

## A Trumped Up Civil Justice System

Like him, loath him, or so saturated with media coverage you would rather not hear another word about him, there he is. Undeniably so, beyond even what the House of Cards scriptwriters could imagine. Every article produced before, during, and after the 2016 US presidential elections offering an opinion about his history, his temperament, his intentions for the next four years and beyond.

So why another article? Why should the legal profession be interested? Quite simply, we can't afford not to be. Reality TV has become reality, and the election of Donald Trump as the forty-fifth US President could have a profound and lasting impact on our civil justice system.

### *Trump the litigator*

It is no coincidence that Trump, the billionaire real estate mogul, victor in the most expensive and adversarial election process in politics, and most powerful man on the planet, is also one of the most litigious people in modern history. USA Today found that, as at 1 June 2016, the Don had been involved in at least 3,500 legal actions in federal and state courts during the past three decades.<sup>1</sup> People in Mr Trump's position have always been able to take advantage of the legal system for their own ends, especially when facing less well-resourced opponents. Regarding Trump's legal exploits, USA Today noted:

"He sometimes responds to even small disputes with overwhelming legal force. He doesn't hesitate to deploy his wealth and legal firepower against adversaries with limited resources, such as homeowners...Lawsuits are one of his primary negotiating tools. He turns to litigation to distance himself from failing projects that relied on the Trump brand to secure investments...he also uses the legal system to haggle over his property tax bills."

Although such blatant abuses or near-abuses of legal process are contemptible, Mr Trump now exists as a de facto role model – or at least highly influential figure – for millions. His well-documented proclivity for using the courtroom as a blunt instrument may well be viewed as a badge of merit. A demonstration of how to manipulate and benefit from a corrupt system controlled by The Man, perhaps.

'Getting one over the system' is precisely how Trump pitched his response to the revelation of the now infamous US\$916m debt write-off that has allowed the President-Elect to pay virtually no federal income tax for years. The general response from many of his fellow Americans seemed to be: "Good for you, Donald", or indifference. The Don's response to any media and public outcry, "I'm smart."

There is a critical distinction, though, between using the tax and judicial systems to your best commercial advantage and a civil dispute, where your opponent is not the state but a fellow citizen. Thus, rather than sticking it to The Man, you are steamrolling your neighbour. But Trump does not seem overly concerned with semantics.

### *Deeds, not words*

Many of Trump's critics during the election campaign were outspoken in their condemnation of his remarks about various demographic groups. A defence often raised by his supporters was that he should be judged by his deeds, not words. After all, he is a successful businessman who built an empire over several decades; he must be doing something right. Locker room banter aside.

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<sup>1</sup> <http://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/> (accessed 5 January 2017)

As the above brief examination of Trump's use of litigation in business illustrates, some of those actions are arguably more odious than his sometimes derogatory comments. The insidious effect of people thinking, when it comes to Trump's legal actions, "if it's good enough for the leader of the free world, it's good enough for me" is self evident.

Whether you agree with him about tax or not, the Don's approach to legal matters is not "smart". It is abhorrent. The judicial system should protect individual rights and interests for the greater good of society. It should not be a tool for ruthlessly advancing individual interests at the expense of others – especially those who are less equipped to defend themselves.

This is not about wide-eyed idealism or altruism. I am not suggesting lawyers are or should aspire to be saints, forgoing the pursuit of profit and competitive advantage. Heaven forbid. Rather, my concern is that calculated abuses of legal process directly attack the foundation of the rule of law. They drive up the cost of legal services and limit the public's access to justice. They clog up the courts and, in doing so, waste valuable and scarce public resources. A justice system geared to create, or at best allow, an ever-greater bias towards the rich and powerful is one in name only.

Knowingly taking advantage of legal processes for your own ends is inexcusable, but sadly inevitable. Lawyers who cynically promote such strategies, while likely seeing themselves as pragmatists, should not be admired. It is no less than sneering at the oath sworn by each lawyer to uphold their overriding duty to the Court. The processes and ethics that permit these shameful practices demand change.

With The Donald soon to take his seat at the Resolute desk, such practices are now at risk of becoming – if they are not already – entrenched. Practices not just permitted, but celebrated, endorsed by the most powerful man in the world. A man with a long history of exploiting the justice system to his personal commercial and political advantage, who now has immense influence over almost every part of that system. All the more reason to demand change. The question is how.

#### *A post-Trumpian system?*

First, lawyers, judges, everybody, must start deploring, or at the very least stop extolling, Trumpian litigation tactics. This is a tough sell for lawyers, who have a clear economic incentive to spend as much time as possible resolving (or not resolving) disputes via the Court. Time is money, particularly if you can charge \$60 for every six-minute unit.

I believe an ethical lawyer should act directly against the financial incentive to profit if the services being rendered are either not required or not in the client's best interests. That is difficult in reality. Economic incentive is probably the most reliable predictor of human behaviour. It is instinctive for lawyers, like most people, to simply act in accordance with that incentive rather than fight against it. Being a lawyer is, after all, a tough gig these days, believe it or not.

Effecting a widespread behavioural shift on an individual basis towards ethics that promote the values of justice above financial reward is a daunting, if not futile, prospect. It would require a great degree of accountability within the legal profession, far beyond mere lip service. This, of course, would mean increased cost and reduced revenue. It seems likely, then, that so long as it is possible, lawyers will generally adopt whatever strategies are permitted to achieve the greatest monetary reward. In Trump We Trust may well be the litigator's mantra for years to come.

### *In Trump We Trust*

What might Trumpian litigation tactics include? Making meritless claims or interlocutory applications, and pursuing meritless arguments to force the other side to incur the time and cost of opposing. Bombarding the other side with unnecessary or disorganised documents during the discovery process to make their lawyers spend more time deciphering the evidence. Sending voluminous and unnecessary correspondence to opposing counsel to ramp up their fees. Waiting for the last possible date and time to comply with all procedural deadlines, merely to cause delay. Losing the case but going through the appeals process anyway, to make the other side incur more time and cost.

And, after all that, negotiating an out of court settlement for an amount lower than what ought to be paid, to a deserving but exhausted opponent. The ultimate kick in the guts: declaring bankruptcy or going into liquidation without paying anything.

For these abuses of process to happen is one thing. For them to be held up as examples of good, or successful (if you will permit the distinction) lawyering, is another. The former I can accept as an inevitable but controllable reality. The latter is toxic. Lawyers who slow, disrupt, or abuse the legal process purely for profit should be ashamed. But this is not enough. The system itself needs to change if the individuals within it will not, or are disincentivised to do so.

### *The change within?*

While abuses of process are naturally against the rules of every court, it takes too long for the abuse to be finally determined. It requires a lawyer to raise the issue of the abuse, a judge to hear arguments from lawyers for both sides on the matter and give a determination based on the law and the facts, and for that determination to go through the appeals process. The cost of all that is beyond the means of most people, let alone going through a trial to resolve a complex civil dispute. Litigants who are well resourced like Trump can take advantage of this institutional inertia. They can throw their considerable weight around without consequence, unless facing a similarly cashed-up opponent.

Meritless arguments also take too long to be exposed. Even with the useful process of summary judgment, a bad claim can take years to be thrown out of the Court. And again, there's the appeals process. The time and cost of defending nonsense claims can effectively be used as weapons by wealthy individuals and corporations. Most litigators will have war stories of being on the wrong end of such tactics. Having experienced it, I can almost empathise with the people who believe a bare knuckle free-for-all would be a more effective dispute resolution process than litigation. Almost.

Due process is important, and good things take time. But it is equally important that the very processes designed to bring about justice do not create invisible barriers to it. There needs to be a better, faster, and cheaper way to resolve basic issues of fact and law. Summary judgment is not fast enough.

A registrar ought to be able to determine whether a deadline has been reached the moment the relevant document is filed. A judge or associate judge should be able to throw out a silly argument made in a statement of claim without the defendant having to apply to strike it out. A judge should be able to determine the relevant law that applies to a fact scenario without the lawyers having to present it.

In short, the Court should have a greater role in refining and improving the quality of arguments and claims, whether filed by lawyers or self-represented litigants. Hopefully the new Electronic Courts Act, together with the recent judicature modernisation process, will bring about some much needed change in this area.

The fact that it often takes six months and \$50,000 to defend a bad claim is completely unacceptable. It means civil justice is practically out of reach for most people. It means we have barely advanced from the days where disputes were settled by duel or judicial combat, where the best and hardest charging knights would usually win. The knights have simply been replaced with high-priced barristers and solicitors – a more civilised process but one that today only the most privileged and powerful can realistically afford.

This is not the way to uphold the rule of law. Justice must be accessible, and all those within the legal system must work to ensure it is. At a time when the person holding the most powerful political office is also one of the most aggressively litigious, this is now more critical than ever.

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