

STRATEGIC LITIGATION AT THE ALS

A REVIEW AND A ROADMAP FOR FUTURE CHALLENGES IN THE CRIMINAL LAW

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.¹

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¹ Lord Mansfield in *Somerset v Stewart* (1772) 98 ER 499. A test case backed by the abolitionist Granville Sharp, who later founded the Committee for the Abolition of the Slave Trade and pursued similar successful litigation in Scotland, along with lobbying for legislative change and government action, culminating in an Act abolishing slavery throughout the British Colonies in 1833.

² This paper has been written with significant and much appreciated contributions from Tim Farhall (Bourke ALS) and Jeremy Styles (Redfern ALS).

INTRODUCTION

1. Access to the Aboriginal Legal Service client base provides a unique opportunity for monitoring systemic issues in the criminal law affecting some of the most disadvantaged members of our community. As trends and concerns emerge, cases may be identified and litigated as part of an overall strategy to bring about reform of the criminal justice system.
2. Strategic litigation (also called impact litigation because it seeks to have an impact beyond the outcome for the individual client) commonly seeks to:
 - Challenge the accepted interpretation of the current law;
 - Create new law, for example, by establishing new rights or duties recognised by statute or the common law;
 - Ensure that the current law is interpreted and enforced properly; or
 - Clarify the meaning of the existing law.
3. Successful strategic litigation is the culmination of a deliberate process of assessing legal and policy issues, identifying an appropriate client vehicle for appellate litigation, planning a media strategy and coordinating with other groups or stakeholders.
4. Appellate litigation on a particular issue will often be the result of a concerted pre-planned approach in the lower courts, where the legal issues may be argued and refined over a considerable period of time before action is taken at a higher level in an appropriate case.

Potential benefits

5. Beyond winning the case for the individual client, there are a number of additional potential benefits of strategic litigation:
 - It may set an important precedent to be followed in other similar cases.
 - The case may empower the individual client. It may provide an opportunity for the client's voice to be heard by a wider audience as well as providing a platform for organisations like the ALS to speak out about the bigger picture.
 - An individual legal problem may exemplify or relate to a broader social or societal problem. The case may achieve broader social and legal change affecting a larger group of people, such as ALS clients or criminal accused generally.

- Strategic litigation has the potential to bring about systemic change affecting disadvantaged and marginalised groups in our community.
- The case may promote the reputation of the legal system through an improved sense of access to justice.
- The litigation and may raise awareness and encourage public debate.
- The increased awareness and public debate of the broader issues may in turn trigger large-scale policy changes.
- Even if the individual case is lost, a shift in the debate and policy in the area may still result.
- The strategic litigation process is productive for lawyers in the developing and refining of legal arguments, theories, ideas and viewpoints (often beyond the scope of the individual case). This is particularly the case in relation to understanding the underpinning policy ideals of the law

Potential pitfalls

6. There are, however, risks:

- The case may make bad law. (The precedent-setting effect of appellate litigation cuts both ways.)
- The case may prompt a response from the police or other organisations or individuals to lobby against the desired reform.
- The issues of the case may be difficult for the public or the media to understand.
- The litigation may cause some backlash against the client or their community.
- The case may undermine the judicial and criminal justice systems by highlighting injustices or abuses of power, inadequacies of the system or unfairness in a particular field of operation of the law.
- Pursuing the case is likely to use up valuable and strained resources.
- The final outcome of the case is likely to be delayed by any litigation process.
- The costs implications for the client in superior courts is a risk of appellate litigation (however this risk can to a significant degree be

avoided by costs agreements with opponents whereby each party covers their own costs).

Challenges and obstacles

7. There are also a number of additional factors that may pose challenges or obstacles to pursuing a case as part of an overall strategic response to an issue. Determining the most suitable appellate jurisdiction and mode of appeal can be a difficult aspect of any case.
 - There is a tension between pursuing an appeal route in the District Court and in the Supreme Court.
 - An appeal to the District Court will generally achieve a much faster result for the client and usually resolves the matter to finality.
 - An appeal to the Supreme Court has a much greater potential for precedent-setting.
 - An appeal to the Supreme Court may also result in the matter being remitted to the original jurisdiction for final determination of the case, having the effect of further prolonging the proceedings.
 - There are obvious difficulties for a client in custody or on bail for a long period of time awaiting the finalisation of appellate litigation.
 - There are complications in bringing cases for juvenile clients.
8. There are important ethical issues to be considered for lawyers engaging in strategic litigation, particularly in relation to advising a client about the most suitable appellate route to achieve their individual goals. The key consideration will be the absolute primacy of the client's interests.

A REVIEW OF APPELLATE LITIGATION AT THE ALS

9. Over the last five years, the ALS has targeted a number of key issues in its appellate litigation. The focus has been on human rights principles such as the right not to be arbitrarily detained, equality before the law, the right against self-incrimination, the right to a fair trial and the right to be heard and the rights of and protections afforded to children.
10. This appellate litigation at the ALS can be divided into the following categories:

1. Bail, arrest and unlawful detention

Lawson v Dunlevy [2012] NSWSC 48

Williams v Director of Public Prosecutions (NSW) [2011] NSWSC 1085

Tyron Yates v The Commissioner of Corrective Services, NSW [2014] NSWSC 653

David Louie v Governor, Metropolitan Remand and Reception Centre, Silverwater Correctional Complex (unreported per Hall J, NSWSC, 7.4.14)

DW v Commissioner for Corrective Services, NSW and Director General of Attorney General and Justice (discontinued)

2. Sentencing of Aboriginal offenders and systemic disadvantage

Bugmy v The Queen [2013] HCA 37

Sentencing outcomes for traffic offenders

Sentencing of Aboriginal children and 'postcode justice'

3. Procedural fairness – a hearing free from bias; the non-attendance of an accused at court; the right to be heard and the right to appear by a lawyer; adjournments; disclosure and access to subpoenaed material

Gaudie v Local Court of NSW [2013] NSWSC 1425

Hammond v DPP [2013] NSWSC 888

Thorpe v R (unreported, District Court at Dubbo, Nicholson DCJ, 2 February 2012)

McKellar v DPP [2014] NSWSC 459

Reynold v SPA (Discontinued proceedings)

DPP v Streeting [2013] NSWSC 789

Osborne v R [2014] NSWCCA 17

4. *Doli incapax* and the law affecting children

RH v DPP (further appeal pending)

"RP" v Ellis & Anor [2011] NSWSC 442

CL v Director of Public Prosecutions (NSW) [2011] NSWSC 943

5. Forensic procedures and the inadmissibility of unlawfully obtained DNA evidence

TS v James (pending)

Daley v Brown; Pittman v Brown [2014] NSWSC 144

R v Shane Michael Knight (unreported, District Court at Dubbo, Lerve DCJ, 24.4.14)

R v Bradley Ward Ridgeway (unreported, District Court at Sydney, Townsen DCJ, 17.7.13)

R v Earl John Greenaway (unreported, District Court at Dubbo, Lerve DCJ, 12.4.13)

R v Dwayne Peckham (unreported, District Court at Dubbo, Lerve DCJ, 15.12.11)

R v Darrel Ryan; R v Ben Joseph Fitzhenry (unreported, District Court at Wagga Wagga, English DCJ, 19.10.11)

6. Particular offending

Hammond v R [2013] NSWCCA 93

Lillian Ratcliff v The Queen (Special Leave application pending)

11. A number of cases were strategic from the outset. Other cases have emerged as opportunities for effecting broader change and fitting into the overall strategic approach of achieving justice for Aboriginal accused in the criminal justice system.
12. Alongside a number of cases, the ALS has engaged in strategic campaigning and lobbying of government on systemic issues and raised the broader issues in the media to promote awareness and prompt public debate.

IDEAS FOR FUTURE STRATEGIC LITIGATION

1. Appearing in the absence of the accused and children: s 12 *Children (Criminal Proceedings) Act 1987*
2. Curfew checks in the absence of an enforcement condition – improper conduct in circumventing the legislative regime
3. Bail cut-off times and “as soon as reasonably practicable” test
4. Affray and “the person of reasonable firmness”
5. *Monis* reasoning on political communication – offensive language etc
6. Break and “knowledge” element: *He Kaw Teh* reasoning regarding lack of consent and knowledge of lack of consent
7. Admissions: the admissibility of roadside interviews; persistent questioning by police in custody after ALS confirmation of exercising right to silence; and the use of CNS evidence on the *voir dire*
8. Sentencing post-*Bugmy* and section 21A(5AA) special rule for self-induced intoxication: distinction between self-induced and circumstantially-induced intoxication
9. The new police powers: arrest, search, detention period, safeguards
10. The new *Bail Act 2013*