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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act* 1967 (NSW) on 27 September 1991 the Commission received the following reference from the then Attorney General, the Hon P E J Collins QC, MP:

> To inquire into and report on the following matters:
>
> 1. non-statutory criminal offences (purely common law offences);
> 2. the common law of conspiracy, especially procedural and evidentiary aspects;
> 3. the common law of complicity;
> 4. the common law of attempt; and
> 5. any related matters.
>
> In undertaking this work, the Commission is to give priority to items 1 and 2. The Commission is also to be mindful of the work being undertaken by the Standing Committee of Attorneys General supporting development of a uniform criminal code so as to avoid unnecessary duplication.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon G J Samuels AC QC (from 3 April 1993)

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Submissions

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this *Discussion Paper.* Submissions and comments must reach the Commission by **1 August 1994**. All submissions and inquiries should be directed to:

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There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or else arrange to make your submission in person.

If you would like your submission to be treated as confidential, please indicate this in your submission.

Use of submissions and confidentiality

Submissions made to the Commission may be used in two ways:

- Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to any person or organisation. However, if you would like all, or part of your submission to be treated as confidential, please indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act* 1989 (NSW).

- In preparing the final Report, the Commission may also find it useful to refer to and make mention of comments submitted in response to the *Discussion Paper*. However, if a request for confidentiality is made, it will be respected by the Commission in relation to the publication of such submissions in a Report.

1. Introduction

BACKGROUND

1.1 The terms of the Commission's reference into common law crime[1] stipulated that priority be given to those offences which are non-statutory, that is, which exist purely by virtue of the common law. To this end, the Commission commenced its inquiry by investigating the offences of barratry, maintenance and champerty.

New South Wales legislation

1.2 On 16 September 1993 the New South Wales Government introduced into State Parliament the *Legal Profession Reform Bill* 1993. This followed the release earlier in the year of the Commission's Report entitled *Scrutiny of the Legal Profession - Complaints Against Lawyers*[2], as well as a number of papers on the legal profession produced by the Commission over several years.

1.3 Cognate with the principal Bill was the *Maintenance and Champerty Abolition Bill* 1993 (NSW), the objects of which were to abolish the common law crimes and torts of maintenance and champerty. The Attorney General, the Hon J P Hannaford MLC, stated that this abolition was to be read in conjunction with those clauses of the principal Bill concerning conditional costs agreements.[3] Linking the two Bills was the then existing prohibition against legal practitioners sharing in the proceeds of litigation. The Bills sought to relax this prohibition to the extent that a legal practitioner and client could enter into a costs agreement, whereby the payment of legal costs would be contingent on the successful outcome of the action. In the event of success, such an agreement might also provide for payment by the client of a premium on top of the usual costs. In the principal Bill, strict conditions govern these costs agreements. The rules against maintenance and champerty would have presented an obstacle to the workings of such agreements, and thus led to the introduction, at short notice, of the cognate Bill.

Standing Committee of Attorneys General

1.4 The terms of reference indicate that the Commission is to be mindful of work being done by the Standing Committee of Attorneys General (SCAG). This requires a brief explanation. In June 1990, SCAG placed the issue of developing a uniform criminal code throughout Australia on its agenda.[4] The impetus for this decision came from a recognition that most jurisdictions were conducting major reviews into their respective criminal laws.[5] In September 1990, the Third International Criminal Law Congress was held in Hobart, and one major theme to emerge was the desirability of working towards achieving uniformity.[6] To this end SCAG established the Criminal Law Officers Committee (CLOC),[7] comprising an officer from each jurisdiction, who would advise his or her Attorney General on criminal law issues. Priority was given to drafting principles of criminal responsibility, and a report on this topic was published early in 1993.[8] Part 4 of that Committee's report deals with, amongst other subjects, attempt, complicity and conspiracy. Although these constitute part of our terms of reference, in order to avoid duplication we have postponed consideration of these issues until we have had an opportunity to study SCAG's findings.

PURPOSE OF THE DISCUSSION PAPER

1.5 This Discussion Paper examines the common law offences of barratry, maintenance and champerty. The introduction, and subsequent passage on 20 November 1993, of the *Maintenance and Champerty Abolition Bill* 1993 (NSW) overtook the Commission's detailed investigation of the area of champerty and maintenance. The Commission has, however, taken the decision not to abandon its inquiry into these common law crimes. We believe that the introduction of the cognate Bill was based mainly on the practical consideration that, while champerty continued to be unlawful, the provisions relating to conditional costs agreements would be

unworkable. Indeed, in the Parliamentary debate on these Bills, virtually no comment, other than that of the Attorney General, was made regarding the cognate Bill. The Commission is concerned that there are other issues pertaining to the law of maintenance and champerty that merit consideration, and which may have been overlooked in the passage of this legislation. Chapter two of the Discussion Paper examines the role of maintenance and champerty in the modern context, and raises for discussion purposes these wider concerns.

FOOTNOTES

1. Terms of reference p iv.

2. New South Wales. Law Reform Commission (Report 70, 1993).

3. New South Wales, Legislative Council *Parliamentary Debates (Hansard)* 16 September 1993 at 3279. The clauses referred to are 186-188.

4. Criminal Law Officers Committee of the Standing Committee of Attorneys General (hereinafter "CLOC") *Model Criminal Code: Chapter 2 General Principles of Criminal Responsibility* (AGPS, Canberra, 1993) at i.

5. For a summary of these initiatives see CLOC at i.

6. CLOC at ii.

7. Since renamed the Model Criminal Code Officers Committee.

8. See footnote 4 above.

2. Barratry, Maintenance and Champerty

INTRODUCTION

2.1 In 1877, the English judge, Sir James Stephen, wrote that, along with the Criminal Law Commissioners, he was of the opinion "that the offences of champerty, maintenance, and being a common barrator ought to be abolished."[1] Nearly a century later his view became law in England. In New South Wales the offence of barratry, technically at least, is still part of the law. Maintenance and champerty were abolished in November 1993.

BARRATRY

2.2 "Barratry" has a number of meanings, but the common offence involves habitually moving, exciting or maintaining suits or quarrels, whether at law or not.[2] In England, the offence was rarely prosecuted prior to its abolition in 1967,[3] the most recent case occurring in 1889 for the stirring up of a series of fraudulent actions for damages against a railway company.[4] The only Australian case the Commission has discovered dates back to 1871, and concerns an attorney of the court found to have fomented litigation.[5] The offence of "being a common barrator" was abolished in Victoria in 1969.[6]

2.3 The origin of the offence supposedly lies in the Christian belief in medieval Europe that litigation was inherently evil because it is a virtue to forgive debt, and trials were by ordeal, battle or compurgation.[7] More practical reasoning is to be found in a case from 1686, in which the Court held that a person who arrested another where the former's "design was not to recover his own right, but only to ruin and oppress his neighbour" was guilty of barratry.[8] In *Williams v Page,*[9] Romilly MR stated:

> It is then strongly and properly urged that this Court is bound to protect strangers against the injury arising from the stirring up of quarrels and law suits, and that it ought to repress every tendency to that offence, which is called, in legal language, barratry... It is extremely difficult to draw the proper boundary between advice, encouragement, and instigation of a client to institute a suit, and all these may proceed from an earnest desire to redress the wrongs suffered by a p oor and uninfluential person.

2.4 While the offence of barratry has fallen into disuse in this jurisdiction,[10] in the United States of America the term seems to be enjoying something of a revival. This is because of its association with the more extreme forms of advertising and solicitation by lawyers, which could be used to stir up litigation.[11] For example, in 1990 several Texan lawyers faced barratry charges for allegedly soliciting clients after a motor vehicle accident in which there were a number of fatalities. The *American Bar Association Journal* stated that "at the time of the accident, there were numerous reports of lawyers flocking to the disaster site from throughout Texas", and the relative of one victim said that one lawyer had offered her $5000 and promised to buy her a new house, while another assisted her in buying a new van.[12]

2.5 Such "ambulance chasing" is prohibited in New South Wales. Clauses 20 and 22 of the *Legal Profession Regulation* 1987 (as amended) govern advertising by solicitors and prohibit conduct which is improper or will bring the profession into disrepute. Advertising for clients amongst those who have suffered trauma or injury as a result of a particular event are proscribed if the form of advertisement is likely to offend.[13] In early 1993 the Council of the Law Society published supplemental guidelines to assist the profession in interpreting the Regulation.[14] The Council stated that it considers clauses 20 and 22 breached if, among other things, a solicitor "improperly incites litigation against a specific person or a specific group of persons" or directly solicits for work in a way which would be likely to offend or distress, whether by means of advertising or other activity.[15] It is difficult

to imagine that this offence would have much application other than to the legal profession, and even here its relevance must be doubted for, as the foregoing shows, rules governing the professional conduct of lawyers proscribe barratrous behaviour.

2.6 The evil which the offence of barratry was designed to overcome is adequately addressed by other existing means. In relation to legal practitioners the offence has been superseded by rules governing the profession, whilst the general population is subject to the rules about abuse of process. Consequently, the Commission's tentative view is that the offence should be abolished.

Proposal

The Commission tentatively proposes the formal abolition of the offence of barratry.

MAINTENANCE AND CHAMPERTY

Introduction

2.7 Maintenance[16] is the ancient common law crime and tort of assisting a party in litigation without lawful justification. Champerty[17] is an aggravated form of maintenance, in which the maintainer receives something of value in return for the assistance given. As stated above, the crimes and torts of maintenance and champerty were recently abolished in New South Wales.

2.8 Why were such actions deemed unlawful? In 1895, Lord Esher, MR, observed that the offence was grounded on the fear of encouraging "mischievous" litigation:

> The doctrine of maintenance ... does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.[18]

2.9 The law in this area developed as a response to perceived abuse of the judicial process in medieval England, whereby interference in litigation by powerful nobles and officials was a tactic used to harass and oppress private individuals. Champerty was especially feared, because the champertor's financial stake in the court action provided a strong temptation to suborn justices and witnesses, and to pursue worthless claims which a defendant may have lacked resources to withstand.[19]

2.10 The public policy considerations which shaped the doctrine of maintenance in the Middle Ages changed with time. The courts tended to broaden the class of interests deemed to have legal justification. Lord Denning MR has commented that:

> Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side.[20]

2.11 Trading associations, friendly societies, political parties and legal aid commissions are further examples of bodies which could lawfully provide litigation assistance.

2.12 The decline of the law of maintenance is reflected in the fact that there is no record of a criminal prosecution for many years - if at all - for maintenance or champerty in New South Wales or elsewhere in

Australia.[21] As criminal offences, maintenance and champerty were considered a "dead letter" in the United Kingdom and Victoria before their abolition in the 1960s.[22] In *Clyne v The New South Wales Bar Association*, the High Court of Australia expressed grave doubts about whether these crimes were still viable, referring to maintenance as "an obscure and dubious offence, of which we have found no reported instance" and noting that while maintenance "was at one time a crime of great importance ... the reason for its importance disappeared centuries ago".[23]

2.13 In short, the common perception of maintenance is that as a shield against the oppressive misuse of the judicial system it had become unwieldy. The offence had become subject to many exceptions and led to compensation in few cases. The view prevailed that the offence had outlived its usefulness, and its aims could be better realised in other ways. Fleming, for example, attributes the longevity of maintenance to "a persisting, if perhaps exaggerated, fear that it is still needed as a safeguard against blackmail and speculation in lawsuits prone to increase litigation." He adds, however, that "this policy against maintenance is, on the whole, amply safeguarded by the availability of penal sanctions and by the continued refusal to recognise assignment of causes of action in tort."[24]

2.14 As stated in the previous chapter, maintenance and champerty were abolished as crimes and torts by the *Maintenance and Champerty Abolition Act* 1993 (NSW).

Contemporary issues in maintenance and champerty

2.15 Given the paucity of civil actions for maintenance, and the small likelihood of being awarded compensation even where maintenance was proved, it is no wonder that calls for the abolition of the tort on the grounds of obsolescence were common. The Commission believes, however, that in abolishing the crimes, and in particular the torts, of maintenance and champerty, some of the legal implications may have been overlooked, and that these at least merit consideration. The Commission therefore invites public comment on the discussion following.

Access to justice

2.16 The words of Lord Esher which began this section make the point that the doctrine of maintenance is founded on considerations of public policy. Originally, as we have said, this policy was the discouragement of "interference" in litigation, which, it was feared, would subvert justice. Our perception of justice has altered with time. Once, the law assumed the maintainer's motives to be improper. Today society recognises the injustice which may result from wealth determining who has access to the law, and instead favours the increased accessibility by the public to institutions such as courts. A number of socially sanctioned means exist to facilitate the initiation or defence of an action, by providing legal and financial assistance. Nevertheless, the Senate Standing Committee on Legal and Constitutional Affairs stated that "the high cost of justice in Australia has resulted in the legal system being inaccessible to sections of the community", and quoted the Chief Justice of South Australia saying that:

> ...once it is grasped that justice fails radically unless citizens, irrespective of means, have access to the professional assistance necessary to vindicate their legal rights, legal aid is seen to be as natural and essential a component of legal justice as the judiciary, the court buildings and the court staff.[25]

2.17 Traditionally, legal disputes have been resolved through what one commentator calls the "Rolls-Royce method", namely, litigation, the expense of which has put it out of the grasp of most people.[26] In recent years, many developments have been introduced here and overseas in an attempt to achieve cost-effective justice. These include procedural reforms, the establishment of specialised tribunals, and the increased use of mediation and alternative dispute resolution. Litigation support is another trend towards countering the high cost of court actions, and its acceptance and spread are indicative of the law turning its back on the old rule. Litigation support comes in many forms, including legal aid, representative actions, and funding from insurance companies, trade unions and special funds, such as Western Australia's Litigation Assistance Fund.[27] The provisions in the *Legal Profession Reform Act* 1993 (NSW) allowing conditional costs agreements are also part of this trend.

2.18 It appears, therefore, that over centuries there has been a diametric change in attitude towards the maintenance of litigation, from an evil to a boon. It should be acknowledged, however, that there are still other considerations which require balancing. We will discuss some of these below, and reproduce the following extract from a recent Victorian case to highlight some of the issues:

> What circumstances sufficed in law to justify the support of litigation by a third party? What is the real and bona fide interest in litigation which would justify a stranger in intermeddling in it? These have been questions of great difficulty in which decisions, even of 50 years ago are of limited assistance. Any modern formulation must have regard to currently accepted notions at a time when much private litigation is funded by the State, by insurance companies or by trade unions; where class actions may involve the introduction of outside funding; where book debts are assigned or factored; where contingency fees are not looked upon with unqualified dismay ... It must cope with the acceptance by the community that the preparedness of a solicitor to fund an action for an impecunious client and to agree to recoup this expenditure from the proceeds of the action is in most cases seen as a commendable public service consistent with the best traditions of the profession .... On the other hand, there is an obvious difficulty where an impecunious nominal plaintiff is funded by a wealthy supporter which has an interest in the outcome of the litigation without any risk of paying costs if the maintained plaintiff fails. Furthermore, such a maintainer is not easily amenable to the ordinary processes of the court, such as discovery or interlocutory directions ...[28]

Implications arising from abolition of maintenance and champerty

2.19 The abolition of some ancient and little used common law crimes and torts may appear an innocuous exercise. However, the virtual removal of maintenance and champerty from the legal lexicon may have unexpected and far-reaching consequences on the way our legal system works. As one of its prime objectives the *Maintenance and Champerty Abolition Act* 1993 (NSW) has opened the way for contingency fee arrangements in this State. For years, lawyers in this and other jurisdictions have debated the merits of loosening the maintenance and champerty rules in order to permit contingency fee arrangements. The *Legal Profession Reform Act* 1993 (NSW) has resolved that issue in this State through the compromise solution of sanctioning conditional fee agreements. There are, however, a number of other implications arising from the abolition of the common law crimes and torts of maintenance and champerty.

Speculation in lawsuits

2.20 An issue which the Commission feels must arise inevitably as a result of these changes is the extent to which outside financing of and speculation in lawsuits should now be permitted.

2.21 The *Maintenance and Champerty Abolition Act* 1993 (NSW) contains a safety net provision which preserves the illegality of contracts involving maintenance and champerty where such contracts are deemed to be contrary to public policy.[29] A similar provision applies in Great Britain and Victoria, where maintenance and champerty were abolished a quarter of a century ago.[30] There is not yet much case law elucidating the type of contracts which will be deemed to be contrary to public policy in this context. As well, the common law regards agreements "savouring of maintenance and champerty" as tainted and unenforceable.[31] For example, the law will not recognise an agreement to assign a bare right of action in contract or tort, such as a damages claim for personal injury or defamation.[32]

2.22 The assignment of causes of action is our starting point. The effect on this of the *Criminal Law Act* 1967 (UK) was considered for the first time in *Trendtex Trading Corporation v Credit Suisse*.[33] In the English Court of Appeal Lord Denning MR stated that the Act had:

> abolished the crime of maintenance, including champerty: so that no one can be punished for it. It did away with the tort of maintenance, including champerty: so that no one can be made liable for it. By striking down both the crime and the tort, it seems to me that the statute struck down our old cases as to what constitutes maintenance, including champerty: in so far as they were based on an out-dated policy. But it did not strike down our modern cases in so far as they carry out the public policy to today.[34]

2.23 The facts of the case were as follows. Trendtex, a Swiss company, sold cement for shipment to Nigeria. Payment for the shipment was to be made under a letter of credit issued by the Central Bank of Nigeria ("CBN"), which CBN subsequently failed to honour. Trendtex sued CBN. Heavily indebted to Credit Suisse, which had provided financial assistance in connection with the original cement contract as well as the subsequent litigation, Trendtex assigned its right of action to Credit Suisse. Credit Suisse in turn assigned its right of action to a third party (as it was entitled to do under specific terms of its agreement with Trendtex) for US$1,100,000, earning a profit for Credit Suisse. The third party then went on to settle the matter with CBN for US$8,000,000, netting the undisclosed third party a profit of $6,900,000 within a matter of weeks. Trendtex commenced an action against Credit Suisse, claiming that the agreement between them, purporting to assign the right of action against CBN, was void as contrary to public policy and offending against the law of maintenance and champerty.

2.24 In the course of his judgment in the Court of Appeal, which dismissed Trendtex's appeal, Lord Denning stated that as a result of the changes brought about by the *Criminal Law Act* 1967 referred to above:

> The old saying that you cannot assign a "bare right to litigate" is gone. The correct proposition is that you cannot assign a personal right to litigate, that is, which is in its nature personal to you yourself. But you can assign an impersonal right to litigate, that is, which is in its nature, a proprietary right: provided that the circumstances are such as reasonably to warrant it.[35]

2.25 Lord Roskill disputed this proposition when the matter came before the House of Lords, regarding the non-assignment of a bare right to litigate as "a fundamental principle of our law".[36] Nevertheless, he agreed that the law had softened:

> ... just as the law became more liberal in its approach to what was *lawful* maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. ...it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty...[37]

2.26 The House of Lords held that had the agreement involved only Trendtex and Credit Suisse, the assignment would have been valid because the latter had a "genuine and substantial interest in the success of the CBN litigation."[38] The "vice" was the introduction of a third party, which opened up the possibility of a profit being made by that third party or even by Credit Suisse itself out of the assignment of the cause of action. Lord Wilberforce was of the view that "this manifestly 'savours of champerty,' since it involves trafficking in litigation - a type of transaction which, under English law, is contrary to public policy."[39] Likewise, Lord Roskill viewed the agreement as offending "for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils."[40] Despite the finding by the Court that the assignment was invalid under English law, the appeal by Trendtex was dismissed. The company was unable to overturn a stay of action granted to Credit Suisse on the basis that, under the agreement, it was for a Swiss court to determine what effect the invalidity had on the agreement as a whole.

2.27 If, in the *Trendtex* case, the third party had, prior to taking the assignment from Credit Suisse of a right of action, acquired some proprietary interest in Trendtex, or perhaps even in Credit Suisse, it may not have been so easy to dismiss the notion that the third party had no "genuine commercial interest" in the claim. This, in effect, is what is already occurring in the United States. Intellectual property litigation has provided a lucrative new field for speculators.[41] A number of litigation investment companies have been established, investing in intellectual property suits brought by inventors against large corporations. In some states these companies fell foul of champerty laws leading them to adopt a new strategy of acquiring the rights to patents and suing in their own names, rather than trying to acquire a right of action or be regarded as sharing in the proceeds of litigation. Syndication of lawsuits might be seen as a logical next step in a jurisdiction where contingency fee arrangements and organisations supporting public interest litigation have existed for some years.[42] What these situations have in common when they work as intended is that plaintiffs who otherwise lack financial means are given the opportunity to pursue meritorious claims. Supporters also contend that it is merely bringing financing arrangements into the open that were previously covert. Critics argue that profit making in this way perverts the entire justice system, which is intended to compensate injured parties, not reward shrewd investors. The issue

arises as to whether an agreement between a party and its investors should be invalidated automatically because it is champertous, or whether other factors should be taken into account. In the context of the New South Wales legislation this would depend on whether such agreements were regarded as contravening public policy.

2.28 One American commentator advocates syndication on the following basis:

> Some courts have recognised the many exceptions to the principles of maintenance and champerty and have declined to invalidate agreements on those grounds unless the maintainers or champertors are clearly officious meddlers and are interfering in lawsuits for the purpose of stirring up strife and continuing unwarranted litigation. It is time for all legislatures and courts to eliminate prohibitions against maintenance and champerty. Most of the evils those doctrines addressed are no longer serious threats and those that are can be dealt with in ways that do not eliminate the advantages gained by permitting investments in litigation.[43]

2.29 Supporters of syndication argue that it is unfair if a wealthy defendant can force a poor plaintiff to abandon a meritorious claim or accept an inadequate settlement simply because of greater financial staying power.[44] If, on the other hand, an arrangement between a plaintiff and its maintainers was used oppressively against the defendant or to maintain a frivolous claim, then the defendant should be able to assert that arrangement as a defence.[45] This raises abuse of process issues which will be discussed below.

2.30 As we have noted in the previous section, increasing attention is being paid to the accessibility of justice, particularly when it is reduced to an issue of affordability. While the notion of speculation in lawsuits may be anathema to some, the countervailing consideration is that it has potential to provide access to the courts for many with a genuine cause of action but insufficient means to enforce their rights. The trend in American courts has been to declare that the public interest and justice for all are better served by tipping the scales in favour of increased availability of financial support for, rather than the discouragement of, litigation. Market-based approaches to the provision of professional services have existed for some time in the United States. Now, with much of the law pertaining to maintenance and champerty recently abolished in this jurisdiction, lawmakers have an excellent opportunity to turn their attention to the public policy issues, defining the legal limits to agreements which were previously champertous. Specific attention should now be paid to formulating policy and enacting rules with regard to the syndication of lawsuits.

Other litigation support contracts

2.31 The issue of whether a contract will be regarded as contravening public policy in the context of champerty was considered recently in some English cases concerning the credit hire of cars. In one case very recently before the House of Lords, Lord Mustill noted that 25 years after the passing of the Act abolishing the ancient crimes and torts of maintenance and champerty

> they are being ascribed a vigorous new life, in a context as far away from the local oppressions practised by overweening magnates in the 15th century as one could imagine: namely, the temporary provision of substitute private cars to motorists whose own vehicles have been put out of commission by road accidents.[46]

2.32 The facts in *Sanders v Templer, Giles v Thompson* and *Devlin v Baslington*[47] were, for the purposes of our discussion, substantially the same. Car hire firms agreed with potential plaintiffs, whose cars were being repaired due to motor vehicle accidents, to supply them with free replacement vehicles. In turn the plaintiffs cooperated with the hirers in prosecuting claims against the defendants, and paid the hiring charges to the firms from the damages they received. The car hire firms targeted cases where the plaintiff was very likely to succeed and had not been contributorily negligent, and where the defendant was insured. The insurance companies of the nominal defendants denied recoverability of the car hire, one ground being that the agreements between the hirers and the plaintiffs were champertous.

2.33 The English Court of Appeal, in its judgment delivered in January 1993, found that the head of public policy which rendered champertous agreements illegal was based on a concern to protect the integrity of public justice. Thus the legality of the agreements did not depend on a fixed rule of law, but on whether they tended to corrupt public justice. The car hire firms argued that they had a genuine commercial interest in the action as they

sought to recover the costs of providing replacement cars to the plaintiffs. This argument was rejected; for an interest to qualify as a justification for maintaining an action it had to arise independently of the alleged champertous agreement. In this case the car hire firms were, in effect, buying their way into the litigation by having created an interest by means of these agreements. Nevertheless, the plaintiffs succeeded as the Court held that the agreements were not champertous. In the "classic" champerty case, the champertor shared in the proceeds of litigation. Here, the car hire firms were not sharing in the spoils, but were merely seeking recovery of moneys due for the hire of their vehicles. Their Lordships added that the agreements, had not posed a risk of corrupting public justice through suborning witnesses or by the dishonest inflation of claims.

2.34 The defendants in two of the cases appealed to the House of Lords, which gave judgment on 26 May 1993.[48] The appeals were dismissed on all grounds, except a relatively minor one in respect of interest payable on part of the damages. The House of Lords was of the view that a party pressing into service the old offence of champerty had to keep sight of the underlying principle. In Lord Mustill's words:

> I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether ... there is wanton and officious intermeddling with the disputes of others in where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.[49]

2.35 Here, the House of Lords held that there was nothing officious or wanton in the hire companies' intervention in the litigation. The question had to be considered in terms of the risks to the administration of justice and to the interests of the motorist. The potential risks to the administration of justice were said by the defendants to lie in witnesses exaggerating when giving their evidence, and the encouragement given to motorists to hire cars, at inflated rates, when they were not really required, because they would have to be paid for by the insurers. Their Lordships said these arguments were much exaggerated. On the first point, regarding witnesses, they asked "can it seriously be said that because the claim is backed by a garage the medical evidence will be seriously in danger of exaggeration?"[50] On the second point, their Lordships felt confident that "shrewd and experienced insurers" and "resourceful lawyers" would bring to bear the requisite knowledge to ensure that unreasonable claims would fail.[51] The House of Lords reiterated the important point made in the Court below that the hire company's profit derived from the provision of a genuine service, external to the litigation, and not from the litigation itself.[52]

2.36 Some commentators have called the offer made by the car hire firms to the plaintiffs "a sophisticated form of ambulance chasing" which should "therefore, not be allowed".[53] In a sense this *is* ambulance chasing, in that there is careful targeting of prospective plaintiffs, some of whom may not have pursued court action but for the offer of the car hire firm to provide legal assistance. On the other hand, the decision exemplifies the increasingly liberal attitude of courts towards litigation support, for, as the Court of Appeal found,

> (i)f the court were to strike down the agreements it would interfere with the liberty of action of individual and potential users of the car hire schemes. A ruling that the agreements were contrary to public policy might deprive thousands of people with meritorious claims from effective access to civil justice and from hiring replacement cars when they reasonably needed to do so.[54]

2.37 Like the syndication schemes discussed earlier, this "entrepreneurial" use of maintenance has arisen following the relaxation of the rules against maintenance and champerty. It has allowed vehicle accident victims with valid causes of action to recover reasonably incurred expenses, which hitherto would not have been recoverable because of gaps existing in insurance coverage. In this sense an injustice has been corrected. However, if the agreements had been found to have contravened public policy, and therefore illegal and unenforceable, the position of the plaintiffs is unclear. Would they be liable to the car hire companies for the car hire charges? It could be argued that the Court would not assist the companies in trying to recoup the charges because these arose under an illegal contract. On the other hand, the company might rely not on the contract at all, but on an independent claim for restitution arising from the doctrine of unjust enrichment.[55] These uncertainties will arise in general contract law and ar e not peculiar to this context. They do, however,

demonstrate the sort of problems that will almost certainly confront courts in the future as they are called on to judge the implications wrought by the legislative changes.

Remedies against interference with litigation

Intermeddling in civil litigation

2.38 As the various judicial statements quoted above indicate, the abolition of maintenance and champerty does not mean the law is no longer concerned with the abuses, such as intermeddling in disputes or oppression of opponents, which these offences sought to remedy. Throughout the past century maintenance and champerty have had greater relevance in tort than in criminal law. In theory, an action could lie for intermeddling in civil litigation. In practice, however, a successful plaintiff in a civil action for maintenance was unlikely to recover damages. The decision of the House of Lords in *Neville v London "Express" Newspaper Limited*[56] is authority for the proposition that the plaintiff could recover only where there was proof of special damage; that is, actual monetary loss, capable of precise assessment. This did not include moneys expended in discharging legal obligations or in endeavouring to evade them, so in many, if not most, cases, there would be no entitlement to compensation. In the more likely scenario where the maintained action failed, authority on the issue of damages recoverable for maintenance is scarce.

2.39 In *William Hill (Park Lane) v Sunday Pictorial Newspapers (1920) Ltd,*[57] the plaintiff sued for maintenance, alleging loss resulting from legal costs in successfully defending an action brought by L and maintained by the defendant. The Court held that the defendant's provision of counsel's fee for L did constitute maintenance of a tortious character; nevertheless, the maintenance was not actionable, as there was no evidence that L had been caused to continue his action by the promise of financial assistance. This was despite the fact that the monetary assistance was given after L's solicitor had advised the defendant's legal department that L might have to abandon his action for lack of funds.

2.40 The 1984 Queensland case of *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd*[58] was one in which damages *were* awarded for maintenance. The plaintiff builder had undertaken to do work for the defendant. Under the terms of their contract, the plaintiff was to pay its subcontractors within seven days of receiving from the defendant payment which included an amount for the subcontractors. Three subcontractors were owed money, but the defendant had neither paid the plaintiff nor paid the subcontractors directly, as it could elect to do. Instead, the defendant came to an agreement with the subcontractors, whereby it would lend each subcontractor the amount owing to him, on condition that each subcontractor would "institute and diligently prosecute to judgment" an action against the plaintiff for debt and thereafter enforce judgment.

2.41 The defendant's solicitors closely scrutinised the subcontractors' adherence to the agreement, until the plaintiff obtained leave to amend its statement of claim in an action already commenced, to claim damages for maintenance. After that, as McPherson J noted, the defendant's enthusiasm waned. The judge had no hesitation in finding that the conduct of the defendant amounted to maintenance and lacked legal justification, the "manifest object" of the arrangement being "to embarrass the plaintiff financially and if possible to procure its winding up and so prevent prosecution of the plaintiff's claim" in a related matter.[59] The plaintiff was successful in showing that it had suffered special damage, arising from the refusal of its bank to provide bank guarantees and an overdraft as it had done in the past, this refusal resulting in part from its becoming aware that a writ had been issued against the plaintiff. This situation forced the plaintiff to accept alternative financial accommodation at higher interest rates than previously charged, which was adjudged to amount to loss suffered as a consequence of the maintained proceedings.[60] *Scott's* case is a relatively rare but clear illustration of the type of injustice which the offence of maintenance actually was intended to redress.

2.42 Maintenance and champerty constitute potential abuse of the judicial process, as demonstrated by the *J C Scott Constructions* case.[61] It was feared that through such conduct "outsiders" could gain a foothold in litigation, to be used not in the genuine pursuit of justice, but to oppress the other party, using dubious methods to achieve this aim. Courts have expressed this basic concern in a number of ways:

> All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.[62]

> It [maintenance] is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.[63]

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.[64]

2.43 As these comments show, the law suspected the motives of "meddlers" in litigation, and was perhaps somewhat limited in the sanctions available to it, short of totally prohibiting maintenance. Where, as in *Scott's* case, the legal process is used for a purpose other than that which it was intended to serve, the party aggrieved may have an administrative remedy or a civil action in tort for damages.

Inherent jurisdiction of the court

2.44 In addition to the jurisdiction conferred by the rules,[65] the Court has inherent jurisdiction to control proceedings.[66] Thus, it can prevent an abuse, such as the employment of the judicial process as an instrument of oppression,[67] by such means as termination of proceedings. In *Packer v Meagher*[68] Hunt J stated:

> The legal process of a court is being abused when it is being used to exert pressure to effect an object not within the scope of the process ...; or where it is used for a purpose other than that for which the proceedings are properly designed and exist ...; or where the plaintiff in those proceedings is seeking some collateral advantage beyond what the law offers... .

2.45 More recently, in the New South Wales Court of Appeal, Mahoney JA said:

> I have elsewhere stated my view as to whether and when a court may stay or otherwise deal with a proceeding which is an abuse of its process. I do not repeat in detail what I there have said. It is my opinion that if the purpose of a plaintiff in bringing or pursuing a proceeding is to achieve an object which is outside the relief for which the proceeding may be brought then prima facie there is an abuse of the court's process and the court may stay or otherwise deal with the proceeding to prevent that abuse. ...In some cases the plaintiff may have two objects, one acceptable and the other not acceptable and therefore an abuse of the court's process. In such cases, it will be necessary to consider whether, notwithstanding there is an acceptable object, the proceeding may yet be an abuse because of the unacceptable object, and in what circumstances it will be so.[69]

Liability for costs

2.46 One possibility open to the Court is to make a maintainer liable for costs where it has supported an impecunious party in an unsuccessful action. In *Singh v Observer Ltd*[70] the Court held that its jurisdiction with regard to costs did extend to maintainers. The trial judge stated:

> I am glad to be able to say that the court would not be helpless to make an order, should it be proved that an action has truly been kept going purely because of outside financing, and thus to have been maintained, without the maintainer having any interest whatsoever in the litigation, and by persons who hope never to be made liable for a penny of the other side's costs, should their action fail. It would surely be contrary to justice so to restrict the operation of s 51 [of the *Supreme Court Act* 1981 (UK)]. ... Insurance companies are subrogated to their insured's rights, and both they and unions invariably pay the costs of unsuccessful litigation. Otherwise, injustice could certainly result and I do not believe that if, for example, unions decided simply to refuse to pay costs in these cases, the court would not step in.[71]

2.47 Section 51 of the *Supreme Court Act* 1981 (UK) is in terms similar to those of s 76 of the *Supreme Court Act* 1970 (NSW), which provides, in part, as follows:

> (1) Subject to this Act and the rules and subject to any other Act -

> (a) costs shall be in the discretion of the Court;
>
> (b) the Court shall have full power to determine by whom and to what extent costs are to be paid; and
>
> (c) the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.

2.48 Part 52 rule 4(2) of the *Supreme Court Rules* 1970 (NSW) states that the Court, in exercising its discretion under s 76 shall not make an order for costs against a non-party, but this is subject to subrule (5). Subrule (5) lists circumstances in which a Court may make such an order, such as an order for the payment of the costs of a party to proceedings occasioned by an abuse of process.

2.49 In the recent case of *Knight v FP Special Assets Ltd*,[72] the High Court considered whether the Supreme Court of Queensland had jurisdiction to order costs against non-parties, the receivers and managers of two insolvent companies. The majority, in finding that the Court did have the jurisdiction, stated:

> For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, *where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation*. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made (emphasis added).[73]

2.50 The category of case proposed by the High Court leaves open the question of whether such an order could be made against a non-party who has merely provided financial or other support, but who could not be said to have played an active role in conducting the litigation, or even to have an interest in its subject.

Abuse of process

2.51 As well as the court's powers in this regard, a person injured by a proceeding which is an abuse of process may have recourse to a civil action for damages. The tort of abuse of process[74] may lie where a plaintiff can prove damage resulting from the institution of criminal or civil proceedings against the plaintiff which had an ulterior or collateral purpose.[75] To constitute an abuse of process proceedings must be oppressive or vexatious.[76] The plaintiff must establish that the ulterior purpose was the predominant object of the process.[77]

2.52 An injured party is not precluded from claiming damages for the tort merely because the alternative of having the process struck out is available.[78] The latter remedy has shortcomings. It is subject to limitations on the circumstances in which it may be employed, and various criteria which the defendant must meet in order to succeed in its application.[79] It also fails to provide compensation to the person suffering the wrong.[80] On the other hand, there may be considerable difficulties in establishing the elements necessary for a successful tort action. In *Hanrahan v Ainsworth*[81] Clarke JA stated:

> Proof that a plaintiff brought proceedings in the hope, or with the intention, that his action in doing so would bring him some advantage unassociated with his action would not establish, relevantly, an abuse of process. It would be necessary to go further and show that the proceedings were used to gain an advantage not within the scope of the process in order to establish an abuse, for it is the use to which the proceedings are put, and not their institution or maintenance, that constitutes the abuse.

2.53 In other words, the defendant must show not only that the intent behind initiating proceedings was improper, but also that the improper intent was being realised. As the extract above makes clear, the mere maintenance of such proceedings is not actionable. Presumably, where a party brings an action for a proper purpose, but is maintained in that action by another with an ulterior purpose, no cause of action will lie. It is

arguable that there *should* be no remedy in such a case, because the public interest is better served by the facilitation of a genuine cause of action with potential to enforce rights than by punishing a maintainer for impure motives and consequently extinguishing such an action for lack of funds.

2.54 The converse to this might be that a defendant against whom a maintained action is brought may be put to unnecessary expense defending the action brought against it by a plaintiff assisted by a "deep pocket". Injustice may occur if lack of funds leads to capitulation by the defendant. Of course the same scenario is possible without a maintainer: parties in litigation may be financial unequals. Maintenance of an action in these circumstances is indicative of the much wider problem of potential denial of justice, already referred to above, brought about by the differing financial means of the parties. The potential for injustice, however, is exacerbated by the maintainer's lack of automatic accountability for costs, let alone damages, in the event of a victory by the other side.

CONCLUSION

2.55 The considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice.

2.56 There are several implications arising from the abolition of the common law crimes and torts of maintenance and champerty, apart from the sanctioning of conditional fee agreements. It appears no detailed consideration of the repercussions of abolition has been undertaken. It is clear, from the experience of the United States and the United Kingdom, that one consequence of abolition is the proliferation of litigation support by third parties. This increase in litigation support has manifested itself, for example, in public interest litigation, speculation in law suits and the credit hire cases. A further range of issues is generated by this development. Under the legislation the illegality of contracts contrary to public policy is preserved. However, it is clear that the considerations of public policy which determine whether such agreements are illegal are in a constant state of evolution. Greater focus can be expected to be put on identifying the circumstances in which agreements involving maintenance can be said to be contrary to public policy.

2.57 Despite the abolition of the crimes and torts of maintenance and champerty, such activities may constitute an abuse of judicial process. Alternative remedies such as the tort of abuse of process and the court's general jurisdiction in cases of abuse of process may not be adequate. More attention needs to be directed at issues such as the remedies available to a party in cases where there is interference in litigation. One area which would benefit from further clarification is the extent to which a maintainer is liable for costs where it has supported an impecunious party in an unsuccessful action.

In light of the Maintenance and Champerty Abolition Act 1993 (NSW) the Commission invites comment on the following issues:

- **is there a need to regulate the way in which litigation may be supported by persons who are not parties to it?**
- **should the law relating to the illegality of contracts on the grounds of public policy be codified?**
- **is the court's power to deal with abuse of process adequate?**
- **what remedies should be available to a party where there is interference in litigation by a person who is not a party to it?**

FOOTNOTES

1. J F Stephen *A Digest of the Criminal Law* (McMillan, London, 1877) at xxxiii.

2. "In ecclesiastical law it means the simony of going abroad to purchase benefices from the See of Rome ... (and) in the law of merchant shipping, it means certain forms of misconduct and fraud..." J Burke *Dictionary of English Law* (2nd ed, Sweet and Maxwell, London, 1977) at 192.

3. *Criminal Law Act* 1967 (UK) s 13.

4. J W C Turner *Russell on Crime* (12th ed, Stevens and Sons, London, 1964) at 343.

5. *Re Gresson* (1871) 2 AJR 120.

6. *Abolition of Obsolete Offences Act* 1969 (Vic) s 2 (see also *Crimes Act* 1958 (Vic) s 322A).

7. H K Lillard "Constitutional Law - Tennessee barratry statute conflicts with the First Amendment" (1981) 11 *Memphis State University Law Review* 424 at 425.

8. *R v* - (1686) 3 Mod Rep 97, per Herbert CJ at 97-98.

9. (1858) 24 Beav 654 at 665-666.

10. The 3rd edition of *Halsbury's Laws of England* (Butterworth, London, 1952) notes that barratry is "practically obsolete" (at vol 1 para 79). The 4th edition does not even make reference to the offence in the sense discussed in this Paper.

11. Lillard at 426.

12. P Marcotte "Barratry indictments" (July 1990) 76 *American Bar Association Journal* 21.

13. Clause 20(5)(e).

14. "New advertising guidelines formulated" (Feb 1993) 31 *Law Society Journal* 67-68.

15. See *Legal Profession Reform Bill* 1993 (NSW) cl 38J.The United States Supreme Court, not convinced by the suggestion that lawyer advertising was tainted by barratry, stated "(b)ut advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action....A rule allowing restrained advertising would be in accord with the Bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.'": *Bates v State Bar of Arizona* (1977) 433 US 350 at 376-377.

16. "Maintenance" is derived from *manutenere*, signifying a taking in hand or upholding of a quarrel.

17. "Champerty" is derived from *campum partire*, to divide the land (or other matter sued for).

18. *Alabaster v Harness* [1895] 1 QB 339, 342.

19. *Giles v Thompson* [1993] 2 WLR 908 at 911.

20. *Hill v Archbold* [1968] 1 QB 686, at 694-695; see also *Martell v Consett Iron Co Ltd* [1955] 1 Ch 363, at 415, 416 (CA); *Bradlaugh v Newdegate* (1883) 11 QBD 1.

21. Watson and Purnell, Criminal Law in New South Wales, Vol 1, B (loose-leaf Law Book Co, Sydney) at para 2184. The Australian Law Reform Commission noted in *Standing in Public Interest Litigation* (Report

27 1985) that "inquiries by the Commission to State Attorneys-General in Australia disclose that there has been only one prosecution for maintenance in the past fifty years. This prosecution, which took place in 1959, was unsuccessful" (at para 340).

22. England and Wales. Law Commission. *Proposals for Reform of the Law Relating to Maintenance and Champerty.* London HMSO 1966 at para 7.

23. (1960) 104 CLR 186 at 192, 203. The case does not raise directly any question of the law relating to maintenance.

24. J G Fleming *The Law of Torts* (7th ed, Law Book Co, Sydney, 1987) at 593.

25. Australia. Senate Standing Committee on Legal and Constitutional Affairs *Cost of Legal Services and Litigation - Legal Aid: 'For richer and for poorer'* (Discussion Paper 7, 1992) quoting King CJ at para 1.7.

26. A Crockett "Access to the Law", paper presented at the VCE Legal Studies Symposium (Melbourne, 9 May 1992) at 2-3.

27. The Litigation Assistance Fund ("LAF") was launched in 1991 as a contingency legal aid scheme to assist eligible applicants to proceed with civil litigation where their financial position would otherwise have prevented them from so doing. LAF was designed to compliment the Legal Aid Commission by assisting those who would not qualify for legal aid.

28. *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 606.

29. Section 6.

30. *Criminal Law Act* 1967 (UK) s 14(2); *Wrongs Act* 1958 (Vic) s 32(2).

31. *Glegg v Bromley* [1912] 3 KB 474 at 490.

32. K E Lindgren, J W Carter and D J Harland *Contract Law in Australia* (Butterworths, Sydney, 1986) at para 927 and 1629.

33. [1982] AC 679, HL; [1980] QB 629, CA.

34. [1980] QB 629 at 653.

35. [1980] QB 629 at 657.

36. [1982] AC 679 at 703.

37. [1982] AC 679 at 703.

38. [1982] AC 679 at 694.

39. [1982] AC 679 at 694.

40. [1982] AC 679 at 702.

41. L Himelstein "Investors wanted - for lawsuits" *Business Week* 15 November 1993 at 78; C L Cooper "Champerty, anyone?" (1990) 10 *California Lawyer* January at 19; C Yang "Psst! Wanna buy a lawsuit?" (1986) 137 *Forbes* 19 May 1986 at 67.

42. S L Martin "Syndicated lawsuits: illegal champerty or new business opportunity" (1992) 30 *American Business Law Journal* 485 at 498.

43. Martin at 507.

44. Martin at 499.

45. Martin at 500.

46. *Giles v Thompson* [1993] 2 WLR 908 at 912.

47. (1993) *The Times* January 13 (CA).

48. *Giles v Thompson; Devlin v Baslington* [1993] 2 WLR 908.

49. [1993] 2 WLR 908 at 921.

50. [1993] 2 WLR 908 at 922.

51. [1993] 2 WLR 908 at 922.

52. [1993] 2 WLR 908 at 923.

53. S Catchpole and I Tenquist "Run off the road" (1992) 89 *Law Society's Gazette* 39 at 28.

54. *Sanders v Templer; Giles v Thompson; Devlin v Baslington* (1993) *The Times* January 13 (CA).

55. *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221.

56. [1919] AC 368. W T S Stallybrass in *Salmond's Law of Torts* (9th ed, Sweet & Maxwell Ltd, London, 1936) comments on this case at 669:

> Lord Atkinson and Lord Haldane held that every subject has a legal right not to be harried in Courts of justice by maintained actions brought by officious intermeddlers who have no legitimate interest in their subject matter, that therefore even if the plaintiff has lost nothing, "no not so much as a little diachylon," he will still have his action for nominal damages ...Lord Shaw and Lord Phillimore with equal logic held that maintenance is only actionable if it is to the hindrance or disturbance of common right, to the delay or distortion or withholding of justice and that the plaintiff must have suffered actual injury therefrom. Where the action maintained has succeeded, justice is not denied, the plaintiff has suffered no wrong and can obtain no damages. It is maintenance, but the justification or excuse is to be found in the righteousness of the suit, and the proof of its righteousness is its success. Lord Finlay held illogically (1) that the success of the maintained litigation is not a bar to the right of action for maintenance, but (2) that the action will not lie in the absence of proof of special damage, whilst admitting that there is no such damage where a man is compelled to discharge his legal obligations. Since Lord Finlay had a casting vote upon each proposition, the law remains in that unsatisfactory and illogical position.

57. (1961) *The Times*, April 15.

58. [1984] 2 Qd R 413.

59. [1984] 2 Qd R 430.

60. Although the initial judgment for a total of $567,982 was reduced on appeal to $499,494 the component for damages for maintenance ($9000) was not altered: appeal reported in part at [1984] 2 Qd R 432.

61. [1984] 2 Qd R 413.

62. *Prosser v Edwards*(1835) 160 ER 196 at 203.

63. *British Cash and Parcel Conveyors Ltd v Lamson Store Service Company Ltd* [1908] 1 KB 1006 at 1014, per Fletcher Moulton LJ.

64. *In re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 219-220, per Lord Denning MR.

65. See, for example, *Supreme Court Rules* 1970 Pt 13 r 5 and Pt 15 r 26.

66. B C Cairns *Australian Civil Procedure* (3rd ed, Law Book Co, Sydney, 1992) at 180.

67. Cairns at 181.

68. [1984] 3 NSWLR 486 at 492.

69. *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 98.

70. [1989] 2 All ER 751. The plaintiff applied, successfully, for leave to appeal against this decision, and in the light of further evidence adduced, to the effect that there was no maintainer involved, the defendant did not contest the appeal. The English Court of Appeal stated its view that it was a pity that matters had been allowed to reach the stage they did, and added: "It is indeed obvious that our conclusion on the facts, based as it was on material not before the judge, has changed the entire basis of the exercise by the judge of his discretion ... there would be no practical purpose in exploring the interesting and difficult questions of law which arose on the facts as they had appeared to the judge below, and we say nothing at all about that." [1989] 3 All ER 777 at 778.

71. [1989] 2 All ER 751 at 756, 757.

72. (1992) 107 ALR 585.

73. (1992) 107 ALR 585 at 595.

74. *Grainger v Hill* (1838) 4 Bing NC 212, 132 ER 769.

75. *Australian Torts Reporter* (loose-leaf, CCH, Sydney) at 46-360.

76. *Miller v Ryan* (1980) 1 NSWLR 93.

77. *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478; [1977] 2 All ER 566 at 490, 575; *Spautz v Williams* (1983) 2 NSWLR 506 at 540.

78. *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 96.

79. *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

80. *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 96, 107.

81. (1990) 22 NSWLR 73 at 118.