

Exploring the litigation explosion myth



The public could be mistaken for thinking that society has become much more rights-based and that lawyers advertising contingency fee terms have contributed to a litigation explosion in Australia.

The assertion that litigation is 'out of control' and 'exploding' is an important premise in the argument made by insurers, corporate defendants, and professional groups that lobby to curtail the individual's right to compensation for injury.

The argument has been repeated so often in the media that many journalists uncritically accept the assertion as true. Curiously, few have bothered to examine the facts or the statistics available to verify whether the assertion is correct.

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Population Changes in the Last Decade

In February 1990 the Australian population officially reached 17 million. At that time approximately half of the population was under 30 years of age with about 5.4 million under the age of 18. In August 1999 the population reached 19 million.

The major portion of the increase in population came from the 'baby boom bubble', which resulted in an increase to the aging population.

This means that in the period between 1990 and 1999, Australia experienced the largest increase in adult population in the country's history. This trend, coupled with increasing life expectancy and a declining mortality rate, is set to continue for several years to come.

According to the Australian Bureau of Statistics, in 2001 Australia's rate of population growth was 1.1% per annum. It is obvious from this figure that the contribution of adults to this growth is accelerating at a growing rate.

These population statistics are important as they imply that even if per capita litigation rates remained stable, then an examination of the gross litigation rates would predict an increase in litigation in correlation with the increase in Australia's adult population, adults initiating virtually all litigation.

Gross Litigation Rates in the Last Decade

In late 2001 APLA initiated inquiries with all Australian Court Registries to ascertain details of personal injury court filings over the last decade.

Some states were able to provide details based on subcategories of personal injury litigation, while others were incapable of providing data on gross litigation rates, let alone data on the different categories of litigation.

These are the only sources of data on litigation rates in Australia. It follows that claims about increasing litigation must be based upon these statistics if they are to have any credibility at all.

The South Australian District Court provided data that revealed a modest increase in litigation since 1994, but a decrease in the 1992-3 data is included.

The trend since 1994 is what would be predicted by changes in the population alone. This observation is given further credence by the fact that the growth rate of personal injury litigation was slower than the growth of other 'non-personal injury' litigation in the same period.

The South Australian District Court was one of the few courts able to provide data on different types of personal injury litigation. A spike in 1993 was caused by legislative changes to the South Australian worker's compensation regime. This resulted in a temporary increase in litigation as already injured claimants issued actions to protect their common law rights to compensation.

The South Australian data reveals a gradual increase in motor vehicle claims during the decade, but very little personal injury litigation other than this category. What other litigation does exist has not increased beyond that which would be anticipated by general increases in population over the same period.



The Tasmanian Supreme Court was able to provide data on filings of personal injury and non-personal injury actions to the end of 1999. Their data demonstrates no evidence of significant increase in personal injury litigation in the Tasmanian Supreme Court since 1994-5. There was virtually no change between 1997 and 1998 and a decline in 1999.

The Australian Capital Territory, like Tasmania, was able to provide data on gross personal injury verses non-personal injury claims. The data reveals no evidence of any increase in personal injury litigation in the ACT Supreme Court. Indeed, in 2000 the rate declined significantly.

The Queensland Supreme Court has published data for gross claims commenced (both personal injury and non-personal injury) between 1995 and 2000. It has not provided any data specific to the rates at which personal injury claims were commenced. That said, the Court's internal case management reports reveal that at February 1995 there were 226 personal injury cases (amounting to 61% of the total list) awaiting allocation of hearing dates at that time. By January 2001 the workload of the Court had reduced dramatically such that only 27 cases were then awaiting trial (which represented 36% of the total list). This material suggests that personal injury claims in the Queensland Supreme Court have declined considerably.

The Queensland District Court provided details on personal injury actions commenced each year between 1992 and 2001. It reveals a decline in litigation in 1999 followed by an increase in 2000 and 2001. In part, the increase mirrors the decline in the Supreme Court filings, and probably reflects increases to the District Court jurisdictional limit, and a shift of workload to the lower court. The Queensland District Court conducts the majority of personal injury work in that state. As is the situation in the Queensland

Supreme Court, case management data also reveals a dramatic decline in cases awaiting trial in this jurisdiction.

The New South Wales Supreme Court does not track or publish statistics due to lack of funds for that purpose. The NSW District Court has provided details of actions commenced in that court since 1991. Unfortunately, the Court's data also does not discriminate between personal injury and non-personal injury actions. The NSW District Court is arguably the busiest court in the country. The overwhelming majority of personal injury actions commenced in NSW take place in that court.

The gross filing data of the NSW District Court reveals a significant decline in litigation in the first half of the decade. Two spikes in actions, in 1996 and more recently in 2001, each correlating with legislative changes in worker's compensation and, more recently, medical negligence. These increases were caused by government attempts to limit common law rights to damages and the resulting flurry of activity by injured claimants to commence proceedings before the legislation took effect. Overall, this data does not provide any clear evidence that personal injury litigation has increased in NSW.

The Western Australian Supreme Court maintains data on civil actions issued each year. The Court's data reveals a steep decline in 1999, followed by a substantial jump in 2000 and 2001. But this jump cannot relate to personal injury actions. In Western Australia all first-instance proceedings for damages for personal injury are commenced in either the Local Courts or the District Courts. We have not, as yet, received any data from the lower courts in Western Australia.

At the time of writing this report, APLA was unable to source any comparative data in relation to personal injury litigation in Victoria or the Northern Territory. Requests have been made for the data and APLA will publish the results when they come to hand.

Statistics Debunk the Myth

Published statistics reveal no evidence to support claims that personal injury litigation is 'out of control' or undergoing an 'explosion' in Australia.

The real question is not whether there is a litigation explosion in Australia (because there is no evidence to support such a claim), but what are the motives of those that claim there is a dramatic increase in litigation?

Australian media reports claiming a local litigation explosion commonly cite insurers, medical associations, and other vested interest groups as the source of the allegation. These are the same groups that stand to benefit most by curtailing the citizens' rights to compensation for negligence.

Similar groups have conducted a comparable propaganda campaign in the United States of America since the early 1980s. This campaign, which has continued since that time, has resulted in varying degrees of legislative restriction on the citizen's right to sue in most American states.

Published research in the USA has established that none of these legislative changes have had any impact on reducing premiums in that country. It is vital that governments in this country do not fall into the same trap of accepting anecdote as truth and responding with unfair restrictions on compensation, which both hurt the injured and do nothing to solve the underlying problem of premium increases.

Governments are under significant pressure to address the difficulty of some community organisations and small businesses to secure affordable public liability insurance. This is an issue for the whole community, not just insurers and their clients. Solutions must be found, but they must address the true causes of the problem if the solution is to be both sustainable for policy holders and fair to the negligently injured. ■

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