VEXATIOUS LITIGANTS AND THEIR JUDICIAL CONTROL – THE VICTORIAN EXPERIENCE

SIMON SMITH*

Most people have their favorite abusive or vexatious litigant story. In modern times it is the United States examples which are the most often cited. For example:

> "The world's greatest court jesters are the Americans – as some recent cases prove, they'll sue anything that moves.
>
> A San Francisco woman recently sued a man friend for attempted murder after he offered her a cigarette at a party.
>
> She claimed she viewed tobacco as an ancient death weapon and had taken great offence at the action after only knowing the man for an hour . . . .
>
> A woman who claimed her housekeeper stole her husband while she was confined to a body cast was awarded $195,338 by an Illinois court earlier this year.
>
> A favorite for writ-happy, drunk-driving Americans is to sue the restaurant pub or even private host who served them alcohol before they were involved in accidents while under the influence.
>
> A Minneapolis woman who caught herpes in her lover's bedroom tried a novel approach to avenge the deed.
>
> She sued her paramour under the liability provision of his homeowner's insurance policy and won $25,000.
>
> A young man in Colorado sued his parents for failing to raise him properly. He lost the case but it was marked as the country's first parental malpractice suit".[1]

However the vexatious litigant is no new phenomenon. From earliest times the courts have battled with both the ingenuity and pertinacity of such litigants.[2] Indeed, in the first Elizabethan period the Parliament found it necessary to enact legislation to "avoid trifling and frivolous suits in law in Her Majesties court in Westminster".[3]

As to the motivation of vexatious litigants little or no accurate data exists. One English psychiatrist has written:

* B.Juris., LL.M. (Monash), Director of the State Insurance Office Consumer Appeal Centre.
I acknowledge the helpful comments made by my colleagues Susan Campbell and Barry Connell. However, I accept full responsibility for the accuracy and views expressed in this article.

[1] 'In USA it is Writ. . .' *Sunday Press*, 17 August 1986.

[2] For a general description of abuses in the 14th to 16th Century see W.A. Holdsworth *A History of English Law* (4th ed., London, Methuen & Co. Ltd., Sweet & Maxwell (1936)) Vol. II, pp. 457-459; W.J. Jones *The Elizabethan Court of Chancery* (Oxford, Clarendon Press, 1967) pp. 305-320.

[3] 43 Eliz. C. 6.

"There are however, a small group of people who persist in litigation over real or imagined grievances, and these people are rarely seen for formal psychiatric evaluation even though their behaviour is so bizarre that those around them suspect the litigant of suffering with some form of mental illness. The litigation usually starts with a legal slight or injustice which has a special meaning to the individual which can be called a 'key' experience as it unlocks their litigious behaviour. There is a constant legal process of appealing against any decision that goes against them and they gradually go on to other courts, despite, losing cases at every stage. Examples of the 'key' precipitating experience are wrongful dismissal, alleged fraud, winning a libel action (as in a recent case concerning a famous actress), a disputed pools win and divorce. The court cases take up a majority of the litigants mental energy to the widespread detriment of family and career. They usually act as their own legal advisors out of choice, although legal fees in litigation can be ruinously expensive. It is probably because of the lack of direct medical involvement with these people that there has been little written in English in the psychiatric literature about this interesting and difficult group . . . .

There is no agreed terminology for the description of these people that persist in unnecessary litigation and they are described legally as 'vexatious litigants' or medically, that they are suffering from 'querulous paranoia' or 'querulous paranoid state' or 'litigious paranoia'."[4]

Accordingly this article will canvas the sources of judicial power for control of the vexatious litigant in civil proceedings.[5] It will also explore the nature and characteristics of the vexatious litigant and the effectiveness of the judicial controls with particular emphasis on the Victorian experience.

SOURCES OF CONTROL – THE INHERENT JURISDICTION AND STATUTORY RULES

The range of judicial remedies available to control vexatious litigants is extensive. As Mason notes in his article "The Inherent Jurisdiction of the Court"[6] the remedies include injuctive relief, removal and/or amendment of improper documents/pleadings through to the staying of proceedings (absolutely or conditionally) or summary dismissal of the action. In addi-

[4] Dr Michael Rowlands, *Psychiatric Aspects of Persistent Litigation*. Unpublished paper by a Lecturer/Senior Registrar in Psychological Medicine, St. Bartholomews Hospital, London. Priv. Corres. 29/5/1987. See also I. Freckelton *Querulent Paranoia and the Vexatious Complainant*, Unpublished paper presented to the Eighth Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law. Melbourne 1987. Priv. Corres. 6/1/1988.

[5] Abusive criminal litigation is outside the scope of this article. In the United States the "*pro se*" or "jail house lawyer" is a considerable problem particularly for the Federal appellate courts. This reflects the constitutional emphasis given to the first and fourteenth amendments guaranteeing "due process" and the extensive concurrent jurisdiction between State and Federal Courts in criminal matters. For a further discussion see M.J. Mueller, "Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control" (1984) 18 *Journ. of Law Reform* 93; D.H. Zeigler and M.G. Hermann, "The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts" (1972) 47 N.Y.U.L.R. 159.

[6] (1983) 57 A.L.J. 449, 453.

tion there is the ability to both award and seek security for costs and the power to gaol for contempt. More recently the Victorian Supreme Court has moved towards a preliminary control by granting to the Prothonotary the power to refuse to seal or accept documents (including initiating documents) which appear to be irregular or an abuse of the process of the courts.[7]

Of all of these remedies the ability of the court to summarily or peremptorily stay/dismiss an action is a key judicial weapon when dealing with abusive litigants. The alternative approach of seeking the amendment of abusive pleadings and/or allowing the litigation to go full term and then deal with it according to substantive principles is far less satisfactory. The latter approach can lead to delay, wasteful use of legal resources, hardship to litigants and an erosion of confidence in the administration of justice.[8]

The earliest expressions by the courts of their right to use such remedies to protect themselves from vexatious litigants were based in the inherent jurisdiction.[9] In later times there has been a movement towards regulation of the courts' practice and procedure through statutory and subordinate legislation.[10] Nonetheless as Campbell notes in her study *Rules of Court*[11] although aspects of the inherent jurisdiction may have been overtaken or modified by statutory provision it has not wasted away. It continues to be relied upon by the judges, albeit less frequently, when making orders relating to the conduct of litigation and the better administration of justice. This is particularly so when no express statutory provision can be found. As such

[7] Rule 27.06(1). This provision was introduced with promulgation of the *Supreme Court Rules*, 1986 (Vic.) on 1/1/1987. Its counterpart in the *High Court Rules* is Order 58 r. 4(3). This latter provision was introduced in 1943. The Registrar of the High Court Mr F.W.D. Jones advises that it is quite often used in that court and is regarded as a primary weapon in the fight against prospective vexatious litigants. Priv. Corres. 20/7/1987.

[8] See N. Williams, *Civil Procedure – Victoria* (3rd ed., Butterworths, 1987). Para 23.01.20.

[9] See *Ex parte Wilbran; In Re Wilbran* (1819) 5 Madd 3; 56 E.R. 794; *Grainger* v. *Hill & Anor* (1838) 4 ing P.C. 211; 132 E.R. 769. *Grepe* v. *Loam* (1887) 37 Ch. 168; *Metropolitan Bank Ltd* v. *Pooley* (1885) 10 App. Cas. 210.

[10] In Victoria the two most relevant statutory rules (of the *Supreme Court Rules*, 1986 (Vic.)), are, first

23.01 (1) Where a proceeding generally or any claim in a proceeding –
(a) does not diclose a cause of action;
(b) is scandalous, frivolous or vexatious; or
(c) is an abuse of the process of the Court –
the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.
(2) Where the defence to any claim in a proceeding –
(a) does not disclose an answer; or
(b) is scandalous, frivolous or vexatious –
the Court may give judgment in the proceeding generally or in relation to any claim.
(3) In this Rule a claim in a proceeding includes a claim by counterclaim and a claim by third party notice, and a defence includes a defence to a counterclaim and a defence to a claim by third party notice.

and secondly

23.03 On application by a defendant who has filed an appearance the Court at any time may give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits.

[11] E. Campbell, *Rules of Court: A Study of Rulemaking Powers & Procedures* (Sydney, Law Book Co., (1985)) Ch. 1.

the inherent jurisdiction can be said to be complementary to the rules of court. The two sources supplement and reinforce each other.[12]

The Early Cases

An early example of the court exercising its inherent power summarily to control a particular litigant and his litigation is the 1875 English case of *Castro* v. *Murray*.[13] That case involved the Tichborne Claimant's attempt to reopen his 1874 criminal conviction for perjury. That conviction had resulted in a 14 year gaol sentence. More particularly Castro had failed to persuade a court official to issue his documentation challenging the conviction. The clerk maintained that the Attorney-General's fiat was a condition precedent. Castro had sought inter alia Mandamus against the clerk. The court summarily stayed the action as frivolous and vexatious and an abuse of the process. On appeal the Court of Exchequer agreed. Bramwell B. said:

> "This action, therefore, is pretenceless, and has been properly stopped. I do not say it was malicious – in one sense, it may be said to be vexatious – but it is absolutely groundless, and it is one in which the Court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the Court."[14]

The presence of the inherent power was confirmed in 1885 by the House of Lords in *Metropolitan Bank & Anor* v. *Pooley*.[15] That decision also confirmed that the (then) new 1883 statutory rules provided a more flexible method of summary control of a particular litigants action. In that case Pooley, a bankrupt, had issued various litigation against his creditors and liquidator. One action had been dismissed with costs against Pooley. In the present proceedings the defendant bank sought a stay of litigation as frivolous, vexatious and harassing until payment of costs in the prior action. Their lordships agreed that the case was an abuse but on the basis that Pooley was an undischarged bankrupt and thus had no standing to bring the proceedings. As to the court's power to dismiss summarily the action Earl Selborne L.C. said:

> "Before the rules were made under the *Judicature Act*, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court, although so far as I know there was not at that time either any statute or rule expressly authorising the Court to do it. The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure. Another reason why that should have been very rarely done before the recent rules is this, that if the objection was one which could be raised upon the face of the pleadings, that always might be done by demurrer. But when the

[12] See I.H. Jacob, "The Inherent Jurisdiction of the Court" [1970] *Curr. Leg. Prob.* 23.
[13] (1875) 10 Ex. 213. See also Lord Maugham, *The Tichborne Case* (London, Hodder and Staughton, 1936).
[14] Id. 218. This decision was soon approved in *Dawkins* v. *Prince Edward of Saxe Weimar* [1876] 1 Q.B. 499, 502.
[15] (1885) 10 App. Cas. 210.

rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and summary, or at least equally summary, modes of applying to the Court to get rid of an action on the face of it manifestly groundless, might be substituted."[16]

An early Australian example of restricting a particular litigant through the inherent jurisdiction is the Victorian Supreme Court decision of *Foran* v. *Derrick*.[17] In that case Foran believed himself libelled by a report prepared by a government ministry. A first action was non-suited with costs because of Foran's inability [in those pre-Freedom of Information days] to have the responsible minister produce the report. A second action was stayed because of non-payment of the costs of the first action. Foran then brought proceedings for the third time. The defendant sought summary dismissal of the action as being vexatious. The Full Court agreed. In delivering the Court's judgment Madden C.J. drew attention to the Court's duty in respect of the proper administration of justice. He said:

"The duty of the Court is the administration of justice, and wherever it is proper that for the satisfaction of justice a person should not be thwarted for want of means, the Court will give such person every consideration and assistance to assert his right or to have his wrong redressed. But it must be remembered that there are two parties at least to be considered where justice is being administered, and while a person of small means is not to be forgotten, his antagonist should also be remembered."[18]

These decisions reflect a narrow approach of dealing with the particular litigant on the merits of each presenting case. The Court of Appeal took a bolder step in the 1887 decision in *Grepe* v. *Loam*[19] when it introduced the concept of staying any future moves in the proceedings without prior leave of the Court. The facts behind that case concerned a series of applications which had culminated in a final decision in 1882. Between 1886-1887 various applications were made to set aside the 1882 judgment. All had been dismissed with costs, none of which had been paid. When another challenge was made the Court of its own motion dismissed it as unfounded and ordered costs. The Respondent counsel drew the Court's attention to the impossibility of recovering costs and thus its failure as a deterrent to future litigation. Accordingly the Court issued a direction restricting further applications in the action without prior leave. It read:

"That the said applicants or any of them be not allowed to make any further applications in these actions or either of them to this court or to the court below without the leave of this court being first obtained. And if notice of any such application shall be given without such leave being obtained, the Respondents shall not be required to appear upon such applications, and it shall be dismissed without being heard."[20]

[16] Id. 214-215.
[17] (1893) 14 A.L.T. 284.
[18] Id. 285.
[19] (1887) 37 Ch. 168.
[20] Id 169. See also *Davison* v. *Colonial Treasurer* (1930) 47 W.N. (N.S.W.) 19.

In 1905 in *Lord Kinnaird* v. *Field*[21] the Court of Chancery had before it a case which had not yet got as far as a final judgment. Nonetheless the defendant had made some 29 interlocutory applications with respect to procedural matters such as pleadings and discovery. In none of the applications was the defendant successful. Relying on *Grepe*'s case the plaintiffs sought an order stopping further applications being issued without prior leave. Warrington J. agreed but set limits on its operation.

> "It will not be part of the order, but I desire to say this – that my intention in making the order is that reasonable applications (whether they are likely to succeed or not is another matter), that is, applications which a reasonable litigant would make, are to be allowed, but that except in such cases the leave ought to be refused. The matter is one of considerable importance, and, as I am interfering with the liberty of the defendant to make applications in the action, I think it only right, although he does not choose to appear here to ask it, to give him leave of appeal."[22]

The Australian Position

That the inherent and Rules power of the court to control particular litigants is restricted to existing proceedings and not future proceedings, is confirmed by the Australian High Court in the 1974 decision of *Commonwealth Trading Bank* v. *Inglis*.[23] In that case the bank had successfully defended an action at first instance. The plaintiff had appealed. Before the appeal the bank applied to the Court for an order pursuant to the inherent jurisdiction that no legal proceedings be instituted or applications in existing proceedings made or appeals lodged by the plaintiff without prior leave. The reason given was that Inglis had previously habitually and persistently instituted vexatious applications and generally wasted time. The Court in giving judgment took the opportunity to fully review the authorities and relevant statutes. Whilst approving *Grepe*'s case and *Lord Kinnaird*'s case it concluded that it had no inherent power to restrain a particular litigant from issuing new proceedings without prior leave. It said:

> "In our opinion, it is not surprising that the courts do not appear (so far as we have been able to discover) to have taken the further step of intervening in a summary way to prevent the commencement, except by leave, of actions and other proceedings by a particular person or persons but have limited themselves to exercising their powers in relation to proceedings which have been taken in a court and have thus been placed under its control. It may be that the exercise of supervision, by means of a requirement that leave should be obtained for the bringing of proceedings, could have been justified logically as a proper safeguard against abuse of the courts process in cases where it was shown to be probable that a person would continue bringing groundless proceedings. But, in our opinion, it is apparent that the courts, both in England and in this country, have declined to regard themselves as having power to do so, except where such power has been conferred upon them by an Act of Parliament or

[21] [1905] 2 Ch. 306.
[22] Id. 308. The defendant appealed unsuccessfully to the Court of Appeal.
[23] (1974) 131 C.L.R. 311.

by rules promulgated under statutory authority. This is demonstrated, not merely by the absence of reported cases in which such orders have been made under the inherent power of the court, but by the fact that it has been thought necessary to deal with specific cases of the bringing of numerous unfounded proceedings by legislation rather than by invoking the inherent power of the court."[24]

CONTROL UNDER STATUTE

It can be seen that the courts have not been prepared to assert an unlimited control over the future litigation of particular litigants based only on the inherent jurisdiction or statutory rules. Accordingly it was left to Parliament to give the courts that further power. The power is designed to stop individual litigants whether they be acting for themselves, in a representative capacity or under cover of the corporate veil[25] from commencing conducting and continuing litigation without the prior leave of the court.

The English Parliament first entered the field in 1896 with the passage of the *Vexatious Actions Act.*[26] That legislation was introduced primarily to stop one Chaffers[27] from litigating. Between 1891 and 1896 he had brought 48 actions in the High Court and inferior courts. His defendants included judges of the High Court, the Speaker of the House of Commons, the Archbishop of Canterbury and trustees of the British Museum. Causes of action included conspiracy by the judges to defeat the ends of justice, refusal to accept his petitions to Parliament and refusal to allow him to use the reading room of the British Museum.

In introducing the legislation in the House of Lords the Lord Chancellor Lord Halsbury said:

"the practice of bringing absolutely wanton and vexatious actions by persons of no responsibility whatever on every conceivable subject, had now become such a scandal that the time had arrived when some sort of stop should be put to such proceedings. The misfortune was that these actions were apt to create an example and to multiply themselves, and, although a particular plaintiff might be estopped, he would have many successors, and the practice would go on undiminished. The difficulty was to have some process by which they could stop useless, wanton, and mischievous actions and, at the same time, not place unnecessary obstruction in their Courts against the bringing of causes by those of Her Majesty's subjects who really had a grievance. The object sought to be secured by the Bill was that there should be some protection to the person sued. It was quite true that in such cases as those to which he was directing attention, verdicts followed for the defendants, but it appeared to be forgotten that they had to appear to defend themselves, and to instruct counsel, and the result

[24] Id. 314-315. The court constituted Barwick C.J. and McTiernan J. Walsh J. died before the appeal was delivered. Inglis lost the appeal.

[25] *In Re Langton* [1966] 1 W.L.R. 1575; *Attorney General for N.S.W.* v. *Solomon and Ors* [1987] 8 N.S.W.L.R. 667.

[26] 59 and 60 Vict. C. 51.

[27] *In Re Chaffers; Ex Parte The Attorney-General* (1897) 45 W.R. 365.

was that though they succeeded, they succeeded at a loss to themselves. It was to put an end to that wanton and vexatious course of procedure that this Bill had been devised."[28]

The legislation was not without its detractors. Speaking in the House of Commons against its introduction Mr. J.F. Oswald said:

"For the first time in the history of Parliament a Bill has been brought in practically shutting the doors of all Courts of Justice to particular subjects of the Queen, and that because one individual had made himself somewhat obnoxious in bringing proceedings. The Court already possessed powers to stop proceedings which might be considered to be vexatious. He was opposed to officialism – [laughter] – and he objected on behalf of the people of this country to a Bill which established that the Attorney General himself an official, might come to the Court and make an application to shut the doors of the Courts to the whole of Her Majesty's subjects, because Her Majesty's subjects were naturally inclined to be litigious [laughter]. The Bill ought to be most carefully considered, and it was not a measure which ought to be thrust on the country at the last moment of an expiring Session. The Courts of Justice ought to be open to all. This clause actually proposed that a judge of the High Court on the application of the Attorney General should have the power to shut the doors of any inferior court against any particular person. If an application had to be made it ought to be made to each separate Court. He was opposed to the clause 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."[29]

Since the passage of the English legislation in 1896 the English High Court has declared 79 people as vexatious litigants.[30]

In Australia the development of the legislation restricting vexatious litigants has a similar history. Victoria was the first State to introduce specific legislation which it did in 1927.[31] This provision has from time to time been irreverently known as the "Blackfellows Act".[32] It was almost a direct copy of the English provision. As in England the catalyst for action was the litigious activity of one litigant – Rupert Millane.[33] Millane had between 1926 and 1929 initiated 56 legal proceedings in the Court of Petty Sessions at

[28] 42 *Parliamentary Debates* (4th Series) Col. 1410.

[29] 44 *Parliamentary Debates* (4th Series) Col. 455-456.

[30] Priv. Corres. P.D. Emery, Queens Bench Chief Associate, Crown Office and Associates. Royal Courts of Justice, London dated 1/7/1987.

[31] *Supreme Court (Vexatious Actions) Act* 1927 (Vic.). Now contained in s. 21 *Supreme Court Act* 1986 (Vic.).

[32] Victoria, *Parliamentary Debates*, Legislative Council, 10th September 1963, 89. The term was used by the then Mr. R.J. Hamer introducing an amendment to the provision. He suggests that it derives from the kind of provision then to be found in the Australian Constitution which in effect treated Aborigines as "non persons" so that they were to have no vote nor to be counted in the census. They were to be placed outside the law. Priv. Corres. Sir Rupert Hamer dated 7/7/1987.

[33] *In Re Millane* [1930] V.L.R. 381.

Heidelberg against the Shire of Heidelberg or its servants or agents. A further 60 proceedings had been issued at the Court of Petty Sessions at Melbourne against the Shire of Heidelberg, the Corporation of Melbourne and the proprietors of leading daily newspapers.[34] In introducing the legislation into the Legislative Council the Hon. J.P. Jones said:

> "The position with regard to Victoria is that occasionally, and particularly during the last two years proceedings of a frivolous or vexatious nature have been taken against various public bodies and officials. Although the Court has given short shrift to the plaintiffs in most of those proceedings, the bodies or officers who have been sued or otherwise proceeded against have had to incur legal expenses in defending themselves against what were often proved to be ridiculous claims. On account of the impecuniosity of the plaintiff, in some cases awards of costs against him are worthless. The object of the Bill is to provide that where a person of a litigious turn of mind is determined that he will take action in this way an opportunity will be given for the Supreme Court, when it is satisfied that there is a person of that type in the community who is determined to go on with his litigation, to say that that person is one who is disposed to take vexatious action. The Bill is practically a repetition of the law that exists in England."[35]

Again, just as in England, the legislation had its detractors. Speaking in the Legislative Assembly Mr. Maurice Blackburn said:

> "Any citizen has the right to come into a court without let or hindrance and without seeking the permission of any judge, and to put his case before the court and appeal to the Judge to hear him. That right must not be taken away simply because one or two cranks have initiated a few frivolous actions or dozen such actions."[36]

The provision is now incorporated as section 21 of the *Supreme Court Act* 1986 (Vic.). It reads:

> 21. (1) The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.
>
> (2) The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has—
>
> (a) habitually; and
>
> (b) persistently; and
>
> (c) without any reasonable ground—
>
> Instituted vexatious legal proceedings in the Court or any inferior court against the same person or different persons.
>
> (3) A vexatious litigant must not, without the leave of the Court, commence or continue any legal proceedings in any court.
>
> (4) Leave must not be given unless the Court is satisfied that the proceedings are not an abuse of the process of the court.
>
> (5) The Court may at any time set aside or revoke an order made under sub-section (2) if it considers it proper to do so.

[34] Id. 383.
[35] Victoria, *Parliamentary Debates*, Legislative Council, 13th September 1927, 1228.
[36] Id. 1361.

(6) The Attorney-General must cause a copy of an order made under sub-section (2) to be published in the Government Gazette.

(7) The Court, when exercising a power under this section, must be constituted by a Judge.[37]

Since 1928 the Victorian Supreme Court has declared 8 people vexatious litigants.[38]

Initiating a Vexatious Litigant Application

The very wording of section 21 of the Victorian *Supreme Court Act* 1986 makes it clear that the initiation of an application to declare a litigant vexatious will always be a political decision. This is because the power to initiate is given exclusively to the Attorney-General.[39]

Whilst the section as a whole, which will be examined further below, gives guidance on the type of litigation intended to be caught by the provision it is clear that Parliament saw its primary application as being when public bodies or public officers are on the receiving end of abusive litigation. For example when making the second reading speech in the House of Commons in 1896 the English Attorney-General said:

> "[The Vexatious Actions Bill] was to put to an end an abuse which had been going on for years. Certain persons went from Court to Court issuing vexatious proceedings against the Lord Chancellor, the Archbishop of Canterbury and other public men."[40]

Similarly with the introduction of the Victorian legislation in 1927 the Victorian Attorney-General, Mr. Slater said:

> "I yield to no man in my desire that individual rights shall be jealously preserved. But surely individuals who put public bodies to needless expense

[37] Other states which have similar legislation are:
New South Wales. S. 84 *Supreme Court Act* 1970
South Australia. S. 39 *Supreme Court Act* 1935-6
Western Australia. *Vexatious Proceedings Restrictions Act* 1930
The High Court relies on Order 63 r. 6 of the *High Court Rules*.

[38]

Date	Name	File No.	Judge
5.9.1930	Rupert Frederick MILLANE	4360	Mann C.J. McArthur J. MacFarlan J.
21.7.1941	Edna Francis ISAACS	501	Macfarlan J.
27.3.1953	Goldsmith COLLINS	M2073	Hudson A.J.
6.9.1963	Geza LASZLOFFY	M4693	Sholl J.
12.12.1969	Constance May BIEN VENU	M7029	Gillard J.
5.9.1977	William COUSINS	M12263	Starke J.
17.3.1981	Abdul Madjil BEN HEMICI	M14544	Starke J.
17.7.1981	Kathleen GALLO	M15122	Gray J.

These names were extracted as a result of a manual search of the court records by the author. Only two people have been declared vexatious in the High Court. They are:

13.6.1952	Goldsmith COLLINS	Williams J.
19.8.1971	Constance May BIEN VENU	Walsh J.

This latter information was supplied by Mr F.W.D. Jones, Registrar of the High Court. Priv. Corres. 20/7/1987.

[39] S. 21(1). In N.S.W. "any person aggrieved" can make the application. See section 84(2) *Supreme Court Act*, 1970 (N.S.W.).

[40] 144 *Parliamentary Debates* (4th Series) Col. 259.

should be checked. We cannot possibly put a check on the individuals unless we have legislation of the character we have brought down."[41]

An examination of the files of the 8 Victorian vexatious litigants reinforces the suggestion that actions instituted against public bodies or officials will be a major factor considered by the Attorney-General in invoking the section. For example in *Millane*'s case[42] proceedings were against the Shire of Heidelberg and members of the Corporation of Melbourne; in *Isaacs*[43] against Sir Isaac Isaacs, a former Governor-General; in *Collins*[44] against the Attorney-General, the Supreme Court Library Committee and the Northcote City Council; in *Laszloffy*[45] against the Gas and Fuel Corporation, Myer Emporium Ltd and Malleson Stewart and Co; in *Bien Venu*[46] against the Chief Justice of the Supreme Court of Victoria, Gillot Moir and Winneke, Weigall and Crowther, RSPCA, Norman Banks, Haddon Storey and McInerney J.; in *Cousins*[47] against the Registrar of Titles, and Police Sgt. Ireland; in *Ben Hemici*[48] against the (then) Legal Aid Committee and the Ombudsman; and in *Gallo*[49] against the Shire of Bright, the ANZ Bank and the Registrar of Titles.

Similarly the wording of section 21 makes it clear that the volume of the litigation, its time span and its ultimate result will be factors taken into account before instituting an application. In particular the section speaks of litigations which a litigant has brought "habitually" and "persistently" and "without reasonable cause".

In terms of volume of litigation an examination of declared litigants files shows that Millane[50] with 116 actions over a five year period and Chaffers[51] with 48 actions over a 40 year period stand at one end of the scale. Lying at the lower end of the scale are Isaacs[52] with 8 actions over 18 months and Ben Hemici[53] with seven actions over two and a half years.

As to the criteria of "persistence" and "without any reasonable grounds" it is suggested that this is indicated by two factors. First the constant naming of the same defendant(s) notwithstanding the naming of miscellaneous co-defendant(s). Secondly the continued failure or the non-completion of the litigation. For example in *Chaffers*[54] defendants regularly named were the

[41] Victoria, *Parliamentary Debates*, Legislative Assembly, 5th September 1928, 1363.
[42] [1930] V.R. 381, 383.
[43] See Affidavit of Joseph Davis sworn 8/7/1941 in Supreme Court file 501 of 1941.
[44] See Affidavit of Rupert Duncan MacFarlan Sworn 18/3/1953 Supreme Court file M2073 of 1953.
[45] See Affidavit of Graham John Frederick Dethridge sworn 22/7/1963 Supreme Court file M4693 of 1963.
[46] See Affidavit of Joseph Andrew Sharkey sworn 4/12/1969 Supreme Court file M7029 of 1969.
[47] See Affidavit of James Stanislaus Mornane sworn 7/3/1977 Supreme Court file M12263 of 1977.
[48] See Affidavit of Percival Stanley Malbon sworn 22/7/1980 Supreme Court file M14554 of 1980.
[49] See Affidavit of Percival Stanley Malbon sworn 14/4/1981 Supreme Court file M5122 of 1981.
[50] Op. cit.
[51] (1897) 45 W.R. 365.
[52] Op. cit.
[53] Op. cit.
[54] (1897) 45 W.R. 365; 42 *Parliamentary Debates* (4th Series) Cols. 1410-1412.

Speaker of the House of Commons and several Law Lords. Chaffers was successful once in 48 actions. The others had been either stayed or resulted in judgment against Chaffers. In *Millane*'s case[55] the regularly named defendant was the Shire of Heidelberg. Millane was unsuccessful in all his 116 actions. In *Isaacs*[56] Sir Isaac Isaacs was the constant defendant. None of the 8 actions was successful.

The reach of the statutory provision is extremely wide. It can extend to persons acting in a representative capacity or using the "corporate veil". This interpretation is a fairly recent development. In the cases referred to above (with the exception of *Laszloffy* where the court was clearly aware that the prime instigator was the litigant's wife, the former Mrs. Isaacs[57]) all the declared litigants instituted proceedings in their own name.

The wider view emerged in the 1966 Court of Appeal decision in *In Re Langton.*[58] In that case the litigant had instituted 10 actions challenging the validity of his aunt's will. In some of these actions the litigant had sued as administrator of his mother's estate. In unsuccessfully resisting the application declaring him vexatious the litigant sought to distinguish these "representative" actions. Lord Parker C.J. would have none of it. He said:

> "I am quite unable to see any ground for giving a restricted meaning to 'any person'. Certainly as it seems to me, it covers any persons acting in a representative or fiduciary capacity. After all as Mr. Solicitor has said, the whole purpose of this section is to protect those against whom these actions are being brought, and to prevent them from being subjected to the burden of costs which they will never recover."[59]

In the Australian context the wider view was recently endorsed in the 1987 New South Wales Supreme Court decision of *Attorney General for N.S.W.* v. *Solomon and Ors.*[60] In that case one Eddie Solomon instituted a mixture of civil and criminal proceedings – 14 in all. The litigation was initiated either in Solomon's name, in the name of another pursuant to a power of attorney or in the name of companies controlled by Solomon. It was variously directed against the ANZ Bank, Corporate Affairs Investigators, Receivers or the Police. In finding Solomon vexatious the court also took the view that the defendant companies controlled by Solomon were also within the definition of "any person" and should also be declared vexatious. *In Re Langton* was expressly approved. In giving judgment Young J. said:

> "Looking at the whole of the litigation, it is abundantly clear that it was instituted by Mr Solomon for himself or for his companies mainly in an attempt to divert attention from the prosecutions which had been launched against him, or to frustrate the receivers activities. It was not instituted in a bona fide attempt to have the court adjudicate on questions which

[55] [1930] V.R. 381.
[56] Op. cit.
[57] See Affidavit of Graham John Frederick Dethridge sworn 22/7/1963 Supreme Court file M4693 of 1963.
[58] [1966] 1 W.L.R. 1575.
[59] Id. 1579.
[60] [1987] 8 N.S.W.L.R. 667.

were in dispute. For the reasons I have set out above the individual proceedings were vexatious and the series of proceedings were vexatious."[61]

It is clear that the vexatious litigant is shown considerable tolerance before the Attorney-General institutes an application. The actual cut off point or catalyst for such an application is unclear. One way is a clear encouragement from the Bench. For example in *Isaacs* in delivering judgment in one of the unsuccessful County Court actions Foster J. said:

"It is certain that never in the long history of our Courts has there been a gross abuse of the privileges of the Court as has taken place in this litigation. Mr. Mulvany has invited me to make some expression of judicial view upon matters which arose during the course of this long hearing. I should have felt it my obvious duty to do so without an invitation. Protected by her privilege of summoning under the King's Command, witnesses; relying on the leniency usually conceded to an unassisted litigant, and upon her sex; she has deliberately, in spite of all my efforts, my repeated warnings and requests, ignored and abused the Court's rules and procedure; utilised the opportunities her own cunning had devised to defame and denounce her own witnesses, and those of the Defendant, and even others unconnected in any way with this litigation. Nothing could stop her not even threats of imprisonment. She was utterly unworthy of any credence. That she perjured herself again and again is clear. That she was guilty of gross prevarication was made manifest throughout the hearing. Her conduct reveals an unbounded malice and vindictiveness and the evidence revealed that her motive was greed. I find no redeeming feature in any part of her conduct of this litigation. The only possible extenuation is that she is utterly irresponsible. But that irresponsibility, as I pointed out during the trial, has had serious consequences, not only to the persons directly involved; not only to the witnesses, compelled by her own subpoenae to attend; not only to the legal men engaged in the case, but, above all, to the proper administration of justice, than which there is hardly a more serious consequence. To some extent I share the blame that the last result continued so long. Maybe I was too tolerant.

She denounced and besmirched her husband while mouthing an affection for him. That can only be described as sheer — hypocrisy. She denounced and accused his brother, Sir Isaac Isaacs, of the vilest behaviour, and could not be suppressed. She did it all under cover of her right to examine or cross-examine witnesses.

She did it all without the remotest shred of warrant or — justification. It surely is not improper for me to add, in the light of the wide publicity that the proceedings have provoked, a properly humble tribute to the greatness of Sir Isaac Isaacs — to the noble service he has rendered his country for more years than I can remember, to the splendid contribution he has made to the making, the application, and the interpretation of our Constitution, and our Laws; to the grace with which he has adorned the highest office, a properly appreciative country could confer upon any citizen — I share with Mr. Mulvany and the Bar he spoke for, the privilege of making this tribute. Nothing, of course, the Plaintiff could say has, or would ever, in any way, tarnish so splendid a record; but it is a tragedy that an irresponsible litigant should have had the opportunity to attempt it.

[61] Id. 679.

She called as her witness Mr. Joseph Davis the Managing Clerk of the Defendant's Solicitor, and made against him allegations that must have as Counsel has assured me they did – provoked him to inexpressible indignation. It is proper that I assure him that there was less than no justification for any of the allegations she made; and now that I have expressed an opinion of the maker of them, perhaps he may assess them at their real value. I should like to commend Mr. Mulvany's wisdom and firmness in declining, against what was a most natural and strong desire on the part of the two latter witnesses to go into the box, to make a sworn refutation of the Plaintiff's vile allegations.

She suggested that another of her witnesses attempted to poison her; that the husband of another witness had been guilty of some offence; that Mrs. Revelman who had visited her as her life long friend in hospital, came to steal from her her jewellery. By direct assertion, and by all sorts of innuendo, she denounced and defamed both her own and the defendant's witnesses. Needless to say, this was without any justification or grounds whatever; two soldiers – Burrell and Stephenson – found no protection in their uniform from her malicious tongue.

In a long and dignified letter, which the Defendant wrote in sorrow to his wife, he complained that he had been tricked into this marriage. A challenge to her chastity had come to him before marriage and she gave him a written ... declaration of her purity. No Court, after hearing the evidence I have listened to, would place any credence in that declaration.

The litigation before me concerns the ownership to certain personal property, removed by the Interpleader from the residence of the Defendant, By the Order of His Honour Judge Clyne, the Plaintiff in the action against the Defendant was made the Plaintiff in these proceedings. The burden was on her, and she has failed completely to establish any claim of right, or title to these goods or to any of them. She alleged that there existed a written document evidencing her title made by her husband, in the presence of his brother. I find that there was never any such document; her assertion of its existence was a wicked last minute invention. I find no reason to reject the Defendant's evidence that he made no gift of this property to her and that it has always remained his property. There is no evidence whatever that any article in the possession of the Interpleader belonged, or belongs, to the Plaintiff and I therefore find that, as against the Defendant, the Plaintiff has no claim whatever to any of these goods. I reject the Plaintiff's claim. I direct her to pay the taxed costs of Interpleader and Defendant of all these proceedings, the ordering of which has been left to my discretion, and I certify for five refreshers.

And now, I am bound – out of regard to the administration of justice, if not out of regard to possible future victims of this woman's irresponsibility, or spite – to indicate as I did to her during the trial that her unrestrained irresponsibility is both a menace to justice and an unwarrantable danger to innocent people. In the interests of both she should suffer some legitimate restriction, such, for instance, as was imposed in another notorious case. Already she had threatened to issue many more Writs against many persons. I am informed two have already in fact been issued."[62]

[62] See Affidavit of Joseph Davis sworn 8/7/1941 Supreme Court file 501 of 1941.

Determining Vexatiousness

Once the application is before the court it is not obliged to approach its task of determining reasonableness by examining each piece of litigation. Rather it should take a global approach. In *Chaffers'* case, Wright J. expressed it as:

> "the consideration of whether a person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground does not depend on a minute examination of whether in each particular action there was or was not a reasonable ground; we must consider the number of actions brought, their general character and their results."[63]

That the test to be applied is an objective one was made clear by Ormerod L.J. in the Court of Appeal decision in *In Re Vernazza*.[64] In rejecting counsel's submission that the test was a subjective one which had to be decided by considering whether the person instituting the proceedings was acting maliciously or otherwise in good faith his Lordship said:

> "[That is] not the right way to look at the matter. The words of the section are 'without any reasonable ground instituted vexatious legal proceedings'. They are referring to legal proceedings, and the question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the persons against whom they are directed, and, therefore, the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. That is a matter for the court to decide. But, in the opinion of the court the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims."[65]

That objective approach was expressly approved by the High Court in *Hutchinson* v. *Bien Venu*[66] one of the two cases in which that court has declared a litigant vexatious. There Walsh J. after approving Ormerod L.J. in *Re Vernazza* said simply "proceedings may be vexatious whether or not the person who instituted them believes that they are justified."[67]

In *Bien Venu*'s case the judge nonetheless proceeded to examine closely the fourteen proceedings brought by the respondent Bien Venu in the High Court.[68] In declaring the respondent vexatious the judge relied on only 5 of them distinguishing the other actions as having some reasonable basis despite their eventual lack of success.

The issue of what "legal proceedings" are appropriate for the court to take into account was further considered in the 1976 N.S.W. Supreme Court decision of *Hunters Hill* v. *Pedler*.[69] That case involved a long running dis-

[63] (1897) 45 W.R. 365, 366.

[64] [1960] 1 Q.B. 197. Although the result was reversed on appeal, the House of Lords did not express disagreement with the approach of Ormerod L.J. See *A.G.* v. *Vernazza* [1960] A.C. 965.

[65] Id. 208.

[66] Unreported judgment of Walsh J. dated 9 and 10 August 1971. Located in High Court file 22 of 1970.

[67] Ibid.

[68] The proceedings instituted by the respondent in Victoria which had led to her declaration as vexatious in that state were not considered.

[69] [1976] 1 N.S.W.L.R. 478.

pute with a local council over planning permission. The rejection in 1967 by the Council of planning permission for a dwelling house was the starting point for litigation which worked its way through all divisions of the N.S.W. Supreme Court; High Court; the Federal Court of Bankruptcy; the Privy Council and several local planning boards. In the course of the legal proceedings there had been many interlocutory proceedings. In 1976 the Hunters Hill Municipal Council moved to have Mrs. Pedler and her son declared vexatious litigants.[70] In declaring the Pedlers vexatious the court made it clear that the statute narrowly prescribed the proceedings that could be looked at. In the course of his judgment Yeldham J. said:

> "The vexatious legal proceedings to which the action refers are those in this court, or in any inferior court, and hence I omit from consideration those proceedings in the High Court and the Privy Council and the Federal Court of Bankruptcy ...."[71]

Similarly his Honour suggested that proceedings before the local planning appeals board were not classified as inferior court proceedings and that they too were outside consideration.[72] On the question of interlocutory matters or proceedings his Honour expressed similar reservations. He said:

> "While it is probably correct to say that interlocutory proceedings taken in the course of an action initiated by another person which is still current are not within the section, I think, without endeavouring to supply an exhaustive definition, that, where a final decision has been given, any attempt, whether by way of appeal or application to set it aside, or to set aside proceedings taken to enforce such a decision, which is in substance an attempt to relitigate what has already been decided, is the institution of legal proceedings."[73]

In Victoria it is now clear that the court can consider criminal as well as civil proceedings instituted by the litigant.[74]

It is also clear that the provision gives the court power to control not only future proceedings but proceedings instituted before the making of the order and not yet completed.[75]

Duration and Effectiveness of Order

The wording of the provisions covering vexatious litigants makes it clear the Parliament did not intend to close off completely their access to the courts. Rather it sought to control future use by only allowing issue of proceedings

[70] S.84(2) of the *Supreme Court Act* (N.S.W.) 970 allows "any person aggrieved" to apply to the Supreme Court for an order declaring a person a vexatious litigant. In Victoria the right to apply is restricted to the Attorney-General. In all other respects the provisions are similar.

[71] [1976] 1 N.S.W.L.R. 478, 485.

[72] Ibid.

[73] Id. 488.

[74] *In re Millane* [1930] V.L.R. 381 which distinguished the contrary view of the English Court of Appeal in *In Re Boaler* [1915] 1 K.B. 21. Millane was refused special leave to appeal to the High Court (1930) 45 C.L.R. 603.

[75] The matter of *Laszloffy* identified this problem. It was resolved by a 1963 statutory amendment to s. 33 of the Supreme Court Act 1958 (Vic.); 271 Victoria, *Parliamentary Debates* 88-89.

with the prior leave of a judge.[76] That leave should not be generously given is made clear in the 1971 Court of Appeal decision of *Becker* v. *Teale*.[77] In that case Becker had previously been declared vexatious. She had been given leave to bring proceedings in detinue. Her claim had been entirely eliminated by a successful counterclaim. Becker then obtained further leave to appeal. When the matter reached the Court of Appeal it was unanimously dismissed. Davies L.J. said:

> "In my view the jurisdiction which is given by that section to a judge in chambers to give leave for the institution or continuance of proceedings by a vexatious litigant is a jurisdiction that should be very carefully exercised. Ex hypothesis the person has already 'habitually and persistently and without any reasonable ground instituted vexatious proceedings'; and there is a high onus case on such a person when he or she applies to the judge for the leave mentioned in the section.
>
> We all, unfortunately, know what ingenuity vexatious litigants can from time to time display in, if I may use the expression, cooking up imaginary claims and pursuing futile appeals, and it is to be remembered that the application, in the first instance at any rate, is ex parte, though the judge may cause notice of the application to be given to the Attorney-General so that he may be represented. As I say, we do not know what was before Cooke J. when he made the order that he did; but I repeat that in my view the jurisdiction is one which should be very carefully and indeed almost sparingly exercised and the court should be satisfied, before giving leave, that there is really a case of some substance, or an appeal of some substance, to be argued."[78]

In Victoria an examination of the files of declared litigants shows that leave has only been given to two declared litigants. In the case of *Millane* leave was given 4 times over 24 years including once to the Privy Council[79]; in *Isaacs* leave was given once in 46 years[80]; although in declaring Laszloffy vexatious in 1963 the Court was clearly aware that his wife, the former Mrs. Isaacs, was the main instigator of the litigation.[81] In neither of these cases is there any evidence of prosecution of the litigation to a result favourable to the litigant. Both cases also show that the practice of the Supreme Court is to give leave only if the matter is to be carried forward with the assistance of counsel.[82]

The declaration of a litigant as vexatious appears to have a mixed result. An examination of the files of the eight Victorian vexatious litigants suggests that only Laszloffy, Cousins and Ben Hemici have been stopped in their tracks. The pattern that emerges is that the litigants transfer their litigious activities to other original jurisdictions, in particular the High Court. An

[76] See for example s. 21(3) *Supreme Court Act* 1986 (Vic.).
[77] [1971] 3 All E.R. 715.
[78] Id. 716.
[79] Manual search by author of file 4360 Supreme Court of Victoria. See especially memorandum of Barry J. dated Aug/Nov 1950.
[80] Manual search by author of Supreme Court file 501 of 1941.
[81] See Affidavit of Graham John Frederick Dethridge sworn 22/7/1973 in File M4693 of 1963.
[82] See memorandum of Sholl J. dated 30 April 1952 in *Millane*, Supreme Court file No. 4360 of 1930.

examination of the indexes for the High Court shows that the remaining five Victorian vexatious litigants had all been active in that jurisdiction after having been declared vexatious in Victoria.[83]

Since *Pedler*'s case whether the control extends to proceedings issued or commenced in tribunals is doubtful. It will be recalled that in that case the court thought it unlikely that the tribunals were within the ambit of the inferior jurisdiction. Certainly this has not been an issue in the early cases of vexatious litigants but in the late 1980's with the growth of tribunals this may become a significant gap.

Finally the legislation now formally recognises that the court has power to rescind its order declaring a litigant vexatious. In introducing the clarification in his 1986 second reading speech the then Attorney-General Mr. Jim Kennan said:

> "Clause 21 now makes it clear that a vexatious litigant need not receive an effective life sentence for the court may at any time vary or revoke its order."[84]

Some guidance on what the court would look for in granting such an application is provided in *Bien Venu* v. *Attorney General for Victoria*.[85] This case was an unsuccessful application for leave to proceed. In rejecting the request Crockett J. suggested the following approach:

> "It may be that the court would be required to undertake some enquiry into the general nature of the earlier litigation in order to learn if possible what, if any, particular act or circumstances could be ascribed to the cause of such litigation so as to determine whether that act or circumstances was still likely to operate as to cause the applicant, unless restricted from doing so, to give rise to a succession of further action in court."[86]

No new material had been brought forward by the litigant in this case.

CONCLUSION

Abusive or vexatious litigants pose special problems for courts seeking to balance litigant access whilst maintaining public confidence in the legal system. That the courts and in particular the Victorian courts, show remarkable tolerance to this group is indicated by the small number of eight declared litigants and the large number of unsuccessful proceedings that these litigants have conducted before the Victorian Attorney-General has initiated the statutory application to have them declared vexatious.[87] For example at one end

[83] High Court indexes, Melbourne Registry, at 3rd April 1984 revealed:
Millane 20 writs up until 1953
Isaacs 5 writs up until 1947
Collins 5 writs up until 1952
Bien Venu 14 writs up until 1971
Gallo 12 writs up until 1982

[84] Victoria, *Parliamentary Debates*, Legislative Council, 5 December, 1986, 1659.

[85] [1982] V.R. 563.

[86] Id. 566.

[87] S. 21 *Supreme Court Act* 1986 (Vic.).

of the scale Rupert Millane[88] was allowed 116 unsuccessful actions and at the lower threshold Edna Isaacs[89] was allowed 8 unsuccessful actions. Whilst this tolerance is to some degree statutorily required so that the provisions of "habitually" and "persistently"[90] can be satisfied it is suggested that it is difficult for the court to be fully aware of the full extent of abusive litigants activity as most is likely to be invisible as discussed above.

It is clear however that the court's inherent or statutory rules power to control abusive litigants is limited to current proceedings on a "one off" basis. This is demonstrated by *Commonwealth Trading Bank* v. *Inglis*[91] where the High Court specifically declined the invitation to prohibit future activity based on anything but a specific statutory power.

However once the statutory application is made the courts have signalled a preparedness to look beyond the corporate or similar veil to ensure that its processes are not abused. Thus in *Re Langton*[92] a litigant was not able to distinguish proceedings brought by him as an administrator of his mother's deceased estate nor in *A.G. for N.S.W.* v. *Solomon*[93] was the litigant able to lower the corporate veil.

Nonetheless the legislation does have difficulties. First, in Victoria it can only be activated by the Attorney-General.[94] This inevitably increases the scope for political considerations to interfere with an important judicial safeguard. It is suggested that the more flexible procedural approach of New South Wales of permitting applications by "any person aggrieved"[95] is to be preferred. After all it is still the court that must be satisfied as to whether a person should be declared vexatious.

Secondly, *Hutchinson* v. *Bien Venu*[96] and *Hunters Hill Municipal Council* v. *Pedler*[97] make it clear that the court is confined to consideration of litigation by the litigant within its own hierarchy. With the increasing mobility of litigants between jurisdictions this seems unnecessarily restrictive. At the same time *Pedler*'s case also suggests that a vexatious litigant order will not apply to tribunals. With the growth in range and number of such bodies it is suggested that this is a considerable gap. Already the activity of "vexatious complainants" and the powerlessness to deal with them has been commented on by a number of such bodies.[98]

Thirdly, there must be concern about the utility of the provision having regard to the fact that it was a direct response to a particular litigant – Rupert Millane. As with its counterpart in England the provision was very much

[88] [1930] V.R. 381.
[89] See affidavit of Joseph Davis sworn 8/7/1941 in Supreme Court file 501 of 1941.
[90] S. 21(2) *Supreme Court Act* 1986 (Vic.).
[91] (1974) 131 C.L.R. 311.
[92] [1966] 1 W.L.R. 1575.
[93] [1987] 8 N.S.W.L.R. 667.
[94] S. 21(1) *Supreme Court Act* 1986 (Vic.).
[95] S. 84(2) *Supreme Court Act* 1970 (N.S.W.).
[96] Unreported judgment of Walsh J., 9/10 August 1971. High Court Case No. 22 of 1970.
[97] [1976] 1 N.S.W.L.R. 478.
[98] See for example the comments of F. Eyre in Victorian Parliament, *Report of Lay Observer* 1985, 13 and Mr P. Opas Q.C. Chief Chairman of the Planning Appeals Board, "Appeals system is abused, says planning chief" *Age* 22 June 1987.

tailored to combat a particular problem which was repetitive and unsuccessful litigation against public bodies. As was discussed above all the eight declared Victorian litigants have satisfied these narrow criteria.

What of the situation where the defendants are not public bodies or officials but private citizens? Whilst these citizens may have a reasonable defence s/he may be unable to "have their day in court" because s/he lacks the legal resources of a public body or official. It is suggested that such a scenario is increasingly possible in an age where credit houses and other large organisations use the default procedures of the court, especially the Magistrate's Court, on a large scale. In such a situation it is suggested inappropriate judgments can and do occur. Such a situation would appear to be outside the criteria of the provisions but in other respects be an oppressive or vexatious use of the legal system.

Finally doubt must be expressed as to whether the statutory provision provides a complete answer to the activities of a vexatious litigant. The best it would seem to achieve is a transfer of attention to other jurisdictions and a general slow down of activity. Perhaps the last word should come from one declared litigant who said:

> "The lawyers said I was paranoid. It is a mild degree of paranoia which I am having treated at a clinic. When it is better, I shall take up my actions again. I have to get redress through the court."

He said he did not trust lawyers so that when he was again able to go to court he would again conduct his own cases. He was still convinced that he had been the victim of a conspiracy.

> "I have been wronged and I must keep going until I succeed he said."[99]

[99] Abdul Ben Hemici declared 17/3/1981. See D. Elias "Self taught 'lawyer' ruled out of court", *Age* 2/6/1981.