legal representation, if not for the entirety of the trial, then the very least to the extent of ensuring that they are properly seized of the matters upon which the Court is now ruling.”

However, the difficulties for courts and tribunals in hearing the unrepresented litigant are obvious: in the absence of competent legal representation, the tribunal will not get the assistance that it ought to have in relation to questions of fact and law; the unrepresented party is likely to be more emotionally affected by the subject matter of the case when compared to a disinterested practitioner; although some self-represented litigants will be rational and intelligent, there is always the prospect of some person being uncontrolled or undisciplined; the conventional rules of ethics

¹ Kim Cull “A Profession Defined by Trust” Vol 40, No 2 *Law Society Journal of NSW* March 2002 p 60 at 63

applicable to legal practitioners would not be enforceable; a burden is placed upon the court or tribunal to give some assistance to the unrepresented litigant, especially when that litigant might be faced by a competent legal opponent; and then there is the vexed issue as to the extent to which the tribunal can assist the litigant, whilst maintaining its impartiality. A number of these difficulties are dealt with by Justice Nicholson of the Federal Court of Australia in his address to the Fifth Worldwide Common Law Judiciary Conference.³ Of course, in the real world one must acknowledge that lawyers are of variable quality and that sometimes inappropriate behaviour occurs by qualified practitioners. Nonetheless, it is clear that untoward conduct is likely to occur more readily by people who appear for themselves. In *Abriel v Bennett*⁴ Meagher JA made the following observation as to a matter which had come before his court:

“There are two other observations which I think should be made in relation to this disturbing litigation. One is that Mr Abriel had endured the appalling experience of being incarcerated in Auschwitz during the war, and some of his close family were killed in that unspeakable place. He acquainted the Court with these facts whenever the whim took him. This is to be deplored, because those facts had no conceivable connection with any matter which the Court was required to consider. One can only conclude that Mr Abriel was trying to use those matters as a form of emotional blackmail.”

The dilemma facing courts and tribunals is well expressed by Damien McGregor in an observation⁵ in which he described the competing pressures in these terms:

“on the one hand, courts have acknowledged the difficulties faced by unrepresented litigants in complex litigation and the need to assist such parties in various stages of proceedings. On the other hand, however, courts need to ensure that they maintain neutrality in the determination of proceedings and do not overcompensate for an unrepresented party to the extent that another party the proceedings believe the court is showing bias.”

That useful case note cites a number of recent authorities articulating the “disadvantage” of unrepresented parties facing effective legal representation, and the proposition that subject to the need for a court to maintain its position of neutrality,

² *R v Mohammed Ali Khan* (11 September 2003)

³ “Australian experience with self-represented litigants” (2003) 77 *Australian Law Journal* 820

⁴ *Abriel v Bennett* [2003] NSWCA 323

⁵ Damien McGregor, Vol 11, No 4 May 2002 *Journal of Judicial Administration* 163

some advice and assistance to an unrepresented litigant can be given so as to ensure a fair trial⁶.

None of this is to deny the proposition that an amateur litigant can be spectacularly successful. One example is to be found in the defendants to a libel case taken by McDonalds in the High Court of Justice in England. After a vast hearing brought by a highly skilled legal team on behalf of the major corporation in libel the defendants emerged with a reasonable degree of success having vindicated a number of their allegations made against the fast food chain.⁷ On the other hand, a South Melbourne resident living in proximity to the Albert Park reserve seeking to oppose the staging of the Commonwealth games in 2006 was unsuccessful and Mr Stewart has commented that: “it is particularly easy for a non-professional litigant to overlook the hidden requirements of preparing a viable case. It is sometimes difficult to understand the need for, and role of, the barrister and solicitor. However, as the process wears on, the benefits become more and more apparent.”⁸

Commendably, the New South Wales Bar Association has published guidelines for barristers in relation to dealing with self-represented litigants.⁹ Whilst emphasising the paramount duty of honesty to the court, and the primary role of the barrister as to the duty to the client, the guidelines in a balanced way emphasise the duty of the advocate to facilitate a fair hearing. The guidelines directly deal with a difficult area, namely the question of settlement negotiations with a non-represented litigant. The need for discretion is emphasised and the guidelines suggest the legal practitioner should appreciate the stress, frustration or emotional state of his or her opponent and observe a requirement in all circumstances act professionally and curiously.

One area of current controversy concerns the unrepresented defendant in sexual assault cases. The question of principle is whether an unrepresented accused person should be entitled to cross-examine a complainant in cases involving allegations of rape or other sexual assault. In a report published in June 2003, the New South Wales

⁶ *Rogers v Law Coast Mortgages Pty Ltd* [2002] FCA 181; *Bhagatt v Global Custodians Ltd* [2002] FCA 2003; *Ross v Peach* [2002] NTSC 19

⁷ John Vidal, *McLibel- Burger Culture on Trial* 1997 Macmillan, London

⁸ Iain Stewart “Memoirs of an Amateur Litigant” Vol 28, No 3 *Alternative Law Journal* pps 117 at 119

Law Reform Commission recommended that an unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding, and that a legal practitioner should cross-examine the complainant in such proceedings where the accused is unrepresented. It was further recommended that the accused must be advised, at the earliest possible time after arrest and no later than the commencement of proceedings, that legal representation is necessary in sexual offence proceedings if he or she wishes the complainant to be cross-examined. The accused, it was recommended, should be advised to make arrangements for representation and given the opportunity to do so.¹⁰

The legislature responded to see the problem, embarrassment or difficulty about such cross-examinations by a legislative regime which, as has been pointed out by Sully J¹¹ departs in some respects from the Law Reform Commission's Report.

All of these are difficult matters and the ethical and procedural questions that arise will be faced more particularly by relatively informal tribunals as compared to the higher courts which, by and large, have the benefit of advocacy by senior or other experienced counsel. However, an exception to that generalisation is to be found in the increasing level of unrepresented litigants in the High Court seeking special leave to appeal, particularly in immigration cases. All those who occupy public office in presiding over tribunals will need to grapple with these conflicting pressures. We must remain neutral, but there is a level of assistance that can be given to the unrepresented litigant. Where the boundaries lie is very much a matter of discretion and I think I said something relevant about this in a judgment.

In *R v Mohammed Ali Khan & Ors*,¹² Sully J considered an application for separate trials in relation to five persons accused, in substance, of unlawful aggravated sexual intercourse. Two defendants were unrepresented, and three were represented by legal practitioners, and this fact was the substance of the successful application for separate trials.

⁹ New South Wales Bar Association, "Guidelines for Barristers on Dealing with Self-Represented Litigants", July 2001

¹⁰ NSW Law Reform Commission, Report 101 "Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials" June 2003

¹¹ *op. cit*

The judgment draws attention to an apparent discrepancy between the recent legislation denying the right of a self-represented defendant to cross-examine the complainant in a sexual assault case.¹³

His Honour cited the majority advice of the New South Wales Law Reform Commission, saying:

“...the majority of the Law Reform Commission took it for granted that if an unrepresented accused was to be stripped peremptorily of what has hitherto been regarded as a fundamental incident of his right to defend himself in a fair trial, then at the very least he should have qualified and experienced legal professional assistance as a proper and fair correction of the imbalance and unfairness that might, and probably would, otherwise result.”

The doctrine in *Dietrich v The Queen*¹⁴ as to the provision of the services of a Public Defender to the accused, see also *Attorney-General for NSW v Milat* which has not been abrogated by the legislature in New South Wales ensures that an indigent accused is entitled to legal representation. This factor alleviates what otherwise may seem to be a hardship.

In *Damjanovic v Sharpe Hume and Co*¹⁵ the New South Wales Court of Appeal critically dealt with the conduct of District Court judge in relation to an unrepresented plaintiff, saying:

“Confidence in the judicial system plays a very important part in maintaining confidence in the orderly working of society. Confidence by a judicial officer, which may cause that confidence to be diminished, is to be deplored. Judicial officers must have particular regard to the due performance of their functions in situations where a litigant is in person, and does not have English as his or her first language and, as in the present case, has shown a healthy scepticism for the legal system. Such people should not be made to feel that because they are appearing in person, as they are entitled to do, or do not understand the language fully, they are under disadvantage. Within the rules concerning helping litigants in person, the Court should observe with scrupulous fairness

¹² *ibid*

¹³ s.294A, *Criminal Procedure Act* 1986 (NSW)

¹⁴ *Dietrich v The Queen* (1992) 177 CLR 292; as to the provision of the services of a Public Defender to the accused, see *Attorney-General for NSW v Milat* (1995) 37 NSWLR 370

¹⁵ *Damjanovic v Sharpe Hume and Co* [2001] NSWCA 407

the duties to which we have referred”; and to observations from Sheppard J as follows:

“So the path the Court has to tread is not an easy one, and it is not unlikely that misapprehensions and misinterpretations of what this court does or does not do from time to time during the course of a case will occur. That is something that judges have to put up with, particularly bearing in mind the increasing number of cases which we are now finding coming before the Court in which there are unrepresented parties”.

Those of us who have shared the experience of the Common Law tradition tend to think that legal representation is desirable both in the interests of the litigants and the efficiency of disposition of the controversy. Nevertheless, the right of self-representation should be respected.

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