Complexity in civil litigation

By Michael Legg

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Civil litigation is more frequently giving rise to cases that are regarded as complex. They are expensive for parties to run, time-consuming, and use a large amount of taxpayer-funded court resources, thus delaying other cases.

Efficiently disposing of these cases requires careful case management. But case management requires a couple of preliminary steps:

- identifying that the case will be complex so that case management does not unnecessarily add to the costs of what would otherwise be a routine or straightforward case. Complex cases are usually of considerable value or importance, and have the capacity to inflict large costs if left unmanaged. Front-loading of costs is warranted, as management is necessary to control costs overall; and
- identifying the causes of the complexity so that the correct case management tools are chosen, with a view to addressing those causes of complexity.

This article seeks to provide a clear description of the factors that create complex civil litigation, as a first step in diagnosing why a case is likely to be complex and in

facilitating the correct case management treatment. It starts by reviewing the causes of complexity that have been suggested in the United States, United Kingdom and Australia before distilling those discussions into categories of complexity. The lawyer or judge armed with an understanding of what may cause complexity in a particular case can then take action to address that complexity, which will assist in reducing the twin evils of excessive cost and delay.

COMPLEX CIVIL LITIGATION IN THE US

The existence of complex civil litigation and its adverse consequences for the judicial system and the parties involved has been recognised in the United States since at least the 1950s.[1] The complexity of civil litigation arose in the public interest litigation context associated with civil rights, major anti-trust or competition law litigation, and mass tort litigation (usually in the form of a class action, of which asbestos has been the signature example).[2]

The first edition of the *Manual for Complex and Multidistrict Litigation* defined 'complex litigation' as 'one... or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as "protracted" and "big"'.[3] The *Manual* then went on to describe classes of potentially complex cases:

'(a) anti-trust cases;
(b) cases involving a large number of parties or an unincorporated association of large membership;
(c) cases involving requests for injunctive relief affecting the operations of a large business entity;
(d) patent, trademark and copyright cases;
(e) common disaster cases, such as those arising from aircraft crashes;
(f) individual stockholders', stockholders' derivative, and stockholders' representative actions;
(g) product liability cases;
(h) cases arising as a result of prior or pending government litigation;
(i) multiple or multi-district litigation;
(j) class actions or potential class actions; or
(k) other civil and criminal cases involving unusual multiplicity or complexity of factual issues.'[4]

The current edition of the *Manual for Complex Litigation* observes that the term 'complex litigation' is not susceptible to any 'bright line' definition.[5] However, the content of the *Manual* includes areas creating special problems such as multiple jurisdiction litigation, class actions, mass torts and expert scientific evidence. There is also a discussion of particular types of litigation, including anti-trust, securities, employment discrimination and intellectual property.[6]

California, with the recommendation of several task forces and committees, began considering complex litigation issues in 1990. In 2000, the state instituted a Complex Civil Litigation Pilot Program in six California Superior Courts.[7] Typically, cases were characterised as complex because of legal complexity (complex issues of law); evidentiary complexity (requiring specialised expertise in a discipline other than law); or logistical complexity (involving a large number of parties or a large volume of evidence).[8] California Court Rule 3.400 provides the following definition and factors to consider in determining whether a case is complex:

'(a) Definition
A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.
(b) Factors
In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:
(1) Numerous pre-trial motions raising difficult or novel legal issues that will be time-consuming to resolve;
(2) Management of a large number of witnesses or a substantial amount of documentary evidence;
(3) Management of a large number of separately represented parties;
(4) Co-ordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
(5) Substantial post-judgment judicial supervision.
(c) Provisional designation
Except as provided in (d), an action is provisionally a complex case if it involves one or more of the following types of claims:
(1) Anti-trust or trade regulation claims;
(2) Construction defect claims involving many parties or structures;
(3) Securities claims or investment losses involving many parties;
(4) Environmental or toxic tort claims involving many parties;
(5) Claims involving mass torts;
(6) Claims involving class actions; or
(7) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(6).
(d) Court's discretion
Notwithstanding (c), an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex under this subdivision.'

Cases that fall into the provisional designation are designated as complex by a judge or requested to be treated as complex by a party (and not challenged by another party resulting in the judge making the designation) are then subject to active case management.[9] The Southern District of New York implemented a new Pilot Program for Complex Cases from 1 November 2011 which designated 14 types of civil lawsuits as 'complex cases', including 'stockholder's suits, patent and trademark claims, product liability disputes, multi-district litigation, and class actions'.[10]

Complex litigation has also been examined by academics >>

The causes of complexity include legal complexity, factual complexity, high stakes, multiple parties and lawyer conduct.

through a more conceptual framework. In seeking to describe the features of adjudication and its limits, Professor Lon Fuller resorted to the concept of the polycentric task which is 'many-centred' and 'will normally involve many affected parties and a somewhat fluid state of affairs'.[11] The polycentric dispute may therefore be a characteristic of complex civil litigation. Professor Abram Chayes identified 'the crucial characteristics and assumptions' associated with 'public law' litigation (securities fraud, anti-trust and desegregation litigation) which has been interpreted as a form of complex litigation.[12] They include the scope of the lawsuit being uncertain, the party structure being sprawling and amorphous, and the factual inquiry being wide-ranging.

'Adversarialism' has also been suggested as a cause of complex civil litigation. The result of adversarialism is a 'scorched earth' policy where there is no co-operation and every point is taken and contested – 'super-aggressive, manipulative lawyering – explicitly designed to increase the other side's litigation bills and thereby induce them to compromise their claims or defenses'.[13] The conduct of lawyers may thus create or enhance complexity.

THE UK EXPERIENCE WITH 'HEAVY AND COMPLEX' CASES

The UK has not experienced complex litigation on the scale of the US, but it has nonetheless been identified as an issue of concern. Lord Woolf in his *Access to Justice – Interim Report* stated that 'the complexity of the present procedure for conducting litigation impedes access to the courts and imposes an unnecessary burden upon the parties'. Lord Woolf focused on complexity created by the courts' own procedures, but also referred to 'the substantive law which the court has to apply, which is often obscure and uncertain'.[14]

These issues were revisited in the UK Costs Review, where Lord Justice Jackson, focusing on the causes of excessive costs rather than complexity, noted concern with the rules of court, complexity of the law, the method of remunerating lawyers, the preparation of factual and expert evidence and discovery of electronically preserved records.[15]

The UK Commercial Court Long Trials Working Party provided this definition:

> 'A threshold question is, of course: what is comprised by a "heavy and complex" case, or "long and/or complex" case, or a "supercase", to use the sobriquet which has often been applied. Like the proverbial elephant, a "long (or heavy) and complex" case is easier to recognise than to define. The amount at stake in the litigation, the number of parties involved, the potential length of the trial, the number of issues raised and the complexity of the legal or technical issues could all be measures by which to gauge whether a particular case merits the badge of "long and complex" or "heavy and complex" or "supercase".'[16]

THE AUSTRALIAN EXPERIENCE WITH MEGA-LITIGATION

In Australia, the judgment in *Seven Network Ltd v News Ltd*, otherwise known as the C7 litigation, by Sackville J referred to 'mega-litigation' and defined it as:[17]

> '...civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form'.

Justice Sackville has also examined the causes of mega-litigation extra-curially, observing that in fields such as competition law or intellectual property, the issues are often not only legally complex, but involve extremely difficult and wide-ranging factual issues. Further complexity can arise from complicated business dealings between multiple parties over a long period of time. Moreover, increasing specialisation may require experts in a variety of disciplines. Justice Sackville also points to 'individualised justice', discretionary remedies, procedural innovations such as class actions and relaxed standing rules, and the impact of technology on discovery.[18]

The characteristics of complex civil litigation have also been illustrated by *Bell Group Ltd (in liq) v Westpac Banking Corp*[19] in the Western Australia Supreme Court and *Australian Securities and Investments Commission v Rich*[20] in the NSW Supreme Court. In *Bell*, there were multiple parties leading to the judge observing that 'in reality, it was 20 or 21 trials because the case (especially in terms of knowledge) had to be proved against each of the 20 banks individually and one of them as agent'. There were many documents and many witnesses as the events took place over an extended period (from October 1985 through to April 1991) and involved a large commercial group of companies with intra-group dealings. In *ASIC v Rich*, Austin J of the Supreme Court of New South Wales set out 10 factors that contributed to the length of that case. In doing so, his Honour touched on a number of factors that may make litigation complex. This included the underlying factual matrix which necessitated proof of the true financial circumstances of a large corporate group over a period of four months and by way of defence the corporate governance structures of the group. The case also involved extensive documentation with most or all of the electronic financial records of the parent company being downloaded or copied by ASIC.

The Australian system has also been said to be too adversarial so that 'the desire to win is antithetical to a willingness to contest only the real issues and to disclose relevant information to the other side, particularly if either is likely to help the opponent'.[21] For example, the tactics of

discovery are often about seeking an informational advantage over an opponent through seeking or resisting disclosure of information.[22] The use of time-based billing means lawyers' economic interests are also advanced by spending more time on litigation tasks.[23] The more complex, larger or longer litigation, the greater the possible remuneration for the lawyer and/or their law firm.

THE CAUSES OF COMPLEX CIVIL LITIGATION

The causes of complex civil litigation may be summarised as:

- legal complexity;
- factual complexity;
- high stakes;
- multiple parties; and
- lawyer conduct.

Civil litigation may be complex because of the uncertainty or nature of the law involved. Uncertainty may arise because of a lack of precedent, a novel interpretation of pre-existing law or a law that is expressed in open-ended terms. The adoption of principle-based regulation rather than more specific rules-based regulation introduces flexibility and discretion, which may have positive regulatory outcomes but in a dispute also gives rise to a lack of determinacy that expands the room for argument and the scope of relevant evidence.[24] Complexity due to the nature of the law may be illustrated by cartel litigation, where the requirements of s45 of the *Competition and Consumer Act* 2010 (Cth) (formerly *Trade Practices Act* 1974 (Cth)) involves proof of concepts such as 'arrangement or understanding', which were deliberately drafted in a broad manner so as to ensure their application to situations that do not rise to the formality of a contract, and elements of a contravention, such as 'substantially lessening competition', which incorporate evaluative requirements using ambiguous language and economic concepts.

Complex litigation may result from the underlying subject matter being technical and beyond the unaided comprehension of the lay person, so there is a need for expert evidence. The breadth of the dispute can increase the scope of the litigation giving rise to substantial discovery, including of electronically stored information. Expert evidence and discovery can themselves create complexity through increasing the size of the litigation or adding to the difficulty in resolving the underlying dispute. The technicality and scope of disputes may also be linked to greater complexity in business such as through globalisation, corporate structuring, cross-border disputes, increased regulation of business and technology. The complexity of the disputes that a court confronts will mirror the complexity of the society in which the court operates.

Complexity can arise due to the litigation being 'high stakes' or 'bet the company' litigation. The outcome of the litigation becomes very significant because of the quantum of the claim; it is strategic litigation aimed at achieving >>

commercial objectives; it will establish a beneficial/harmful precedent or the case threatens to prevent a company from being able to continue trading – for example, in competition law and intellectual property cases that threaten a key input or competitive advantage. The impact of a win or loss on a party can be of such a magnitude that a win-at-all-costs attitude develops. When a party conducts litigation in this manner, then the incentive to reduce costs is minimal because the ramifications of losing the litigation are far greater than any costs incurred in conducting that litigation. Equally, expensive and time-consuming steps that produce only marginal benefits in terms of success in the litigation become worthwhile because of what is at stake.

Multiple parties include cross-claims, joinder, consolidation and class actions. Complexity arises when a number of claims and party interests are combined into a single proceeding. This may have advantages for the court in terms of efficiency and providing access to justice for the community but it can also result in more complex litigation. Class actions, in particular, rely on economies of scale, but the aggregation of claims that may only be similar or related[25] can create disparate groups, with numerous subsets of issues. Where there are group members whose rights are determined by the litigation but who are not actually present, additional steps need to be observed to protect their interests. This can result in complicating the litigation. The conduct of lawyers can result in complex litigation through 'adversarialism', where instead of co-operating and agreeing non-core issues, they contest every point, escalating the contentiousness of the case, resulting in the need for more evidence and ballooning the cost and size of the litigation. Lawyer conduct may also be driven by the economic incentives created by law firm business models. For example, time-based billing may create an incentive to take steps that prolong and expand litigation in the interests of lawyers receiving a greater fee.

CONCLUSION

The above categories of complexity help to explain the causes of complex litigation and suggest a tentative definition. Complexity exists on a continuum. In the lower courts, many cases may be routine and not have any of the above elements of complexity. In a superior court, many of the cases will have some aspect of complexity about them and yet others will have many aspects of complexity, perhaps even rising to the level of 'supercase' or 'mega-litigation'. For example, a cartel case may have multiple causes of complexity as it involves legal complexity due to the causes of action involved; contains factual complexity due to the nature of proving markets and arrangements or understandings; the clandestine nature of the dealings will often mean that extensive discovery is involved; and as a cartel by definition requires multiple members, the existence of multiple parties is likely. If the case covers an extended period, involves large corporations and goes to the heart of their business operations, then it may be at the extreme end of complexity.[26]

Identifying a complex case as such is important because it allows for the court, legal practitioners and the parties to determine that the case would benefit from managerial judging. Put another way, it is not a routine case that can be left to proceed through the usual pre-trial steps and proceed efficiently to trial or settlement. In routine or lower-value cases, the costs of managerial judging may outweigh any likely benefits. More significant is identifying the causes of complexity, so as to tailor the case management approach to the case. Exactly how complex a case is, or which sobriquet it merits (large, mega, super) is not particularly important. Rather, identifying the causes of complexity so that they may be treated in the most appropriate way is what is most important. ■

Notes: **1** Jay Tidmarsh and Roger Trangsrud, *Modern Complex Litigation* (2nd edn 2010) pp716-17. **2** See Francis Kirkham, 'Complex Civil Litigation – Have Good Intentions Gone Awry?' (1976) 70 *Federal Rules Decisions* 199. **3** Judicial Conference of the United States, *Manual for Complex and Multidistrict Litigation* (1970) § 0.11. **4** *Ibid* at § 0.22. **5** Federal Judicial Centre, *Manual for Complex Litigation* (4th edn 2004) at 1. **6** *Ibid*, at 2 and chapters 20, 21, 22, 23, 30, 31, 32 and 33. **7** Scott Paetty, 'Classless not Clueless: A Comparison of Case Management Mechanisms for Non-Class Based Complex Litigation in California and Federal Courts' (2008) 41 *Loyola of Los Angeles Law Review* 845. **8** National Center for State Courts, *Evaluation of the Centers for Complex Civil Litigation Pilot Program*, 30 June 2003 pp5-6. **9** Scott Paetty, *Op. Cit* (see note 7 above) at 855-7. **10** Edward Spiro and Judith Mogul, 'Southern District Launches Pilot Project for Complex Civil Cases', *New York Law Journal*, 20 December 2011. **11** Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 394-5, 397. **12** Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281 at 1302. **13** Robert Kagan, *Adversarial Legalism – The American Way of Law* (2001) p119. **14** Lord Woolf, *Access to Justice – Interim Report* (June 1995) Chapter 3 at [44]. **15** Lord Justice Jackson, *Civil Litigation Costs Review – Final report* (December 2009) pp40-9. **16** Report and Recommendations of the Commercial Court Long Trials Working Party (December 2007) at [26], http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf. **17** *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [1], [12]. **18** The Hon Ronald Sackville, 'Mega-litigation: Towards a New Approach' (2008) 27(2) *Civil Justice Quarterly* 244 at 245-7. **19** *Bell Group Ltd (in liq) v Westpac Banking Corp (*No. 9) (2008) 225 FLR 1 at [954], [956]-[957]. **20** *ASIC v Rich* (2009) 236 FLR 1 at [24]-[55]. **21** The Hon G L Davies, 'Civil Justice Reform in Australia' in Adrian Zuckerman (ed), *Civil Justice In Crisis: Comparative Perspectives of Civil Procedure* (1999) p175. **22** Michael Legg, 'The United States Deposition – Time for Adoption in Australian Civil Procedure?' (2007) 31 (1) *Melbourne University Law Review* 146 at 169. **23** Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2007) pp195-9. **24** See Michael Legg, 'Regulatory Theory, Litigation and Enforcement' in Michael Legg (ed), *Regulation, Litigation and Enforcement* (2011) at [1.220] and [1.270]. See also *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50 at [151]-[153] in relation to the obscure drafting of Ch 7 of the *Corporations Act* 2001 (Cth). **25** See *Federal Court of Australia Act* 1976 (Cth) s33C(1)(b). **26** See Michael Legg and Zoe Adams-Lau 'Teaching Complex Civil Litigation with Real Life Case Studies', *Transforming Legal Education – Australian National Conference on Clinical & Experiential Learning*, UNSW, Kensington, 9 September 2011 examining the above categories of complexity by reference to cartel enforcement proceedings.

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