Court Delays

The Supreme Court has launched a full-scale assault on the problem of court delays in the Common Law Division. Robert Stitt Q.C. outlines the new measures which were odiscussed at a seminar for members of the Bench and the profession on 17 September, 1988

The backlog and delay existing in the Common Law division of the Supreme Court of New South Wales has now reached a critical level.

At a recent seminar for judges and members of the legal profession organised by the Chief Justice Sir Laurence Street the nature of the problem and methods for its solution were examined and discussed.

The Chief Executive Officer and Principal Registrar of the Supreme Court, Mr. Warwick Soden, delivered a report which evaluated the extent of the delay in the Common Law Division.

Some of the points which emerged from that report were:

* In the Sydney Registry alone, filings of statements of claim have remained high at approximately 9,500 per year since 1985, with an extraordinary rise in filings in 1986 of 13,332. This was directly attributable to the imminent Transcover and Work Cover Legislation.

* The opening of Supreme Court Registries in Wollongong, Newcastle and Wagga Wagga allowed parties to comence actions in those country centres. There has been no decline in the number of actions commenced in those areas.

* Since mid-1983 pre-trial conferences in claims for damages for personal injuries have been conducted. The percentage of common law mattes settled prior to hearing has steadily fallen from 47.3 in 1983 to 15.4 in 1988.

* A decline in settlements at the door of the Court has occurred since 1983. This decline is believed to be attributable to the fact that cases have been unable to be allocated a definite hearing date. As the delay in hearing dates increase, the settlement rate decreases.

"..... 2.4 judges "

* Any percentage decline in the success of pre-trial settlements reduces the Court's overall capacity to dispose of cases. The percentage of cases not reached has increased from 10.3 in 1985 to 22.6 in 1987; already in 1988 it is 14.4.

* The decline in the availability of judges to hear common law matters is quite startling. The average number of judges listed as available per day to take general matters in the common law division has declined from 6 in 1986 to 2.4 in 1988. This decline is partly due to the increased workload within the Criminal Division of the court with the resultant loss of judicial resources to the Civil list.

* On presently available statistics the estimated disposal rate of matters in this list lies between 4 years and 12 years.

The need for urgency in defeating delay is starkly apparent.

Mr. Justice Wood as chairman of the Delay Reduction Project Committee outlined in a report some of the proposals which are to be implemented by the Court in an endeavour to overcome this critical problem. Apart from the difficulties identified by Mr. Soden the committee is concerned that if common law rights in motor vehicle and industrial accidents are restored retrospectively from 1st July, 1987 and these claims are to be heard in the Supreme Court a significant volume of additional work will come into the division.

The proposals as to current matters will take effect from the commencement of the 1989 Law Term. All practitioners should carefully note the following points:

1. A revised roster which allocates judicial resources between civil and criminal matters will be introduced.

2. The Court of Criminal Appeal sittings are to be concentrated over ten days in two weeks of the month.

3. Regional Circuits, the majority of which will be concentrated in the middle of the year will be introduced. The circuits will be presided over by the same judge sitting successively in each centre as the work requires.

The Regional Circuits are as follows:

* Northern Rivers - Grafton, Lismore, Coffs Harbour.
* Northern Tablelands - Tamworth, Armidale, Narrabri.
* Central West - Dubbo, Orange, Bathurst.
* Riverina - Albury, Griffith, Wagga.
* Broken Hill.
* Goulburn.

There will be a concentration of criminal hearings separate from civil sittings in country districts at a principal centre for each region. They are Lismore, Tamworth, Bathurst, Wagga, Broken Hill and Goulburn for each Regional Circuit respectively.

4. There will be continuous sittings (alternating civil and criminal) in Newcastle and Wollongong (in the latter case using that centre as the extra court for criminal trials) with provision for standby periods for extra sittings.

5. Once the pre-trial procedures have been completed in the Administrative Law and Defamation Lists (which should remain specialist lists under the control of a particular judge) matters in those lists should be included in the General List, with appropriate priority for the purposes of allocating a hearing date.

6. No changes were recommended in relation to the Admiralty List.

7. All pending matters in the long cases list or matters sought to be added to it, will be subjected to court supervision to confirm that they are properly in the list, to narrow the issues, to promote settlement and to ensure realistic time estimates are given for the hearing when a date is allocated. The criterion for a long case will be 7 days plus.

8. The court will be in a position to guarantee firm hearing dates. The period between the Issues and Listings Conference and hearing is intended to be reduced to six weeks. Matters will only be given a hearing date when the court is satisfied that they are ready for hearing. This will require the parties to be fully prepared at the time the hearing date is allocated and so should encourage settlement.

9. A central part of the new proposals is the Issues and Listing Conference. This will be held before a Master. At the Conference the court will not allocate a hearing date unless satisfied that the matter is ready to be heard. At such conference the Master will satisfy himself:

(a) that all medical reports and experts' reports to be relied upon have been served;
(b) that final Part 33 particulars have been filed and served;
(c) that all documents evidencing financial loss have been served;
(d) that all necessary medical examinations have been conducted;
(e) that the issues are settled;
(f) that settlement prospects are explored;
(g) whether there is to be any application to dispense with the jury or other contested interlocutory application;
(h) whether there are any aspects in which informal proof or delivery of witnesses statements or delivery of bundles of documents relied upon would assist in disposition of the proceedings;
(i) that the estimated length of hearing is realistic.

The conference should be attended by counsel or a solicitor fully prepared to negotiate and make relevant decisions. The plaintiff and the defendant (or the relevant claims manager where the defendant is insured) should also attend. Offers between plaintiff and defendant and also contribution offers between cross-claimants will be recorded and if made by a defendant with payment-in arrangements, treated as equivalent to a payment in; otherwise the offer should be accompanied by a payment into court within fourteen days after the conference. The plaintiff's presence at the conference will be necessary and the Master will ensure that he/she is involved in the settlement negotiations.

Once a matter is fixed for hearing no additional particulars or reports will be permitted (save for good cause) and the matter will proceed on the date allocated unless settled.

10. Costs sanctions will be applied in the case of matters which should not reasonably have been left in issue at the conference. Cost orders will be made in favour of the defendant if the verdict does not exceed the offer made by the defendant at the Issues and Listing Conference.

11. In jury matters, at the Issues and Listing Conference theparties will be required to specify:

(i) which doctors whose reports have been served, are required for cross-examination; reports of those doctors who are not required for cross-examination will be permitted to be tendered and incorporated in the transcript as if they were called;
(ii) statements of the past earnings losses, out-of-pocket expenses, comparable earnings and workers' compensation paybacks are to be settled so far as they can be agreed and incorporated in the transcript as if the relevant witnesses were called;
(iii) The number of jury matters listed will be increased and the practice of avoiding the end of the week for such trials is to cease.

12. The parties should be offered an opportunity at the time of the preliminary conference (in the case of expedited and complex matters), at the time of set down (in the case of standard track matters), and at the time of the Issues and Listings Conference (all matters), to refer the matter to either arbitration or mediation by individual members drawn from a panel of experienced Counsel and Solicitors. Arbitration would follow the District Court model; mediation would involve an informal "weighing" of the

claim by an experienced practitioner and would be more suitable to cases where the liability issue was unlikely to be substantial.

These measures will go a long way towards facilitating settlements. They should also remove the "advantage" perceived by some insurers of not making an offer until the case is called on for hearing.

13. The court is also to adopt a case flow management programme for new listings. This will apply to all new filings from the start of 1989.

The guiding principle of this program is that the court will establish clear, realistic and achievable time standards for case processing. The profession will be expected to maintain and keep to those timetables. The court will take control of each new case from filing until disposition. Events will be scheduled within fixed time limits, dates for hearing will be certain dates and a firm adjournment policy will be respected.

14. The present method of instituting proceedings in civil causes by summons and statement of claim will be preserved. But there will be 6 separate "tracks" for their processing. They are:

(i) Applications - short matters in the Friday application list, or before a Master;

(ii) Administrative law.

(iii) Standard - i.e. run of the mill cases, including most personal injury cases not requiring special directions or supervision.

(iv) Complex - matters because of the number of parties, likely issues or special features requiring hearing time in excess of 7 days or special directions e.g. cases of professional negligence, spinal chord trauma.

(v) Defamation.

(vi) Expedited - matters which because of urgency or simplicity of issues permit of or require a prompt hearing.

15. Matters will be allocated as "expedited track", "standard track", "complex track", "defamation track" when the proceedings are commenced by statement of claim. The plaintiff should endorse the initiating process with a statement as to the track considered appropriate.

16. Where the claim is the "run of the mill" personal injury case or debt recovery action then it should be endorsed "standard track" in which event the usual rules for pleadings and interlocutory steps will apply.

Each standard track matter which has not been settled or finalised by summary or default judgment within four months should then come before a Registrar or Master for a preliminary conference at which its place in an appropriate track would be considered and appropriate directions given.

Within this period of four months the parties would be expected to conclude the pleadings and interlocutory procedures and to exhaust the default and summary procedures in debt recovery actions. If this has not been done, cost sanctions will apply, including the non-recovery of costs for steps later taken, unless good cause to the contrary is shown.

17. Where the matter is complex it should be so endorsed and an appointment for a preliminary conference obtained when the statement of claim is filed and served.

Complex matters will remain under the continuous supervision of the Court. A timetable for directions will be given by the Registrar. Disputes about it will be referred to the Master. Afer the time for the last step in directions has expired the matter will be called up for review. When all interlocutory matters are concluded the matter will be set down as ready. It will then be called up for an Issues and Listing Conference after which a hearing date will be allocated.

18. Defamation matters will continue to be managed under the supervision of the Defamation Judge.

The solutions proposed by the Committee depend upon maximising the opportunities for settlement. It considers that the existing delays should be capable of reduction by the new roster which will allow greater certainty of listing and better use of available judge time in civil cases, more effective pre-trial narrowing of issues and greater certainty of hearing, with limited opportunity for adjournment or risk of not being reached, and by the use of Acting Judges.

The Committee suggests that without additional judicial resources there is no prospect of making any real in-roads into the existing backlog. Only limited gains can result from improvements in internal procedures and it is unrealistic to expect judges to increase their personal workload. In this regard it is evident that there has been a substantial increase in individual case disposition rates over recent years and the pressure of work upon judges in hearing cases and deliverying judgments in the wide variety of work assigned to them is already burdensome.

The Attorney-General, Mr. John Dowd, spoke at the seminar and it was apparent from his words that the Government is aware of the considerable problem of delay in the courts. It was equally apparent, however, that the Government did not propose to solve this problem by throwing money at it and that it was looking to the court itself to attempt to alleviate some of the difficulties.

The implementation of the proposals of Mr. Justice Woods' Committee will go some way towards achieving that objective. ❑