

New Zealand Insurance Law Association Conference  
October 2002

**ACCESS TO JUSTICE IN A  
MULTI-PARTY CONTEXT**

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# THE GLOBAL CONTEXT

# Globalisation at the Macro Level

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- Compression of time and space
- International production and marketing
- International finance
- International trade de-regulation  
(NAFTA and WTO)

# Globalisation at the Macro Level

- Single space in Europe. Brussels regulation and anti-suit injunctions. (Move or resist move of case to a country with lower damages, lower costs or a more restricted disclosure regime)
- Increasingly individual citizens experience their health, rights, finances, etc. being affected by a single defendant or group of defendants. They demand redress
- Increasingly claimant lawyers see this as a marketing opportunity.

# Impact of Globalisation on the UK Legal Market

- What drove the Woolf reforms?
- HR from Europe
- Forum shopping
- Legal aid pressures – particularly on group actions. (Benzodiazepine cost legal aid £40 million for no recovery) NB Europe wide legal aid (Perfect the single market)
- Internationalisation of English law firms with US firms following on
- Targets of opportunity for US plaintiff lawyers in Europe.

# Influence of Global Media

- International real time exchange of information (see spread of information about 9/11)
- Role of media in soliciting claims
- Role of media, manipulated by lawyers, in influencing settlement
- Use of media to win un-winnable cases or out of forum cases (*Masai v. MOD*)
- Transfer of ideas globally e.g. *Jakarta NGOs v. Governor of Jakarta* re inadequate flood defences.

# Effect of Globalisation on Litigation

- Forum shopping (e.g. London to Paris) has little impact if firm based in both
- Collapse of litigation in England and Wales
- No major move to ADR (except in the Commercial Court but see *Dunnett v. Railtrack*)
- No major move to arbitrate

# Effect of Globalisation on Litigation

- Reasons for the collapse:-
  - Forward loading (protocols)
  - Part 36
  - Corporate governance and risk management
  - In-house counsel paid by cost reduction
  - Cultural changes
  - Law firm response: early case assessment.

# Effect of Globalisation on Lawyers

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- Lawyers as entrepreneurs in the market place (experience in Canada and NZ)
- MDPs and the OFT report. TescoLaw
- Mutual recognition of foreign lawyers.

# The UK Government's response to Globalisation Issues

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- Withdrawal of legal aid – risk transfer from state to client to lawyer
- Community Legal Services Fund
- Access to Justice Act 1999
- Conditional fees
- Collective conditional fees (Trade Unions, the RAC)
- Success Fees

# The UK Government's response to Globalisation Issues

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- BTE and ATE
- Recoverability
- The claims management companies
- The liability insurer's aggressive response
- Why? Unreserved expenditure; Stock Market and interest rate decline (see EL and GovernmentRe)

# The UK Government's response to Globalisation Issues

- The effect:-
  - CFA chaos. The Allen and Overy case. The continuing regulatory problem
  - Costs chaos. 200,000 Part 8 cases in a queue for assessment
  - The Civil Justice Council programme. Fixed costs and the abolition of the indemnity principle
  - Are contingency fees the answer?
  - Is compulsory BTE or insurance run no fault schemes likely?

# THE MULTI-PARTY CONTEXT

# Globalisation and the 'Litigation Crisis'

- Individuals with rights must have remedies
- Increase in individual rights in the market context; breakdown in community solidarity; reduction in deference
- 'Do We Blame and Claim Too Much?'
- The Daily Mail and Prince Charles. The Insurance Empire fights back
- The planted stories: McDonalds; 'Welcome home. I've just had your poodle cremated'
- Impact on the senior judiciary.

# Causes of Action

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- Instant disasters UK rail crashes; 800 seat jumbos
- Creeping disasters; pharmaceuticals, Dalkon Shield; blood products

# Causes of Action

- Financial cases:-
  - Security actions
  - Competition: Sotheby's
  - Enron
  - WorldCom
  - Lloyd's
  - Equitable Life
  - Pension misselling
  - Claims against advisers (accountants and lawyers)

# Causes of Action

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- Holiday cases (600 cases - £1.5 million damages)
- UK Competition Act and Third Party Rights (HR problems)
- Novelties: GM foods.

# Causation Issues

- Pharmaceuticals; environmental cases; mass disasters (Warsaw Convention)
- Causation often determinative. Expert evidence expensive. Quantum expensive and therefore investigation and risk assessment more expensive
- Financial cases

# Causation Issues

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- Causation may be easier. Generic issues may be more focussed. Experts may be less important
- A matter of concern: migration from harder but important cases to easier but less vital ones.

# Procedural Issues

- Class Actions: juries; exemplary damages; claimants suing on behalf of a wider class; market share damages; no fee shifting (changes in the USA towards more fee shifting statutes but also defence applying more)
- Group Actions: joining together claimants' actions; cost sharing orders; more costs/less damages/less chance of winning

# Procedural Issues

- USA use of private attorney generals. Availability of low cost regimes for NGOs in Germany or France
- Consultation paper on representative actions in England and Wales. The defence response.

# Financing Issues

- USA: Auction lead lawyer or auction claims
- UK: Can you run a multi-party action on a CFA
- Investigation costs
- Firm risk sharing (Tobacco)
- Coat-tailing USA contingency fees

# Financing Issues

- What about ATE insurance? Is the same as the plaintiff's bar in the USA pooling resources in tobacco or asbestos? The separation of risk management from investment
- Prozessfinanz
- Impact of SF and ATE on the settlement point
- Claims Farmers and test cases
- TescoLaw and test cases.

# Is Canada a Model?

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- US influence but UK costs structure
- Class actions spreading across provinces
- Lawyers migrating to a 'new product line' because of workman's compensation and no fault RTA

# Is Canada a Model?

- Examples:- mass torts (personal injury); pensions; life insurance; illegal interest charges; unfair competition activity; solicitor's negligence; misrepresentation in real estate; defective construction of apartment blocks, etc.
- Recovery out of a fund either on a % or lodestar. But recovery is unpredictable: from 2.4 to 60%
- Opt in not opt out (no certification).

# Ethical Issues

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- Conflicts of interest
- Are attorneys in low value claims only interested in their costs? Is it clientless litigation?
- Ethics in contingency fees; CFAs or hourly rates
- The debarring settlement in the English tobacco case and the global market.

END