

## 'Lawyer funded litigation – do we need it?

Andrew Boe

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The *Courier Mail* investigation into the fee charging practices of a particular Queensland legal firm and alleged misconduct in their application of the so called “no win, no fee” arrangement raise serious issues for both the legal profession generally and the communities interest in the due administration of the civil justice system. Criticism has been assumed due and has been freely forthcoming. The Law Society and the Attorney General have taken some steps as a result. Finger pointing is rife: Whose fault is this? How has this level of alleged poor business practice been allowed to fester? Who pays for this? Lawyers in private practice, whether involved in such fee arrangements or not, cannot help but be prompted to think about their own fee arrangements: how ‘fair’ are our own fee levels and arrangements. This discussion must embrace wider dimensions.

It would not be a sufficient response to the issues raised for an official investigation; prosecution or punishment and media focus to only be on this particular fee arrangement by this particular firm. Punishment for and deterrence of misconduct is necessary but it is not all that the community is entitled to expect from the legal profession or its regulators.

The process of engaging a lawyer is complex. The concept of arrangements where litigants did not have to pay any money ‘upfront’ emerged as a result of a realisation that whilst causes of action were available litigation costs are prohibitive for most ordinary Australians. Few plaintiffs are able to pay ‘up front’. [I could not afford even a junior lawyer in my own office in any lengthy litigation without mortgaging my family home.] Few are able to litigate without these arrangements. Although they were initially designed to increase work for lawyers, if undertaken with integrity, these arrangements increase access to justice. In fact we live in a physically ‘safer’ world because of the finding of liability in some of these cases. Nevertheless some of the dynamics created by these arrangements are not ideal. For example, cases with obvious prospects of success or admitted liability are likely to gain precedence over other cases thought to be less certain of success even if the clients are as deserving. Also, costs are not always awarded even if you win. Therefore the lawyer/client relationship is potentially compromised by competing interests: settling an action where costs incurred are a significant portion or exceed the amount recovered means that a lawyer’s own self interest to protect fee recovery compromises how and if litigation ensues. Unsurprisingly, the type and calibre of lawyers that undertake work under these arrangements will be largely determined by the financial rewards that are thought to be available. A lawyer’s assessment of prospects and how that assessment is communicated will ultimately determine how well the lawyer/client relationship survives the duration of the retainer. The quality of that initial advice becomes pivotal.<sup>1</sup> It is a significant filter as to who has access to our civil justice system.

The fact that these ‘lay by’ arrangements are needed suggest that the costs of litigation in our system have to some extent got out of hand. It must be difficult for members of the public to understand why lawyers charge \$300.00 to \$400.00 per hour or \$3000 to \$4000 per day. I sometimes charge those rates and it is of course subjective whether I provide actual value for money. More importantly very few individuals can afford those rates if required up front. On the other hand, it is true that the costs of running practices have

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<sup>1</sup> Assessing the prospects of success and the likely quantum of any claim could not be easy. In what other field of endeavour can a prognosis be perfectly ascertained after a cursory examination? Surgery and motor vehicle repair come to mind as not inapt analogies.

spiralled. This has been partly due to pretensions still held in the profession - the fallacy that a good lawyer must be situated in a salubrious office is self-evident but perhaps not yet fully appreciated by some people, including many prospective clients. Nevertheless, actual costs of legal practice are proportionately high; insurance against negligence, costs of staff, telecommunications and computer equipment, library and research resources and the utter complexity of legal cases absorb considerable human and technical resources.

Not all lawyers are prepared to self-fund cases involving financial compensation for plaintiffs. In fact only a small minority do.<sup>2</sup> Those that do are sometimes motivated by a desire to give greater access to their clients; however usually it is just a business choice to increase an avenue of work. That a mechanism, which provides greater access to the justice system, is not made available by the majority of lawyers bears examination. On the other hand most defendants are 'protected' by insurance companies can afford the large legal firms. These lawyers are more usually guaranteed payment of their fees whether or not their defence is successful. Unsurprisingly they are usually from the big end of town and situated in palatial offices. Anecdotally around town it is almost a badge of success for a lawyer to say: "I only do defendant work nowadays."

Hence, the need for a far more fundamental critique of the present system. This discussion must also focus on the financial morality within the legal profession, including the Bar, both individually and collectively, not unlike the purge taking place within the NRL following the Bulldogs fiasco. There are some obvious questions: What are lawyers *really* worth to our community? How is that value assessed? Why do lawyers believe that they are entitled to earn more than most other workers in society? Why are bright young barristers earning more than High Court judges? Are the most 'skilful' and competent lawyers accessible to the clients most needing such skill to have their cases conducted? Is it not likely that the more skilful lawyers will be sought out by those who can more readily afford them? Why don't all national firms and those at the 'big end of town' undertake legal aid or pro bono work? In a market economy, the skilful become, in the main, the most expensive and less accessible to the individual. What does this mean about notions of 'equality before the law'?

Personal value judgements in this debate are unimportant if not distracting. What is necessary is an appreciation that the 'value' of fair access to equal rights *and* the 'value' of those who can best provide such access bear a significant relationship to moral and social values held and manifested in the community.

These are difficult questions. Australia is a 'first world' country in which notable disadvantaged groups aside, most people enjoy a high level of material 'comfort'. There are few who are unable to obtain food and shelter when needed. Some of us are so well nourished that obesity is a problem; we pay money to help us reduce how much we eat; we pay thousands of dollars for single outfits and associated personal grooming; some televisions cost more than blocks of land in the outer suburbs. We allocate significant public financial resources into social 'luxuries' such as sport, entertainment, amusement and titillation. This is not the observation of a wowser. Sport and entertainment could not be said to be unimportant. However, when focusing upon the tactics of some lawyers in how they generate income, some comparable analysis is worthy of how other businesses are administered. In sport, young men and some women are remunerated in the hundreds of thousands of dollars, for being artful, skilful or strong. Pages of newsprint and magazines are allocated to the celebration of their achievements on and off the field. The commercial 'spin-offs' are obvious. A generation of people prioritise sport and recreational pursuits above all else in how they live their lives; allocate their resources and their intellectual and emotional focus.

Yet, the rights of injured individuals, the socially disadvantaged and others that interface with the justice system are limited by the allocation of financial, emotional and intellectual resources. Government

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<sup>2</sup> Boe Callaghan does not.

commitments, both State and Federal, in respect of legal aid in Queensland would be dwarfed by the expenditure that is made from public sources to sport and entertainment. So, before we can get too sanctimonious, persecutory or critical about the alleged misconduct of a particular firm of lawyers in how they have operated their business or lawyers generally, is it not necessary to look at how we as a community allocate our financial and other resources in other areas. How many footballers play a game for free? How many other professionals work *pro bono* i.e. for the public good or on a 'no win no fee' basis? How many stockbrokers and bank managers work on projects for free, how many architects build houses for the needy for free, how many doctors perform operations without drawing a salary, how many tradesman work because people need something fixed? Indeed how many journalists work on the publication of community issues for free? Of course some do, in all professions, but it seems that more need to, if the ideal of a fair go for all, including, if not especially the weak remains an Australian virtue.

The focus in the present investigation is somewhat narrow. The pre-occupation with how lawyers should be regulated and whether compensation should be paid to those who have 'suffered' as a result of misdeeds or poor business operations of individual lawyers is short sighted. The more necessary dialogue should include how lawyers might be encouraged or 'trained' to appreciate and recognise their special value and role in the community and to make the legal system more accessible to more people in need of it and the remedies that it can provide. Moral integrity is unlikely to be successfully imposed by fear of reprisal, especially when it comes to financial matters in a first world economy. Lawyers clearly have a special obligation to maintain the 'rule of law', which is often said to provide protections of our fundamental freedoms. Of course, if those protections and freedoms are not available to all in the community, and available fairly and equitably, then we lawyers are failing in our collective duty.

Systemic changes are necessary to better protect the weak, poor and vulnerable in our community. Justice Ipp's suggestions for the reform of insurance law and procedure must be carefully examined and sensibly discussed. The current public slaying of some lawyers, whilst perhaps 'good sport', should serve to address the root causes for the alleged misconduct, the malaise that exists in the profession and the need to better protect the public. Sure, 'feather and tar' these alleged 'fraudsters', but in doing so lets not let the important issue of access to justice again slip by.

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10 September 2002

Boe was approached to comment on this local justice issue by the *Courier Mail*, a Queensland newspaper investigating frauds allegedly committed by solicitors in personal injuries actions. He does not practise in that area of work. An edited version of this paper appeared in the *Courier-Mail* on 14 September 2002.