Litigiousness in Australia: Lessons from Comparative Law

Leon Wolff

To be, or not to be, that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles
And by opposing end them?...
(William Shakespeare, Hamlet)

Imagine a modern-day Hamlet. Instead of contemplating “to be or not to be” in his grief over the death of his father, suppose he was deliberating legal action against his father’s killers for the intentional infliction of emotional distress. “To sue, or not to sue,” Hamlet might muse, “that is the question. Is it nobler to suffer the slings and arrows of life's injustices, or take arms — backed by a team of well-paid and highly-educated lawyers — in a court of law and by opposing litigate them?”

To be sure, this is hardly the inspired poetry of Shakespeare’s original play. Nor is it a theme as confounding and as universal as struggling over the meaning of life, as Shakespeare had devised for his original hero. Still, 21st century Hamlet does articulate a modern-day concern: is resort to law the best answer to our woes? Shakespeare, of course, already had his own answer. In his play Henry VII, Shakespeare wrote: “The first thing we do, let’s kill all the lawyers.” Clearly, Shakespeare questioned the social utility of lawyers and litigation. Now, four hundred years later, there are even more lawyers, more judges, more statutes, more cases — indeed, more law. Is it, as Shakespeare himself concluded, too much?

Comparative law provides mixed answers to modern-day Hamlet’s dilemma. Everyone agrees on the threshold issue: modern democracies need a robust civil justice system to hear and resolve legal disputes. After all, the rule of law — much like democracy and the separation of powers — is a cherished value in most systems of government around the globe. But overuse or under-use of the legal system can indicate a social problem. This is where the debate on litigation takes different twists and turns depending on the jurisdiction under the spotlight. Two jurisdictions, the United States and Japan, have occupied a significant corpus of comparative law analysis on the issue of litigiousness, but for different reasons. In the United States, the concern is whether Americans sue too readily. In Japan, it is that Japanese people are too reluctant to invoke the law to protect their rights.

But what about Australia? Are Australians too litigious? Or, at least, is Australian society on the fast-track to becoming too litigious? These are questions that have attracted some — but not enduring — research and debate. Certainly, interest was at its highest at the turn of the century when the Australian states were contemplating statutory reform to tort law. This reform effort was in response to a perceived crisis in the insurance industry precipitated by a supposed spike in negligence claims

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and compensation awards. Newspapers reported an “explosion of negligence cases before Australian courts.” Politicians complained of “excessive litigation” caused by the “current adversarial litigious legal framework.” Judges — both judicially and extra-judicially — complained about crippling case workloads due to burgeoning litigation. Scholars questioned whether Australia was entering an era of American-style “hyperlexis.” The Australian law Reform Commission investigated whether Australia’s court system was in crisis. However, once the Australian states enacted civil liability statutes, the question of litigiousness in Australia has largely withered as an area of scholarly or policy concern.

This article seeks to re-open this debate. It does so by drawing lessons from the comparative law literature on litigation and litigiousness, especially in the contrasting cases of the United States and Japan. The article argues that, since litigiousness is difficult to directly measure, cultural stereotypes persist of a right-obsessed, litigation-loving America and a socially harmonious, litigation-averse Japan. Comparative law scholarship, however, strongly contests — and, often, outrights rejects — these populist impressions.

This has implications for understanding litigiousness in Australia. Two competing images currently define Australian identity. The first is that Australians are laid-back, friendly and easy-going, an

7 Melvich v Cattanach [2001] QCA 246 at [60] (McMurdo P); Lisle v Brice [2002] 2 Qd R 168 at 174 (Thomas JA); Swain v Waverly Municipal Council (2005) 213 ALR 249 at 251 (Gleeson CJ); Re Jan Blaszczyk and Secretary, Department of Family and Community Services [2005] ATA 1224 at [23] (Savage-Davis and Tovey, members); Lade & Co Pty Ltd v Black [2006] 2 Qd R 531, 543 (Keane JA).
11 See, for example, Civil Liability Act 2003 (Qld).
image projected in such Australian vernacular as “fair go”, “she’ll be right, mate” and “no worries”. The second, popularised in the mass media, is that Australians are becoming too “American” in their approach to rights and litigation.\(^\text{14}\) On this view, the Australian legal system is heading for crisis. More than that, it possibly even spells the decline of society as citizens prioritise their individual rights over their collective responsibilities.\(^\text{15}\) This article explores how commentators seek to correlate these conflicting impressions about Australian identity to Australian litigiousness. It concludes by suggesting that the better view might lie somewhere between these two polar extremes.

Part One of this article introduces the contesting definitions of litigiousness and the contrasting views over its social and economic utility. Part Two explores the cultural assumptions typically made about strong legal consciousness in the United States and weak legal consciousness in Japan; it surveys some of the critical scholarly reactions to these assumptions. Finally, Part Three applies these ideas to the Australian case, concluding that Australians are neither unduly diffident nor overly enthusiastic about invoking the law to resolve their disputes.

I. Litigation: Good or Evil?

Let us return to modern-day Hamlet’s dilemma. The question he posed for himself — one that many modern citizens similarly pose for themselves when confronted with conflict or injustice — raises a set of complex questions about the social value of litigation. Is litigation a good because it promotes individual rights and a healthy liberal democracy?\(^\text{16}\) Or is it a disease crippling civil society by privileging selfishness over community?\(^\text{17}\) Does litigation provide just compensation for those who are wronged? Or does it precipitate spikes in insurance premiums that threaten professional services and public events?\(^\text{18}\)

This is the nub of the litigiousness debate. And it is a contentious one. Indeed, it is so highly charged there is not even agreement over what litigiousness means. For Feldman, for example, litigiousness is the willingness to assert legal rights.\(^\text{19}\) For Hayne, a Justice of the High Court of Australia, litigiousness “suggests an eagerness to go to law or even a fondness for the process.”\(^\text{20}\) For Haley, litigiousness is the gauge by which we measure the efficacy of law in directing social behaviour.\(^\text{21}\) Each definition has its own point of emphasis. In the first, litigiousness is about rights assertion; in the second, it is about over-use or abuse of the legal process; in the third (and the widest), it is about law’s relevance to social order. A compromise might be to define litigiousness as the extent to which people are conscious of the law and prepared to engage formal legal processes. A litigious people are those who frame their disputes in legal, adversarial terms; non-litigious people are those who prefer to resolve their complaints through informal means, such as negotiations or discussions, because they prefer to preserve relationships rather than rupture them.

At first blush, this difference over definition might reflect different value judgements over the social value of litigation. Thus, Haley and Feldman see it as a good; Hayne, as an evil. In fact, it is more complex than that. Hayley and Feldman, as comparative lawyers, are interested in explaining low levels of litigation in Japan, especially by American standards. They seek to defend Japan against the charge that its legal system is failing its people. By contrast, Hayne, as a serving Australian judge, sees litigation every day of his professional life and is concerned that it does not spin out of control.

\(^{14}\) Davis, ‘The Tort Law Crisis’, above n 8, 865-66.
\(^{15}\) Refshauge, above n 4, 4; cf Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (The Free Press, 1991), 9, 16, 107.
\(^{16}\) Stewart Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change (Yale University press, 1974).
\(^{18}\) Spigelman, above n 6, cited in Conde, above n 8, 29.
\(^{19}\) Feldman, above n 2, 1.
\(^{20}\) Hayne, above n 6, 381.
\(^{21}\) Haley, above n 3.
There is a strong imperative for him to do so because, as a judge, he sees first-hand the costs of litigation (both financial and emotional) and believes its over-use outweighs its benefits to democracy, freedom and social justice. He is not the only judicial officer to think so.

Litigiousness is also a barometer of a nation’s economic health. According to the prevailing orthodoxy, law, lawyers and litigation are both essential to — *and* a burden on — the economy. *Too little* rights-assertion points to a weak legal infrastructure otherwise necessary to support a market economy. Law-and-development theorists have long posited that a strong legal system is essential to deliver a stable and predictable environment for investment and a transparent and efficient system for enforcing property rights and investment decisions. *Too much* law, however, is a drag on economic growth. Indeed, empirical studies have shown an inverse relationship between the number of lawyers and the vibrancy of the economy. The explanation for this is that lawyers, unlike entrepreneurs and engineers, do not generate wealth; they are rent-seekers who contribute complexity and other costs to completing transactions.

II. Comparative Litigiousness and Culture

The challenge for any liberal society, then, is to keep litigation levels in a state of balance: *too much* undermines social cohesion and economic activity; *too little* threatens social justice and economic stability. But where or how to strike this optimum balance is extremely complex. This is largely because litigiousness is difficult to measure directly. For one, it is open question whether litigiousness is indicated by simply filing legal proceedings, proceeding to trial or concluding a dispute with a judicially-determined outcome. For another, “variations in institutional conditions, including court and professional structures, procedural and substantive rules, as well as recording practices, make it extremely difficult to compare litigation rates across national boundaries in a valid and meaningful fashion.”

With the complications associated with collecting, validating and comparing quantitative data, it is little wonder, then, that much comparative commentary on litigiousness resorts to cultural portrayals. Take the United States, for example. For Australians, it is tempting to derive clues about American litigiousness from American popular culture. After all, American sitcoms and dramas appear nightly on Australian television screens; Hollywood movies dominate theatrical releases; and American pop, rock, hip-hop and rap feature heavily on Australian music charts. A survey of American popular culture quickly reveals that law and rights-assertion are dominant plot points and themes. From *To Kill a Mockingbird* (1962) to *The Lincoln Lawyer* (2011), American movies depict lawyers as heroes. From *LA Law* (1986-1992) to *The Good Wife* (2010-), American television uses the court-room to debate contemporary social and political issues. And from Bob Dylan’s *Blowin’ in the Wind* (1963) to Christina Aguilera’s *Beautiful* (2003), American popular music lyrics frequently champion civil rights.

Indeed, many scholars do argue that American popular culture reveals central truths about American legal culture. And the message is that Americans are over-reliant on law. As David argues, “the

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22 Hayne, above n 6.
23 See cases referred to above n 7.
26 Anleu and Prest, above n 4, 6-8.
27 Ibid, 6.
28 Ibid, 8.
meme [is] that the legal system has gone mad. That ‘Santa Claus’ judges have encouraged a culture in which everyone feels there is no injury without blame, and no blame without a claim.”31 Others agree: Law suits are “exploding”.32 Litigation is the new “national disease”.33 Americans are “gorged”34 on legal rights:

American rights talk is set apart by the way that rights, in our standard formulation, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities… we have observed a tendency to formulate important issues in terms of rights; a bent for stating rights claims in a stark, simple, and absolute fashion; an image of the rights-bearer as radically free, self-determining, and self-sufficient; and the absence of well-developed responsibility talk… and a consequent carelessness regarding the environments that human beings and societies require in order to flourish.35

Other scholars are less sure. Ramseyer and Rasmusen, for example, admit that litigation in the United States is more voluminous than in other advanced economies — but not by much.36 The ratio of law suits between the United States and the United Kingdom, for example, is less than ratio between the United Kingdom and Canada. The Americans have fewer judges than the French. And although there are more lawyers per capita than anywhere else in the world, Australia is not very far behind.37 Others go further and argue that American popular culture misrepresents real America. According to their empirical studies, Americans invoke the law only rarely; most prefer to resolve their disputes using non-legal means.38

Japan, by contrast, is said to be a non-litigious society. Currently, 18,000 lawyers serve a population of 125 million people, about 3 for every 20,000 citizens. Nearly 30% of Japan’s court districts have one lawyer (or none) practising in the region. Large commercial law firms are uncommon.39 With so few lawyers, litigation rates are very low. In the mid-1990s, for example, there were only 9.3 cases per 1,000 people in Japan compared to 123.2 cases in Germany, 74.5 in the United States 64.4 in the United Kingdom and 40.3 in France.40 Even by Asian standards, this rate is low. Based on statistics for new civil cases filed for trial in district courts in Japan, South Korea and Taiwan in 1995-1996, South Korea had five times as many filings and Taiwan about twice as many.41 Some commentators are claiming that litigation rates are steadily increasing, especially since the beginning of the 21st century.42 However, others explain that most of the increase is attributable to the surge in expedited

31 Davis, ‘The Tort Law Crisis’, above n 8, 866.
33 Manning, above n 9.
34 Feldman, above n 2, 2.
35 Glendon, above n 15, 9, 107.
37 Ibid.
41 Haley, above n 3, 124.
debt recovery cases following the bursting of the economic bubble; ordinary contested cases — a better barometer of litigiousness — still remain at relatively low levels.  

Why is litigation so much lower in Japan compared to other modern democratic economies? One of the more popular explanations is the cultural model of Japanese civil justice. This model attributes low levels of litigation to Japanese national traits of harmony and groupism. As far back as the 1960s, Japanese socio-legal scholar Takeyoshi Kawashima argued that Japanese pre-modern culture meant a low demand for legal professional services. As Japan modernises, Kawashima predicted, more Japanese would eventually accept litigation as a means to resolve their disputes. Several scholars have endorsed Kawashima’s thesis, although with different normative conclusions. For example, Chin and Lawson agree that Japanese are culturally averse to law. Japanese attitudes to law have been shaped geographic isolation, ethnic homogeneity and religious thought. Instead of law, the authors submit, non-legal forces ensure social order. Like Kawashima, the authors suggest that only social change will bring about a change of legal consciousness; but, whether change happens or not, they evaluate Japanese attitudes to law quite positively as “law of the subtle mind”. By contrast, Inoue assesses Japanese legal culture more darkly. The communitarian ethic — which carries with it an aversion to the individualism of rights-talk — carries real social costs, Inoue warns.

Comparative law researchers have strongly criticised the cultural model and offered alternative explanations. One of the first counter-explanations stresses institutional factors over cultural attributes. Specifically, this model points to a number of institutional disincentives in the legal system that deter litigation. For example, Hayley, while acknowledging that Japanese file proportionately fewer civil suits compared to citizens in other industrialised countries, points to evidence that the Japanese are not reticent about asserting their legal rights. Rather, institutional incapacity — few lawyers and judges, discontinuous nature of trials, and an inadequate range of remedies and enforcement powers — sets up a barrier to bringing suit in Japan. Other institutional barriers include a lack of pre-trial discovery procedures, high contingency fees, prohibitive court costs and the absence of a jury system.

Yet another counter-explanation is that the Japanese civil justice system is politically manipulated. Under this view, political elites — notably, the bureaucracy — manage the pace and direction of social change by channelling disputes away from the courts and into the hands of government-annexed informal dispute resolution facilities. Adherents of this view submit that lower levels of litigation in Japan have nothing to do with a cultural aversion to law; it is more a result of deliberate conservative government policy. Japanese political conservatives prefer informal resolution of disputes because, it is submitted, they view litigation as a threat to the political and social status quo and, therefore, take calculated steps to discourage litigation.

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48 Port, above n 44, 659-670.
51 Port, above n 44, 661-662, 669-670.
A more controversial explanation for low litigation rates in Japan is advanced by economic rationalists. They advance economic rationales for Japanese litigating behaviour. Under this view, Japanese prefer to settle because damages verdicts are predictable and it is cheaper — or economically “rational” — to bargain in the shadow of the law rather than pursue litigation. A cultural aversion to law, argue economic rationalists, is pure myth.\(^{53}\) Ramseyer and Nakazato, for example, contend that the Japanese preference to settle cases out of court is not culturally pre-determined nor compelled by structural impediments in the legal system.\(^{54}\) Japanese settle because they can predict what damages they might get if they pursued their dispute in court and, therefore, simply bargain “in the shadow of the law”. Settling is cheaper and quicker than pursuing a court case. This shows that the Japanese are bound by rationality, not culture, because they will maximise — not forsake — their self-interest. And it proves that the Japanese legal system works, because, if disputants are settling their disputes in light of expected litigated outcomes, then clearly law is structuring behaviour.\(^{55}\) Consider, for example, noise pollution from karaoke machines, a big problem in congested Japan.\(^{56}\) According to case law databases, only about 40 disputes result in litigation brought before Japanese courts. By contrast, nearly 100,000 cases are heard each year by pollution complaint counsellors, an informal dispute resolution service established by the Dispute Law. Under the law, counsellors have strong, judge-like powers to consult with residents, investigate pollution incidents, and provide guidance and advice. Filing a complaint involves no direct monetary cost, does not preclude filing a concurrent (or subsequent) law suit, and allows complaints to be heard and dealt with relatively swiftly due to the lack of formalities.

III. Litigiousness and Australian Culture

Culture might also allure as an explanation of Australian attitudes to law. Consider “she'll be right, mate” and “No worries” — two quintessentially Australian expressions. It matters little whether most people actually use these expressions or revert to American vernacular such as “cool” or “awesome” instead. What does matter is that they project images of who we are or, more accurately, who we think we are as Australians: laid-back, informal and easy-going with an anti-authoritarian streak and jocular contempt for elites. Like most cultural assumptions, however, this self-image is open to critical scrutiny. For example, Australians are not as laid-back as they might like to think. Indeed, studies show that Australians work some of the longest hours compared to workers elsewhere.\(^{57}\) And our easy-going nature does not necessarily extend to welcoming outsiders. Immigration policy, for example, has long been a sore point in Australian external relations, dating back to post-war Australia policy\(^{58}\) and extending to today’s political preference for off-shore processing of asylum-seekers. Despite all this, this self-image is core to the Australian identity. Certainly, it saturates our popular culture. Prime-time television shows, for example, celebrate low-key family life in middle-class suburbia. Neighbours and Home and Away, two of the longest running soaps on Australian television, illustrate this perfectly. Contrast this with US soap operas which focus on the life of the extravagantly wealthy (Young and the Restless, Days of Our Lives, Dallas and, more recently, Revenge); British serials that portray the battles of working-class existence (Eastenders and Coronation Street); and Japanese television series that prioritise the value of work by situating the drama within generic office settings with white collar protagonists.

\(^{53}\) Port, above n 44, 661-662, 668-669.
\(^{55}\) Ibid.
What insights does this have on litigation behaviour in Australia? A cultural analysis would tend to suggest that Australians are — or, at least, should be — ambivalent about the law. With the Australian cultural predisposition to informality, mateship and the “fair go”, you would expect most Australians to prefer to resolve their conflicts informally rather than through legal means; to preserve their personal and professional relationships rather than place them at risk through financially and emotionally draining litigation; and settle their disputes using an innate sense of justice rather than abstract legal rules.

Popular culture reinforces this expectation. Unlike in the United States, the television and film industry in Australia makes infrequent use of lawyers as characters and court-room battles as dramatic plot points.59 Where it does, the legal process is either mocked for being un-Australian or criticised for destroying personal relationships and lives. In The Castle (1997), for example, an ordinary family sues a developer to prevent it resuming its land to extend the Melbourne Airport. The movie pokes fun at the law, highlighting how alien court-room procedures and legal language are to the film’s hero, a well-meaning, likeable and community spirited Aussie battler. In the ABC series Sea Change (1998-2000), a corporate lawyer in a large, urban law firm quits her job and finds personal happiness in a coastal community serving as the local magistrate. Her court-room features a parade of quirky characters whose complaints, she finds, are usually better resolved through informal, community-affirming strategies than formal fines or custodial sentences. More recently, the ABC eight-part mini-series The Slap (2011) comprised a minor story line where a young mother brings formal charges against her friend’s husband for slapping her young son at a family barbeque. The lead-up to her court case places pressure on her marriage and strains her relationships with her friends, and the court case ends in disaster when she is humiliated on the witness stand. Australian popular culture, in short, largely neglects law as worthy of narrative attention and, when it does, treats it with comical or derisive scorn. The thesis is clear: formal law is not a good cultural fit with the Australian identity.

The alternative view is that litigiousness, far from being alien to Australian cultural values, is actually spinning out of control. This might be attributable to the cultural ‘Americanisation’ of Australian society.60 Australians are more willing to assert their rights; indeed, “the exercise and assertion of rights is legitimated and increasingly encouraged.”61 They are more prepared to complain; the rise in watchdogs and complaints-handling bodies, such as the Human Rights and Equal Opportunity Commission, the Insurance Ombudsman and the Banking Ombudsman, facilitates this.62 And Australians are more inclined to resort to litigation to effect social and economic change instead of relying on political action or advocacy.63 In particular, they increasingly look to the courts for financial support when struck by misfortune.64

All too often the courts are asked to act as an avenue to welfare rather than compensation. Guy Swain was left a quadriplegic after diving into a sandbank at Bondi beach…. Kerry Melchior sought and was awarded the costs of raising her (perfectly healthy) son Jordan, who was born after a botched sterilisation procedure. Diane Burns sued Hoyts after she was injured trying to sit in a cinema seat that had folded back. And Rosalie Cole, who had a blood alcohol content of 0.238gm per 100ml when she was run over by a four wheel drive, sought compensation from the South Tweed Heads Rugby Football Club for her injuries. All this serves to create …[a] risk-averse society….

60 Davis, ‘The Tort Law Crisis’, above n 8, 866.
61 Refshauge, above n 4, 4.
62 Ibid.
63 Ibid.
64 Conde, above n 8, 30.
Three key social institutions paint litigiousness as a problem in Australia. The first is the mass media. As Refshauge notes, television news and newspaper reports are awash with stories about litigation and legal risk: from cases of disabled children suing schools to allow them to study alongside able-bodied children; to reports of local councils removing coconut trees because of the risk coconuts might fall and injure pedestrians. The second is the insurance industry. The Insurance Council of Australia, as the peak organisation representing the insurance industry, pointed to statistical evidence that Australia was, at one point, the second most litigious country in the world after the United States. In its submission to a governmental inquiry on personal injury law and public liability insurance in 2002, it argued that the Australian legal system was reaching crisis point because too many Australians wanted “compensation for any loss, which used to be considered fate, luck or an accident.”

The third is the judiciary. Several judges, in their judgments or in extra-curial speeches or articles, criticise over-litigiousness in Australia and the burden this is placing on the courts. For former Chief Justice of the Australian High Court, Sir Gerard Brennan, the Australian civil justice system was “in crisis”. For another former Chief Justice, Murray Gleeson, Australia was becoming “a rights-conscious and litigious society, in which people are apt to demand reasons for any decision by which their rights are affected….” For David Ipp, former justice on the New South Wales Court of Appeal, clogged courts was leading to “dissatisfaction with the court system” and “erosion of confidence in the justice system.” Queensland judges have been especially scathing in their criticism. In Lade & Co Pty Ltd v Black, Keane JA remarked:

In a litigious society, enthusiasm for litigation may, in some cases, overwhelm rational consideration of whether “the game is worth the candle” with the unfortunate result that the costs expended by the parties upon the litigation vastly exceed the monetary value of the matters in dispute.

In Melchior v Cattanach, McMurdno P noted:

…[I]n Australian society, we have become accustomed to claimants pursuing claims against insured friends and relatives; we are no longer shocked when a husband sues his wife in a motor vehicle accident case for damages for personal injuries, children sue parents for whom they work when injured in the work place or students sue their school for damages arising from negligence.

In Leslie v Price, Thomas JA raised strongly-worded concerns about the ease by which injured Australians could sue for compensation:

[Australian law] … increasingly permit[s] unrealistic results in [personal injury] cases, in both liability and quantum. Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.

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65 Ibid, 2.
67 Insurance Council of Australia, above n 66, 11.
68 Brennan, above n 6, 139.
71 [2006] 2 Qd R 531, 543.
72 [2001] QCA 246, 60.
In a compensation-conscious community citizens looks for others to blame. The incentive to recover from injury is reduced. Self-reliance becomes a scarce commodity. These are destructive social forces. Also much community energy is wasted in divisive and non-productive work. A further consequence is the raising of costs of compulsory third party, employers’ liability, public risk and professional indemnity insurance premiums. These costs are foisted upon sectors of the public and in the end upon the public at large. I would prefer that these problems be rectified by the development of a more affordable common law system, but in recent times its development has been all in one direction — more liability and more damages.

I express these concerns in this particular case because authority constrains me to participate in pushing the boundaries further when I think that the time has already been reached when courts should be seriously reconsidering the formulation of firmer control devices than those that currently exist. I fear that we are developing a creature we can no longer control.

IV. Criticisms

The case put by the media, the insurance industry and the judiciary is a powerful one. But how convincing is it? For example, the media attracts its audience through attention-grabbing stories. Would it not be natural for them to highlight high-stakes and unusual cases rather than describe the “routine” contract, torts and property claims that are the bread-and-butter of the court system? Further, as Davis questions, is it not in the interests of the insurance industry to undermine plaintiff rights because they place pressure on insurance affordability and, therefore, dampen consumer demand for insurance products? And, finally, Australian judges decide law suits every day in their professional lives. When they make claims about litigious behaviour, are they not relying on an unrepresentative — and therefore unreliable — sample of the Australian population?

The question of Australian litigiousness was independently tested by the Australian Law Reform Commission (ALRC). In its report on the civil justice system, the ALRC conducted the first nationwide empirical investigation into litigation rates in Australia. It found no “explosion” in litigation rates. Although case-loads were increasing in some jurisdictions and civil cases were generally becoming more complex and taking longer to resolve, this lent insufficient weight to the view pushed by the media, the legal profession and the judiciary that the legal system was on the verge of crisis. Indeed, according to later studies examining civil filings, litigation has been generally declining since the late 1990s. More recent statistics confirm that litigation continues to decline in the first decade of the 2000s:

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74 Ramseyer and Rasmusen, above n 36, 5.
75 Davis, ‘The Tort Law Crisis’, above n 8.
76 Australian Law Reform Commission, above n 10.
77 Weisbrott, above n 10, 242.
78 Davis, ‘The Tort Law Crisis’, above n 8, 866-67; Refshauge, above n 4, 1-2.
Conclusion

So how litigious are Australians? Do Australians seek informal resolution of their conflicts, to preserve their social relationships, or are they quick to assert their rights? Which prevailing view of Australian identity best explains Australians’ attitude to law? Put differently, if something goes wrong, do you expect a “she’ll be right, mate” or a “she has rights, mate”? Access to lawyers is not an issue. Indeed, according to Ramseyer and Rasmusen, Australia nearly has the same number of lawyers per capita than the United States.80

But the data on civil court lodgements clearly show that Australian do not necessarily retain them at the same rate as Americans — or, if they do, not primarily for the purposes of contesting their disputes in the courts. At the same time, there are enough lodgements to show that Australians are not unwilling to make use of the courts. As the research on litigiousness in the United States and Japan also holds, culture — or, at least, cultural stereotyping — is an unreliable guide to Australian litigating behaviour.

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80 Ramseyer and Rasmusen, above n 36, 27.