SOUTH  AUSTRALIA

SIXTY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE LAW GOVERNING LOCUS STANDI—NON-PARTY INTERVENTIONS AND AMICI CURIAE IN RELATION TO PROCEEDINGS IN CIVIL JURISDICTION

1982

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SIXTY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE LAW GOVERNING LOCUS STANDI—NON-PARTY INTERVENTIONS AND AMICI CURIAE IN RELATION TO PROCEEDINGS IN CIVIL JURISDICTION

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

We turn in this respect to that area of the problems relating to locus standi which covers non-party intervention in suits and the place of an amicus curiae in the working of the Courts in their civil jurisdiction.

It is a problem which has been discussed by numerous commentators. The Chairman of this Committee did so in a paper given at the Fifth Commonwealth Law Conference Edinburgh in 1977: "The Scope of Judicial Development of the Law" in which he dealt with the need for changes of the kind which we discuss in this paper. Our thinking has been helped by two American articles: one by David Shapiro "Some Thoughts on Intervention before Courts Agencies and Arbitrators" in 81 Harvard Law Review 721 and the other by Ernest Gellhorn "Public Participation in Administrative Proceedings" in 81 Yale Law Journal 359.

As is pointed out in the article by Shapiro, a civil action in the common law tradition has usually been thought of as a private controversy between plaintiff and defendant. Any person seeking to intervene, unless he had an actual legal interest in the outcome of the proceedings, was usually regarded as an undesirable intermeddler. On the other hand it is also true that courts of Admiralty and courts of Equity have recognized intervention for centuries as a proper means of asserting an interest in property in the custody of the court. The common law, whose whole system of pleading was directed to producing a specific issue which could be submitted to the arbitrament of a jury, was impatient of complications such as third party interveners and non-party interveners. Our present rules of court bear the marks of the self-limitations accepted by the common law. Order 16 Rule 11(2) of the Supreme Court Rules merely enables the Court to add parties who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. In addition there are special jurisdictions such as interpretation of wills and trust documents and testator's family maintenance applications where the Court may order representation for special classes such as an unascertained class of beneficiaries, additional possible classes depending on the interpretation of the will or trust document next of kin who may take on an intestacy or the Crown who may claim by escheat or as bona vacantia.

Some alterations to this position have already been made by statute in this country. In 1969 by an amendment to the Supreme Court Act inserting a new Section 62g, the Crown became entitled to appear before

the newly created Land and Valuation Court (a division of the Supreme Court) in any matter or proceeding in which the public interest or any right or interest of the Crown might be involved or affected.

In 1976 the Commonwealth Judiciary Act 1903 was amended by Act No. 164 of that year. Section 17 of the amending Act inserted new Sections 78a and 78b into the principal Act. These sections permit intervention by the Attorney-General of the Commonwealth or the Attorney-General of a State in any proceedings before the High Court or any other Federal Court or any Court of a State or Territory relating to a matter arising under the Commonwealth Constitution or involving its interpretation. Where such a matter arose it is the duty of the Court not to proceed until notice of the cause specifying the nature of the matter has been given to the Attorney-General of the Commonwealth and in certain cases to the Attorney-General of a State.

In 1977 the State Crown Proceedings Act 1972 was amended to provide in Section 12(1a) that the Attorney-General might intervene on behalf of the Crown in any matter in which the interpretation or validity of the law of the State or of the Commonwealth was in question, or in which the legislative or executive powers of the State or Commonwealth or of an instrumentality or agency of the State or Commonwealth was in question or where the judicial powers of a court or tribunal established under the law of the State or the Commonwealth were in question, for the purpose of submitting argument upon the question. By new subsection (1b) the Attorney-General was given a right of appeal in respect of any judgment or decision given in the proceedings, as if he were a party to the proceedings, and under subsection (1c) he became liable to an order for costs to reimburse the parties to the proceedings against costs occasioned by the intervention.

We do not recommend any interference with these sections to which we have referred. The matters referred to in this paper are cumulative upon the powers given to the Crown by the sections whose substance is set out above.

The question of non-party intervention is closely related to the question of locus standi and it is best to distinguish these matters at the outset. Not only will this avoid confusion but it will also clearly indicate the precise nature of what we consider to be non-party intervention. This report is limited to a discussion of non-party intervention in suits and is not to be regarded as a substitute for remedying the defects expressed in other reports on cognate subjects in relation to the standing of persons to bring or intervene in suits as parties.

As far back as 1884 the Supreme Court of the United States said in *Krippendorf v. Hyde (1884) 110 U.S. 276 at 285:*

> "The purpose of allowing parties to intervene in a legal action . . . is to prevent a failure of justice."

The phrase "failure of justice" can embrace two ideas in this context. In the first place the third person wishing to intervene in the action may be so affected by the potential decision that it would be a failure of justice to him to decide the dispute without first giving him the opportunity to be heard. In the second place justice may fail if the court does not have before it all relevant arguments and information when making its decision, and third persons may, on intervention, be able to supply such argument and/or

information. This second notion recognizes that courts should strive for correct decisions if justice is to be done not only to the parties but also to those members of the public who may be influenced by the precedential nature of the decision. In the context of this report the important distinction is that whereas in the first situation the intervener's interest demands that he be heard, in the second his intervention can only be justified on the ground that he can assist the court in reaching an informed decision.

Where a third person claims to be so affected by a potential decision that he should be able to participate in that decision it is submitted that a question of locus standi properly arises. participation in such circumstances should be a matter of right and carry with it the concomitant condition that the third person be bound by the decision in any case in which he has so participated. He should be entitled to participate to the extent necessary to protect his interest in the dispute, which may entitle him to formulate the very issues to be litigated. On the other hand where intervention is sought merely on the ground that the intervener can assist the court in reaching an informed decision a quite distinct question arises. There is no question of the intervener being entitled to participate. He must justify his intervention by reference to the contribution he can make. It is only in this latter situation that the committee considers that a question of non-party intervention arises. Under existing practice a court may appoint counsel as amicus curiae. This is a species of such non-party intervention, recognizing that intervention can be justified on an information-providing basis.

The drawing of these distinctions produces four important propositions.

Firstly, any discussion of non-party intervention begins with the proposition that the intervener is intermeddling with the dispute of others. It is left to the parties to the action to define the ambit of their dispute. If they wish to settle without trial or concede issues without argument that is their prerogative. It is only after the parties show that they are determined to dispute particular issues that a question of non-party ntervention arises. Furthermore, if they subsequently agree to settle those issues that is their prerogative. Similarly if the parties do not wish to pursue avenues of appeal the matter must be left where it stands. The non-party intervener has no interest to justify his appealing.

Secondly, as non-party intervention only has the purpose of elucidating the issues between existing parties and the intervener is in no sense a party to the action, seeking no direct relief for his own benefit, there is no question of any estoppel arising from his intervention. If a person has sufficient interest to be heard he may be joined under Order 16 Rule 11 and if joined will be bound by any subsequent decision.

Thirdly, the crucial consideration when intervention is sought is whether the intervener has arguments or information which will significantly help the court in deciding the issues between the parties. The intervener may have legal arguments the parties are not prepared or willing to explore, or he may have at his disposal factual information which is relevant to the issues before the court. In either case the matter may be of such significance that the court should take them into account before pronouncing judgment.

Fourthly, as intervention is only to enable elucidation of existing issues the degree of intervention need only be to the extent necessary to enable that elucidation. Intervention is not an all or nothing decision and the degree of intervention will depend upon the nature of the assistance which can be given by the intervener.

One other factor needs emphasis before formulating a test for intervention. An overriding interest of the parties is that their dispute be settled as swiftly and as cheaply as possible, and this interest must be kept firmly in mind. Intervention can only be justified if any increase in time and cost can be clearly shown to be outweighed by the contribution the intervener has to make.

The test for non-party intervention can as a result be formulated as follows:—

> Non-party intervention may be allowed where the intervener can provide arguments or facts which will contribute to the court's reaching an informed decision, and where the significance of these arguments or facts is sufficient to outweigh any expense and/or delay which may be caused to the parties by such intervention.

The nature of the test demands that the court decide from case to case whether to allow intervention and the degree to which it is necessary. This case by case approach is appropriate where intervention is sought on grounds of contribution to an informed decision. One difficulty in formulating non-party intervention in terms of "interest" is that courts, by interpreting this concept, will develop by force of precedent a right to non-party intervention. This is appropriate where a question of locus standi arises but not where the question is one only of non-party intervention. The procedure by which non-party intervention should be sought will be adverted to below. In deciding whether the above test is satisfied a number of matters will deserve the courts' consideration:

(1) The interest that the intervener has in the proceedings will remain of importance, but not as a test for intervention, but as an indication of the extent to which the intervener can possibly contribute. The closer he is to the issues in dispute between the parties the more likely he is to be able to make a significant contribution. The greater the effect any decision will have upon him the greater the motive to produce arguments or information of relevance to the decision. The fact that a person could apply for party status should not disqualify him from seeking mere intervention on appropriate grounds. However, intervention may be refused if it is proper that he pursue his arguments as a party.

(2) The nature of the dispute between the parties will be important. The issues may be simple and clear and be easily decided without outside help. The issues may have only minor public repercussions so that the decision will have little or no precedential value. In such a situation the parties' interest to litigate swiftly and cheaply may be paramount. On the other hand the issues may be complex and of considerable public importance so that the court will welcome all the help it can get in reaching its decision. The significance of additional arguments and information is related to the public significance of

the issues between the parties. Where further actions of a similar nature are probable these are more likely to be avoided if a well argued precedent can be produced.

(3) The ability of existing parties to present the arguments and/or information which the intervener intends to adduce will also be of crucial importance. Where an intervener has a point of view distinct from that of the parties because of the way in which any decision may ultimately effect him it is more likely that he will be able to supplement the arguments of the parties. But this will not always be so and even where the interests of intervener and parties coincide the intervener may be able to contribute because of his peculiar knowledge or the resources he has to amass arguments and/or information.

(4) The nature of the contribution the intervener is able to make will determine the extent to which intervention is allowed. Contributions of law and/or fact should be possible. Where the former are alone concerned the most convenient form of intervention may be by written brief, with, in suitable cases, a right of supplementary oral argument after the parties have adduced their point of view. But where the intervener has factual material to present it may be appropriate for him to participate more fully in the case, at the summons for directions, later discovery and inspection, and at the trial by calling and cross-examining witnesses.

Intending interveners should seek leave to intervene by way of summons. The summons should be accompanied by an affidavit explaining precisely the grounds upon which invention is sought and the extent of intervention considered appropriate. These should be served upon the parties to the action so that they have a full opportunity to object to intervention on the hearing of the summons. At that hearing the burden should be upon the intervener to show that he can make a significant contribution to the issues in dispute which will outweigh any delay and expense to the parties. On the summons the judge should have power to direct whether to allow intervention and if so to what degree and upon what conditions. In particular the judge should have power to demand security for costs should the grounds for intervention turn out to be unfounded. This power assumes that after the trial costs may be awarded against the intervener for any delay and expense unnecessarily caused by his intervention. Furthermore, as a general rule in any event the intervener should meet his own costs unless the court is of the opinion that the information adduced by him should have been adduced by one of the parties. If leave to intervene has been granted the trial judge should have power, upon application or upon his own motion, to alter or vary that order as seems proper to him during the course of the actual hearing of the action. Alternatively he may adjourn the application to a later stage of the hearing or grant leave to renew the application later. Where leave to intervene is refused at first instance appeal should be possible but only with leave.

One procedural difficulty is determining the appropriate time at which leave to intervene should be sought. There are two problems. On the one hand the intervener may not find out about the trial until a late stage so that in the absence of a system of notification the fixing of a strict time

limit would severely limit the possibility of intervention. On the other hand an order for intervention cannot be made until the parties have defined the issues which exist between them. In view of these problems no time limit is suggested, and application for intervention should be possible at any time up to judgment and during appeal proceedings.

In this procedural context the use of written briefs needs to be again emphasized. Intervention by way of written brief is an important way of allowing intervention yet not subjecting the parties to much delay and expense. Although the opportunity for oral argument should always be available to parties to the action, where the object is merely to provide arguments or information on particular issues this can in many cases be fulfilled by allowing only written submissions. Supplementary oral argument need only be allowed where appropriate.

The final question is in which courts intervention should be allowed. Intervention will only be justifiable in cases likely to be of precedential value, and as most such decisions are taken in or proceed to the Supreme Court it is recommended that intervention only be possible in that Court. Intervention is also of importance in the area of administrative decision-making but this matter will be taken up in our separate Report dealing expressly with such proceedings. In this context it may be pointed out that intervention is already available in the industrial jurisdiction: see Section 44(2) of the Industrial Conciliation and Arbitration Act 1972-1979, and Sections 36 and 106 of the Commonwealth Conciliation and Arbitration Act 1904. Reference may also be usefully made to the decision of the High Court of Australia in *The Queen v. Evatt; ex parte Master Builders' Association (N.S.W.) (1974) 132 C.L.R. 150.* The fact that a concept of intervention has worked well in the industrial jurisdiction lends support to our plea for a general principle of non-party intervention. Industrial tribunals have learnt to formulate and exercise proper controls in relation to intervention and their experience may well be utilized in formulating statutory rules to permit non-party intervention in the ordinary civil jurisdictions of the various civil courts.

We turn then to the role of the amicus curiae. He, as his name suggests, is merely the friend of the Court. He is a by-stander (and we hope not an officious one) whose role it is when called upon by the court, to help a court in cases of doubt where only one point of view is being put, or only several out of a totality of points of view are being put. Useful references in this regard are to the decision of the Full Court in *Parry v. Crooks 27 S.A.S.R. 1,* the judgment of Legoe J. in *In re the Estate of Kolodnicky 27 S.A.S.R. 374,* and the judgment of Bray C. J. in *Superintendent of Licensed Premises v. Milne (1971) S.A.S.R. 403 at 411.*

At present the court may ask for help from a possible amicus but there is no machinery by which it may obtain such help except where an amicus steps forward at the right time.

We think that an amicus curiae may do one of two things: either he may orally address the court or, as is common in the United States, he should have the right to file a written brief to enlighten the mind of the court. We think that power should be given to the Supreme Court, but probably not to courts of inferior jurisdiction, to appoint counsel suo motu for this purpose, either when (a) a novel question of interpretation arises and no party appears to put an opposing argument, (b) conflicting precedents exist

which cannot be resolved without some additional point of view being argued which is not in the interest of those who are already parties to the action to argue, or (c) a question of procedure or of the jurisdiction of the Court of of the legality of the proceedings is raised by the issues but no party wishes to take such a point.

In those cases we recommend that the law be amended to give the Supreme Court power to appoint counsel to present argument, either orally or by written brief as directed by the court, to act as amicus curiae.

We envisage that some consequential amendment will have to be made for the appropriation of funds, possibly on the certificate of the Attorney-General, who may, in any event, be intending to exercise the rights conferred on him by Section 12(1) (a) of the Crown Proceedings Act, 1972.

The Committee is appreciative of the research work done in the preparation of this paper by Miss Mandy Willson the Associate to the Chairman.

We have the honour to be

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