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Litigious Paranoia: Confronting And Controlling Abusive Litigation In The United States, The United Kingdom, And Australia

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This paper presents a comparison of judicial and legislative approaches to controlling abusive litigation in the United States, the United Kingdom, and Australia. While all these countries share the aim of preventing abuse of the judicial process by restricting access to the courts, the methods of achieving these goals differ, and the effectiveness of these methods is subject to challenge. The paper concludes that reforms are necessary to ensure the proper balance between litigant access and public confidence in the legal system.

Field of Research: Legal Environment of Business, Business Law

1. Introduction

In the 1980s an English psychiatrist used the term, "litigious paranoia," to describe a medical condition in which a person obsessively engages in persistent, unnecessary litigation; and this psychiatrist lamented the fact that "there has been little written in English in the psychiatric literature about this interesting and difficult group" (Smith, 1989). While medical journals may, in fact, contain a paucity of articles on this topic, legal literature---especially the written opinions of the judiciary---is replete with descriptions of people who appear to exhibit the symptoms of litigious paranoia. In legal terminology, these individuals are known as "vexatious litigants" (Forester, Ketley & Co., 2005). In the following excerpt from an English court decision in 2002, the judge, while not pretending to offer a medical diagnosis, nevertheless makes a convincing case that the claimant suffers from something akin to litigious paranoia:

> I am quite satisfied that the claimant, sadly, has become obsessive about his treatment in May 1994 [an alleged unlawful eviction from his accommodations at
>
> the Brompton Hotel in London] to the point where all reason and proportionality have deserted him. . . . The allegations he has chosen to make against responsible professionals in this case, allegations, which in some cases, are wild, scurrilous and outrageous demonstrates to me that the claimant can no longer be relied upon to behave in a reasonable and responsible manner in deciding whether to litigate or not.

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> His belief that there has been a far reaching conspiracy against him continues unabated and regrettably no doubt these proceedings themselves and the result of them will further fuel that belief (emphasis supplied) (Mehta, 2002).

While the legal system is, of course, not equipped to diagnose and treat this medical condition, it does provide legal measures to confront and control abusive litigation. Historically, statutory remedies for vexatious litigation in England date back to 1896 (Vexatious Actions Act, 1896) and in Australia to 1927 (Supreme Court Act [Vic.], 1927); and the first Vexatious Litigant law in the United States was enacted in California in 1963 (Neveils, 2000). By 2007, only four additional states--Florida, Hawaii, Ohio, and Texas--had passed similar legislation (Neveils, 2000). While the laws of each state differ in some respects, they all apply to plaintiffs who appear in *propria persona* (i.e., plaintiffs who represent themselves rather than hiring an attorney). The rationale for this narrow focus of applicability is that while courts can regulate attorney conduct through the Rules of Professional Conduct, sanctions, and the threat of disbarment, no such deterrent mechanisms apply to plaintiffs who represent themselves. Vexatious Litigant statutes thus seek to remedy the problems caused by frivolous filers who appear in *propria persona* with sanctions tailored to the abusive plaintiff who is non-represented (Neveils, 2000).

Most of the Vexatious Litigant laws in the United States define a “vexatious litigant” as someone who repeatedly files lawsuits (e.g., five or more) and who repeatedly loses those lawsuits within a prescribed period of time (e.g., five years). The sanctions for such conduct usually involve a requirement that the vexatious litigant: (1) file a security bond during the pendency of the litigation; and/or (2) seek permission from the court before filing any further lawsuits (Florida Statutes, Section 68.093, 2006).

The purpose of this paper is to: (1) analyze the Vexatious Litigant laws in the United States; (2) examine how the judiciary has interpreted these laws; (3) describe measures available in the United Kingdom and Australia to combat the filing of vexatious litigation, and (4) assess the effectiveness of these measures.

2. Egregious Cases

In some instances the actions of vexatious litigants cross the line from distressing, harassing behavior to egregious conduct. In a California case, the vexatious litigant was found to have engaged in the following actions:

- filed 43 unmeritorious and frivolous pleadings in the appellate court;
- appealed nonappealable orders;
- abused his privilege of being excused from paying filing fees;
- repeatedly failed to provide an adequate record for review; and
- continued his frivolous behavior despite previous sanctions (Luckett, 1991).

Furthermore, in a Florida case, the state Supreme Court denied a litigant the right to file any more appeals with the Supreme Court unless they were signed by an attorney (Lussy, 2002). According to the court's unanimous opinion (which did not cite Florida's Vexatious Litigant statute), the offending litigant engaged in the following abusive behavior:

- filed more than 26 cases in Florida courts, all of which were dismissed;
- repeatedly filed lawsuits that included personal attacks on judges;
- filed 13 meritless cases in Montana against state and federal judicial officers, each of whom had ruled adversely to him in previous suits (Lussy, 2002).

In England, the filing of dozens of unsuccessful lawsuits by one litigant caught the attention of members of Parliament. According to legal historian Michael Taggart, "it was principally the litigation mania of [Alexander] Chaffers that stirred the British Parliament to enact the Vexatious Actions Act 1896" (Taggart, 2004). Professor Taggart explains:

> . . . in the early to mid-1890s Alexander Chaffers filed 48 proceedings against a number of leading personages—including the Prince of Wales, the Archbishop of Canterbury, the Speaker of the House of Commons, Lord Chancellors and many judges—but succeeded only once, receiving one pound for work done copying an affidavit for the use of the Treasurer's solicitors. Costs were awarded against Chaffers in most of the other cases, but he never paid a penny. As a consequence, the Vexatious Actions Act was enacted in 1896, and, in the following year, Mr. Chaffers was the first person declared habitually vexatious and to lose his liberty to commence future litigation without judicial permission (Taggart, 2004).

Professor Taggart points out that Chaffers was not solely responsible for the Act being passed. It appears that in the 1880s Mrs. Georgia Weldon filed more than 100 lawsuits—the vast majority *pro se*—which led one commentator to opine that Mrs. Weldon "may well have done as much as Chaffers to pave the way for the 1896 Act against vexatious litigants" (Taggart, 2004, p. 678).

An Australian commentator points out that "[a]s in England the catalyst for action [in Australia] was the litigious activity of one litigant—Rupert Millane. Millane had between 1926 and 1929 initiated 56 legal proceedings in the Court of Petty Sessions" (Smith, 1989).

These egregious cases clearly show the salient characteristics of a vexatious litigant, which one commentator summarized as follows:

(1) the litigant is usually unrepresented;

(2) hopeless claims are instituted;

(3) totally misconceived appeals are launched;

(4) the litigant seeks to re-litigate the same issues that have already been dealt with by the court and bombards the same defendant with actions and applications;

(5) the materials filed are often irrelevant, incoherent, and scandalous; and

(6) the litigant becomes abusive towards the opposite parties and the judge (To, 2000, p. 90).

A somewhat different list of "hallmarks of vexatiousness" was produced by a New Zealand court, to wit:

(1) a pattern of complex, prolix and sometimes incomprehensible pleadings;

(2) compulsive litigation against a widening circle of defendants;

(3) extravagant claims and unfounded attacks;

(4) all or parts of statements of claim frequently struck out;

(5) proceedings started but left dormant. (Taggart and Klosser, 2005).

3. Vexatious Litigants: United States

Definitions

Five states—California, Florida, Hawaii, Ohio and Texas—have enacted Vexatious Litigant statutes. While similar in many ways, the laws are not uniform in their approaches to applicability, definitions, and sanctions. For example, all five state laws apply only to litigants who file civil actions in *propria persona* (or *pro se*), but the laws differ in their definitions of a vexatious litigant (Neveils, 2000, p. 359). In California, Hawaii, and Texas, one qualifies as a vexatious litigant when five or more adverse judgments have been entered against the litigant in a seven-year period (California Code, Section 391, 2006; Hawaii Statute, Section 634J-1, 2006; Texas Civil Practice, Section 11.054, 2006). In Florida, the time period is only five years (Florida Statutes, Section 68.093, 2006). In Ohio, however, neither a case minimum nor a time period is specified. Instead, the Ohio statute defines a “vexatious litigator” as “any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action” (Ohio Code, Section 2323.52, 2006). “Vexatious conduct” is defined as any of the following:

(a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.

(b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
(c) The conduct is imposed solely for delay (Ohio Code, Section 2323.52, 2006).

Other variations among the statutes relate to: (1) types of lawsuits excluded from vexatious litigant sanctions, and (2) courts included within the ambit of the statute. In California, Florida, Hawaii, and Texas, small claims actions are excluded from the law's coverage; in Florida, family law matters are also exempt from the statute (California Code, Section 391(b)(1), 2006; Florida Statutes, Section 68.093(2)(a), 2006; Hawaii Statute, Section 634J-1(1), 2006; Texas Civil Practice, Section 11.054(1), 2006). In Florida and Ohio, the law applies only to state court action, whereas in California, Hawaii and Texas, both state and federal court actions are within the ambit of the statute (Neveils, 2000). Table I summarizes the requirements necessary to be declared a "vexatious litigant."

TABLE I

"VEXATIOUS LITIGANT" REQUIREMENTS

State	*Pro Se* Require-ment	No. of Adverse Judgments Required	Time Period for Adverse Judgments	Actions Excluded	State/Federal Court Actions
California	Yes	5	7	Small Claims	State/Federal
Florida	Yes	5	5	Small Claims; Family Law	State
Hawaii	Yes	5	7	Small Claims	State/Federal
Ohio	Yes	n/a	n/a	--	State
Texas	Yes	5	7	Small Claims	State/Federal

Sanctions

The sanctions provided by the Vexatious Litigant statutes complement and, in some cases, duplicate sanctions already contained in existing statutes and case law. Apart from statutory remedies, currently available sanctions include the following:

1. Denying vexatious litigants indigent status, thereby necessitating payment of filing fees and court costs;
2. Requiring that court filings by vexatious litigants include the signature of a licensed attorney;

3. Striking or dismissing pleadings that are patently frivolous;
4. Awarding court costs and attorney's fees to a prevailing party when the action is based on a complete absence of a justiciable issue of either law or fact (Neveils, 2000, p. 349-351).

As indicated earlier, the sanctions available under the Vexatious Litigant statutes generally require that the vexatious litigant: (1) file a security bond during the pendency of the litigation; and/or (2) seek permission from the court before filing any further lawsuits (Schiller & Wertkin, 2001).

Security Bond Requirement

The Vexatious Litigant statutes in California, Florida, Hawaii, and Texas provide for the posting of security as a sanction. An example is the Texas statute which provides as follows:

> § 11.055. Security
> (a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.
> (b) The court in its discretion shall determine the date by which the security must be furnished.
> (c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees (Texas Civil Practice, Section 11.055, 2006).

The law of Hawaii requires not only a showing that the plaintiff is a vexatious litigant but also a showing that "there is not a reasonable probability that he will prevail in the litigation against the moving defendant" (Hawaii Statute, Section 634J-2, 2006). The laws of California and Florida are nearly identical to Hawaii's law (California Code, Section 391.1, 2006; Florida Statutes, Section 68.093(3)(a), 2006). In California, the security provision was attacked on constitutional grounds by a litigant who claimed that the law discriminated against poor litigants who are unable to furnish the required security. The California Court of Appeal, First District, rejected the argument, stating that:

> . . . if this argument were accepted, any statute which required the payment of a fee or the furnishing of security as a prerequisite to the filing of a complaint, the issuance or levying of a writ, or the procurement of a record on appeal, etc., would be unconstitutional (Talliaferro, 1965).

Prefiling Order

In all five states that have adopted a Vexatious Litigant statute, a prefilng order is the ultimate sanction that is utilized against a vexatious litigant. Typical of these provisions is the Florida statute, which provides as follows:

> (4) In addition to any other relief provided in this section, the court in any judicial circuit may, on its own motion or on the motion of any party, enter a prefiling order prohibiting a vexatious litigant from commencing, pro se, any new action in the courts of that circuit without first obtaining leave of the administrative judge of that circuit. Disobedience of such an order may be punished as contempt of court by the administrative judge of that circuit. Leave of court shall be granted by the administrative judge only upon a showing that the proposed action is meritorious and is not being filed for the purpose of delay or harassment. The administrative judge may condition the filing of the proposed action upon the furnishing of security as provided in this section (Florida Statutes, Section 68.093(4), 2006).

Effectiveness of Vexatious Litigant Laws in the U.S.

Florida's Vexatious Litigant law provides that "the Clerk of the Florida Supreme Court . . . . shall maintain a registry of all vexatious litigants (Florida Statutes, Section 68.093(6), 2006). Although Florida's law became effective on October 1, 2000, only twelve names have been listed in the registry of vexatious litigants (Waters, 2007). Either the clerks of lower courts are not relaying the names of vexatious litigants to the Supreme Court for placement in the registry or there simply are not many instances of individuals being found to be "vexatious litigants" in Florida. Indeed, a review of Florida appellate decisions since 2000 discloses only a handful of cases involving the interpretation of the Vexatious Litigant statute (Stauber, 2007).

Analysis of California's experience with its Vexatious Litigant law casts additional doubt on the effectiveness of these laws. One commentator summarized the situation as follows:

> . . . research and statistics on California's vexatious litigant statute, and courts' application of it, show that the statute is not a viable tool for deterring vexatious litigation**.** Although statistical evidence shows that courts' use of the pre-filing order sanction has increased since it inception in 1997, statistical and anecdotal evidence also shows that courts are only applying the vexatious litigant statute in extreme situations, and judges do not regularly use or consider the vexatious litigant statute in "definitely appropriate situations." Additional evidence suggests, however, that even strict adherence to the vexatious litigant statute would not

> address all career litigants. For example, one California litigant who has filed over 100 lawsuits would not fall within the scope of the statute because he won or settled almost all of his suits (Schiller & Wertkin, 2001).

Ironically, there is evidence to suggest that labeling plaintiffs as vexatious litigants in an attempt to limit or prevent court filings has actually resulted in increased litigation as the statute itself has sparked litigation regarding the proper qualifications in determining a plaintiff to be a vexatious litigant (Brown, 2006; Leonard, 2005).

4. Vexatious Litigants: United Kingdom

Vexatious litigants, as would be expected and as indicated earlier, are found also beyond the borders of the former English colonies. Courts in the United Kingdom have been called upon to deal with these frivolous filers, and in many of these cases, the vexatious litigants are unrepresented by lawyers (Southall, 2002; Mehta, 2002). These are the *pro se* litigants who, as explained earlier, are the target of the Vexatious Litigant laws in the United States.

History

"It is only since the 19th century that vexatious litigation has posed a significant problem in England and Wales" (Clarke, 2006). The foregoing historical assessment was offered recently by Sir Anthony Clarke, Master of the Rolls in England and Wales. According to Judge Clarke, it was during the mid-1800s that procedural rules began to be relaxed which resulted in courts becoming accessible to those who elected to proceed to court without the assistance of counsel. As Judge Clarke noted, "The greater ability to bring claims gives rise to a greater ability to bring vexatious claims" (Clarke, 2006).

And so it was in the seminal case of *Grepe v Loam* that the Court of Appeal noted that: (1) Plaintiffs had continued to litigate issues over the same property on which judgments had been repeatedly rendered—in 1879, 1882, 1883, 1884, 1885, 1886, and 1887; (2) the lower court had considered the plaintiffs' current application to be "wholly unfounded"; and (3) it would dispose of the matter pursuant to the following direction:

> 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 application, and it shall be dismissed without being heard (Grepe, 1887).

This "*Grepe v Loam* order" (as it came to be called) was based on the court's inherent jurisdiction to prevent the abuse of the judicial process. The precedent was thus established that, in appropriate cases, courts could require litigants to obtain prior permission from the court before those litigants could commence new proceedings (Clarke, 2006).

Less than a decade later, a codification of the *Grepe v Loam* pre-filing order was enacted by Parliament. Described as "the first Vexatious Litigant statute of its kind in the world" and "the ancestor and original source for all other Vexatious Litigant statutes world-wide," the Vexatious Actions Act 1896 was passed into law by Parliament on August 14, 1896 (Frost, 2007). As indicated earlier, legal historians have characterized the law's enactment as a reaction to the "litigation mania" of Alexander Chaffers who filed almost 50 actions against leading British personages (Taggart, 2004). About thirty years later, the law found a new home when it was consolidated nearly verbatim into Sec. 51 of the Supreme Court of Judicature (Consolidated) Act 1925 which was thereafter amended by the Supreme Court of Judicature (Amendment) Act, 1959. This amendment prohibited appeals of court denials of pre-filing orders once a person had been found to be vexatious (Frost, 2007). The law found its current home in Sec. 42 of the Supreme Court Act, 1981. In 1985, this law was amended to designate the Attorney General as the government official authorized to make applications for pre-filing orders and was also amended to include criminal proceedings within the ambit of the statute (Prosecution of Offenses Act, 1985). The legislative intent of the latter amendment, according to one commentator, was as follows:

> The broad purpose of this section is to extend the restriction on vexatious civil proceedings to cover vexatious criminal proceedings. It is clearly intended to restrain vexatious private prosecutors, since it is inconceivable that Crown Prosecutors will act vexatiously (Allsop, 1986).

Legal Requirements

Summarizing, the principal features of this Vexatious Litigant law are as follows:

(1) a civil proceeding order [pre-filing order] shall be issued when a person has habitually and persistently and without any reasonable grounds instituted vexatious lawsuits or prosecutions;

(2) the Attorney General is authorized to apply to the High Court for a civil proceedings order or a criminal proceedings order or both;

(3) the civil and/or criminal proceedings order prohibits the vexatious litigant from filing or continuing any civil proceeding or criminal prosecution without permission of the court;

(4) the civil and/or criminal proceedings order remains in effect indefinitely unless otherwise specified;

(5) the civil and/or criminal proceedings orders are non-appealable;

(6) the civil and/or criminal proceedings orders are to be published in the *London Gazette*.

In addition to the vexatious litigant provisions found in the foregoing statute, there exists in the Employment Tribunal Act 1996 provisions applicable to employment cases that allow for a "restriction of proceedings order" that is similar to and modeled on the civil proceedings order authorized by the Supreme Court Act 1981 (Employment Tribunals Act, Section 33, 1996). According to this law, if the Employment Appeals Tribunal (EAT) makes a finding that a person has "habitually, persistently, and without any reasonable ground instituted vexatious proceedings or applications," an order may be entered prohibiting new or continued actions unless permitted by EAT (White, 2006). The statute authorizes the Attorney General or the Lord Advocate to make applications for a restriction of proceedings order (Employment Tribunals Act, Section 33, 1996). The pre-filing order mechanism has thus expanded to include not just proceedings in court but dispute resolution in employment tribunals as well.

Effectiveness of Vexatious Litigant Laws in the U.K.

In the last 10 years there has been an increase in the number of vexatious litigants. There are currently 175 pre-filing orders on record, with 88 of those having been entered since 1995. Some observers of the legal scene attribute this increase, at least in part, to the impact of the European Convention on Human Rights (ECHR). Incorporated into UK law by the enactment of the Human Rights Act in 1998, the ECHR guarantees the right to a fair trial which, it has been argued, should result in providing greater access to the courts. As noted earlier, "The greater ability to bring claims gives rise to a greater ability to bring vexatious claims (Clarke, 2006). In any event, in response to the rise in vexatious litigant activity, the judiciary has taken the following actions to make the law more effective:

(1) *Grepe v Loam* orders now apply to litigation in county courts whereas previously they only applied in High Court;

(2) *Grepe v Loam* orders now restrain litigants from suing the judges or the lawyers involved for either party;

(3) Civil restraint orders can now be applied to lay individuals, known as McKenzie friends, who help litigants in court but who are not themselves parties to the proceedings;

(4) Courts can now restrain litigants' access to court buildings and court staff where their conduct has been seriously abusive and is seriously impeding, or likely to seriously impede, the proper administration of justice (Clarke, 2006).

5. Vexatious Litigant Laws In The U.S. And The U.K.: A Comparison

As noted earlier, five states in the United States—California, Florida, Hawaii, Ohio, and Texas—have enacted Vexatious Litigant statutes (Neveils, 2000). The state of California thus had more than three quarters of a century of the English experience to

draw upon when in 1963 it passed the first Vexatious Litigant law in the United States (Neveils, 2000). While based on the laws of the United Kingdom, the Vexatious Litigant laws of the United States differ in several respects:

(1) U.S. laws apply only to *pro se* plaintiffs; U.K. law contains no such restriction;

(2) U.S. laws (except for Ohio) provide for a finding that a plaintiff is a vexatious litigant if he has exceeded a certain number of adverse judgments within a prescribed period of time; U.K. law has no such requirement;

(3) U.S. laws provide that a petition for declaration of "vexatious litigant" status be filed by a party to litigation or by the court on its own motion; U.K. law limits the right of application to the Attorney General or the Lord Advocate;

(4) U.S. laws provide for a security bond requirement during the pendency of litigation involving a "vexatious litigant"; U.K. law has no such requirement;

(5) U.S. laws are limited to civil proceedings whereas U.K. laws cover both civil proceedings and criminal prosecutions.

(6) U.S. laws generally require the state Supreme Court to maintain a roster of vexatious litigants whereas U.K. laws mandate that pre-filing orders be published in the *London Gazette*, the official newspaper of record in England (Neveils, 2000; Supreme Court Act, 1981; Employment Tribunals Act, Section 33, 1996).

These differences are shown in Table II below.

TABLE II

Vexatious Litigant Laws: U.S. And U.K.

LEGAL PROVISIONS	UNITED STATES	UNITED KINGDOM
Applicable only to *Pro Se* Plaintiffs	Yes	No
Vexatious Litigant Status Requires Set Number of Adverse Judgments Within a Prescribed Period of Time	Yes	No
Who Files Petition for Declaration of Vexatious Litigant Status	A party to the litigation or a court on its own motion	Attorney General or the Lord Advocate
Security Bond Requirement	Yes	No
Jurisdiction	Civil	Civil and Criminal

Publication of Roster of Vexatious Litigants	State Supreme Court Registry	*London Gazette* (official newspaper of record)

6. Vexatious Litigants: Australia

History and Application

In Australia, judges as well as legislators have addressed the issues relating to vexatious litigants. Shortly after the English case of *Grepe v Loam* was decided, the Australian judiciary became involved when the Victorian Supreme Court decided *Foran v Derrick* (Foran, 1893). In that case, after Foran had brought three successive unsuccessful libel lawsuits against the same defendant, the court ruled that the lawsuit was vexatious and summarily dismissed the action (Foran, 1893). The Australian Court did not, however, go as far as the *Grepe v Loam* court did, instead taking the position that "the inherent and Rules power of the court to control particular litigants is restricted to existing proceedings and not future proceedings" (Smith, 1989). Eighty years later in *Commonwealth Trading Bank v. Inglis* (Commonwealth, 1974), the Australian High Court confirmed this approach and ruled that a prefiling order would only be appropriate if such power had been conferred upon the courts by an Act of Parliament.

The first such Act of Parliament occurred in 1927 when Victoria enacted a Vexatious Litigant law that was "almost a direct copy of the English provision" (Smith, 1989). In the 60 years following the enactment of the law, only eight people had been declared vexatious litigants by the Victorian Supreme Court (Smith, 1989). Other states in Australia—New South Wales, South Australia, and Western Australia—enacted similar laws (Supreme Court Act [N.S.W.], 1970; Supreme Court Act [S.A.], 1935-36; Vexatious Proceedings Restrictions Act [W.A.], 1970).

One difference between the current law in Victoria and the current law in New South Wales is that in Victoria the application to have a person declared a vexatious litigant must originate with the Attorney General, whereas in New South Wales the application may be filed by the Attorney General or "any person aggrieved" (Supreme Court Act [N.S.W.], 1970). Victoria's approach is more in line with the English model whereas the New South Wales law is similar to the American model. The Victorian approach appears to be more politicized in the view of at least one commentator who stated that the law "makes it clear that the initiation to declare a litigant vexatious will always be a political decision . . . because the power to initiate is given exclusively to the Attorney-General" (Smith, 1989). Another difference is that the law in Victoria includes vexatious proceedings in tribunals within the ambit of the statute (similar to the United Kingdom) while the law in New South Wales does not extend coverage to tribunals (Supreme Court Act [Vic.], 1986; Supreme Court Act [N.S.W.], 1970).

Judicial Attitudes Toward Vexatious Litigants

While court decisions are replete with the opinions of exasperated judges (Mehta, 2002), it must be noted that judges are also seen to be patient and painstaking as they address the claims of plaintiffs who have already been declared to be vexatious litigants. Two recent cases illustrate this commendable attitude.

In *Phillip Morris Ltd v Attorney General for the State of Victoria*, the Court of Appeal in 2006 upheld a trial court's decision to grant permission to a plaintiff who years earlier had been declared a vexatious litigant. Plaintiff, who had been denied such permission to file actions on eight separate occasions, was given leave by the trial court to pursue his claim for damages that he asserted were caused by smoking cigarettes manufactured by defendant company (Phillip Morris, 2006). The lengthy decision by the Court of Appeal carefully analyzed the arguments and, rejecting a claim by the company that plaintiff had "simply hawked his application from judge to judge in search of a successful outcome," determined that the action was "not foredoomed to fail" and should thus be permitted to proceed (Phillip Morris, 2006).

In *Knight v Anderson* (Knight, 2007), the Supreme Court of Victoria in 2007 relied on the *Phillip Morris* decision for the proposition that the discretion to grant leave to file must be based on a determination of whether the proceeding would be an abuse of process. That determination, in turn, depended on "whether the proceeding is foredoomed to fail, not whether it has reasonable grounds" (Knight, 2007). In this case, the applicant—serving a life sentence for murdering seven people and attempting to murder many others—sought leave to seek judicial review of the prison warden's refusal in 2005 to permit him to send a letter of apology and explanation to one of his victims (the applicant had been declared a vexatious litigant in 2004 necessitating the application for leave). In a thoughtful review, the Supreme Court ruled that applicant's contention that prison authorities had no power to stop the letter from being sent to the victim was not "foredoomed to fail" (Knight, 2007).

Effectiveness of Vexatious Litigant Laws in Australia

Suggestions for improvement of Australia's Vexatious Litigant laws include the following: (1) extend the provision permitting applications to be filed by "any person aggrieved" to all jurisdictions in the nation thereby eliminating the exclusivity now enjoyed in some jurisdictions only by the Attorney General; and (2) extend the application of the law to tribunals in all jurisdictions in the nation (Smith, 1989).

Another commentator frames the situation as follows:

> Past experience provides minimal support for concern about vexatious litigation as a serious practical problem. Yet, in an increasingly litigious community, the question may attract increasing prominence. Attention to date has focused primarily on obsessively litigious individuals. A not unrelated issue also deserving

> attention is the resort to the courts by large and powerful corporations to achieve some collateral commercial advantage rather than to resolve a genuine substantive dispute (Willheim, 2006).

7. Conclusion

Both judicial and legislative tools are available in the United States, the United Kingdom, and Australia to deal with the problem of vexatious litigants. While all these tools share the aim of preventing abuse of the judicial process by restricting access to the courts by persistent and obsessive litigants who file groundless actions, the methods of achieving that goal vary among the three countries.

In the United States, only five states have enacted vexatious litigant statutes (the first of which was in California in 1963), all of which apply to litigants who represent themselves (*pro se)* in civil actions. Each state has its own set of requirements along with various sanctions. The ultimate sanction---the pre-filing order---forces litigants to obtain permission from a judge in order to proceed *pro se*. As for use of the statute in the United States, it appears that pre-filing orders issued incidental to vexatious litigation have been increasing since 1997, notwithstanding the fact that the statute itself has been used relatively sparingly. Moreover, it appears the statute has sometimes sparked more litigation as litigants argue about proper qualifications in determining a plaintiff to be a vexatious litigant.

In the United Kingdom, the first country to identify and attempt to rectify the problem of vexatious litigants, the judiciary initially determined that courts possessed the power to deal with frivolous filers by issuing *Grepe v Loam* orders (i.e., pre-filing orders). A decade later, Parliament passed the first vexatious litigant statute, the Vexatious Actions Act of 1896. The legislation, which has undergone several revisions since its enactment, is similar to the United States model in that the judiciary retains the power to issue pre-filing orders. The U.K. law differs from the U.S. law in the areas of (1) applicability to lawyer-represented plaintiffs; (2) minimum number of adverse judgments required; (3) power to initiate vexatious litigant petitions; (4) security bond requirement; and (5) civil/criminal jurisdiction. In the last ten years there has been a marked increase in the number of vexatious litigants in the U.K. with the issuance of pre-filing orders doubling during that period. Some observers attribute this increase, at least in part, to the impact of the European Convention on Human Rights' emphasis on providing greater access to the courts. In response to the rise in vexatious litigant activity, additional reforms have been implemented such as applicability of the law to county courts, prohibitions on suing judges and lawyers in the case, and denying litigants access to court buildings and court staff when their conduct is abusive or disruptive.

Australia first addressed the problem of vexatious litigation in 1893 through judicial intervention and in 1925 through legislative enactment. The 1925 statute, enacted in Victoria, mirrored the law in the U.K. Other states in Australia—New South Wales, South Australia, and Western Australia—subsequently enacted similar laws. In the 60 years following the enactment of the Victorian statute, only eight people had been

declared vexatious litigants by the Victorian Supreme Court, leading some observers to conclude that vexatious litigation was not a serious practical problem. Nevertheless, reforms aimed at improving the effectiveness of the law have been proposed, such as (1) permitting vexatious litigant applications to be filed by "any person aggrieved" thereby eliminating the exclusivity now enjoyed in some jurisdictions only by the Attorney General; and (2) extending the application of the law to administrative tribunals.

Critics point out that vexatious litigation statutes do not achieve the objective of deterring abusive litigation and, in fact, sometimes result in increased litigation. As indicated, reforms have been advanced in all three countries to address these criticisms. The aim must be, in the words of one commentator, "to balance litigant access whilst maintaining public confidence in the legal system" (Smith, 1989).

As explained at the outset, vexatious litigation statutes can be viewed as a legal response to what is in reality a medical problem. As some commentators have remarked, "it would be remiss not to acknowledge the underlying mental illness suffered by almost all persistently vexatious people . . . [t]here must be a scope for a more humane approach which will provide persistently vexatious litigants with the professional help they need." (Taggart and Klosser, 2005).

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