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Insight Into The Mind Of A Trial Lawyer: An International Perspective

Australian Trial Practice

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1. Introduction

Over the past 25 years much of the product liability litigation that has been conducted outside the United States has been heavily influenced, indeed sometimes driven, by US lawyers.

Many of the global multi-plaintiff actions had their origins in the United States. The first cases were often filed in the US. The fascination the rest of the world has with the US legal system coupled with the magic of the internet ensures that a claim that is filed in the US quickly becomes news globally. Foreign plaintiffs' lawyers look to their US colleagues for advice and assistance, something which is often readily provided.

From the defendant's perspective, US lawyers also play a critical role in foreign product liability litigation. Many multi-national companies are based in the US while those that are not, usually maintain significant US operations. The US legal system, combined with the sheer size of the market, inevitably means that the outcome of any litigation in the US involving a product marketed internationally is likely to have a significant impact on the defendant.

However, while the underlying facts and many of the causes of action may be similar, there are stark differences in the way cases are prepared and tried in Australia as compared to the US. This paper identifies some of the key differences between Australian and US civil procedure with a particular focus on product liability litigation. It also touches on the Australian class action procedure as many Australian product liability actions take the form of a class action.

2. Role of In House Counsel

Litigation outside the United States is an increasing reality of most global businesses. The prevalence and aggressiveness of extra-US litigation (much of which has its roots in US litigation) has only been increasing over the years, and while once it was a concern though not at the front of mind, today, with a highly globalized economy litigation exported from the US is a reality. Not only is the fact of litigation about a product immediately available to every corner of the globe, but outcomes in lawsuits, settlements and other local media pieces are similarly available and are impactful in cases commenced outside the US. Moreover, the seemingly increased collaboration with the US plaintiff’s bar presents a unique challenge in the 21st century. All of these factors combine to present a challenge to in-house counsel in coordinating US litigation and ex-US litigation concerning the same product.

In-house counsel hold the key to managing effectively multi-national litigation.

First, developing a clear and consistent global litigation strategy at the outset of litigation is critical. In the absence of such a strategy, in house counsel run the risk of different counsel in different jurisdictions pursuing defenses, taking positions, advancing theories that while successful in their jurisdiction may be contrary to the company’s broader global interests.

Second, directing the communication strategy. The importance of establishing from the outset key themes, strategies and positions cannot be overstated.

Third choosing local counsel who can work effectively and cooperatively with both US counsel and those in other jurisdictions.

3. Mode of trial

The mode of trial in Australia is very different to that in the US.

In Australia there is no constitutional right to a civil jury trial. Today, most civil proceedings in Australia are heard by a judge alone - what is known in the US as a 'bench trial'. While there are still, in very limited circumstances, some cases and aspects of defamation proceedings heard by juries in the state court system there has never been a civil jury trial in the history of the Federal Court of Australia.

On the rare occasions where a jury hears a civil case, or part of a defamation action, it will usually be heard by a jury of four, although there is a potential for a 12 person jury in the Supreme Court. There is no voire dire allowed and the parties are told nothing whatsoever about the potential jurors. The same applies in criminal trials although there will be a jury of 12. The parties can object to persons selected by ballot as jurors - in a civil trial, each party has a number of peremptory challenges equal to half the number of jurors required to constitute the jury. However, since the parties know nothing of the jurors this is done on a superficial basis - despite what some lawyers may claim about their ability to detect a potential jurors' views from the fact that they are carrying a newspaper!

Product liability claims, including those that proceed as a class action, will almost always be heard and determined by a judge sitting without a jury. The judge who hears the case must then deliver a written judgment setting out the court's material findings and conclusions. That judgment must explain why one set of evidence is accepted over another - something which is particularly important in the case of expert evidence. The Australian appellate courts have made it very clear that the trial judge must conduct a "painstaking review of the evidence" and then expose his or her reasons for relying upon one witness's evidence in preference to another[1]. A failure to refer to evidence that was "important" will lead to an inference that it was overlooked and not considered. This can be fatal on appeal as a failure to provide adequate reasons can result in the appellate court overturning the first instance decision.

This has a number of consequences for the preparation and conduct of a product liability trial. First, the evidence that is led by the parties, particularly the expert evidence, must be comprehensive. An expert's evidence-in-chief, which will be provided to the court in written form, must set out in detail the expert's conclusions and the reasoning and material that supports those conclusions. There will generally be extensive reference to the medical and scientific literature that supports those conclusions. Second, at trial the witness will be subjected to extensive cross examination that will test not just the material findings and conclusions but also the material upon which they are based. In one notable Australian medical device trial which was run as a quasi-class action, each of the plaintiffs' experts were subjected to five consecutive days of cross examination.

This can raise a number of interesting issues where an expert may have to testify in a jury trial in the United States and a bench trial in Australia in the same matter. If there is a choice, which jurisdiction should go to trial first? If the expert provides extensive written evidence in the lead

[1] See for example, *Ceva Logistics Australia Pty Ltd v Redbro Investments Pty Ltd* and the cases cited therein.

up to an Australian trial can that be used in the US proceedings? What are the consequences in the US in the event that the Australian trial proceeds first and the expert is the subject of adverse findings or criticism in the judgment of the Australian court? How is an Australian expert used to give evidence in Australian proceedings to be prepared for a US jury trial?

4. Discovery

Australian discovery is much more limited to that in the US.

First, there are no pre-trial depositions. Second, interrogatories can only be administered with leave of the court - something that is rarely given. Third, documentary discovery is now much more limited than the past[2].

General discovery will rarely be ordered. Rather, the parties will formulate categories for discovery which they will seek to agree amongst themselves. Those categories will identify a class of documents or documents by reference to their relevance to a certain transaction, device, or product. If the parties cannot agree between themselves as to the categories for discovery, they will approach the court for orders in respect of discovery. The court will then closely supervise the discovery categories and limit them as it sees fit so as to not make the discovery process too extensive or costly. This can, of course, be even more difficult than providing general discovery in that the parties are then obliged to consider large volumes of documents to determine whether or not a particular document falls within one of the categories that must be discovered. Lists of documents will then be drawn up by the parties and those lists will identify those documents over which legal professional privilege or some other privilege is claimed. The parties will allow inspection and provide copies of those documents to each other unless the subject of a claim of privilege.

Documents produced on discovery in Australian litigation are subject to a deemed or implied undertaking to the effect that that they cannot be disclosed to a third party (for example the media) or used in any other proceedings without the leave of the court until they are tendered in open court[3]. While the constraint on the collateral use of documents is referred to as an 'implied undertaking' there is nothing voluntary about the undertaking - it is a substantive obligation to the court[4]. Any breach of the implied undertaking is treated very seriously by the courts as it is considered to constitute contempt.

5. Evidence

Evidence in chief in cases before the superior courts is usually given in writing by way of a statement or affidavit. This is exchanged well before trial and in the Federal Court any objections to that evidence will be notified to the Court and other parties before the hearing commences. In some cases the objections will be determined by the trial judge before the hearing

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[2] See generally *Federal Court Rules 2011 (Cth)* Chapter 2, Part 20 'Discovery and Inspection of Documents'. Similar rules apply in the Supreme Courts of each of the States and Territories.

[3] See, for example, *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

[4] *Hearne v Street* [2008] 235 CLR 125.

commences. As a consequence, the oral evidence is largely restricted to cross-examination and any evidence in reply.

The documents which the parties wish to tender will also be exchanged and provided to the Court before the trial commences by way of a 'trial bundle'.

6. Oral argument

In Australia there is a tradition of oral argument before the courts. Motions, arguments and most appeals are not briefed as in the US - rather, counsel is expected to develop and explain the argument at an oral hearing. This probably results in longer hearings and certainly much longer appeals than in the US. At the same time there are less interlocutory motions in Australian proceedings than in a similar matter in the US. For example, applications for summary judgment are rarely made as the test applied by the courts for summary dismissal sets such a high bar that the summary judgment is rarely granted.

7. Damages

The good news for a US lawyer involved in Australian litigation is that, where a plaintiff is successful, the damages that will be awarded by the court will be significantly less than in a similar case in the US. An award of punitive or exemplary damages in any category of Australian civil litigation is extraordinarily rare. There has never been an award of exemplary damages in an Australian product liability case.

8. Costs

Australia follows the so called 'English' or 'loser pays' rule in relation to costs. That is, the unsuccessful party pays the costs of the successful party.

In this context 'costs' includes both the lawyers' professional fees and the out of pocket expenses (known as 'disbursements').

Australian lawyers are prohibited from entering into contingency fee agreements with their clients. They can however, enter into a 'no win no pay' agreement whereby the client is only liable to pay their lawyer if the case is successful.

At the same time there is a very active litigation funding market operating in Australia whereby non-lawyers can enter into a contingency agreement with a plaintiff which entitles the funder to an agreed percentage of any settlement or verdict in consideration of their payment of the costs of the proceedings to the plaintiff's lawyer.

9. Australian Class Actions Litigation

Much of the significant Australian product liability litigation, particularly drug and device claims, has proceeded by way of class actions. In part this is because the development of the Australian class action procedure introduced in 1992[5] was heavily influenced by plaintiffs'

[5] *Federal Court of Australia Amendment Act, 1991*

lawyers who had been frustrated in their unsuccessful attempts to bring class actions or multi-plaintiff claims in the Dalkon Shield and Thalidomide litigation.

In certain key respects, Australia's class action system is more plaintiff friendly than that of the US or Canada[6] and virtually identical provisions in the Victorian, New South Wales and Queensland state court systems).

First, there is no certification process. Once commenced a class action will continue to verdict or settlement unless struck out by the court in response to an application brought by the defendant. Second, there is no requirement that common issues predominate over individual issues. Rather, it is sufficient if the claims of the members of the class arise out of the "same or similar or related circumstances", there being no additional requirement that it be a central or substantial issue[7]. The common issue must involve a "substantial issue of fact or law"[8]. However, this requirement has been limited by the High Court of Australia, the country's ultimate appellate court, which has held that " … 'substantial' does not indicate that which is 'large' or 'of special significance' or would 'have a major impact on the ... litigation' but, rather, is directed to issues which are 'real or of substance"[9]. Third, the Australian class action procedure makes provision for the court to determine the claims of sub-class or even individual members in a class action[10].

As a consequence of these differences, a number of class actions involving drugs or medical devices have gone to trial as class actions in Australia. The class may, of course, comprise hundreds or even thousands of class members. Clearly, it is simply not possible for the individual claims of each of those class members to be determined at trial. Rather, the court will hear the claim of the representative class member, dealing with both the common questions which have been identified by the parties and the individual issues associated with that plaintiff's claim. The court will then deliver its decision in relation to the representative class member's claim. If the defendant is successful in defeating the representative class member's claim that will usually be the end of the matter. However, if the representative class member is successful the court will make an award of damages in relation to that person's case. The parties are then left with a number options. They could proceed to take the next individual case to a hearing to determine liability and damages, informed by the court's decision in relation to the common issues. However, in practice, the parties will then negotiate an overall settlement of the remaining class members' claims. As a general rule that settlement will inevitably discount the value of most class members claims as compared to any award of damages received by the lead plaintiff. Of course, this is only possible by virtue of the fact that class actions in Australia are tried as bench trials and the trial judge delivers a written decision setting out his or her findings and the reasons for those findings.

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[6] Part IVA *Federal Court of Australia Act*, 1976 (***FCAA***)

[7] Section 33C(1)(b) *FCAA* and *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255

[8] Section 33C(1)(c) *FCAA*.

[9] *Wong v Silkfield Pty Ltd* at ¶ 28

[10] Sections 33Q and 33R *FCAA*)

While most class actions are settled prior to trial, a few have proceeded to verdict. However, where that has occurred, the damages that have been awarded to the representative class member have been, by American standards, modest and the amounts received by the other class members in the ultimate settlement have been subject to a further discount.

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S Stuart Clark AM FAAL is a consultant to Clayton Utz. His practice focuses on the defense of class actions with a particular interest in drug and medical device claims. His work with clients throughout the US and Europe has provided him with a deep understanding of the challenges involved in global litigation. Stuart has been a member of the IADC since 1993 and has served on both its Board and that of the Foundation of the IADC. He is an Adjunct Professor at Macquarie University Law School and a Fellow of the Australian Academy of Law. In 2016 he served as President of the Law Council of Australia, the Australian legal profession's peak representative body.