



JOHN SLEE

What makes a litigant vexatious

JUSTICE Roden's refusal earlier this month to declare Katherine Wentworth a vexatious litigant must have vexed some people.

It can hardly have pleased the 19 people she has accused of conspiring to prevent her obtaining redress for the assaults she alleges her former husband Gordon John Rogers committed against her on January 29, 1977.

Justice Roden said he had no doubt that it was primarily Miss Wentworth's litigation against those people that led the Attorney-General to seek to have her declared a vexatious litigant.

Indeed, in his careful survey of the numerous actions brought by Miss Wentworth, Justice Roden was highly critical of her conduct of the three sets of actions against those people.

"I am in no doubt," he said, "that there was considerable abuse of process involved in all three proceedings." It was no wonder all were dismissed by the Court of Appeal, he said.

However, he gave this analysis of Miss Wentworth's conduct:

"First, she was endeavouring to pursue litigation with a view to redressing what she asserted was a very serious wrong which had been done to her, and which had brought about, and threatened to reproduce, a grave miscarriage of justice in her substantive litigation against Mr Rogers.

"Secondly, in the course of doing that, she was thrashing about and lashing out wildly, with insufficient regard for the rights of others and with a lack of understanding of the relevant principles of law and procedural requirements."

He said the Court of Appeal, in dismissing her actions, had dealt appropriately with her abuse of process. But the substance of her allegations was a different matter.

He said: "There is no abuse of process necessarily involved in the making of allegations, no matter how serious, against persons in high places. The courts must be, and are, prepared to receive and deal with such allegations. The courts must not be, and are not, outraged or affronted by them.

"Whether the defendant be barrister, doctor, policeman or judge, or whether he be 'the humblest in the land', the questions ... are the same. Are the allegations totally unsupportable? Is the claim 'utterly hopeless'? Is it made without any reasonable ground?"

He also said: "Even the most difficult, irritating and frustrating of litigants can be the victims of wrongs perpetrated by others. When they claim, that they have been wronged, it is only in the rarest of cases, in my view, that there should be any fetter upon their right of access to the courts to pursue the appropriate remedies."

It could be proper to pursue "ancillary allegations" in pursuit of a substantive claim.

Justice Roden said Miss Wentworth's "thrashing about and lashing out wildly" had produced some actions which could be said to be vexatious. He said proceedings for contempt of court against Sly and Russell, solicitors, and against a barrister and a solicitor acting for Mr Rogers were also vexatious.

But actions against some others she had accused of conspiracy were not without foundation, as was clear from the Court of Appeal's decision to order a retrial of her damages action against her former husband.

That decision pointed to evidence that witnesses at the first trial had withheld material evidence relating to the alleged assault. There was also "compelling evidence of forgery, or at least of material alteration, in a relevant hospital record" and "an apparent change of position by a doctor as to the nature of the complaint made to him [by Miss Wentworth]".

Therefore, in the context of "the considerable body of litigation for which Miss Wentworth has been responsible as she has pursued her claim against Mr Rogers", Justice Roden said he did not think she had *habitually and persistently* and without reasonable cause instituted vexatious proceedings, within the meaning of section 84(1) of the Supreme Court Act.

Justice Roden highlighted the danger of hasty conclusions in cases such as this by noting the Court of Appeal's different evaluations on different occasions of Miss Wentworth's complaint that a solicitor had withheld evidence.

On the first occasion, Justice Kirby (with Justices Hope and Samuel agreeing) said: "The solicitor might simply have forgotten what [Miss Wentworth] had told him when he gave his evidence."

On the second occasion, this proposition seems to have been rejected, Justice Roden said. Instead, Justice Glass (with Justices Kirby and Hope agreeing) said: "According to the witness the memory of it lasted for four years but not a further four years and after eight years was incapable of revival. After making full allowance for the advantage enjoyed by the trial judge, of observing the witness's demeanour, we are satisfied that the witness was withholding material evidence and should have been treated as hostile."

Justice Roden surmises that this change came about because "the evidence was presumably subjected to closer scrutiny". But was it that simple?

It looks more like another example of the difficulty faced by a litigant in person (as Miss Wentworth was on the first occasion) compared with one who has legal representation (as she did on the second occasion).

That, surely, has a great deal to do with making a litigant appear vexatious even when she (or he) is not.