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An evaluation of some ways of limiting and reducing the costs to parties of conducting litigation in the magistrates court (civil division) in South Australia

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AN EVALUATION OF SOME WAYS OF LIMITING AND REDUCING THE COSTS TO PARTIES OF CONDUCTING LITIGATION IN THE MAGISTRATES COURT (CIVIL DIVISION) IN SOUTH AUSTRALIA

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CHAPTER 1

EXECUTIVE SUMMARY

The trinity of cost scales that reward activity, fear of being sued for negligence and an adversary based litigation process drive lawyers to leave no stone unturned in litigation at a cost to the parties that is beyond their ability to pay and which often overwhelms the amount of the actual dispute. "Every system contains a percentage of errors; and if by slightly increasing the percentage of error we can substantially reduce the percentage of cost it is only the idealist who will revolt."[1] The idealists have reason to be cautious. A cheap efficient system may contain the seeds of a different set of problems. The German experience suggests that too great an efficiency coupled with certain and full cost recovery can lead to excessive litigation. This may not increase access to justice by the needy but rather may further empower the powerful.[2] This causes a substantial expense to the community both in publicly funded judicial expenses which are much higher per capita than is the norm in Europe and in legal resources generally. The United States of America has moved towards judicial case management and the promotion of alternatives to adjudication but there remains a strong thread in the literature of that country in defence of the adversary trial process. The judicial process as we know it is best at dispute resolution by trial. It is open, has safeguards and is perceived by litigants as careful, unbiased and dignified. It generates a body of decided cases to guide future disputants. It is said that its procedures express our value structure and once engaged it ensures that society's interests are protected in any resolution of the dispute.[3] If litigants are forced to resolve disputes by methods outside that process (mediation and other alternative dispute resolution- 'ADR') that involves a dilution of the protection that the trial process offers and calls into question the very need to have the judiciary. Although they are uniquely empowered and trained in the trial process that is not so with ADR.

In introducing reforms to save costs, care must be taken to ensure that today's solutions do not become tomorrow's problems and that the virtues of the present system are not

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[1] Lord Devlin in the BBC series "What's wrong with the law". This is quoted at greater length within the discussion of the Woolf interim report *Access to Justice* chapter 3 under the heading "civil litigation in England and Wales".

[2] See **A continental European perspective** in chapter 3.

[3] See the **United States of American experience** in chapter 3.

discarded.

The Magistrates Court (civil division) in South Australia has introduced several policies aimed at limiting and reducing costs. It has not designed its pretrial processes just as a linear track culminating in a well ordered adversary trial because in fact less than ten percent of defended cases will need a trial. Litigants are given multiple exit points from the litigation process, including court annexed mediation as an alternative to the conventional litigation. The court has certain and predictable party/party costs and seeks to minimise pretrial procedures. Judicial input is front loaded in the process and litigants are personally advised of the process, the costs they may incur and recover and the alternative ways offered by the court to resolve their disputes. This is a deliberate policy to inform the parties to enable them to have control of and to make rational decisions about their litigation. The court has a well developed small claims jurisdiction where legal costs are minimised by excluding lawyers from the pretrial and trial process. The effectiveness of these policies in limiting and reducing costs to the parties has been evaluated in this research. Some collateral implications of the parties' satisfaction with the process have been considered.

The ninety day preaction notice rule

In personal injury litigation the first exit point occurs before the litigation is commenced. The State Government Insurance Commission in South Australia (called herein SGIC- the fund is now owned by the Motor Accident Commission of SA), the compulsory third party (CTP) insurer in SA, established a settlement conference team in an endeavour to settle claims before legal proceedings were issued. The available data and the subjective opinion of lawyers involved in CTP litigation show that this initiative was successful in settling a substantial number of claims before legal proceedings were filed. A relatively high level of respect by lawyers for the settlement conference team has contributed to the success of the initiative. A rule of court requiring 90 day preaction notice of an intended claim institutionalised this approach. The number of personal injury actions commenced in courts in South Australia is now one quarter the number in 1989/90. Casualty accidents in the same period have not declined substantially. This initiative has had a dramatic effect in allowing settlements to occur before claims were filed in court in up to three quarters of potential cases. Settling claims before legal proceedings were filed has resulted in a

substantial reduction in the medico legal costs incurred both by the claimants and SGIC.

The reduced level of general damages imposed by statute reduced the total payout by SGIC and has no doubt diminished the attraction of litigating if a reasonable offer is made by SGIC. Even allowing for these qualifications, the proactive settlement policy adopted by SGIC, in conjunction with the rule change has resulted in plaintiffs receiving their entitlement under the existing system earlier in the process and this has saved costs both to them and SGIC.

This approach has been so successful that it should be considered in any specialist field where there is a major player who can be convinced of the benefit of settling cases before the claims commence in court. It clearly can offer dramatic cost savings to the parties by allowing them to exit from the litigation path even before a claim is commenced in a court. In general litigation the risk of introducing a requirement of a preaction notice is that unless it is coincident with an intention by at least one and ideally both of the parties to negotiate then it is likely to fail to settle many cases. It could become just an additional step in a linear litigation process heading towards the court steps and in fact increase the costs to the parties. To be applied successfully to litigation generally attention would have to be given to education or other means to ensure a willingness by the parties to use the opportunity to settle their disputes.

Information to parties and mediation

The next exit point offered to parties in general claims is at the first directions hearing which now is conducted by a magistrate. The parties are required to attend in person, are told about the difference in the party/party and actual cost of litigation and are offered the option of mediation. A survey of parties showed that this information was well understood but there is an inertia against trying mediation. The new system was highly successful in bringing settlements forward in the litigation process. Two and a half times as many settled by the end of the directions hearing under the new system than previously. This clearly saved those parties substantial costs. The front end loading of judicial input in combination with the parties being present and better informed were the reasons for this successful result. Parties were generally happy with the opportunity offered to discuss the case at this early stage. Repeat users of the court and their lawyers were not in favour of

the requirement that the parties attend in person. Only 4.5% of parties jointly chose mediation. At the time of data collection about half those had settled with indications that figure may rise up to a maximum of three quarters. Parties interviewed who tried mediation were very happy with the procedural fairness of mediation even where they were unhappy with the outcome. This contrasted with parties interviewed who had gone to trial who were only satisfied with the procedural fairness of the trial if they won. There was a concern about the enforceability of mediated settlements and further attention is necessary to ensure that these are framed in a way that makes them easy to enforce as a judgment if a party defaults.

The other notable change was that 15% of cases went straight from the directions hearing to trial. If these were correctly identified as cases that could only be finalised with a trial date this reduced delay and was a small cost saving to the parties.

Insisting that parties attend in person at the first directions hearing which is conducted by a magistrate, who gives them clear information about the costs of litigation and the option of mediation, has been successful in giving the parties an early exit point. Only a small percentage chose mediation but it is a useful alternative and was well accepted as a process by those who did choose it.

Alternative adjudication- the small claims procedure

The small claims procedure excludes lawyer involvement once the claim is filed and defended. That clearly reduces the costs to the parties. Until recently the procedure was to list claims for hearing at which a magistrate made attempts to settle them. If that failed the magistrate determined them by an inquisitorial process. This dual role often caused complaints by the parties. A directions hearing before the trial has been successful in finalising an extra 25% of cases without the need of a trial and has clarified the role of the trial magistrate. This saved those parties some costs but the rest who went to trial were put to the expense of an additional attendance. It has reduced delay. The parties who settled at the first directions hearing were very pleased with the speed and informality of the process. Those who did not settle and went to trial generally thought the directions hearing was a useful step even if it had not been for them. Some who were convinced that a trial was the only way for them to be vindicated thought the additional step was a waste

of time. Lawyers' opinions about the new directions hearing also were divided. However apart from this lawyers are in favour of the small claims process. It offers a judicially determined result with a resulting court enforceable judgment at very low cost compared to general claims. Lawyers say that it is not economic to represent parties in claims under $10,000. Some conclude that the small claims limit should be increased to that sum. Others think the results are on occasions too unreliable to increase the limit that far. None think the present limit of $5,000 is too high. A new procedure allowing claims over $5,000 to remain as small claims unless someone objects may be a sensible compromise.

The small claims procedure is a very cost effective way of providing access to the courts. There is a trade off here. Without lawyers the quality of the result is highly dependant on the ability of and the time a magistrate has to devote to each case because of the very high demand placed on the magistrate to ensure that the factual and legal issues are properly canvassed. The introduction of a directions hearing before trial with the option of mediation being offered has been well received by those parties who settled at the directions hearing or at mediation but with some additional personal cost to litigants who went to trial. It has the advantage of giving the magistrate an unambiguous role at the trial as an adjudicator, compared to the system without a directions hearing where a magistrate who failed as a conciliator then adjudicated.

The conventional trial path

The fixed rate cost scale, which provides a predictable and limited party/party cost recovery has been all pervasive in maintaining a cost saving culture in the Magistrates Court. It does not reward activity but the completion of the key steps in the process. Rules that permit limited pretrial activity assist this culture but it is the lack of cost incentives for non essential work that discourages it. This has clearly limited the cost to parties of litigating in the Magistrates Court. Cost penalties that modify the party/party costs have discouraged excessive ambit claims and have encouraged offers that have helped to settle cases earlier. This also has saved costs.

Conclusions

The common feature of these findings is that involving the parties in the dispute resolution process at points at which they are given opportunities to settle has been effective in

allowing a significant number to settle earlier than they were previously. This and ensuring clear and timely information is given to parties must be part of policies designed to reduce and limit costs to litigants.. Courts' pretrial processes must not be primarily designed for the small percentage of cases that are finalised by judicial determination but rather must assist the great majority of parties who will settle to do so earlier in the process. Parties must be given multiple exit points from the litigation path. Expensive legal procedures should be left as late in the process as possible to minimise the cost burden on the cases that settle. All procedures should be assessed in the light of the costs they cause the parties. For example allowing proof of damage by service of an invoice with the claim is a small change that has brought significant savings to the parties, mostly in motor vehicle property damage claims.

In addition courts can substantially reduce the parties' costs by adopting special procedures for particular classes of cases such as the preaction notice in personal injury claims and the small claims procedure where lawyers are excluded where their costs would be disproportionate to the amount of the dispute.

Finally it is essential that the cost scale gives certain and predictable party/party costs which is not increased by activity. This allows the parties to make rational choices and gives them a basis on which to negotiate costs with their own lawyers. It discourages profligate legal jousts over issues that at the end of the few cases that go to judicial determination do not matter anyway.

CHAPTER 2

INTRODUCTION

The Magistrates Court in South Australia in 1992 was given control of its own procedures and, as one of its policy objectives, was concerned to limit and reduce the costs to the parties of conducting litigation in that court. The court adopted caseflow management policies and procedures with cost factors specifically in mind. A lump sum/percentage cost scale was adopted to provide predictable and certain costs accruing on the stage of the process and so not encouraging activity for activity's sake. A set of cost penalties was put in place to encourage realistic offers. Since those initial policies the court, in conjunction with other courts in South Australia, also has adopted a special procedure in personal injury matters to require pre-action notice, which enables the insurers of the defendant to attempt to settle the matter before the costs of filing the claim and defending it are incurred. Most recently the court has offered court-annexed mediation and has been proactive in ensuring that litigants are personally aware of the litigation process, the alternatives offered by the court and the cost issues in litigation.

The purpose of this research is to assess the extent to which those policies have been effective in limiting and reducing the cost to parties of conducting litigation in the Magistrates Court in South Australia. The cost of litigation cannot be viewed in isolation. Just as an extremely ponderous but accurate and expensive dispute resolution process may not be useful to society in solving its civil disputes due to the fact that it is not accessible to a large part of society due to its expense, in contrast, a cheap dispute resolution process which yields results that are unreliable or even capricious and leaves the parties with a sense that they were not given a proper hearing would be only to replace one evil with another. Policies to make the delivery of dispute resolution more affordable must still ensure that other important elements of the system are not substantially prejudiced. The Magistrates Rules identify three prime policy objectives, namely the expeditious, economical and just conduct and resolution of an action or proceeding.[4] The primary focus of this research is whether the policies adopted have been effective in ensuring the economical conduct and resolution of actions and proceedings. It is the contention of the

[4] *Magistrates Court (Civil) Rules* 1992 (SA), r 3. After this footnote references are to the rule alone.

author that in the context of the Australian legal system the Magistrates Court has and still does deal with its matters in a reasonably expeditious way, and in the event this research suggests that the policies introduced with an intention of reducing costs have not increased delay; on the contrary, if anything, they have reduced it. It is important that the justice of dispute resolution not be prejudiced significantly by any other policy parameters. It is beyond the ambit of this research to carefully articulate and research the justice of the dispute resolution in the Magistrates Court. Although it has not been specifically researched, there is no suggestion that the level of appeals has substantially increased as a result of the policies researched in this thesis. Thus by the judicial system standards, the level of justice has not been significantly called into question. Whatever justice may in fact be, the litigants' view of whether they received it is one measure of it. It is not the job of courts to be populists, but it is important that the litigants in the court processes have a sense that they were given procedural fairness, even if they are not happy with the outcome.

In this research firstly I have discussed some of the approaches to cost concerns and policies adopted in other common law countries in particular, and I have briefly looked at the German costs system because it has attracted some favourable comment in the Woolf Report[5]. Some dangers of having too efficient a litigation system with certain and effective cost and judgment recovery are also discussed. It is intended that this discussion gives context to the policies to be discussed and sets out some of the pitfalls of pursuing cost reduction.

Although the various policies in the Magistrates Court intended to address the cost issue have been introduced at different times, it is convenient to discuss and assess those policies in the order of their stage within the litigation process rather than arbitrarily by when they have been adopted.

It has been the intention of this ongoing process of reform that the pretrial processes of the court should not be solely nor even primarily designed to bring cases in an orderly manner to a judicial determination. They are intended rather to encourage and give opportunities

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[5] Lord Woolf *Access to Justice - Final Report* Internet HTTP:\\ltc.law.warwick.ac.uk\woolf\report July 1996

to settle, or exit points, to litigants at as many stages of the process as possible. Those who cannot settle but wish to take the case to the end are able so to do. This may establish a point of principle for them and also may create a useful precedent for future litigants and society at large. However they are the minority and the pretrial procedures accommodate them but are not designed around them.

The court needs to adequately serve many different users. It has regular commercial users collecting the occasional debts from a multitude of transactions that they undertake, typically retail stores and financial institutions. There are the one-off litigants greatly incensed by a matter and willing to devote all their material resources to successfully establish a matter of principle. There are wealthy litigants some of whom may be willing to exploit procedural opportunities to exhaust their less well-resourced opponents. Society itself has its needs from the litigation process to ensure that results are within society's parameters and to set precedents for other disputants. A proper balance needs to be found between facilitating the resolution of disputes and exacerbating disputes by offering too easy and affordable a facility for those who are argumentative and greedy. Rights too easy to enforce can be exploited as weapons of abuse. It is perhaps unrealistic to expect that all these aspects of a just civil litigation system can be satisfied in a cost-effective way. It is certain that not all the litigants can be left happy. "The convoluted wording of legalisms grew up around the necessity to hide from ourselves the violence that we intend toward each other."[6] It is only because of the vicissitudes of human nature that we need a civil litigation system at all. It is, however, obvious that for a well-ordered society we do need a civil litigation system, and it is submitted that the aspirations set out in the Magistrates Court Rules quoted above, that it provide an expeditious, economical and just conduct of dispute resolution, are realistic and appropriate aspirations. Whilst the purpose of this research is primarily to assess whether certain policies that have been adopted have been effective in reducing the costs to the parties of conducting their litigation in the Magistrates Court, the research has also attempted to monitor any consequences the policies may have had in relation to delay and litigant perception of the fairness of the process. It is noted that costs to the litigant is primarily discussed in terms of costs they have expended on lawyers, experts and other disbursements rather than their own time and internal costs of their organisations. However, some assessment of their own costs has been borne in mind

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[6] Frank Herbert, *Dune Messiah* (1st ed, NEL paperback, London, 1972) p 160.

in the evaluation.

It is appropriate to first turn to the recent history of the court and describe the introduction of the policies the subject of this research and, within that, to briefly outline the means adopted to evaluate those policies.

A Brief History of the Court and its Jurisdiction

Historically, the Magistrates Court in South Australia was divided into courts with jurisdiction over limited geographical areas known as 'Local Courts'. These had a limited civil jurisdiction. Above that, all civil disputes were conducted in the Supreme Court. In 1970, an amendment created an intermediate court in South Australia, known as the District Court, which had jurisdiction over civil matters between the jurisdiction of the Magistrates Court and the Supreme Court. The civil jurisdiction of the Magistrates Court was conferred by this legislation and was still dealt with on a regional basis by the various 'Local' Magistrates Courts. In 1975, the Magistrates Court had conferred upon it a small claims jurisdiction up to a limit of $500. At that time its 'limited' jurisdiction was $2,500. Magistrates could hear cases up to that limit. District Court judges could hear claims up to $7,500. The small claims jurisdiction was a plenary jurisdiction, i.e. all monetary claims under $500 were dealt with as a small claim and subject to special procedures. In 1982 the Small Claims Jurisdiction was increased to $1,000 and the Limited Jurisdiction to $7,500. District Court judges could hear claims to $46,000 and $60,000 for damages for personal injury caused in motor vehicle accidents.

In May 1988, the small claims jurisdiction was increased to $2,000 and the limited jurisdiction to $20,000. The Magistrates Court in its civil jurisdiction, then still known as the `Local Court', remained as an adjunct to the District Court. District Court judges could hear claims to $100,000 and $150,000 for motor vehicle personal injury claims.

In 1992 the jurisdiction of the courts was substantially altered. The Magistrates Court was constituted under a separate Act of Parliament, given Rule-making powers, and its civil jurisdiction was increased to $60,000 for personal injury claims arising from motor vehicle accidents and also for actions for recovery of property and $30,000 in other matters.[7]

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[7] *Magistrates Court Act* 1992 (SA), s 8.

In 1987, general damages in personal injury claims arising from motor vehicle accidents were capped at $60,000, indexed for inflation for accidents in subsequent years.[8] Courts assessing those damages need to prescribe a number between one and 60 to the injury. This is then multiplied by $1,000.[9] The Supreme Court interpreted this to the effect that 60 was reserved for the most serious of injuries, and a typical whiplash injury would be of the order of five to eight.[10] Before this, awards for past and future pain and suffering (the equivalent to the Wrongs Act number) for a typical whiplash injury were much higher. For example in *Wilkinson v. Alseika*[11] the award for past and future pain and suffering for a "disabling though not a crippling injury of a whiplash type exacerbated by the nerve lesion"[12] was $30,000. Allowing for inflation, this was of the order of eight times the typical award in 1987 under the Wrongs Act. The combination of the reduction of general damages consequent upon the amendment to the Wrongs Act in conjunction with the increase in jurisdiction, resulted in the transfer of a substantial portion of personal injury motor vehicle accident claims from the District Court to the Magistrates' Court.

South Australia has its population highly concentrated in the main capital city of Adelaide. In suburban and country areas, Magistrates Courts deal with both civil and criminal jurisdictions. However, in the CBD and inner metropolitan area, the civil and criminal jurisdictions, for many decades, have been separated. A specialist civil Magistrates Court serves the CBD and inner metropolitan area. This court has been staffed by five magistrates for the past 20 years. The author has been supervising that court formally since 1 August 1991 and prior to that, on an acting basis with some minor interruptions, since 8 April 1988. As an author of some of these policies I would like to find that they are effective. I have borne this self interest in mind when undertaking this research.

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[8] *Wrongs Act* 1936 (SA), s 35A.

[9] 1987 - the multiplier increases with inflation.

[10] See *Packer v. Cameron*, (1989) 54 S.A.S.R. 246

[11] SA Supreme Court (1981) 97 LSJS 355

[12] Ibid p 358

Policies Adopted in the Magistrates Court (Civil) Rules 1992

The 1992 Magistrates Court Act delivered the power to control its own procedures to the Magistrates Court. The Magistrates Court stated its motherhood principle in its civil jurisdiction as "the Court and Registrar must in all things promote the *expeditious, economical and just* conduct and resolution of an action or proceeding" (author's italics) and "these Rules are not intended to defeat the proper action brought in good faith of any party and are to be interpreted accordingly". The court has regard to the Supreme Court case-flow management Rules.[13]

In the Magistrates Court, delay historically has not been and still is not a significant problem. The Adelaide Civil Registry of the court in the past five years has not had a trial delay for litigants ready for trial of more than nine months.[14] Other Registries in South Australia have less delay. Statistics on the percentage of cases completed within a particular time have only been taken out occasionally. Those figures again show a satisfactory, albeit slowly deteriorating position.[15] The increased number of early settlements occurring at the directions hearing reported later should have significantly improved this position.

The Magistrates rules committee identified the cost of litigation as a major impediment to access to justice. In adopting procedures, the cost implications for the parties were borne in mind. Several innovations have been adopted to reduce costs. These are discussed in their order in the litigation process not their order of adoption.

The Ninety Day Preaction Notice Rule

In South Australia, all third party personal injury motor vehicle insurance is held by SGIC. In 1991, SGIC had initiated informal conferences to deal with the backlog of pre-1990 personal injury actions in the District Court. This led SGIC to establish in August 1992 a settlement conference team of experienced claims officers to endeavour to settle claims before legal proceedings were issued. This team has resolved, on average, 100 claims per

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[13] Rule 3.

[14] See appendix A.

[15] See appendix B.

month, with a settlement rate of 85-95%.[16] As evidence of the success of this approach, the average time to settle CTP claims has reduced from 31 months in 1991 to 25 months in 1993.[17] In 1993 the Crown Solicitor made representations to the Chief Justice on behalf of SGIC. As a result, at the end of 1993, all civil courts in South Australia introduced Rule amendments to provide that a plaintiff in an action for damages for personal injuries who failed to give at least 90 days notice of the claim to the defendant's insurer or the defendant, is not entitled to the costs of preparing and filing the claim.[18] In the Magistrates Court this rule effects all actions commenced after 7 March 1994.[19]

Most defendants of personal injury actions are insured against the liability. The purpose of the Rule is to give the insurer an opportunity to settle the claim before the substantial additional costs of initiating a court action are incurred by the plaintiff and, ultimately, paid for by the defendant if the claim is successful. SGIC is the insurer of the overwhelming majority of defendants in personal injury claims in South Australian courts. The number of these claims has declined substantially. An analysis of data made available by SGIC has been conducted to assess to what extent the decline in personal injury matters commenced in the Magistrates Court can be attributed to the introduction of this Rule rather than other factors such as a change in policy by SGIC, a decline in the number of accidents, less incentive to claim due to reduction in level of general damages, or other factors. Interviews of legal practitioners who specialise in personal injury claims, both from plaintiffs' and defendants' perspectives, have been conducted to ascertain their view of the cause of the reduction in personal injury claims and the effectiveness of the new procedure.

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[16] John Winter "The ninety day rule" (24 February 1994), an unpublished paper delivered to lawyers as part of the Law Society of SA CLE program.

[17] Ibid. p 3.

[18] Rule 106(8). The lawyer may still be able to charge the client- eg if instructions were given at the end of the limitation period and it was necessary to file without notice to avoid the claim being statute barred. In the higher courts the penalty is all costs.

[19] After 28/10/93 in the Supreme and District Courts.

Information to litigants and Mediation

In a pilot initiative commenced on 1 May 1996, the Adelaide civil registry of the Magistrates Court adopted new procedures to ensure that parties to litigation had timely and accurate information about the cost and nature of the litigation process and offered a mediation service as an alternative dispute resolution technique. Parties in defended actions were required to attend in person at the first directions hearing. These directions hearings were conducted by a magistrate who explains to the litigants the court's party/party cost scale and the potential difference between that and solicitor/client costs. The magistrate offered alternative paths in the conduct of the litigation. The first of these remains the **conventional path** through normal preparation processes to a conciliation conference and, if settlement does not occur there, to a trial. The alternative path offered is direct to a mediation conference conducted by a court officer at no charge to the parties or, if they wish, a mediator retained by them either under a pro bono scheme offered by the Law Society or a paid mediator. If the case settles at mediation the court can continue to supervise it until the terms of settlement are carried out and, when they are, dismisses the case or records a judgment if that is the agreement. If the case does not settle it is referred direct to a magistrate to ensure the necessary pretrial steps are conducted to bring it to trial without going back to a conciliation conference, unless the parties wish that. It is the intention that mediation be an alternative path and not an additional step in the conventional path.

The mediation offered by the court is at no charge to the parties and is conducted by senior registry staff trained in LEADR[20] mediation. The parties are also given information about the availability of private mediators. The mediator's role in this process is to help the disputing parties find a solution to the dispute with which they both agree. This can be distinguished from the adjudication or trial process in several respects, in particular:

- The parties control the result;
- Relationships between the parties may be preserved;
- Problems in proving a claim may be overcome;
- Everything is discussed in confidence in comparison to a public trial;
- Creative solutions beyond traditional legal options may be available;

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[20] Lawyers Engaged in Alternative Dispute Resolution, an organisation that trains and accredits mediators.

- The resolution of the dispute does not necessarily involve winners and losers.[21]

It is explained to the parties that they should not enter the mediation without being aware of the potential results they may achieve by the trial process so that, before agreeing to a mediated result, they can make a sensible assessment of whether it is in their best interests.[22] The parties are given information pamphlets to explain to them these alternative paths and the legal cost issues.[23] The court's party/party cost scale is a lump sum/percentage scale so that these costs are predictable. If the parties choose mediation by the court as the path, then a time is appointed some three weeks ahead for the mediation hearing.

One of the objectives of this hearing is to give parties an opportunity to finalise their cases earlier in the process than they previously could under the conventional litigation track. Over 90% of cases are finalised without a judicial determination at trial,[24] usually at the conciliation conference or on the court steps on a trial day. By either occasion substantial legal fees have been incurred. This is an opportunity for some of those parties to settle earlier, with one benefit being a reduction in the costs they have incurred by the time of that settlement.

An evaluation of the effectiveness of the effect of offering timely information to the parties and the alternative of mediation has been conducted. The number and percentage of cases where the parties adopted mediation, and the outcome, has been recorded. A comparison

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[21] These are a summary of LEADR objectives for mediation.

[22] In LEADR terms the parties should have an idea of the *B*est, *W*orst or *M*ost *L*ikely *A*lternative to a *N*egotiated *A*greement- known as the BATNA, WATNA or MLATNA.

[23] These are reproduced in Appendix G.

[24] In a sample of three months defended general claims in the Adelaide Civil Registry of the Magistrates Court in SA in1992 tracked to conclusion only 27 out of the total sample of 379 had a trial commenced. This sample is discussed in Chapter 5. Consistent with this finding Williams Goldsmith and Browne *The cost of civil litigation before intermediate courts in Australia,* AIJA 1992 p 45 found that of cases issued in the samples in VIC and QLD !0% go to trial. Professor Judith Resnick University of Southern California, "Alternative Dispute Resolution and Adjudication; A glimpse at changes in the United States" an unpublished paper delivered to the Litigation Reform Commission conference Brisbane 1996, p. 4 reported that research in America showed less than 4% of civil cases go to verdict. The balance do not all settle- some are summarily determined or are finalised by default.

has been made of a three month sample of cases conducted under the pilot scheme to a previous three month sample of cases before the scheme came into effect, to ascertain if a higher percentage of cases settled earlier. Lawyers have been interviewed to find their perception of the effectiveness of the new process and parties have been interviewed to gauge the extent of their understanding of the alternatives and the reasons for their choosing mediation or the conventional path. They have also been asked their opinion of the processes they experienced. The results are discussed in Chapter 5.

Alternative Adjudication - The Small Claims Procedure

The Magistrates Court has had a special procedure for small claims since 1975. Since 1992 the general jurisdictional limit for small claims has been $5,000 and has included a general equitable jurisdiction[25]. Small claims are a type of minor civil action. In late 1995 a new class of minor civil actions known as minor statutory proceedings was created. This includes disputes about fences, domestic building contracts, second-hand motor vehicle warranties and retail shop leases. In these if they are under $5,000 they must be conducted in the minor civil action jurisdiction, but if they are over $5,000 either party may elect to have them removed to the general jurisdiction. For the purpose of this thesis these distinctions are unimportant and all are described as small claims because that term is generally used in Australia to describe claims with similar special procedures.

Small claims are commenced with the filing of a claim form as with general claims but no interlocutory processes are allowed without leave which is rarely given.[26] The most general pleadings are accepted and discovery and other pretrial activity is not required. The small claims trial process is an adjudication procedure with the court deciding the factual basis for its determination and then making a determination in accordance with legal principles. However, the procedure is clearly distinct from the general adversary legal process. The court is required to investigate possibilities of arriving at a negotiated settlement and "the trial will take the form of an inquiry by the court into the matters in dispute between the parties rather than an adversarial contest between the parties".[27] The

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[25] *Magistrates Court Act* 1991 (SA), s 8.

[26] Rule 65.

[27] *Magistrates Court Act* 1991 (SA), s 38.

court may itself call witnesses, is not bound by the rules of evidence, must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms and the parties are not bound by written pleadings.[28] This is clearly an alternative to the conventional adversary process, where the magistrate/adjudicator remains aloof from the field of battle only to adjudicate at the end. In small claims, the magistrate is a major participant in the trial process, often being examiner-in-chief, cross-examiner and adjudicator. What is common with the normal trial process it that the trial occurs in open court and the magistrate adjudicates between the parties and imposes a decision upon them. The parties are not in control of this process, in contrast to mediation where if the parties achieve a result it is their choice and the process is undertaken in private and confidentially.

Until 1996, the practice in small claims was to list them for trial without any pretrial process. The trial was typically 8 to 12 weeks after the defence was filed. Only about a third of these small claims actually proceeded to judgment[29] and, in respect of those which did, the parties were often ill-prepared or did not know the court's expectations in relation to the evidence that they should bring to the hearing. Some litigants resented attempts by magistrates to bring the parties to a settlement. To address these concerns, on 1 May 1996, a pretrial step was introduced on a pilot basis in the Adelaide Civil Registry. The parties were required to attend a directions hearing conducted by a member of registry staff, trained in LEADR mediation. At that hearing they were encouraged to negotiate a settlement. If they did not settle the difference between mediation and the trial process was explained to the parties and they were offered the choice of either process. A duty magistrate was available to deal with default matters and to assist with procedural and other advice. If the parties chose mediation, a mediation date was appointed before a court-trained mediator. If they chose the trial process, the evidence they needed to bring to the trial was discussed with them. Written information about each of those alternatives was given to the litigants.[30]

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[28] Ibid.

[29] In a sample of three months defended small claims in the Adelaide civil registry of the Magistrates Court in SA in 1992 tracked to conclusion 167 out of the total sample of 537 (31%) had a trial commenced. This sample is discussed in Chapter 6.

[30] The information pamphlets are reproduced in Appendix G.

The small claims procedure saves the parties substantial legal costs. The fact that pretrial processes such as discovery between the parties are generally not allowed and the exclusion of lawyers from participating in the trial avoids the substantial legal costs that are incurred in these processes in general claims. A successful claimant is only entitled to recover legal fees from the loser incurred for the preparation of the claim in the sum of $20 plus 10% of the claim up to a maximum of $200 and the court filing fee of $48. Nominal witness fees are allowed to the party successful at trial[31]

To evaluate the small claims procedure a previous client survey has been reviewed, there is a quantitative comparison of the point of disposal and delay in 3 month samples of defended cases in 1992 and 1996, answers to interviews of parties who have been through the new procedure have been analysed and lawyers have been interviewed. The new step of a directions hearing and offering mediation is a close parallel to the pilot scheme in the general claims jurisdiction. The level of understanding by the parties of their choices and their reasons for choosing trial or mediation can be extrapolated to the parallel general claims procedure. The extra step introduced into the process must cost parties who go to trial more of their own time and the extent that this is balanced by other advantages is evaluated.

The conventional path - fixed rate cost scales, cost penalties and case flow management policies that allow pretrial activity to be minimised

The rules have three strategies to limit costs in cases that proceed down the conventional track. Firstly, there is a fixed rate cost scale.[32] This provides two scales for general claims, one for routine matters and one for complex matters.[33] A party can convert a matter for cost purposes to the complex scale by giving written notice to the other. If the other does not contest that conversion within 21 days, the party/party costs will be on the complex scale. If it is contested, the issue of the appropriate scale is determined by the trial magistrate.[34] If parties wish an earlier determination, they can apply to the court for

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[31] The cost scale is reproduced in Appendix H.

[32] In Appendix H the cost scales and relevant cost rules are set out.

[33] The third scale is for minor civil actions (small claims).

[34] Rule 106 (7).

that issue to be determined. The routine and complex scales have the same items, but there is a small cost increase in complex matters for taking original instructions, in some items in the pretrial process and, in preparing a case for trial. The scales provide a mixture of percentage and lump sum costs to the net effect that, at the end of the first day of trial in a matter that has not had many adjournments of pretrial steps, in a routine action the party/party costs will be 30% of the amount of judgment to a plaintiff or, if the defendant wins, the amount claimed against the defendant. In a complex action the costs will be 36%. Disbursements will add another 4% and a great deal more if professional reports and witnesses are used. A daily rate for counsel applies after the first day with no additional solicitor fees or refreshers for counsel..[35] It is recognised that these party/party costs may be significantly below the actual costs. This gap is used by cost penalty provisions to encourage the parties to make realistic offers by not later than the conciliation conference. The rules have the usual cost penalties to the effect that if a plaintiff obtains a higher judgment than an offer filed by the plaintiff then from 14 days after the offer was made the plaintiff receives solicitor client costs. If the plaintiff obtains a judgment for less than the defendant's filed offer then the plaintiff pays the defendants party/party costs.[36] In addition rules 52 and 53 provide a formula to the effect that if a plaintiff obtains a judgment for less than half the amount claimed at the conciliation conference then the plaintiff's cost entitlement is reduced but if the plaintiff obtains a judgment for more than twice the defendant's filed offer at the conciliation conference then the plaintiff's cost entitlement is increased. Once either rule applies the greater the margin the greater the effect the formula has on the cost entitlement. The rules are intended to encourage the parties and their advisers to make realistic assessments of their prospects of success by the conciliation conference so that the plaintiff reduces his or her claim to a realistic figure and the defendant makes a realistic offer. It is also intended to discourage the spurious counterclaim which has no merit except to frighten the plaintiff.[37]

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[35] A typical bill is included in Appendix I.

[36] Rule 59 which is reproduced in Appendix H.

[37] Rules 52 and 53 are reproduced in appendix H. Examples of the operation of the rules are-

- a plaintiff amends the claim to $40,000 at the conciliation conference but only obtains judgment for $10,000: rule 52 reduces the Cost Entitlement by 2 x costs x 10,000 ÷40,000 =1/2 ie the plaintiff's party/party costs are halved.
- a defendant files an offer of $5000 at the conciliation conference but the plaintiff obtains

The case-flow management procedure of the court is to call the parties in for a directions hearing about four weeks after a defence is filed. Parties who choose the conventional path advise when they will be ready for a conciliation conference dates are fixed to attend to any interlocutory matters. If the case does not settle at the conciliation conference it is set for trial. In an endeavour to save costs to the parties, it is not a policy of the rules that the parties must be ready for trial at the conciliation conference. Although in personal injury matters it is necessary for the litigants to automatically make discovery under the rules and also for the plaintiff to provide extensive particulars,[38] in all other claims there is no automatic requirement for any pretrial activity. Interrogatories are only permitted with leave of the court.[39] It is not necessary to file copies of any documents other than the pleadings at the court except expert reports and the personal injury particulars for the conciliation conference. Because the court does not monitor whether these steps have occurred, there is no need for it to receive copies of the documents. The policy of these rules is to allow litigants and their advisers to minimise pretrial activity rather than automatically impose it on each file, regardless of its ultimate outcome. The court accepts that some actions are not fully prepared for trial by the conciliation conference. However, given that only 7%[40] go to trial, it is better to have some of those under-prepared than to impose very expensive over-preparation designed for the trial process on the 93% of cases that never go to trial. The rules adopt policies that are specifically directed at minimising costs to the litigants, to ensure that adequate offers are made and to ensure that the party/party costs are predictable.

Prior to the requirement introduced on 1 May 1996 that the parties attend in person at the first directions hearing it is reasonable to infer that the parties were largely unaware of these policies. Any affect of these policies on the conduct of litigation lay with the parties' legal advisers. Interviews of the legal profession have been conducted to ascertain their knowledge of these policies and the extent to which they have influenced them to modify

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a judgment for $20,000: rule 53 raises the Cost Entitlement by 2 x costs x (20,000-5000) ÷20,000 =3/2 ie the plaintiff's party/party costs are increased by 50%. There is a cap on this increase of actual solicitor client costs.

[38] Rule 68.

[39] Rule 74.

their activity in a way that reduces costs to the litigants. Since 1 May 1996 the parties attend in person at the first directions hearing where they are given oral and written information about the concepts in the cost rules and their choices.[41] Parties have been interviewed to ascertain their level of understanding of these issues.

[40] In accordance with the 1992 sample discussed in footnote 24.

[41] The information pamphlets are reproduced in Appendix G.

CHAPTER 3

SOME POLICY ISSUES IN REDUCING THE COST OF LITIGATION

United States of American experience

Kakalik and Pace in *Costs and Compensation Paid in Tort Litigation*,[42] conducted a wide-ranging analysis of the relationship between the costs of conducting court litigation and compensation pay-outs in the United States. This surveyed total expenditure on tort litigation in both State and Federal Courts in the United States of America in 1985. They estimated that approximately 866,000 tort lawsuits were terminated annually in State and Federal Courts of general jurisdiction in 1985.[43] The total cost of expenditure on this tort litigation in that year was between $US29 billion and $US36 billion, of which an estimated $US16 billion to $US19 billion was spent on the various costs of the tort litigation system, that is, less than half the total expenditure was spent on the net compensation paid to the plaintiffs.[44] Therefore, plaintiffs received about $US14 billion to $US16 billion out of the total pay-out of $US29 billion to $US36 billion. After deducting the defendants' legal fees, the plaintiffs' legal fees and expenses represented approximately 30-31% of total compensation paid to plaintiffs.[45] There was no substantial difference between the legal fees and expenses paid by plaintiffs in auto-tort cases compared to other tort cases (31% and 30% respectively). However, the defendants' costs of litigation between these classes of cases differed significantly. In auto-tort cases, defence legal fees and expenses were an estimated 16% of total compensation in auto cases, whereas in non-auto cases, which are often more complex, defence legal fees and expenses were 28% of total compensation paid. Plaintiffs' costs in America are usually paid on a contingent fee basis. Depending on the court and type of tort case, only 2%-6% of individual plaintiffs pay their lawyers on an hourly basis, and only 1%-2% pay on some other basis, such as a flat fee.[46] The percentage fee varies but is of the order of one-third. Where proof of liability may be difficult (e.g. asbestos cases), the percentage may be higher, but where liability is obvious

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[42] 1986 RAND, the Institute for Civil Justice.

[43] Ibid p vi.

[44] Ibid p vii.

[45] Ibid p viii

[46] Ibid p 37.

(e.g. airline accident cases), the percentage may be lower.[47] In contrast in South Australia the SGIC data discussed below shows in 1991/2, the year in which costs as a percentage of payout were highest, that plaintiffs' medico-legal costs as a percentage of the total payout to the plaintiffs was 13.7%[48] and if the unrepresented claimants are taken from the data the percentage is 14.8%.[49]

It is, of course, too facile to suggest that the reduction of costs alone will necessarily result in greater justice. Franaszek in *Justice and the Reduction of Litigation Cost; A Different Perspective*,[50] confronts the assumption that if the goals of reduced cost or delay have been achieved, the goal of improved access to justice has also been achieved. He points out that a small reduction in cost may merely allow greater use of the court system by those who already had access to it, rather than enabling persons presently precluded by the costs from accessing the system. (The European experience discussed below supports this prediction.) To analyse this in an intellectually pure way, it is necessary to define "justice" first and, having done so, to then analyse the effects of reduction of cost on justice as defined. He goes so far on one proposed definition of "justice", namely a "utilitarian definition of justice" to suggest that settlement itself may not advance utility. He quotes Fiss "Against settlement",[51] "To be against settlement is only to suggest that when parties settle society gets less than what appears and for a price it does not know it is paying. Parties might settle while leaving justice undone."

Franaszek's article is useful to confront the bold assertion that what we are presently doing in courts is delivering justice, and therefore if we do it cheaper we are, per se, improving access to justice. I deal with this in at least two ways. The legal cost to parties of taking a case to trial in the Magistrates' Court on the party/party scale is a minimum of 30% each,

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[47] Ibid p 38.

[48] See Appendix C.

[49] Ibid.

[50] (1985) 37 Rutgers Law Review.

[51] (1984) 93 Yale LJ 1073 at 1085.

ie. 60% between them.[52] Add disbursements and the total amount paid out on a trial may well exceed the amount in dispute and actual costs will often exceed these party/party costs. The parties' own time and costs are additional again. It is excessive to put parties to a greater expense than the amount of their argument in every case to ensure that a utilitarian notion of justice is imposed on every one. It is better to offer them opportunities and assistance in arriving at settlements they can live with and are not unfairly forced into. The earlier settlements occur the more costs are saved. Procedures that discourage unnecessary legal activity before settlements occur result in a further saving to those parties. Likewise, in relation to matters that go to trial, if procedures reduce costs and do not reduce the integrity of the trial process, then that also is an improvement. Simply, all other things being equal, if the cost of achieving the same result is reduced, then per se that is an improvement. Cheap may not be beautiful, but less exorbitant is better. More fundamentally, it would be arrogant and absurd to suggest that the value of the decisions by magistrates in civil matters in this State is so great that they have general utility to society, regardless of the expense of arriving at them. This cannot be the case because very few are reported so only the parties know the result and the reasons for it. Moreover on occasions our decisions are wrong. We do our best, but even where factual situations give clear legal answers, on occasions we can be wrong. The fact situation may be impossible to resolve with certainty. For example, I remember a case where a plaintiff driver alleged that he did not fail to stand, but rather the vehicle coming from the opposite direction deviated from its side of the road and turned, without apparent reason, into him and collided with his stationary vehicle. I thought that sounded unlikely. I heard from the driver and the passenger from the approaching vehicle, who both gave cogent evidence to the effect that the plaintiff hesitated, failed to stand, turned across their path and then stopped right in front of their vehicle. At that point, on the balance of probabilities, the most likely version was that of the defendant and her witness, namely that the plaintiff made an error of judgment and turned across their path, saw the approaching vehicle, hesitated and then stopped in front of it. A barmaid at the hotel which was on the corner, sought refuge from her duties and on the balcony overlooking the intersection, was enjoying a cigarette. She was a stranger to all parties and saw the defendant vehicle come down the road, the driver and the passenger horsing about in the front of it and, quite remarkably, it veered to the wrong side of the road and drove straight into a stationary

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[52] See the discussion under the heading **The conventional path** in Chapter 2.

vehicle, namely that of the plaintiff. This event was so remarkable, she thought the plaintiff may be unfairly dealt with and went downstairs and gave her name and address to the plaintiff. On that evidence, clearly the defendant bore all the liability. If, however, the barmaid was a conspirator with the plaintiff, who perjured herself to give false evidence to explain away the accident, then of course the defendant and her passenger were right. To suggest that the resolution of a dispute of this nature, even with the full analysis of the adversary system and all our forensic skills, always can be determined correctly, is nonsense. These are the easy ones. There are many cases which involve balancing of rights, obligations, egos and power relationships in such a way that there can be no black and white assertion as to the correct result. What the courts in civil jurisdictions need to do is provide a credible procedure to resolve these disputes without deluding themselves that the resolution they are providing is in some way justice of a God-like nature. A good file is a file that has been closed in a way that is credible to the parties and in a way that will not see it reopened on appeal or by other means. The extreme notion that society is in some way deprived by not having a judicial pronouncement on a dispute, is just that, an extreme point of view.

Other American literature echoes the Franaszek concerns but in the context of evaluating Alternative Dispute Resolution (ADR) used by courts. Lind and others in *The Perception of Justice. Tort litigants' views of trial, court- annexed arbitration, and judicial settlement conferences*,[53] say

> "These critics argue that litigation and litigation procedures should serve not only the individual parties to the suit but also the society at large. The state provides various dispute resolution methods for disputants, and society has an interest in maintaining a structure for dispute resolution that comports well with the political and social values of the society. Procedures express our value structure. Thus society has concerns about dispute resolution that can be distinct from those of the litigants. In addition, the accumulation of individual decisions in trials and appeals provides a body of law to guide the actions of people in circumstances similar to those involved in the suit. Moreover, society may have an interest in avoiding particular outcomes of disputes, such as agreements that might benefit the plaintiff

[53] (Rand Corp., 1989) p 5.

and defendant but that would harm the community as a whole. Once society's institution for resolving disputes has been engaged, it is argued, society's interests must always be considered in responding to the resolution of- and presumably in choosing the process of resolving- the dispute."

This is the same extreme view as Fiss (it is not necessarily Lind and others' view). Civil disputes are hard enough to resolve credibly without a societal imperative intruding into them. Some solutions should be precluded for reasons of illegality or public policy. These however only limit a few options and should not be allowed to drive disputes by always requiring consideration of society's interests.

The same study concludes

> "that case outcome, delay, and cost were less strongly related to perceived fairness and satisfaction than is generally thought." and it follows that "these findings raise doubts about whether cost or time saving innovations will increase individual tort litigants' satisfaction and perceived fairness." Specifically "litigation cost, whether absolute or relative to subjective standards, showed no substantial relationship to perceived fairness or satisfaction among these tort litigants... contrary to commonly held assumptions, we found that trial engendered higher levels of perceived control and participation as well as higher levels of litigant comprehension... The data suggests that tort litigants do not view trials as lessening their involvement in the legal process, but rather as increasing their involvement."

The study suggests that perceptions of unbiased and dignified procedures, "perceived carefulness of the process, evaluations of counsel, comfort with the procedure, and perceived control over case events and outcomes" were more important for system and outcome satisfaction than cost or delay.

> "The study showed that whatever procedure is used, formal or informal, it must be enacted well and seriously if is to be viewed as fair. The study suggests that improvements in perceived justice and satisfaction are more likely to come from changes in the tone of the judicial process than from innovations designed to cut costs or reduce delay. Further, the study suggests that care must be taken to ensure that innovations intended to reduce cost and delay do not do so at the expense of

those qualities of the judicial process that are more important to litigants."[54]

One of the authors, Professor Judith Resnik from the university of southern California, in a presentation at a Queensland Litigation Reform Commission conference in Brisbane March 6- 8 1996 made the point that the judiciary has a unique function in the adjudication and enforcement of civil claims. However if it fails to deliver on this process but rather diverts all cases to ADR techniques (over which it does not have a monopoly) then the very reason for the judiciary's existence and its claim on society's resources may cease to exist. Further support for the adjudication process is given by Deborah Hensler in "Court ordered arbitration: an alternative view".[55] In assessing court ordered arbitration she reviews the above concerns that departures from the trial process remove the protections of openness, formality, due process, a record of proceedings and the setting of normative precedents.[56] Her review of research on arbitration shows a high degree of litigant satisfaction in common with the trial process. She reports that "litigants believe that both arbitration and trial are more fair than settlement conferences".[57] However in America parties are often not present at settlement conferences. Litigants' high satisfaction with the adjudication/ arbitration approach to finalising their disputes may reflect their personal involvement in the process. Involvement and procedural fairness are important factors in litigant satisfaction. In the small sample of litigants interviewed for this research the perception of procedural fairness was more widely held amongst those who settled at mediation than those who received a judicial determination at trial. No losers at trial were satisfied with the process.[58] The parties were present at both. In Australia the trial process as we presently conduct it is too expensive. We should be seeking ways of making the trial process more affordable as well as seeking cheaper alternatives. These alternatives must ensure procedural fairness.

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[54] Ibid pp vii- x.

[55] 1990 The Legal Forum 399, University of Chicago law school.

[56] Ibid p 405

[57] Ibid p 417.

[58] See chapter 5. These comments about trials were from small claims not general claims.

Civil litigation in England and Wales

The Woolf interim report *Access to Justice*[59] is a comprehensive review of civil litigation in England and Wales, with the aim of improving access to justice and reducing the cost of litigation, reducing the complexity of rules and modernising terminology and removing unnecessary distinctions of practice and procedure.

It is apparent from the review that England and Wales have not, as yet, adopted many of the caseflow management and ADR reforms that have been or are being considered for adoption in Australia. However this wide ranging and comprehensive report is useful in bringing together current ideas in the common law world to reduce the cost of civil litigation.

The report accepts the need for a fundamental shift in the responsibility of the management of civil litigation from the litigants and their legal advisers to the courts. He identifies the need to ensure that caseflow management techniques are adopted in such a way as to avoid additional expense.[60] His proposal is for a three tier system, namely:

- an increased small claims jurisdiction;
- a new fast track for cases at the lower end of the scale; and
- a new multi track covering both the High Court and County Court.[61]

He highlights the problem of costs as a ratio to the value of the claim. Figures from cases surveyed by the Supreme Court Taxing Office showed that, in claims worth £12,500 or less, the costs allowed were an average of £12,044, whereas for cases valued at £250,000, the average costs were £58,434. The point is made that there is a high variation either side of these average cost figures. These costs reflect the costs of only one side of the dispute and I understand them to be party/party costs.[62] He recommends increased use of

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[59] Lord Woolf *Access to Justice* (an interim report to the Lord Chancellor on the civil justice system in England and Wales, June 1995). The final report is now available and is cited later.

[60] Ibid p 32, para 22.

[61] Ibid p 34, para 4.

[62] Ibid p 35, para 7.

summary judgment to dispose of clear-cut cases at the earliest possible time.[63] What is clear cut can be contentious. If this is to be successful it will require appeal courts to back the summary judgment of the lower courts that the alleged claim or defence has no merit. In respect of each of these tracks he recommends:

Small Claims

The need for information to litigants is usefully discussed under this heading. Technological innovations, including "kiosks", can be used to provide information to litigants through computer software programs. These could be sited in libraries, citizens' advice bureaus and other places in addition to court premises. Information videos could be similarly used. Back-up, written information in leaflet form should be available.

A concept of "unbundling" is discussed to the effect that litigants should be able to share the work between themselves and their legal advisers rather than paying lawyers hourly fees to do work that the litigant can successfully do themselves.

Fast Track

It is suggested these would include claims up to and including £10,000 and not including matters involving complex issues of fact or law, issues of public interest or importance or a significant degree of oral expert evidence or multiple parties. It is proposed that a trial date be set at the outset, some 20 to 30 weeks from the outset, discovery will be limited and a trial be confined to not more than three hours, allocated equally between the parties with a maximum of one day. There will be no oral evidence from experts. If necessary the matter would be listed for directions before a District Court judge to make any adjustment to these standard procedures. An integral part of the fast track will be that the party/party costs will be known at the outset. Solicitor/client costs could only exceed these party/party costs where there was an explicit agreement to pay more, which had been fully explained to the litigant.[64] He identifies three advantages in fixed costs, namely the maximum liability or access to party/party costs is known at the outset, there is no need for

[63] Ibid p 37, para 17.

[64] Ibid p 45, para 17.

taxation of costs and solicitors have to work to a budget.[65] It is interesting to note this comment:

> "An indication of what can be achieved in the way of swift and inexpensive civil litigation is available from the German system where fixed percentage sums are payable for costs in different categories of proceedings (see annex 5). This approach does not appear to have had a deleterious effect on the income of German lawyers. I am not suggesting that it is directly relevant to litigation in this jurisdiction. I draw attention to the figures because they indicate that it is perfectly possible to conduct litigation at a cost which is both certain and significantly lower than that which prevails in this country. If we are serious about providing access to justice then we must ensure that costs for the ordinary run of litigation which would be conducted on the fast track are more in accord with those in Germany, where access to justice is not considered prohibitively expensive."[66]

Balance is needed here. Research by Professor Blankenburg, who has compared the Dutch and German legal systems, strongly suggests that the effect of the relatively efficient and cost certain system in Germany has been to enormously encourage litigation so that the society has up to eight times as many civil claims as occur in the Netherlands, where the civil system does not allow certain cost recovery and is relatively slow and inefficient. Blankenburg strongly makes the point that use of the civil legal system cannot be equated with access to justice. Indeed, his conclusion is that the German efficiency and certainty of cost recovery is exploited by the powerful in society to the disadvantage of the less powerful.[67] An efficient system must be combined with alternative dispute resolution, early, and on an affordable basis to encourage litigants to escape the litigation process. Otherwise the solution of cheap efficient access may cause the vice of an excessively litigious society resorting to the courts to resolve disputes that were better dissolved by private conciliation/mediation.

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[65] Ibid p 45, para 18.

[66] Ibid p 46, para 20.

[67] See **A continental European experience** next in this chapter.

Multi track

Cases outside the fast track are to be dealt with under a multi track. In essence, this is a track providing for an initial scrutiny of the cases by a procedural judge shortly after the defence has been received, to assess whether it should be dealt with under a standard timetable or require individual attention and a further assessment of it and a review of the case about 10 weeks prior to the trial to ensure that there is an effective preparation for trial. In his final report he suggests a budget for costs in less complex or lower value cases on the multi track and estimates and guidelines for costs will be fixed at the outset for other cases on that track. It is also proposed that where the parties means are unequal cost shifting to assist the weaker can be ordered.[68] If this is adopted it will require strict judicial discipline to ensure that the application of these distinctions and fixing of budgets, estimates and guidelines does not become an expensive preliminary diversion to the main game.

Alternative dispute resolution (ADR)

The report identifies dispute resolution by courts, arbitration, administrative tribunals, mini trials, ombudsman and mediation. In view of the extent of the reforms recommended already in a system that is clearly, relatively unreformed, introducing ADR at this time is regarded as too hard.[69] He does make the point that, an ethos of cooperation before proceedings begin, would be helpful. In the final report he is more positive about ADR suggesting that courts will encourage it by better information about it and the litigation path being given to litigants and ADR being encouraged at case management conferences. He recommends the adoption of protocols to ensure pre litigation disclosure in claims from medical negligence, personal injury and housing disputes.[70] We have tried a number of these policies already and whether they really work is the subject of this research.

Other issues

The report identifies discovery as a cost abuse and a weapon used by well resourced

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[68] Lord Woolf *Access to Justice- final report* (internet http://ltc.law.warwick.ac.uk/woolf/ report July 1996) overview pp 3 and 5.

[69] Ibid p 143, para 30.

[70] Ibid and also chapters 5, 7 and 10.

parties to defeat the opponent. To address this it is recommended that documents be rationalised into the following categories:

- the parties' own documents;
- adverse documents;
- relevant documents - these are document relevant to the proceedings, which do not obviously support or undermine other side's case. They are part of the story or background;
- train in inquiry documents (see *Companie Financieri Du Pacific v. Peruvian Guano Company* (1882) 11 QBD 55, Brett LJ: "If it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences...").

He says categories one and two are standard discovery and categories three and four are extra discovery. In the fast track, you only have to discover categories one or two; in the multi track, the procedural judge will decide whether it goes beyond categories one or two into category three and even into category four.

The likely result of this would be to cause more expensive arguments over these distinctions than the hoped for savings in discovery. Each distinction is fertile for argument. The point is that discovery is used as a weapon in litigation as a result of courts allowing the parties to chase all conceivably relevant and train in inquiry documents. The cost burden of this can be extremely onerous especially in complex commercial litigation. This is caused in part by the adversary trial process and the need that it sometimes imposes on a party to prove facts that are within the knowledge of the opponent. Discovery of the opponents documents can be a way of doing this. There is also a cost incentive to encourage discovery and the hope that it may reveal a factual pot of gold. Policies to limit the abuse of discovery need to be developed. They may be ineffective whilst litigation occurs under an activity based cost scale and an adversary trial process with rules of evidence and procedure developed more for criminal jury trials than civil litigation before a judicial officer alone.

The exchange of witness statements is identified as a cost abuse. The court can require a party to serve on the other, written statements of oral evidence, and these can be treated as evidence-in-chief. A report from the Commercial Court Users Committee in February

1995 was generally in agreement that the rule was having a devastating effect on costs, because the statements were being treated by the parties as documents which had to be as precise as pleadings and which went through many drafts. A judge put the problems thus:

> "...an enormous amount of time is now spent by lawyers ironing and massaging witness statements; that is extremely expensive for clients and the statements can bear very little relation to what a witness of fact would actually say. Second, they can produce an unfair result because a witness can be unfairly caught saying something contrary to that which a lawyer has put in his statement. It may not be dishonesty but in experience in checking lengthy statements, that leads to being in court, and time is taken up in the trial trying to resolve which it is. For the exchange also allows lawyers to spend hours preparing cross-examination and can thus lead to prolix cross-examination."[71]

An example by one QC indicated in one case that £100,000 had been expended in preparing statements.[72] The report still recommends the exchange of witness statements to obviate the need to develop pleadings or seek to administer interrogatories and to assist settlement before trial. Witness statements should not be required in small claims and only a succinct summary of evidence in the fast track. In the multi track parties will be entitled to provide a summary, identifying the witnesses and the principal topics with which they will deal. After the case management conference, witness statements should then be exchanged. At the trial a party should be entitled to require the witness to amplify summaries or statements but not raise new matters except with leave. Cross-examination on the contents of witness summaries and statements should only be allowed with leave of the judge. Costs allowed for witness statements should reflect the fact that they are not intended to be complex documents. It is hard to see in practice how these suggestions would, in multi track cases, obviate the identified problems of witness statements becoming elaborate and too expensive. In Australia civil law reformers are increasingly suggesting witness statements as a means of shortening the trial process.[73] These

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[71] Ibid p 176, para 7.

[72] Ibid p 176, para 8.

[73] An example is His Honour Justice DA Ipp "Managing the trial process" (1996) an unpublished paper delivered to the Litigation Reform Commission conference Brisbane, p 3 where he said "It is now the practice in Western Australia for witness statements to be

cautionary remarks need to be kept in mind.

The expense and delay caused by experts is discussed and it is suggested that it might help if they met with a view to reaching agreement. In England, a bar on this being effective has been the controlling of experts by lawyers to the effect that such agreement must be referred back to the lawyers for ratification. This same problem exists in Australia. The appointment of court experts is one proposal. Criticism of this approach is the possibilty that the expert, not the judge, will, in practice, decide the case. Increased costs are incurred by appointing a court expert in addition to the parties' own experts and that court expert may be unable to deal with the situation where more than one acceptable view can be held on a particular issue.[74] Lord Woolf's recommendation is that these matters can be borne in mind, but there is a substantial role for the court to appoint assessors to assist and also have reports from experts.[75]

In relation to scales of costs the report recommends that, at the commencement of their retainer, lawyers be obligated to explain to clients how the charges for litigation are calculated and what the overall costs might be, and if that estimate is likely to be exceeded, to give reasonable notice of that fact. Fixed fees for stages in litigation should be encouraged. Consideration should be given to the position of the unassisted litigant who succeeds against a legally-aided opponent. The effect of high court fees on litigants of moderate means needs to be considered. Since the general policy in South Australia is for legal aid not to apply in civil matters, this concern has little application. A judgment against a poor litigant with no assets may in practice be unenforceable but the moderately funded litigant in South Australia takes the greatest risk because he or she will generally have assets against which the judgment can be enforced. A predictable party/party cost scale at least makes the extent of the risk predictable.

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exchanged and used as evidence in chief... Witness statements provide notice of the evidence that will be given at the trial by all the witnesses which the parties propose to call, and they shorten the time spent in hearing evidence."

[74] Op cit Lord Woolf, p 186 para 21.

[75] In SA the Magistrates court has recently adopted a procedure of sitting with experts to assist in disputes involving special technical expertise such as building and mechanical repairs. Generally this is at no charge to the litigants. This initiative is recent and has not been evaluated in this research.

There is a recommendation that the alternative of payment of money into court be abolished. This is justified in part on the basis that the lack of security of an offer is no greater than the lack of certainty of the ability to enforce a judgment.[76] However Woolf backs away from this in his final report recommending that offers and payment into court both be allowed. He suggests that offers should be encouraged early by attracting bonuses of costs and interest.[77]

The need to modernise terminology and have consistent rules and procedures is mentioned. He recommends that the claim should plead facts, the remedies claimed, the matters of law entitling the party to the remedy, and the defence should be required to give any version of facts that is different from those stated in the claim and plead specific defences.

The need for lawyers to broaden their focus is well put early in the report. Lord Woolf says:

> "In the past in considering what is needed to achieve justice we have tended to concentrate exclusively on the final product. Lord Devlin drew attention to the weakness of this approach in his contribution to a BBC series of talks, "What's Wrong With The Law" (editor Zanda 1970 pages 75-77):
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> > `The fallacy inherent in our high court procedure of civil litigation is just that - that where the justice is concerned, time and money are no object. We think of British justice as an ideal into which such sordid considerations ought not to enter. We refuse to associate with it such homely maxims as that half a loaf is better than no bread. But is it right to cling to a system that offers perfection for a few and nothing at all for the

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[76] Op cit Lord Woolf, p 195 (6). It is hard to see the reason for removing this alternative as long as it is clear, as it is in the South Australian magistrates court rules, that defendants can make offers which affect costs without the necessity of paying in money. It is recommended that plaintiff offers be encouraged, which the rules in SA already do. The proposed penalty for failure to accept a plaintiff's offer which is matched or exceeded at trial is enhanced interest. Under the SA rules the gap between party/party costs and solicitor/client costs is used as the penalty.

[77] Op cit Lord Woolf Final report, p 3.

many? Perhaps: if we could really be sure that our existing system is perfect. But of course it is not. We delude ourselves if we think that it always produces the right judgment. Every system contains a percentage of errors; and if by slightly increasing the percentage of error we can substantially reduce the percentage of cost it is only the idealist who will revolt.'"[78]

In "Anthony Ogus and reflections on the Woolf interim report",[79] Ogus makes the point that the trade-off between accuracy and costs will be a factor in parties choosing between the court system and alternative dispute resolution services such as arbitration, mediation or other forms of ADR. Presumably, the rational person with the weaker case will have a preference for less accurate decision making, since that will increase the chance of winning[80]. However, simple market analysis has limitations, firstly due to the monopolistic character of the court's power to enforce the law; and secondly, because dispute resolution has the highly singular feature:

"that it is sought and purchased by two (or more) parties whose interests in the outcome are diametrically opposed: if one party wins, the other loses. This fact, combined with the adversarial culture in the legal process, means that the parties are locked into a classic Prisoners' Dilemma situation[81]: rationally, each would prefer a low-cost solution, but each knows that the more she spends, the greater will be her chance of victory... Moreover, what one party spends will influence the spending decision of the other, with an obvious spiralling effect on the legal cost. Also, the client is normally poorly informed regarding both the prospects of success and the extent to which those prospects may be enhanced by additional time and effort

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[78] Op cit Lord Woolf, p 19 para 5.

[79] (1995) Webb journal of current legal issues, in association with Blackstone Press Limited Webb JLCI. I have not attributed page numbers to the quotes from this thought provoking article.

[80] This certainly has been my observation in conducting directions hearings.

[81] The prisoners' dilemma is a fashionable economic paradox based on two prisoners, each faced with the choice of giving evidence against the other and receiving a lenient sentence in return. If neither 'grasses' the police can only bring evidence to convict them on a lesser charge for which they would be sentenced to a medium term. Their joint interests demand silence but individually one would be better off serving self interest.

devoted to the case by the lawyer. In other contexts, the usual method of constraining the principal agent problem is for the contract to contain some term which generates incentives for the agent loyally to pursue the principal's interest. But here the very reverse is the case: since lawyers are typically paid by the hour (all day), they are motivated to prolong the process and add to the client's costs. The use of the contingent fee in the USA and the arrival of the conditional fee in the UK may partially solve the problem for plaintiffs (but not defendants). Since these devices shift the risk of losing from the client to the lawyer, the latter has a stake in the outcome and will not wish to deploy extra effort where this will not materially increase the chances of success.

"It should be noted that neither device provides the perfect set of incentives. Under the contingent fee, the lawyer is motivated to reach an early, and perhaps inadequate, settlement for the client since he bears all the costs of further work but gains only part of the benefit... Under the conditional fee the lawyer who takes on a strong case for the client has the opposite incentive: he knows that, provided he wins, all the cost of his additional effort is borne by the client."

In relation to the Woolf solution of judicial management and our changing culture away from adversarial to more inquisitorial, Ogus comments:;

"The standard justifications for the adversarial approach are that it enhances information flows and exposes inaccuracies and potential excesses in the opponent's case... But as we have seen, given the combination of the prisoner's dilemma and the principal agent problem, the dominating effect may rather be to prolong the process (at excessive cost) and to influence the decision-making process away from the goal of optimum accuracy... As Tullock has pithily put it, `in the adversary proceedings a great deal of the resources are put in by someone who is attempting to mislead (the court)' (Tullock 1980 page 95). If this is right then transferring some of the controlling power to an external, skilled agent - the judge - would seem to make good sense..."

The point is made that since Woolf identifies inadequate enforcement of current rules as one of the present problems why can it be expected that new rules and procedures will be

better enforced. Ogus says

> "Lawyers have an interest in complex rules not only because the latter may be manipulated to benefit their clients but also because they generate an increased demand for lawyers' services... There is a real danger that an increase of judicial control will only be effectively achieved... by a dense set of complex rules."

This is the inherent danger of case flow management; many models impose standard activity requirements on all files with a primary objective of bringing them to a prompt and orderly trial when in fact they will ultimately settle.

Ogus suggests that greater attention needs to be given to a well-designed set of financial incentives. For example, he suggests that: "To deal with excessive requests for discovery it might be preferable to shift some or all of the cost to the requesting party, rather than leave it to the judge to appraise the value of the request and rule accordingly..."

Ogus is sceptical about ADR: Firstly, because there is not adequate theoretical analysis available; secondly, because some research indicated that, although there may be a saving in costs to the litigants in one perhaps idiosyncratic area of custody disputes, his own findings in research of this area was that the savings to the litigants were not as much as the increased cost of providing the services; and thirdly, a perceived relationship between legal costs and the propensity to litigate. Economic theory and empirical studies suggest that:

> "There is an equilibrium level of court case loads and costs. If the cost of proceedings in a particular court is high because, for example, hearings are subject to considerable delay, the effective stakes of the litigation to the parties are reduced and at the margin this will deter some from litigating. Conversely, if the costs are reduced that will encourage more to litigate. The obvious but depressing implication of this for the Woolf proposals is that if they are successful in reducing court costs that very fact may induce more parties to avoid settlement and ADR and resort instead to the courts."

This repeats the caution expressed by Blankenburg that the German experience is that

efficiency and certainty of cost recovery can lead to excessive litigiousness.[82]

Ogus supports the benefit of "greater transparency" of legal cost which facilitates client decision-making and also leads to greater competition between suppliers and hence reduces the cost of legal services. However, in Ogus's view: "The core problem in my view is not so much inadequate information but rather the array of technical and cultural restraints on competition which afflict legal services."

A.A.S. Zuckerman in "Lord Woolf's Access to Justice..."[83] shares similar concerns. "Any attempt at rendering procedure more affordable can and will be defeated by those with an economic interest in doing so." He expresses the same concern as Ogus summarised by the prisoners' dilemma with the same conclusion: "Although admirable in many respects, the indirect strategy that Lord Woolf adopts for controlling multi track cases has a soft underbelly. This is due to the fact that the economic incentives possessed by lawyers to complicate litigation remains unaffected. True, judges will have the authority to resist lawyers' pressure to intensify the litigation process. But a system in which the courts continually pitch themselves against the lawyers' economic incentives is bound to be inefficient."[84]

He discusses the German system and is attracted to the fixed cost scales discussed below. He briefly attempts to explain away the apparent greater number of judges per head of population in Germany but acknowledges that these comparisons are difficult. A comparison between the Netherlands and Germany discussed below strongly suggests that the German system, for all its virtues has the vice of encouraging access to justice to the extent of excessive litigiousness. Regardless of this the different legal culture resulting from the fixed cost scale in Germany compared to the activity based scale in England is so stark as to invite the conclusion that he draws: "Attempts to cut down costs by simplifying procedure, by judicial pressure or by encouraging clients to resist rising costs have all been tried and found wanting. There is no alternative to a direct attack on the economic

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[82] See below **A continental European perspective**.

[83] (1996) 59 The Modern Law Review 773

[84] Ibid pp 781 and 786.

incentives to complicate and protract the litigation process.[85]

A continental European perspective

Professor Erhard Blankenburg has done considerable analysis on the reasons for the difference in apparent litigiousness in civil matters between Germany and Holland. He contends that the culture of those societies are sufficiently common that there is no obvious cultural reason for the quite dramatically greater number of civil claims in Germany compared to Holland. He gives the following figures:

	The Netherlands	**West Germany**
Summary debt enforcement	705	9,118
Debt enforcement litigation	650	1,570
Landlord/tenant disputes	215	458
Traffic tort	69	247
Labour law cases		586

Figures are per 100,000 of population for 1982-1984.

"The Infrastructure For Avoiding Civil litigation Comparing Cultures of Legal Behaviour in The Netherlands and West Germany", Erhard Blankenburg.[86]

Blankenburg posits several reasons for this radical difference. The first, and most pertinent for this paper, is a difference on the basis upon which legal fees are charged between the two jurisdictions. Legal fees in the Netherlands are charged on a time charge basis and, as such, are not predictable and are not recoverable on a party/party basis unless the court, for particular reasons, orders it. In Germany, costs are calculated on a predictable scale and are recoverable by the successful litigant, against the loser, in full. He also suggests that the Dutch legal culture offers more alternatives to trial resolution and

[85] Ibid p 796.

[86] (1994) 28 Law and Society Review No 4, pp 789 and 797.

more precourt conflict institutions than the German culture.[87] In the summary debt enforcement area, the figures reflect the fact that in the Netherlands there is a private bailiffs system, allowing for the enforcement of small debts outside the court system. He also suggests that in 1984, when court fees were raised, access to the court for debt collecting reduced. Potential plaintiffs had greater recourse to computer-automated reminders together with additional charges for late payment.[88] He makes the point that the more courts offer quick and easy access, the more they will be used for subsequent adversary litigation, and the converse is: "The higher courts set the threshold of access the more they will stimulate out of court alternatives and the more these are professionally regulated, the better they can guarantee standards of due process comparable to those of courts of justice".[89] The Magistrates Court in South Australia has decided that the better approach is to keep all dispute resolution under the court umbrella, where we can ensure that there are adequate standards of due process. However, the point is well made that the courts should ensure that, under its umbrella, non-litigation resolution of disputes should be encouraged.

Professor Blankenburg also contends that the better funding of Dutch consumer organisations and also the greater availability of consumer and quasi legal advice in Holland as compared to Germany, diverts cases from the court system.

> "We observe a recurring pattern however, which is due partly to the institutions filtering access to courts and partly to alternatives that help to avoid them. Part of the infrastructure of avoidance is facilitated by the multitude of forms of legal consultation available within and outside the Bar. Legal advice is not an attorneys' monopoly which allows legal costs insurance, automobile clubs or trade unions to compete with law firms. On the other side there are individual as well as institutional government subsidies for legal aid which for the past 15 years enabled "social advocates" to offer low threshold legal services. Amazingly enough, the abundance of legal advisers fits into a culture of especially low, rather than high, litigation frequency... In Germany, on the other hand, courts appear to be too

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[87] Ibid p 799.

[88] Ibid p 799.

[89] Ibid p 800.

efficient and inexpensive to create incentives for plaintiffs to avoid them. In civil courts half the plaintiffs have a decision within six months...summary proceedings are even faster. It is mainly the business community that profits from having a quick and effective instrument for collecting debts, regulating accidents and threatening tenants with eviction; as they usually win their cases, the defendants pay all the fees."

This experience echoes the concern previously expressed by Franaszek that a small reduction in costs will merely allow greater use of the court system by those who already had access to it.

"The decisions of plaintiffs to use or avoid courts are based on similar strategic reasons on both sides of the border. What differs are the incentives their respective legal systems offer. The infrastructure which provides access as well as alternatives to litigation creates the conditions for invoking or avoiding the courts".[90]

Now here is a radical contrast to conventional wisdom. Implicit in this is that greater justice is done by putting barriers to entry to rapacious, debt-collecting plaintiffs. A resolution by litigation should be unsatisfactory and expensive. Perhaps that is overstating the view of Professor Blankenburg, but it certainly gives a different perspective from one American view that, in encouraging litigation to the end, court judgments necessarily increase the social utility and justice for society. It is interesting to note that the certainty of costs in the German system is seen to be a major factor in the greater use of the judicial system as compared to the Netherlands.

It amply demonstrates that today's solutions may become tomorrow's problems if reforms are adopted with excessive vigour and without balancing policies to prevent obvious abuses of the reformed processes. Even then a watchful eye must be kept open looking for unexpected consequences.

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[90] Ibid p 807.

German cost scales

Since the German cost scales have attracted favourable comment I pause to briefly describe them. [91]

The basic rule in German civil procedure is that costs follow the result of litigation. In contrast to the situation in Australia, the biggest problem is seen in the continuously increasing number of actions.[92]

No special rule exists for small claims, though it is admitted that the party/party costs are inadequate to fully compensate a lawyer on minor matters, but they are expected to carry this on a swings and roundabouts basis.[93]

Contingency fees are prohibited. Likewise, lawyers are not allowed to charge below the standard fee. They are allowed to charge above the standard fee but only if a clear, written agreement with the client, permitting that, is obtained.

The party/party costs and standard lawyers' fees are similar (ignoring the instance where there is a specific agreement to entitle a lawyer to charge more). Party/party costs are payable by fee units. To take a matter to trial, party/party costs of three fee units are incurred. One fee unit is incurred on the issue of the claim (and that is the amount recoverable if it settles early). The second fee unit is chargeable at a hearing, and the third fee unit is chargeable if the lawyer represents his or her party while the evidence is taken . There are strong disincentives to prolixity. The same amount is recoverable, regardless of how long the trial takes and regardless of how many hearing dates occur. The lawyer "has no economic interest in expanding the evidence".[94] There is a fee uplift for achieving an out-of-court settlement. The scale fees fixed in 1994 are three units or the party/party costs payable to the successful party at the end of a trial in which they were represented

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[91] These comments are from Dieter Leipold "Limiting Costs For Better Access To Justice - The German Experience" chapter 14 in Zuckerman and Cranston, *Reform of Civil Procedure, Essays on Access to Justice* Clarendon Press - Oxford 1995.

[92] Ibid p 267.

[93] Ibid p 272.

[94] Ibid pp 271 and 272.

and oral evidence was called are: For a claim of DM5,000, DM480; on a claim of DM10,000, DM705; on a claim of DM20,000, DM1,155; and on a claim of DM50,000, DM1,965. In February 1996, the exchange rate of Australian dollars to Deutschmarks was approximately equal so, as a rough standard of comparison, these figures can be converted into Australian dollars. The Magistrates Court scale offers party/party costs on a routine action of the order of 30% to the end of the first day of trial. The party/party costs under the German system range from 9.6% on a claim of $5,000 declining to 4% on a claim of $50,000. The American experience including cases that settled is that the plaintiff's actual costs were 30% (presumably the costs for cases that went to trial would be much higher)) [95]. In addition to these fees, witness and court fees are payable, as is the case in South Australia. One difference is that, in Germany the court calls and pays the witnesses' fees, however it will only call a witness whom a party wants to be called if it is funded for the costs of that witness.

There is a suggestion in the commentary that the fees on appeal may be rather high and hence encourage lawyers to recommend appeals to build up costs. Apparently the number of appeals is very high.[96] The legal aid system in Germany funds civil litigation but pays the lawyer less than the standard rate set out above. An assessment of prospects of winning the claim in made before a grant of legal aid is made.

There is an incentive to the lawyer to win in relation to a legally-aided client, because the party/party costs are greater than the funding of legal aid for the client.

Australian commentaries

The Access to Justice Advisory Committee Report *Access to Justice, an Action Plan* (commonly known and described in this document as "the Sackville Report") drew together several lines of parliamentary and other inquiries under a general term of reference to "consider ways in which the legal system could be reformed in order to enhance access to justice and make the legal system, fairer and more effective"[97] and

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[95] See the first page of this chapter.

[96] Op cit Dieter Leipold p 273.

[97] The Sackville Report p v.

again, to make the justice system "fairer, simpler and more affordable".[98] As the name of the report implies, it sets out an action plan for reforming the justice system to achieve three objectives:

- Equality of access to legal services;
- National equity; and
- Equality before the law."[99]

Implicit in the report is that the goals in the court system of cheapness and speed are desirable. Under the heading "Some qualifications", the report acknowledges that it may be impossible to resolve disputes cheaply, swiftly and also *fairly*. The Sackville Report does not confront the concern identified by Professor Blankenburg, that a cheap and efficient legal system gives greater power to the already powerful members of society to enforce their rights against the rest and results in excessive litigiousness at considerable expense to the community.[100] It is beyond the scope of this paper to explore the conundrum that removing barriers to justice may in fact not empower the disadvantaged in society but, rather, further empower the powerful. In relation to costs, the Sackville Report recommends the abolition of fee scales, subject to preconditions intended to improve competition in the legal services market, to require disclosure of information to clients and to provide a speedy and accessible system for receiving and investigating complaints about lawyers. Lawyers and clients should enter written costs agreements - "those agreements should govern the dealings between lawyers and clients unless the agreements are unfair or the lawyer's charges under them are unreasonable".[101] This, of course, is a contradiction. If costs are to be regulated by written fee agreements rather than fee scales, well and good. However, unless one has fee scales, it is impossible to say that lawyers' charges under those costs agreements are unfair and/or unreasonable. In the event the Sackville Report recommended that the Australian Law Reform Commission

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[98] Ibid pp XXiii to Xxiv- this phrase is from each of the four headings of the terms of reference.

[99] Ibid p XXX.

[100] Blankenburg reports 2 1/2- 12 times more civil suits in Germany compared to the Netherlands. See **The continental European experience** above in this chapter.

[101] Ibid pp XXXiv and XXXv.

investigate the cost issue. It has done so. The original Issues Paper[102] canvassed a very wide set of options, but the final report *Costs shifting- who pays for litigation?*[103] suggested fairly conservative recommendations to the effect of maintaining the status quo of costs following the event, subject to disciplinary or case management cost orders, special rules relating to public interest proceedings, and the power of the court to dispense with party/party costs if the risk of paying the other party's costs will materially and adversely affect the ability of a party to present his or her case or negotiate a fair settlement.

The point is made that the tax deductibility of legal expenses in the hands of business, gives it an unfair advantage in litigation.

The report suggests the adoption by courts of differentiated case management, namely a system which distinguishes between and treats differently simple and complex cases, can achieve important benefits, in particular... an increase in early settlement of cases... more efficient management of cases and reduced litigation costs.[104] These reforms are recommended and a careful evaluation of their effectiveness is suggested. Some of the reforms the subject of evaluation in this thesis meet this description.

Williams Goldsmith and Browne, *The cost of civil litigation before intermediate courts in Australia*[105] is a review of the cost of civil litigation in the District Courts of Queensland and Victoria (known as the County Court). It is an analysis of where the cost of litigation was incurred in those courts and how the practice and procedure might be modified to reduce the resource of cost of litigation without sacrificing the ability of the courts to produce just results. It is interesting to note that the delay between the commencement of proceedings and ultimate disposition is not a factor in the level of cost (i.e. greater trial delay does not mean greater cost[106]). The strongest influence is the stage at which the case

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[102] Issues Paper No. 13.

[103] Australian Law Reform Commission report no75.

[104] Op cit The Sackville Report p XLiii.

[105] Published under the auspices of the Australian Institute of Judicial Administration (AIJA) in 1992.

[106] This is contradicted in Guest and Murphy *Economic Evaluation of Differential Case*

is finalised (i.e. settle early, save costs). The report also notes a relatively high cost of expert medical reports and a marked difference between those costs in Queensland compared to Victoria, where the cost is greater. It is suggested that rules governing disclosure of reports and cost rules encourage multiple medical reports in Victoria. This is a good example of how the level of costs can be affected by the local legal culture. No-one can seriously suggest that medical injuries are harder to assess in Victoria than they are in Queensland. It is just that Queensland accepts a system of assessment that is cheaper. Finally, where a firm has considerable expertise in a particular type of litigation, its costs are less. This, of course, helps defendants in personal injury matters, where insurers take advantage of this.[107]

Conclusions

The conventional litigation process in Australia is too expensive and needs to be reformed to reduce cost of litigation to the parties. However a litigation process that is too cheap and efficient can result in too ready resort to litigation to resolve disputes. This is a salutary warning that extreme solutions may become the next problems. Alternative dispute resolution is fashionable and may offer a way out of disputes that has dynamics and results quite distinct from the conventional adjudicatory litigation path. If it achieves an early settlement it may save costs. However ADR is not a universal panacea for problems with the conventional litigation process. Lind and others in *The perception of Justice. Tort litigants' views of trial, court- annexed arbitration and judicial settlement conferences* concluded "litigation cost, whether absolute or relative to subjective standards, showed no substantial relationship to perceived fairness or satisfaction among these tort litigants... Contrary to commonly held assumptions, we found that trial engendered higher levels of

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Management (Civil Justice Research Centre, November 1995). The basis of the contradiction is that for an 'economic evaluation' using 'cost benefit analysis' delayed payments must be discounted back to dollar equivalents at the base year. The real discount rate recommended by the Department of Finance was 8% pa in 1991 (p 8). Accordingly all delayed awards and settlements must be discounted by 8% pa and this is regarded as a cost to the plaintiff (but not a benefit to the defendant wrongdoer). It is open to question whether this was still an appropriate discount rate in 1994 the base year for this survey (p 22). However the purpose of the policies the subject of my research is to encourage exit from litigation earlier in the process, which will be earlier in time and thus, on the basis of this research will further reduce the cost to litigants.

[107] Op cit Williams Goldsmith and Browne, Executive Summary p Xi.

perceived control and participation as well as higher levels of litigant comprehension... The data suggests that tort litigants do not view trials as lessening their involvement in the legal process, but rather as increasing their involvement."[108] Perceptions of unbiased, careful and dignified procedures were more important for system and outcome satisfaction than cost or delay. Care must be taken to ensure that innovations intended to reduce cost and delay do not do so at the expense of those qualities of the judicial process that are more important to litigants. The Judiciary has a unique function in the adjudication and enforcement of civil claims. However if it fails to deliver on this process but rather diverts all cases to ADR techniques (over which it does not have control) then the very reason for the judiciary's existence and its claim on society's resources may cease to exist. The problem with the conventional litigation process is that as we presently conduct it, it is too expensive. Rather than just seeking cheaper alternatives we should also be seeking ways of making it more affordable, bearing in mind the risks of thereby encouraging excessive litigation.

It is typical that 93% of cases do not proceed to verdict. These litigants will save costs if they leave the process earlier. To encourage this they should be informed about the process, the costs of it and the alternatives. To enable rational choice it is essential that cost scales result in costs that are certain and predictable. Litigants should be offered multiple exit points from the litigation path both before litigation is commenced and during the process so that those that will leave without a verdict do so earlier in the process at lower cost to them. This may ensure that any increased tendency to use the courts is ameliorated by opportunities to escape the process. The process should not be too linear, leading inexorably to a greater and greater cost burden before the first chance to escape at a conciliation (pretrial) conference and then follows the trial itself. By then the cost burden has often overwhelmed the dispute. The remaining challenge is then to reform the trial process itself for the remaining 7% to ensure that the virtues of the adversary process are not overwhelmed by its vices which can lead to prolix trials where parties are put to proof often on trite issues or matters within the knowledge of their opponent and the view of the forest is lost in hard fought battles over every tree. The trial process itself is beyond the policies discussed in this thesis.

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[108] See above under the heading **The United States of American experience**.

This job must be done. Access to an independent court system is a keystone of our democratic system. At the present its expense denies access to it for most of our society.

CHAPTER 4

AN EVALUATION OF THE NINETY DAY PREACTION NOTICE

To assess the effectiveness of the rule requiring 90 days preaction notice in personal injury claims, data has been obtained from SGIC, and lawyers have been interviewed about the notice.

SGIC are the compulsory third party insurer in South Australia. As such they conduct the defence of the overwhelming majority of personal injury claims arising from motor vehicle accidents. It was at the instigation of the Commission that the 90 day rule was introduced. Statistical data from the Commission has been analysed to ascertain the extent to which the clear reduction in personal injury motor vehicle claims which have been filed in the courts is attributable to the 90 day rule as opposed to other factors.

The data and graphical analysis of it is in Appendix C. This shows that a steady increase in the ratio of medico-legal expense to total payout and delay in closing files both peaked in 1991/2 when this trend was reversed and by 1993/4 both the ratio and the delay had been reduced significantly[109]. Further reduction in both is evident in 1994/5. The obvious cause of this is the settlement of claims earlier before incurring some of the medico-legal costs in filing a claim and taking it through the court proceedings to settlement or trial. An example is that between 1991/2 and 1994/5 the net amount payable to claimants (after deducting all medico-legal costs paid by SGIC and cost of assessors, private investigators and police reports) as a percentage of the total amount paid out increased from 77% to 83%. The defendant legal costs were reduced from nearly $18m to $11m and the plaintiff legal costs from nearly $23m to $12m. In the same period, due probably to the capping of damages by the Wrongs Act,[110] the payout to claimants reduced. In the same period the average age of the files closed decreased from 31 months to 25 months. These figures would tend to understate the reductions because they are an analysis of files closed in each year and include many older files which have not been exposed to the new settlement strategy. The reductions were clearly evident by 1993/4. The rule amendment was not

[109] I have not researched the reason for the cost increase leading up to the peak in 1991/2. The District Court introduced case flow management in 1990 which was too late to have contributed to those cost increases.

[110] This is discussed in Chapter 2.

introduced until the end of 1993. The time lag implicit in these figures suggests that to have achieved the reduction evident by then was due to the efforts of the SGIC settlement team and where the plaintiff was represented, a co-operative approach between the settlement team and the lawyers rather than the rule change itself.

In 1994/5 SGIC settled 3800 claims and they did not instruct solicitors to act in 2556, ie 67% of them. No comparative data in other years for these figures is available but such a high percentage is further indication of the fact that many of these claims were settled before proceedings were filed.[111] The number of claims where court proceedings have been commenced has steadily declined. In 1995 only one quarter the number of cases were commenced as in 1989. Over the same period all types of accident and particularly casualty accidents have shown only a slight decline. A comparison of casualty accidents and actions commenced in court shows that the actions commenced have reduced disproportionately[112]. There may be a time lag of up to three years between the accident and the commencement of the claim in court[113] but that does not explain the fall in the latter. It is clear that the SGIC settlement team has been highly successful in settling claims before a case has been commenced in court.

Lawyers from firms specialising in plaintiff and defendant personal injury work, and other lawyers who work in the field have been interviewed about the effect of this initiative.[114]

The unanimous view was that the establishment by SGIC of a settlement conference team to deal with the backlog of cases in the District Court, which then aggressively attempted to settle cases before proceedings were issued, was highly successful. The team is regarded as experienced and practical and the offers for damages realistic. The settlement team takes its own legal advice in many cases and is willing on occasions to offer more than the amount recommended by its own solicitors in a pragmatic approach that it is cheaper in the long run to pay a little more to settle a claim before proceedings are issued than to pay a lesser amount later. This may incur more in costs than the "saving". The

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[111] When a claimant files proceedings it is SGIC practice to instruct solicitors.

[112] Appendix C.

[113] There is a limitation period of three years in commencing these claims. This can be extended but the overwhelming majority are commenced within the limitation period.

[114] A sample questionnaire around which the interviews were loosely based is in

perception from both plaintiff and defendant lawyers is that they settle a "huge" number of claims before legal proceedings are commenced.

Plaintiff lawyers expressed the view that this was much better for their clients. A realistic preclaim settlement saves stress and delay. It is obvious that it saves costs to both sides. Some thought the offers for the plaintiff's costs were adequate but some that they were rather low.

There are some litigants who will only be satisfied with a court determined result. They are the exception.

The 90 day rule reinforced and institutionalised this change in approach. "The culture already had evolved that way." A level of trust and respect has built up between the SGIC settlement team and the plaintiff lawyers I interviewed. They saw this as the reason for the success of the new approach and the effect of the rule change as largely coincidental. The point was made that the rule does militate against cynical plaintiff lawyers who otherwise might issue a claim before negotiating just to build up costs. However some said the rule is not rigorously enforced. Some plaintiffs apparently have been allowed their costs even though they were in breach of the rule. This is not seen as a bad thing (by either side) but was mentioned to make the point that it is not the rule change that has caused the early settlements. It was the establishment by SGIC of a credible, competent settlement team making realistic offers and the acceptance by the legal profession of this cultural shift. This is reinforced by the reported experience with other insurers who do not make any realistic offer in response to the preaction notice but continue "to play hard ball and die in the trenches over every claim".[115] This indicates that the rule change by itself may not have achieved the success of settling so many cases before proceedings were filed in a court. However in conjunction with a proactive approach by SGIC to settle claims at the earliest possible time, early settlements have been achieved. This has substantially reduced

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Appendix E together with a description of the lawyers interviewed.

[115] Quoting a plaintiffs' lawyer. This view is supported by the fact that data collected for general claims in 1996 (discussed in chapter 5) showed 3 times as many non SGIC personal injury claims settled by the end of the directions hearing. The much lower proportion of SGIC claims that settled at this stage is consistent with SGIC having settled many before proceedings issued.

the cost burden to the litigants. On SGIC's figures the total legal costs paid in 1994/5 were $17.5m less than the total costs paid in 1991/2.[116] This does not include plaintiffs' solicitor client costs so it would significantly under state the saving. If SGIC has been relatively generous with its settlement offers that may have had the effect of some money which might otherwise have been spent on medico-legal costs being spent on the plaintiffs' damages. It is not within the scope of this paper to assess the implications of that but I suggest that in the context of the substantial reduction to general damages imposed by statute there is no social harm if this small transfer has occurred.

The substantial statute imposed reduction in general damages for personal injuries arising from motor vehicle accidents in 1987 has reduced the economic attraction of litigating and has assisted SGIC in being apparently generous relative to the reduced entitlement. This may have been a factor in the apparent success of the 90 day preaction notice. Even allowing for this, the initiative has been a significant success in reducing costs to the litigants. The success was a result of the cultural change in approach by SGIC not just the rule change.

[116] See Appendix C. Allowing for inflation the real saving is in fact higher.

CHAPTER 5

AN EVALUATION OF BETTER INFORMING LITIGANTS AND OFFERING MEDIATION

The prime determinant of costs to a litigant is the stage of the proceedings at which they finalise the case. It is obvious enough that the further down the path to trial one goes, the more legal work is done and the expense increases. Research by Williams suggested this[117] and it was confirmed in recent research by Worthington and Baker.[118] Disbursements, experts' reports and the parties' own expenses in gathering evidence increase the further down the path they tread. Ninety three percent or more will be finalised without a judicial determination at trial.[119] The purpose of making the parties attend a directions hearing at the beginning of the process, giving them clear advice, offering mediation and having a magistrate assess the file and give that advice is to save some of the parties costs by settling earlier. How effective has that been?

Data analysis

All cases commenced between 1 September 1992 and 30 November 1992 which were defended were analysed by type, point of disposal in the litigation process and delay in disposal. This was for the purpose of developing benchmarking standards. It provides a data baseline for the procedures introduced in July 1992. These procedures were well settled by then. The new procedure of requiring attendance of litigants in person at the first directions hearing to advise them of the nature of the litigation process and to offer the alternative of mediation was introduced on 6 May 1996. From that day when a defence was filed a notice appointing a time for a directions hearing about 4 weeks after the defence was sent. All the parties were required to attend in person. In general claims a magistrate conducted all these directions hearings rather than a court officer as had been the case previously.[120] To evaluate the effect of this initiative all cases defended between 1

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[117] Williams Goldsmith & Browne *The cost of civil litigation before intermediate courts in Australia* (AIJA, Melbourne, 1992).

[118] Worthington and Baker *The costs of civil litigation* (Civil justice research centre, 1993) p 62.

[119] From the 1992 sample of general jurisdiction cases discussed in this chapter.

[120] In small claims the directions hearing was a new procedural step. These were conducted by senior court staff. The effect of this change is discussed in the next chapter.

May 1996 and 31 July 1996 were analysed in the same way as the 1992 sample. All these cases were dealt with under the new procedure. It is fair to say that the new procedures were not fully settled when the cases at the beginning of the sample went through the new processes. Indeed at a client consultative committee meeting[121] on 25 September 1996 the criticisms were made that at the first directions hearing magistrates were failing to enforce the requirement that parties attend in person and were not directly informing the parties of the litigation process, cost issues or the option of mediation. These same criticisms recur in the results of the interviews of lawyers. The effectiveness of any significant policy change depends in part on it being accepted by the players in the system. As noted in the above discussion of the 90 day preaction notice in personal injury claims the cultural change can be as important as the rule change. However despite the fact that this initiative was introduced only on a trial basis, without any substantial effort to ensure its acceptance by the legal profession and apparently magistrates on occasions might have failed to fulfil the aspirations of the new system to better inform litigants, the comparative data shows that under the new system many cases have settled earlier in the process than they did under the previous system. The term 'settled' covers various events closing a file such as discontinued, settled, default judgment, dismissed, summary judgment etc. I have generally preferred 'finalised' in this text. For these purposes a case transferred to another jurisdiction is regarded as a finalised case for this court. It is not finalised from the parties' point of view but if the transfer occurs earlier less costs are wasted in the wrong court. In the 1996 sample only 3% were transferred. These are not separately identified in the 1992 sample but were probably even less as the movement of files at that time was from the District Court to the Magistrates Court rather than the other way.

The results of the samples and graphical analysis of them is in Appendix D. Some cases are finalised before the directions hearing. The directions hearing is sometimes adjourned[122] but the end result of the directions hearing is that the case is finalised or it moves to the next stage in the process. Under the 1992 system this was a conciliation conference. After 6 May 1996 this was either a mediation hearing or conciliation

[121] This is a committee of senior Magistrates Court personnel and legal practitioners who regularly use the civil division of the court whose purpose is to provide feedback about the operations of the court.

[122] These statistics were taken at the last directions hearing.

conference. In the 1992 sample 84% went to a conciliation conference, 2% did not have a classified result[123] and 14% were finalised. The 1996 sample showed a quite different profile by the end of this first stage in the litigation process. The proportion finalised had risen two and a half times to 35%. Only 38% had gone to mediation or conciliation. However due to the recent collection of the data another 12% had not left the directions hearing stage of the process.[124] Even if all these go to mediation or conciliation (an unlikely event) 21% more were finalised by the end of the directions hearing under the new process. Although the rules of court allow lawyers not to fully prepare for trial by the conciliation conference (and the interviews of lawyers confirm they do not) it is clear that significant costs are saved by a settlement at the directions hearing rather than at a subsequent mediation or conciliation. A settlement at a court annexed mediation hearing should also be cheaper to the parties than a settlement at a conciliation conference. This was the view of lawyers whose clients had tried mediation successfully. It is common-sense that less will be spent on discovery and other pretrial steps when the parties agree to attempt to mediate at a hearing which the court makes available only about three weeks after the agreement to do this at the directions hearing. On the court party/party scale this cost reduction on a claim for $10,000 would be $700.[125] However mediation typically takes three hours which is rather longer than a typical conciliation conference which would typically take one hour. If the parties take their lawyers to the mediation the costs saved would to this extent be diminished (by say 2 hours x $180= $360) leaving a small saving of the order of $340 and greater for bigger claims. If mediation settled a case that otherwise would have gone to trial the savings would have been substantial. It is of course impossible to ascertain what would have been the destiny of a case had it not settled at

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[123] Category 'other'- this data was collected 31/5/94, 18 months after the last file was commenced. These cases may have been finalised by means not otherwise specified in the data collection or not finalised in personal injury matters for reasons such as injuries not having stabilised or awaiting the outcome of criminal proceedings or parallel compensation claims elsewhere such as in the workcover tribunal.

[124] The data has been updated to late October. It is not surprising that a sample of cases defended as late as July are not either finalised, set for trial nor ready for conciliation or mediation for the reasons noted in the previous footnote.

[125] See Appendix I- plaintiff's bill of costs- item 8- 2x$200 = $400, item 9- $100, item10- $50, item 11- $30, item 20- $80, item 21- $40= $700. The saving on a claim for $60,000 on the routine scale calculated for the same items would be $1,400.

mediation. In the sample of general cases only 10 (4.5%) chose mediation,[126] 5 of these did not settle and went direct from mediation to trial, 3 were finalised at mediation and the other two had not been finalised either way. A mediation is adjourned usually to investigate a possible settlement so it is possible that the settlement rate may rise to 50% which is slightly lower than the general success rate on the mediators' own figures discussed below. On these figures mediation contributed a further 2% of cases that settled early as a result of the new processes. Cases that do not settle at mediation do not re-enter the conventional trial path but proceed direct to trial. Those going from mediation to trial will have incurred extra costs by going to trial by this course rather than by the conventional path through a conciliation conference[127]. The percentage going to mediation was small and the cost effect on those was likewise small. Between 1 May and 30 September 1996 figures kept by the court mediation officer show that he conducted 58 mediations with a settlement and other disposal rate of approximately 50%[128]. In addition to the cases from the samples mediations occurred in cases where the defence was filed before the samples were taken. The modest take up rate for mediation suggests that the attempt to inform the litigants of the option of mediation failed or mediation as presented was unattractive to one of the parties in each case or their advisers.[129] The interviews revealed that information on mediation was given to their clients by a large proportion of the lawyers and the information given to the parties at the directions hearing was generally

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[126] Of the cases that chose mediation 5 were classified as debt, 1 equity, 1 contract, 1 personal injury, 1 motor vehicle property damage and 1 workers lien (building subcontractor against owner). The contract dispute and 2 debt matters were finalised. Mediations in building disputes were conducted by a magistrate. The court has a recent practice of conducting mediations/ evaluations in these matters using its own expert.

[127] As noted above if lawyers attend a mediation each parties' extra costs compared to a conciliation conference are of the order of $360.

[128] He conducted 58 mediations to the end of September. 21 of these were in general matters, 19 reached a mediated agreement and 11 were finalised due to non attendance of parties due to settlements reached between the parties or other reasons. Ie 30 were finalised. Over the period of 5 months 16 mediations were adjourned, some to allow terms agreed between the parties to be carried out. Some of these will not yet have been recorded as a settlement or subsequent non attendance. Thus the figure of 50% of cases referred to mediation having settled is conservative and information from the mediator suggests as high as 75% ultimately may be finalised.

[129] A report in the Victorian "Magistrates Information Bulletin" (December 1996), p 9 on the Victorian Portals mediation scheme showed a monthly average of defended cases referred to mediation between October 1995 and October 1996 of 4.2%. This is notably similar to the 4.5% reported in this SA data.

well understood. There was not a significant difference in the rate of opting for mediation between small claims and general claims.[130] The decision to try mediation was made at the directions hearing. In small claims this was conducted by senior court staff (usually the mediator) without lawyers representing the parties. In general claims it was conducted by a magistrate with lawyers generally representing the parties. Despite these differences the inertia in favour of the conventional litigation path existed for both.

Another significant change in the 1996 sample is that 15% of cases went direct to trial without trying either mediation or conciliation because at least one party thought there was no prospect of success and the magistrate agreed. If the assessment that they had no prospect of settling without going to trial was correct, bypassing the usual conciliation conference would itself have saved these parties the cost of their lawyer reading the file and attending, plus their own costs of attending. It also reduced delay.[131] That however is more properly regarded as a cost saving consequent upon the court's flexible case flow management system which is discussed below .

The profile of the types of cases changed between 1992 and 1996. This is principally due to the dramatic drop in claims for damages for personal injury from 43% in the 1992 sample to 19% in 1996. The profile of the other cases is fairly consistent. This drop in personal injury claims is to be expected due to the operation of the 90 day preaction notice and the efforts of the SGIC settlement team discussed in Chapter 4. The efforts of the settlement team had its effect too late to significantly affect the sample of 1992 cases. It is appropriate to leave personal injury cases in that sample because they are cases that had no special attempt to settle them before the claim was issued. The remaining personal injury claims in the 1996 sample, will have had the preaction notice given to the insurer for the defendant and in most a preaction conference in an attempt at settlement. They are therefore cases that are not likely to settle and so are not a fair test of the new procedures designed to encourage an early settlement. Only 2 out of 26 (7.6%) motor vehicle personal injury claims had settled at or before the directions hearing at the time of collecting the data compared to other personal injury claims where 4 out of 17 (23%) had

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[130] The mediators' figures show 2/4 general/small claims. In the 3month sample the ratio of defences was 2/5 general/small claims.

[131] The scale fee for attendance is $80- $150 and the actual fee may exceed that. The delay would be reduced by about 4 weeks.

settled.[132] This supports the earlier conclusion that SGIC is more effective in using the preaction notice to settle cases than other insurers. Personal injury claims were 19% of the 1996 sample and if these had been excluded the already notable improvement in settlement rates would have been further enhanced.

There have been five magistrates in the court from 1992 (and long before) until 1996. Three have been there for all that period, one joined the court at the beginning of 1994 and one this year. There is no reason to suspect that these personnel changes affected the manner or time of disposal of cases. The magistrates in the court work closely as a team which has been important in the effective introduction of procedural changes.

The amount saved by litigants who settle at the directions hearing stage rather than the conciliation conference or later in the litigation process is hard to precisely quantify but it is considerable. The court party/party cost scale is not an accurate reflection of actual costs in each case and interviews with solicitors suggest it is lower than actual costs. A specialist costing solicitor suggested it is near the mark for personal injury cases, low for complicated commercial causes and generous for routine debt collections. As such it gives a median indication of the costs incurred. On the basis of the first example costing in Appendix I the costs between the first directions hearing and the court steps ready for the first day of trial are $2,120. This is based on a judgement for $10,000 and they increase by more than 10% of any excess over that sum. The parties are not required to be fully prepared for trial at the conciliation conference. Indeed the lawyers' interviews discussed below indicate most of the trial preparation costs are not incurred until it is clear that the case will not settle, ie after the conciliation conference. The scale fee for trial preparation is $1,000 so if that is deducted it is a conservative estimate that the costs of each party saved by settling at a directions hearing rather than the conciliation conference could be more than $1,000. If the settlement would have been on the court steps the saving is double that. This saving was 10%- 20% each, or to both parties combined 20%- 40% of the amount of their dispute. This is a broad axe conservative estimate of their legal costs. Their own costs in gathering evidence for their lawyers, costs of obtaining any

[132] 5 of each were still at directions which was 42% of the cases still at directions although these cases were only 19% of the original sample. In total 6 out of the 43 personal injury cases finalised- only 14% compared to 35% finalised of the total sample.

professional evidence that might have been required and the personal costs of the stress of the litigation process were also saved. The result was achieved two to three months earlier. By any measure these reductions in the cost to parties are significant.

Methodology

A computer record is kept of all court files. The computer captured both samples of files. The data was taken from the hard copy of the file wherever that was available to minimise data errors. Where the file was not available[133] the computer record of the file was used. The data was entered on an MS Excel spreadsheet. The type of case and the result at each stage was recorded by number code. The date of each step in the process and of final disposal was recorded. The data entry of the 1992 sample was done by an experienced court officer and checked at that time. The data entry of the 1996 sample was done by a casual employee. The general claims data entry was checked by the author and the small claims data entry has been checked by experienced court staff.

Party interviews

The party interviews were conducted by court staff by telephone. They used the questionnaires set out in Appendix F. Information from parties in small claims has been extrapolated to this discussion of general claims where it is appropriate. Parties who settled at a directions hearing, parties who tried mediation and parties who declined mediation have been interviewed. Those who declined did so because they believed they were entitled to succeed in full and saw no reason to compromise or their assessment was that the other side were unreasonable, obsessive or it had become a matter of principle (about half). The rest said they were willing to mediate but the other side was not.[134] Those who chose mediation did so because they saw it as less terrifying, less antagonistic, good business to be seen as flexible, amicable, honest and several also because it saved time and the cost of preparing for trial which they had discussed with their lawyers. It is clear that some were very pleased to have the opportunity to resolve the dispute away from lawyers and outside the trial process. Those who settled their case were not only satisfied but generally full of praise for the directions hearing and mediation process. It is

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[133] Active files are constantly on the move and can be hard to capture!

[134] The parties interviewed who went to trial were all in small claims but there is no reason why their motive for choices cannot be extrapolated to general claims.

interesting to note that although three were not satisfied with the outcome they were satisfied with the procedural fairness of the mediation process which was described as fair and equitable, less stress than going to court and a non confrontational environment. One party felt he was forced into mediation and was unhappy as a result of that and with the outcome. However he thought the mediation process was conducted in a fair manner. This is in contrast to those interviewed who had gone to trial. None of those who were unhappy with the outcome were happy with the process and two winners were unhappy with the process. However some of those who did settle at mediation had found that the other party had reneged on the agreement and were worried about the difficulty of then enforcing it. In these the mediator apparently had not put in train a procedure to monitor the agreement. Procedures exist to readily convert such an agreement into a judgment but those interviewed were not aware of this. If the system is to work a simple procedure to ensure the agreement can be enforced is essential. Subject to this, the clear impression is that for some mediation is a process with which they are far more comfortable and which offers flexibility and other advantages over the trial process. In general claims the cost implication are only of major significance if cases that otherwise would have gone to trial settle at mediation.

Lawyer interviews

The interviews of lawyers were conducted by the author. The profile of lawyers interviewed and the questions around which the interviews were based are set out in Appendix E. Some were interviewed in their offices and some by telephone.

There was a positive attitude to mediation. Where they had direct experience of clients using mediation they reported a high success rate in achieving settlement and satisfied clients. In small claims there were no significant cost savings but where settlement have been achieved in general claims it was the view that this saved the client substantial costs.

The attitude to the requirement that clients attend the first directions hearing was contradictory. It is clear that corporate clients who are repeat users of the court regard the requirement as wasteful of their time. The case has already been through a collection agency where compromise was investigated and in any event they tend to a view that they are right and there is nothing to compromise. This negativity is reflected in the attitude of

debt collecting solicitors to the requirement. However they complained that the requirement that the defendant attend is not rigorously enforced and they do advise their clients that they should be prepared to compromise as the court will expect that. One commented that lawyers get in the way of settlements and it is best to leave the clients alone together. They can only do this as a result of the requirement that they be there. Another, commenting on a similar requirement in higher courts thought that not enough time was spent on this first directions hearing and the best way to bring parties to settlements earlier was by careful judicial management at the front end. Indeed he suggested only a short form of pleading occur until after this process to avoid expense on those cases that do settle. A lawyer from a medium sized practice that acted for both corporate repeat users and private commercial clients confirmed the corporate users' view that personal attendance was wasteful of their time but thought personal attendance can be valuable to a private client particularly if the magistrate explains the process and risks. "Clients who are unrealistic may listen to a magistrate where they will not accept my advice." The comment was made that the requirement of client attendance would expose lawyers who were incompetent or ill prepared. None of the lawyers I interviewed admitted that the clients' attendance affected them.[135] It was a common comment that the parties were not actively engaged in the process and just sat in the body of the court wondering why their time had been called upon just to be passive spectators.

It was a widely held view of the lawyers that having magistrates rather than court staff conduct the directions hearings was a benefit. It was suggested there would be a similar benefit if they also conducted conciliation conferences. The Federal Court practice of the trial judge taking control of the case from the outset was favourably commented on by several lawyers.

Most lawyers said the information pamphlets had no effect but one lawyer said that he gave all his clients a standard letter of advice covering the same issues upon receiving instructions. Interviews of parties disclosed generally their lawyers had advised them of the option of mediation and the information given to them at the directions hearing was sufficient for them to understand the choice of mediation that was being offered. The

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[135] This is probably fair comment because I selected competent lawyers to interview.

pamphlets were generally accepted as readily understandable but there are several indications that the policy of ensuring that parties clearly understand the litigation process, the alternatives and the cost implications of both were not yet fully effective.

It is clear that the new process has significantly reduced the costs to a large number of the parties by successfully encouraging settlements at the directions hearing stage. The proportion that had settled by this stage had increased 21/2 times under the new procedures to 35%. It is not clear exactly what caused this result. The significant changes were the involvement of magistrates at the directions hearing, the personal attendance of the parties, a conscious attempt to better inform parties of the litigation process, the cost implications and the option of mediation. From the interviews it is clear that the application of these policies has been imperfect and there is reason to be optimistic that the significant success in enabling settlements to occur earlier can be further improved upon. There is resistance to the new procedures from repeat users but the results justify the imposition upon them. Mediation contributed about a further 2% of earlier settlements. It has been most favourably commented on by those parties that used it and it clearly is a very useful alternative to the conventional trial process.

CHAPTER 6

AN EVALUATION OF THE SMALL CLAIMS PROCEDURE

Lawyers are excluded from small claims with the obvious result that the costs to the litigants are substantially reduced.[136] They are also a departure from the usual adversary process. The trial is conducted as an inquiry and the court is not bound by the rules of evidence. The court is obligated to explore any avenues to reach a negotiated settlement.[137] Until May 1996 the magistrate at trial attempted both this negotiation and if that failed the inquiry and judgment. A review of the small claims process from a plaintiff's point of view was conducted in 1992.[138] Repeat parties, eg retail stores, were excluded. Eight focus sessions were conducted with different groups with a maximum of twelve persons. Both positive and negative experiences were reported with it being evident that the experience was highly dependent on the court personnel rather than the system. The major dissatisfaction was with the enforcement processes. These were completely changed in July 1992.[139] These concerns are outside the scope of this research. It was suggested that the option of mediation should be offered well before and separate from the trial. Parties did not like attempts to settle at the trial. There were no complaints recorded about the cost of the proceedings.

In response to concerns about the confusion and resentment caused by magistrates at trial

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[136] Section 38 of the Magistrates Court Act prohibits representation by a legal practitioner except where another party is a legal practitioner, the parties agree or the court thinks a party would be unfairly disadvantaged if he or she was not represented. An insurer subrogated to the rights of a party can represent that party. The rules of court allow legal fees to be recovered only for the preparation and filing a claim at the rate of $20 + 10% up to a maximum of $200. Witness fees of $30 -$40 are allowed. Cost scale 3 is for small claims and is reproduced in Appendix H.

[137] Section 38 Magistrates Court Act.

[138] Bodzioch, Foster and Carr, *Small Claims Review* (May 1992) an internal courts department document.

[139] Enforcement of Judgments Act 1991 proclaimed 6/7/92. It is doubtful whether this Act has successfully dealt with these concerns which have their origin in the fact that the court leaves the initiation of enforcement procedures to the plaintiff, deals with many debtors who are defacto bankrupts (you can't get blood from a stone) and is on occasions unsuccessful in extracting money from a small group of debtors who cynically prevaricate and delay until the plaintiff is exhausted.

trying to settle cases as well as then deciding them, in May 1996 this attempt at negotiating a settlement was separated from the trial. All defended cases are referred to a directions hearing, conducted by senior, LEADR trained, non judicial court staff. At the directions hearing the possibility of settling the case is discussed. If that fails mediation is offered to parties that want it or the case is set for trial before a Magistrate.

There is a data base of the outcome of 3 months of defended small claims in 1992.[140] Comparative data for small claims defended from 1 May to 30 September 1996 has been collected and analysed on the same basis. There is some analysis of this data in Appendix D. The profile of the cases in both samples is similar. Of the 537 cases in the 1992 sample 23.8% were motor vehicle property damage claims, 69% debt and the balance evenly spread over other case categories. The 507 cases in the 1996 sample were divided between 15.6% motor vehicle property damage claims, 76% debt and the balance again spread evenly.

Under the old system 23% were finalised before trial leaving 77% that went to trial. 40% of those were determined by hearing (ie 31% of the original sample). In contrast, under the new system 17% were finalised before the directions hearing leaving 83% that went to a directions hearing at which a further 31% were settled. At the time of data collection (late September 1996) 11% of the original sample had no outcome ie they were adjourned to a further directions hearing. Under the new system 48% had been settled by the end of the new directions hearing. If the 11% all go to trial a maximum of 52% went to trial or mediation compared to 77% under the system in 1992. If all the 11% with no outcome settle only 41% will go to trial.

There are no legal cost implications of this but it affects the parties' own costs because lawyers are excluded from the process once the claim is commenced and defended. They need to attend in person at both the directions hearing and the trial. They need not be as well prepared and need not bring witnesses to the directions hearing. Under the new system the number of cases which had to go to trial was reduced by more than 25%. For these parties the system was cheaper because they only had to attend a directions hearing.

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[140] These were prepared at the same time and for the same purpose as that for general claims discussed in chapter 5 above.

It was certainly quicker because the directions hearing was 3 to 4 weeks after the defence was filed and presumably it was less stressful than a trial. This was the view of the ten parties who settled at a directions hearing and were interviewed. With one exception who felt she was pressured into a settlement they were impressed by the promptness and informality of the process. One said she was very impressed with the time involved and the system compared to her home country Germany. The trade off is that although a lesser number of cases went to trial under the new system, in those that did the parties had to attend twice, at the directions hearing and the trial. This was as many as 50%. Overall this must have increased the parties' own costs. Ten parties who had to attend both at a directions hearing and a trial were interviewed. Three thought the directions hearing was useful to define the issues and meet the other parties. Another three thought it was not personally useful for them but acknowledged that it had a useful role in the process to better inform parties, give an opportunity to settle and one noted that it would be a necessary step if parties wanted to use mediation. The other four did not think it was useful to them personally nor as part of the process. The 25% who settled or obtained a default judgment saved some expense by not having to prepare for trial and generally were pleased with the process. Up to 50% incurred the cost of an extra attendance. They were fairly evenly split between those who thought the directions hearing was either personally useful or at least potentially useful and those who thought it was not. Thus 25% of the original sample thought the directions hearing had no use.

Delay is not directly related to costs[141] but the reduction in delay is so marked it justifies reporting. In 1996 nearly 50% of cases were finalised within 50 days compared with only about 10% in 1992. This is a result of the matters finalised at the early directions hearing. It is this reduction in the time to finalise cases where there is no substantial contest that probably caused the favourable response to the new procedure revealed in interviews of debt collecting lawyers. Whereas under the previous system a default judgment at trial was not obtained until some ten weeks after the defence was filed, now it is obtained 3 or 4 weeks after the defence.

Lawyers interviewed accepted that a small claims procedure was necessary because it was

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[141] See the discussion **Australian commentaries** in chapter 3.

just not economic to act for parties over small money disputes and generally thought the system worked well. The comment was made by one debt collecting solicitor that they usually had to contact their clients to find out what happened which was an indication of acceptance of the result. There were comments to the effect that rough justice was on occasions handed out. One lawyer feared that there was a tendency by magistrates to split cases down the middle which could unfairly advantage the common enough defendant with a speciously attractive but unmeritorious counterclaim. None said that the present limit should be reduced but several felt that the quality of result was too variable to permit a substantial increase in the limit. In fact the appeal rate is quite low. An appeal (known as a review) lies against the decision of a magistrate to the District Court. In the Magistrates Court between January 1993 and March 1994 there were 4927 small claims defended. A review was sought in 181 (3.5%) and the original decision was varied in 49 (1%).[142] Costs can be awarded on reviews which may be a disincentive to seeking one but even allowing for that this low rate of review suggests parties generally accept the decisions in small claims and where they do not the result is usually upheld.

Larger firms who charge on a time charge basis acknowledged that it was not economic for them to act for a party in a dispute for less than $10,000 and on that basis felt the small claims limit could be increased to that sum. There is a trade off here. There is no doubt that being competently represented at trial advantages a litigant and makes the job of a magistrate much easier because the factual and legal issues are likely to be better canvassed. Without lawyers the quality of the result depends much more upon the ability and the time a magistrate has to devote to each case. The problem is that the cost of a lawyer to take a matter to trial may well be $5,000 to $10,000. Recently in SA a new class of small claim, 'minor statutory proceedings', has been introduced. If the case exceeds $5,000 it remains a small claim unless one of the parties elects to have it removed to the general jurisdiction. The effect of this is too recent to assess yet.

[142] From internal Courts Administration Authority data.

CHAPTER 7

AN EVALUATION OF STRATEGIES IN THE CONVENTIONAL LITIGATION PATH DESIGNED TO REDUCE COSTS

Costs were identified as a major impediment to access to justice when the magistrates adopted their own civil procedures in 1992. The policies to remedy this for cases that proceed along the conventional trial path can be grouped conveniently under three headings, the fixed cost scale, the cost penalties and case flow management designed to minimise activity on all cases but especially those that settle.

In the 1992 sample of cases from which statistics have been drawn, only 74 out of 379 went to trial (20%) and the trial commenced in only 27 (7%).[143] If 80% settle by the end of the conciliation conference, activity designed principally for orderly disposal at trial should not be imposed on these and should be actively discouraged. It is of course necessary that sufficient work be done to have a realistic assessment of the prospects of success if cases go to trial. There is no doubt that a well prepared lawyer is far better placed to negotiate than one who is not but that happy state can be achieved without doing a great deal of the work that is specific to trial preparation. With this in mind the fixed and predictable cost scale is designed to act as a disincentive for any activity that is not essential because that will not be recoverable from the other litigant and will therefore impact on the cost to the lawyer's own client.

The cost penalties are additional to those usually found in rules of court and are specifically designed to discourage inflated claims and counter claims and to encourage the defendant to make realistic offers.[144]

Parallel with this stringent view on cost goes the obligation to ensure that the practice and

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[143] This figure of 10% or less actually going to trial is the same in other jurisdictions. See fotnote 24 - Williams found that of cases issued in the samples in VIC and QLD !0% go to trial and Resnick reported that the USA experience has been that 4% of cases go to verdict.

[144] The operation of these is discussed in chapter 2 under the heading **The conventional path.**

procedures of the court impose no unnecessary activity on the lawyers. How successful have these policies been?

With the exception of corporate repeat users of the court most litigants have little understanding of the litigation process and the cost implications of it.[145] The court has recently attempted to redress that by the information process discussed in the previous chapter but it is clear from the litigant and lawyer interviews that the decisions about the activity done on each file are made by the lawyers not the parties. Accordingly the focus of this investigation has been to assess the impact of these policies on lawyers' attitudes to the work necessary in a Magistrates Court case.[146]

The fixed rate cost scale

Lawyers are well aware of the scales and the party/party costs they provide. A specialist cost solicitor was of the view that the scale is generous for routine debt collections, about right for personal injury claims and too low for complicated commercial disputes.

The actual basis of charging varies widely. Most firms interviewed charge on a time charge basis recorded on a computer in six minute bites. Partners charge out at $150 to $250 per hour. Some charge on the Supreme Court scale and one specialist debt collector charges the party/party scale in whichever jurisdiction the case is issued. He reported that at least one other firm does the same for some matters and he believes the Magistrates Court scale encourages efficiency and firms will specialise in particular types of disputes which due to efficiency they will be able to do lucratively charging scale costs to the client. Most now give advice to clients about their basis of charging and confirm that in writing.[147] The information to clients about the potential gap between actual costs and party/party costs is often not clear, although one lawyer said his firm had recently started giving detailed advice about that. One debt collecting firm sends bills out monthly so that clients are at least aware of their liability for actual costs. The firm that charges

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[145] Corporate repeat users are an interesting exception. They use the bargaining power of volume work to put their work up for tender on special rates based on fixed rates for jobs. This is a basis of charging more akin to the Magistrates Court scale than the usual basis which is time charging or activity based scales such as the Supreme Court scale.

[146] Details of the lawyers interviewed and the questionnaire are set out in Appendix E.

[147] Professional conduct rules require them to do so.

party/party has nothing to advise. There is no gap. Where there was a gap it was estimated that party/party costs were for one firm as little as 50% of their actual charge to their client, for some about 75% and for some nearly adequate to cover the actual client costs. The reported size of the gap was closely correlated to the reported rate of charging. The gap of course lessened once claims exceeded $20,000 as the scale is largely a percentage scale so the absolute level of costs increases with the amount of the claim.

Most acknowledge that the scale is a disincentive to doing any unnecessary work on their Magistrate Court files. Some asserted that they do the necessary work on every file but then acknowledged that they were forced to write off more work as not chargeable than they would in higher jurisdictions. Either way the scale drives costs to the party down. In the former instance there is a risk that the amount of work done will be reduced to a level that prejudices the result. No one would admit to that and it is my impression sitting in the court that this is not the case. On the contrary my subjective impression is that the low cost lawyers are focused and don't get "lost in the trees". There is of course nothing to prevent a party and his or her lawyer agreeing to a level of service beyond that compensated by the scale. However the party bears the excess over the scale personally even if he or she is successful. The cost penalties use the gap between party/party and actual costs to encourage realistic offers. One criticism of the scale was that it was not as much as a disincentive to the unmeritorious defendant who knew the cost risk he or she was taking whereas in the higher courts the cost risk was unknown and higher. A plaintiff can counter this by making an early offer slightly below the full claim. If it is not accepted and the plaintiff proves the full claim he or she is then entitled to full solicitor client costs.[148] However as noted below this was unattractive to at least one personal injury lawyer.

The cost penalties

All lawyers interviewed were aware of these. A plaintiff personal injury lawyer felt they were unfairly weighted against the plaintiff. "It is pretty unattractive to offer to accept less than you think it is worth when the only advantage is the recovery of solicitor client costs. On the other hand the defendant who is well financed can offer something low but near the mark and that puts enormous pressure on the plaintiff." A defendant personal injury

[148] Rule 59.

lawyer felt they did not have much effect because the costs of preparing for trial are so high they are a more important consideration than the cost penalties.[149] Most matters that proceed to trial do so for good reasons and the cost penalties will not overwhelm those good reasons. A sole practitioner in the field said that he was most afraid of the cost penalties and thought they could be capricious in their results. They had the effect on him of making him consider very carefully what the plaintiff is really worth, rather than lodging an ambit claim.

Debt collecting lawyers did not think the rules had much effect except on occasions to penalise a 'shonky' counter claim. Other lawyers thought they could have a powerful effect especially those at the upper end of charging rates who are concerned to recover the gap between the court scale and their own costs. This encouraged rule 59 offers slightly below the expected recovery.[150] The penalties were said to be useful to encourage clients with unrealistic expectations to make sensible offers. It was clear that these rules do influence lawyers to encourage their clients to make strategic offers and to avoid making extravagant claims.

Case flow management policies that do not encourage pretrial activity

Personal injury lawyers thought any difference in the costs of litigation in the Magistrates Court was a consequence of lesser monetary claims being amenable to easier investigation (eg a $500 gratuitous service claim will not be contested seriously in evidence but a several thousand dollar claim will bear closer scrutiny). Any difference in costs is a consequence of the fact that larger monetary amounts are worth arguing over, not any practice or procedural differences. In contrast it was the unanimous view of all lawyers in other fields that it was significantly cheaper to litigate in the Magistrates Court. Debt collectors say they separate claims to keep them in the magistrates jurisdiction or if they cannot and the claim is not much beyond the limit they advise their client to abandon the limit to take advantage of the lower costs and more prompt disposal available in the Magistrates Court.

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[149] The second bill in Appendix I is an indication of the way costs and disbursement can overwhelm the dispute in personal injury claims. It is atypical being contested on all grounds because the defendant thought the claim was totally without basis and contested it vigorously. How to conduct trial in such matters in a cost effective way is another challenge.

[150] If the plaintiff recovers more than a rule 59 offer full solicitor client costs from 14 days after the offer are recovered. Rule 59 is reproduced in Appendix H.

When asked to identify the reasons they identified less pretrial hearings and activity in the Magistrates Court and less interlocutory battles over discovery and pleadings. "People don't take as many points and do less preparation." Several identified the fixed rate cost scale as discouraging activity because the activity does not have its own reward in costs. Pleadings were especially identified as an area where the Magistrates Court is cheaper.[151] It was said by several that rule 46.20[152] requests for a more explicit pleading are routinely used as a weapon in a battle of attrition on costs and to cause delays of up to six months in the progress of a claim. This type of pleading argument does not occur in the Magistrates Court. This is instructive because the magistrates rules adopt the Supreme Court rules for pleadings.[153] The difference is nothing to do with the rules, it is the culture of the court and this is driven by the fixed rate cost scale. "The scale discourages bull." "Magistrates discourage fights about pleading. This saves a lot." It became obvious that the fixed rate scale was an all pervasive influence over the conduct of matters. The case flow management policies in the rules allow the lawyers to avoid unnecessary work but the incentive to avoid it is the scale. Although not asked directly, it was clear that if an activity based party/party scale applied the pretrial activity would quickly blossom into complicated, protracted and expensive fights over pleadings discovery and other matters. These would increase the costs to the parties for no obvious benefit.

Consistent with the conclusion that the practice of the Magistrates Court allows cost savings were the answers to the question about the stages in the litigation when the costs are incurred. They are incurred mainly upon taking instructions and issuing the claim, little in the interim and the largest amount in the weeks leading to trial. The view was widely held that costs are generally incurred later in the process in the Magistrates Court than in higher jurisdictions. It was said that a lawyer can minimise the work on a file in the expectation it will settle, "skate through", and if it does not then settle do the work necessary to clean it up for trial. Others abhorred this approach. They prepare all their

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[151] References to the practice in higher jurisdictions are inevitable as people discuss the alternatives to talk their way through a topic. I have not done any research on the efficacy of the procedures of the higher courts and these comments are not intended as a criticism of those procedures which no doubt are appropriate in view of the higher amounts in dispute and other factors.

[152] This rule entitles a party to request more explicit pleadings.

[153] Rule 24. The relevant Supreme Court rule is rule 46.

cases thoroughly but still find that litigation in the Magistrates Court is cheaper and very few costs are incurred between the filing of the claim and for those cases that don't settle, getting them ready for trial. It was noted that debt collection claims are usually issued without much work done on the file and with these the first substantial work is done if a defence is filed. The scale is thus higher than the actual costs for those claims that are filed but not defended.

Data from SGIC[154] on the average costs per file closed in 1995 analysed by the court in which the case was filed supports these subjective views that it is cheaper to litigate in the Magistrates Court.

	finalised ar PTC	finalised after PTC	finalised at trial
av. costs Supreme Ct.	$13,346	$17,145	$34,498
av costs District Ct.	$ 4,736	$ 6,005	$12,973
av costs Mag. Ct.	$ 2,977	$ 3,450	$ 6,375

This data however contradicts the view that the costs are incurred later in the Magistrates Court. The costs on files settled at the Pre Trial (conciliation) Conference as a percentage of costs of files finalised by judgment were 46% in the Magistrates Court, 36% in the District Court and 38% in the Supreme Court. This may reflect the relatively higher burden of the cost of medical reports in Magistrates Court claims. It is also not obvious why there is such a cost difference between the Supreme and District Courts where procedures are very similar. One explanation may be that a larger claim will bear closer scrutiny and the work done and costs expand accordingly. An activity based cost scale encourages this.

It was noted in the previous chapter that under the new procedures adopted in May 1996 15% of cases proceeded from the directions hearing to trial without a conciliation conference. This was a small saving to parties of their own cost of attending and of the cost of each of their lawyers attending the conciliation conference.[155]

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[154] Internal SGIC data. There is a query on the accuracy of this data due to the inclusion in it of data for cases settled by direct negotiation which one would not expect once proceedings have issued.

[155] See appendix I- plaintiff's bill of costs- the scale fee on a claim for $10,000 is $80 and the actual costs may be more.

The unambiguous conclusion from the interviews was that the policies in the magistrates rules have been successful in limiting the legal costs of litigation in the court. The fixed rate cost scale has been the driving force in maintaining a cost saving culture in the court. The other policies have allowed that to happen but as the pleading experience demonstrates the same rules in different environs can lead to vastly different results. There is no reason to quarrel with the view of the lawyers interviewed that the difference is primarily the result of the cost scale which does not reward activity. It is also clear that the cost penalties have discouraged excessive ambit claims and have been a factor in encouraging realistic and on occasions strategic offers. Some of these must have led to settlements occurring which reduced the costs to the parties.

Finally there is a simple aid to facilitate the proof of damage and that is briefly evaluated next.

Proof of the cost of repairs to, or loss of, property

In claims for motor vehicle damage a simple reform which patently saved costs for plaintiffs was to allow a repair quotation, account or receipt which was attached to the claim when it was served to be sufficient proof to allow judgement to be signed on a claim which has not been defended.[156] If the case is defended the attached quotation, account or receipt is receivable as evidence at the trial.[157] Prior to this rule, where a case of this type was not defended the plaintiff could sign judgment on the issue of whose fault the damage was but then had to apply to the court to assess the amount of the damage. This involved serving another set of documents on the defendant including a notice of assessment and not just the relevant repair quotation, account or receipt but also affidavit evidence from the repairer. There was a hearing at which the court satisfied itself that these documents were in order, served and the amount claimed was reasonable. A lawyer or the plaintiff had to

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[156] Magistrates Court (civil) rules 1992 rule 61. A similar procedure exists in the Victorian Magistrates Court.

[157] Rule 95 (2). If however the defendant contests the validity or reasonableness of the quote it would be necessary to call further evidence to establish the reasonableness of the cost of the repairs.

attend at this hearing.[158] The party costs in 1992 for the assessment were from $80 to $300[159] and the actual costs may well have been higher. The assessment was required and costs likewise were incurred in small claims. The new procedure avoids these costs. No doubt there is an element of risk that repair quotations may be excessive but that risk existed under the old procedure. A defendant wishing to contest the reasonableness of the claimed cost of repair can still do so by contesting the original claim and stating in the defence that it is the quotation that the defendant objects to. The new system is now almost universally used and is now accepted as unremarkable. It clearly saves the plaintiff in undefended cases of this type the costs of assessment and these are passed on to defendants who are able to pay and becomes part of a long term debt collection against those who cannot. In the financial year 1995/6 in the Magistrates Court SA there were 1716 small claim and 242 general motor vehicle property claims filed.[160] Very few of the defendants in these cases concede (they either contest or do nothing), and so in nearly all the damages would have had to be assessed without the aid to proof in the rules. At a median cost of $105 for each small claim and a median cost of $235 for general claims these parties were saved a total of $237,050.[161] This would be about on third of a million dollars if indexed for inflation (the CPI has inflated about 40% since 1988) This is a small but significant saving to parties achieved with no pain.

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[158] Section 108 *Local and District Criminal Courts Act 1926.*

[159] This is from an internal scale for magistrates operative from 30/9/88 as follows- claim up to $1,000- *$80*; $2,000 (small claims limit) - *$130*; $5,000- *$170*; $10,000- *$260*; $20,000- *$300.*

[160] Internal Courts Administration Authority statistics.

[161] (1716 x $105) + (242 x $235)= $237,050.

APPENDIX A

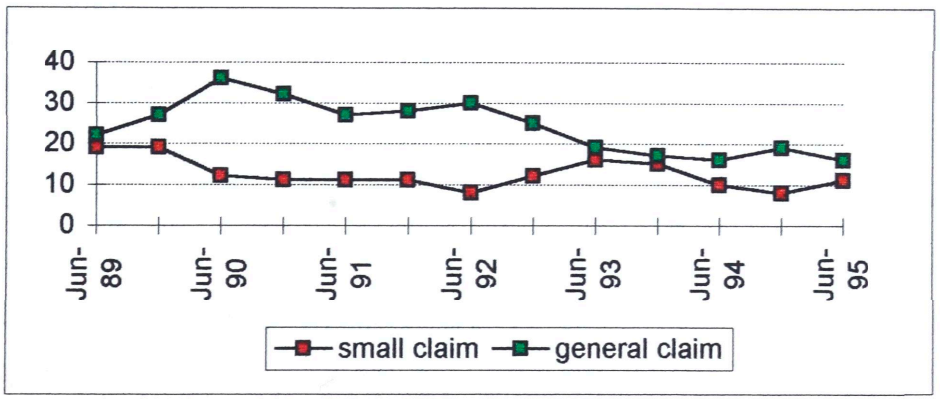
TRIAL DELAY

MAGISTRATES COURT CIVIL DIVISION
ADELAIDE REGISTRY

The attached statistics are drawn from management information kept by the Chief Magistrate and measure the time from the filing of a defence to the commencement of the trial of a case which is not given special priority but proceeds through the pretrial process without delay.

Magistrates Court Civil (Adelaide Registry) - delay in listing for trial in weeks

	small claim	general claim
Jun-89	19	22
Dec-89	19	27
Jun-90	12	36
Dec-90	11	32
Jun-91	11	27
Dec-91	11	28
Jun-92	8	30
Dec-92	12	25
Jun-93	16	19
Dec-93	15	17
Jun-94	10	16
Dec-94	8	19
Jun-95	11	16



APPENDIX B

PERFORMANCE STANDARD

MAGISTRATES COURT CIVIL DIVISION
ADELAIDE REGISTRY

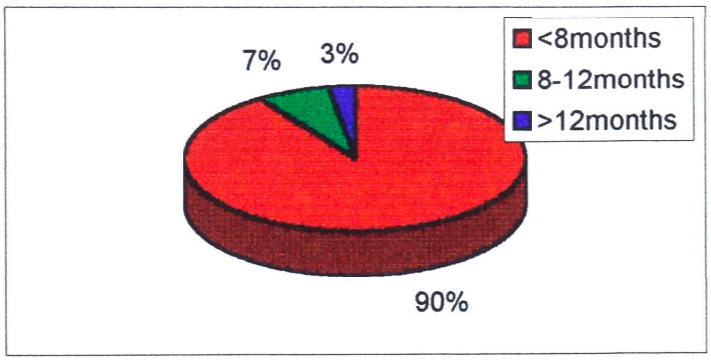
Two sources of statistics are available here. One set have been collected by the Supervising Magistrate on a manual basis for management purposes. They show a snapshot of the age of the cases in the list at the time when the statistics were collected. Every defended case currently in the list has been analysed on the basis of how long it has been in the list since the defence was filed. The data and a graphical analysis of it is attached. This data can be misleading because it shows what is left in the list, not the age of cases when they were finalised.

The other information is an analysis of a group of cases commenced between 1 September 1992 and 30 November 1992 which were defended. Each of these files was tracked to its ultimate disposal and the manner of disposal and delay in achieving that was recorded. The delay is analysed on the attached sheet.

Magistrates Court Civil (Adelaide Registry) - cases analysed by time in trial list

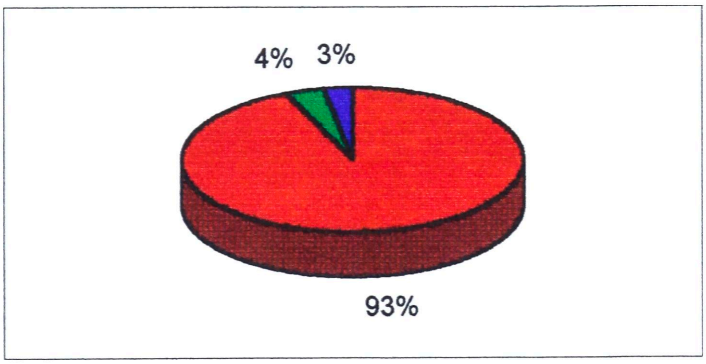
31/8/93

<8months	523
8-12months	40
>12months	15



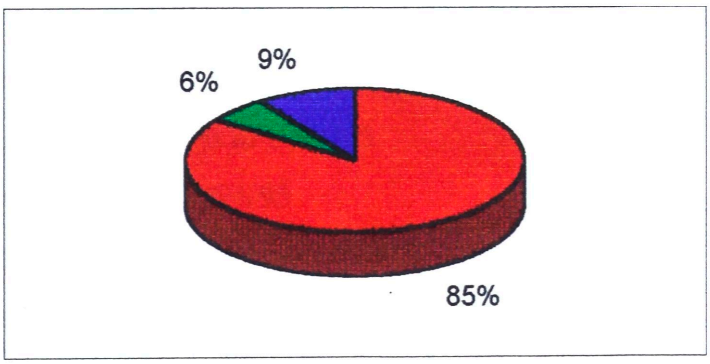
31/12/93

<8months	731
8-12months	29
>12months	21



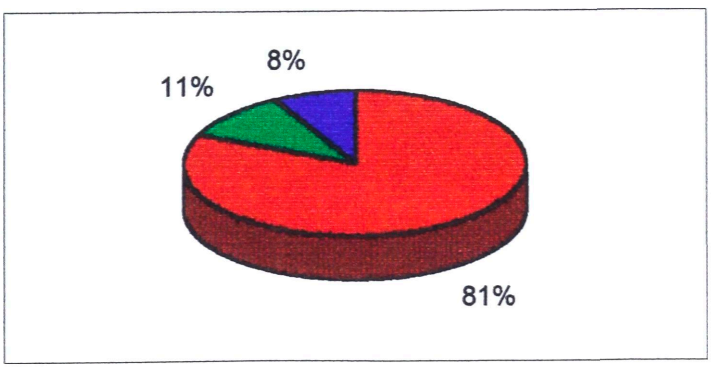
Cases filed 9-11/92 and defended

<270 days	321
270-365days	22
>365 days	36



30/4/95

<8months	523
8-12months	68
>12months	49



APPENDIX C

SGIC STATISTICS

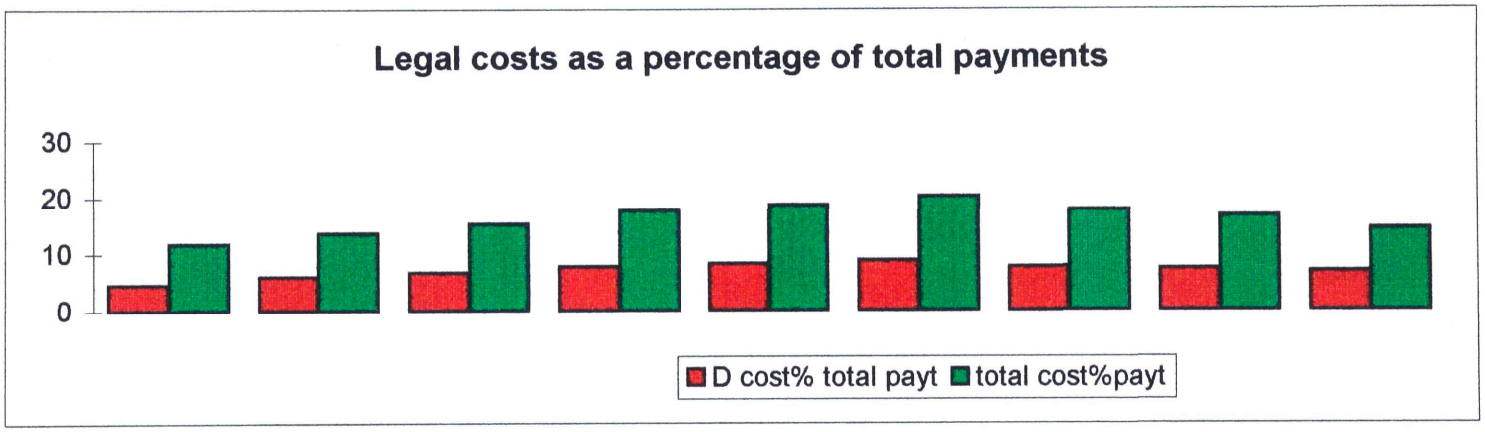
I record my thanks to the Commission for making this statistical data available to me. I especially thank Barry Parker who convinced the computers that the data could be made available in this form.

The data used is set out on the following numbered sheets. Sheets 1 to 5 are discussed in Chapter 4, **An evaluation of the ninety day preaction notice** and Sheet 6 is dicussed in Chapter 3, **Some policy issues in reducing the cost of litigation**.

sheet 1- legal costs as a percentage of total payments 1986/7 to 1994/5
sheet 2 - age of claim files closed 1989/90 to 1994/95
- actions commenced 1989/90 to 1994/95
sheet 3 - proportion of costs to payout 1991/2 and 1994/5
sheet 4 - accident statistics in SA
sheet 5 - casualty accidents compared to claims commenced
sheet 6 - plaintiff medico - legal costs as a percentage of payout.

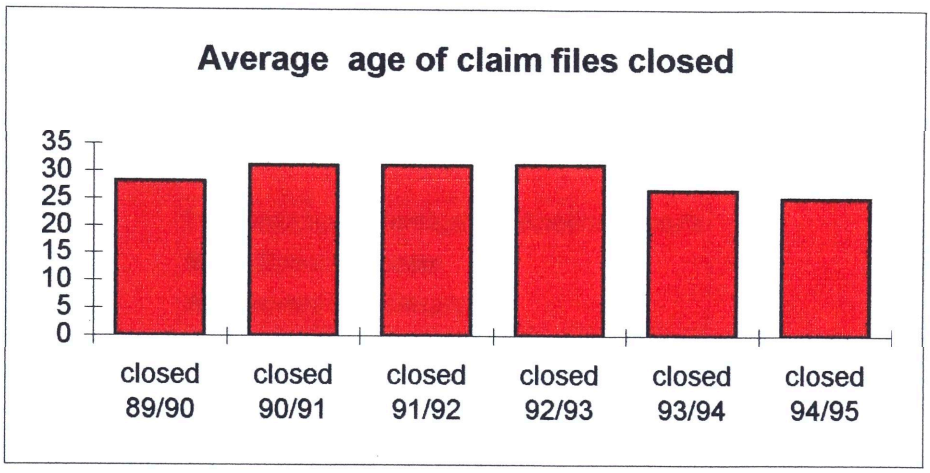
SGIC- legal costs and total payments

	1986/7	1987/8	1988/9	1989/90	1990/1	1991/2	1992/3	1993/4	1994/5
Plaintiff legal cost	11698241	12216857	15266649	18461165	19613332	22805668	18501732	13409545	11988848
Defendt legal cost	7598037	9544422	11898588	14498705	15809360	17738005	14337290	10412612	10965944
total legal cost	19296278	21761279	27165237	32959870	35422692	40543673	32839022	23822157	22954792
Total payments	162761688	158928450	176376690	185501305	189992135	201091998	185883681	143274316	159576679
D cost% total payt	4.66	6	6.75	7.82	8.32	8.82	7.71	7.27	6.87
total cost%payt	11.86	13.69	15.4	17.77	18.64	20.16	17.67	16.62	14.38



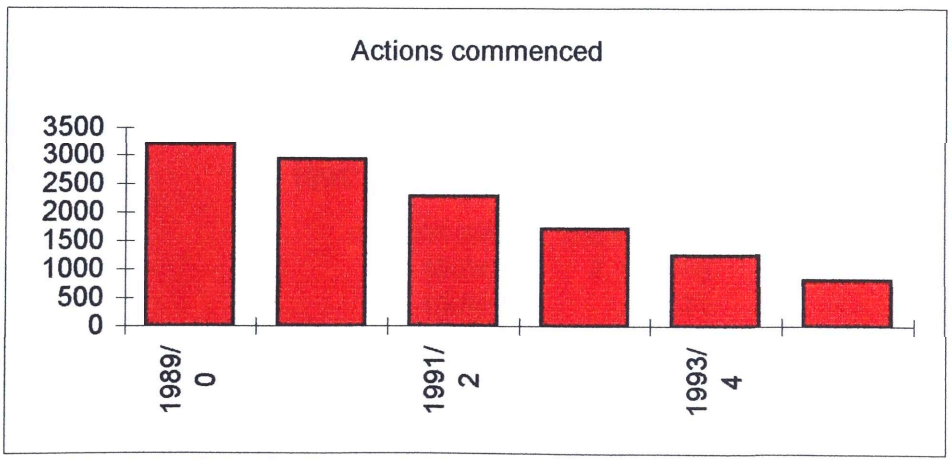
SGIC- average time CTP claim file open for claims closed during period

	Average no. of months claim file open
closed 89/90	28.15
closed 90/91	31.04
closed 91/92	31.04
closed 92/93	31.18
closed 93/94	26.59
closed 94/95	25.12



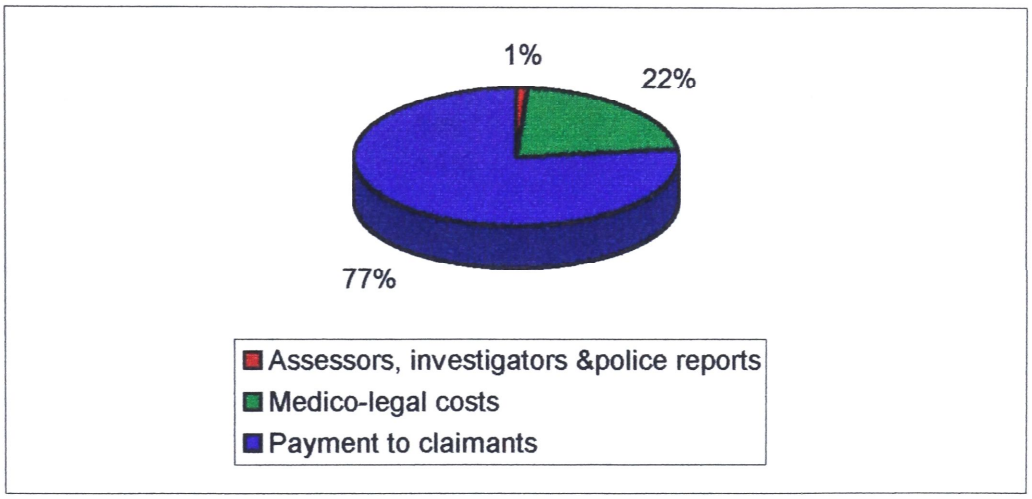
SGIC- number of new CTP actions per year

year	Actions commenced
1989/0	3204
1990/1	2931
1991/2	2284
1992/3	1709
1993/4	1256
1994/5(projected)	815



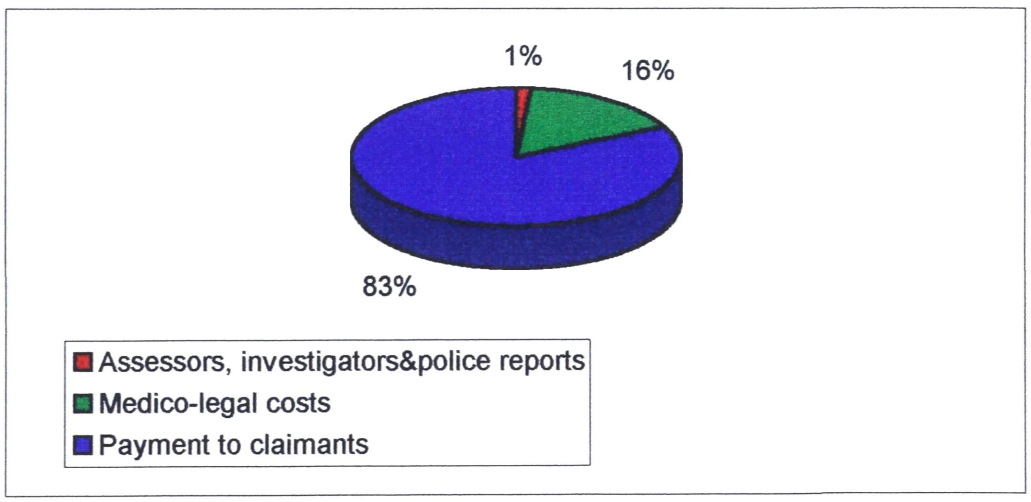
SGIC-proportion of costs to CTP payout 1991/2

Assessors, investigators &police reports	2135464
Medico-legal costs	44153902
Payment to claimants	154802632



1994/5

Assessors, investigators&police reports	2317894
Medico-legal costs	26174603
Payment to claimants	131084182



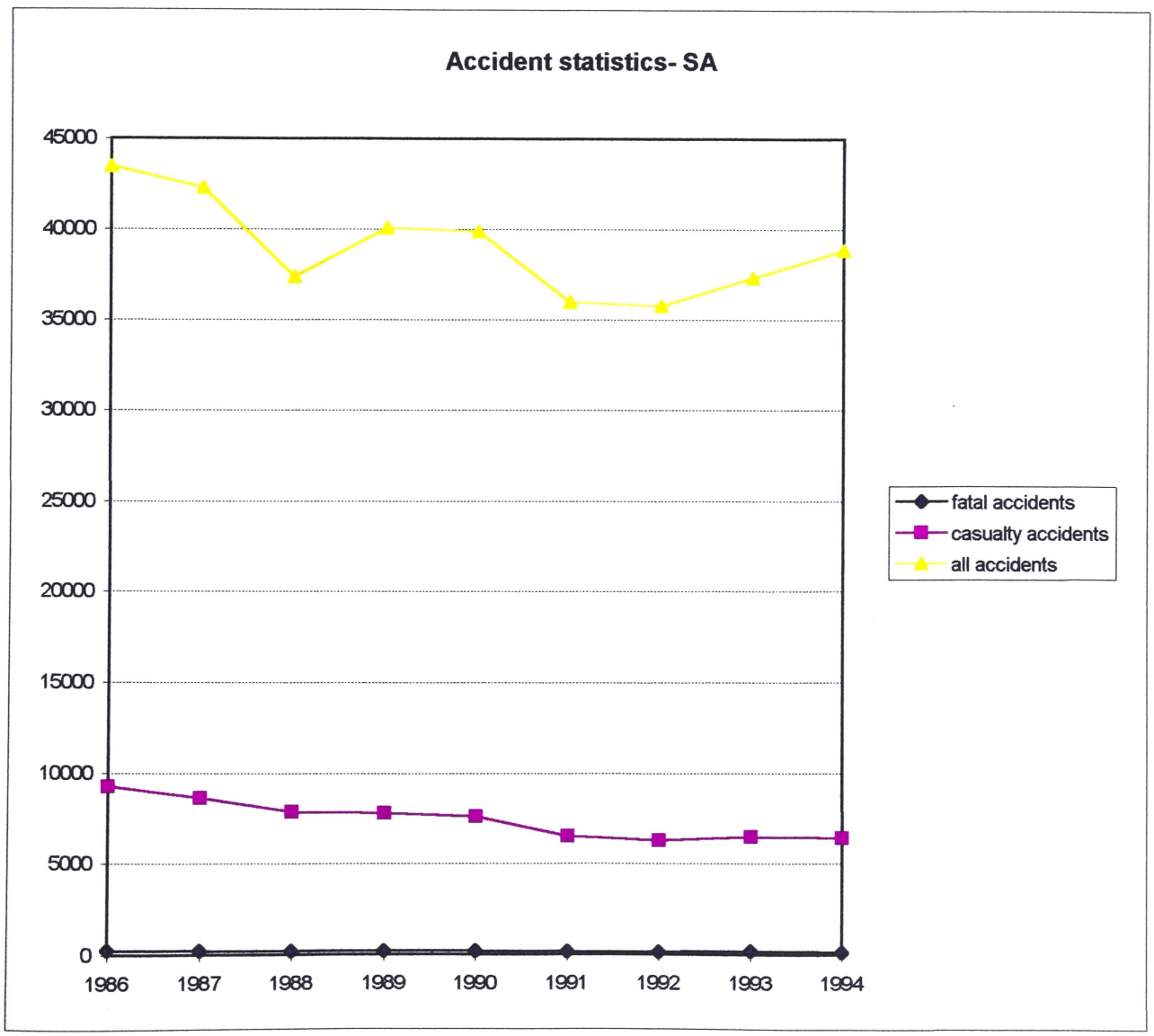
The above have been calculated from the following data

	1991/2	1994/5
total payout	201,091,998	159,576,679
assessors and investigators	2,119,849	2,284,680
police reports	15,615	33,234
defendants' legal costs	17,738,005	10,965,944
plaintiffs' legal costs	22,805,668	11,988,848
medical reports	3,610,229	3,219,811
net payout	154,802,632	131,084,182

Vehicle accidents SA

	fatal accidents	casualty accidents	all accidents
1986	259	9244	43440
1987	230	8619	42240
1988	206	7881	37373
1989	201	7815	40067
1990	186	7606	39844
1991	166	6506	35961
1992	142	6258	35756
1993	191	6467	37295
1994	145	6410	38833

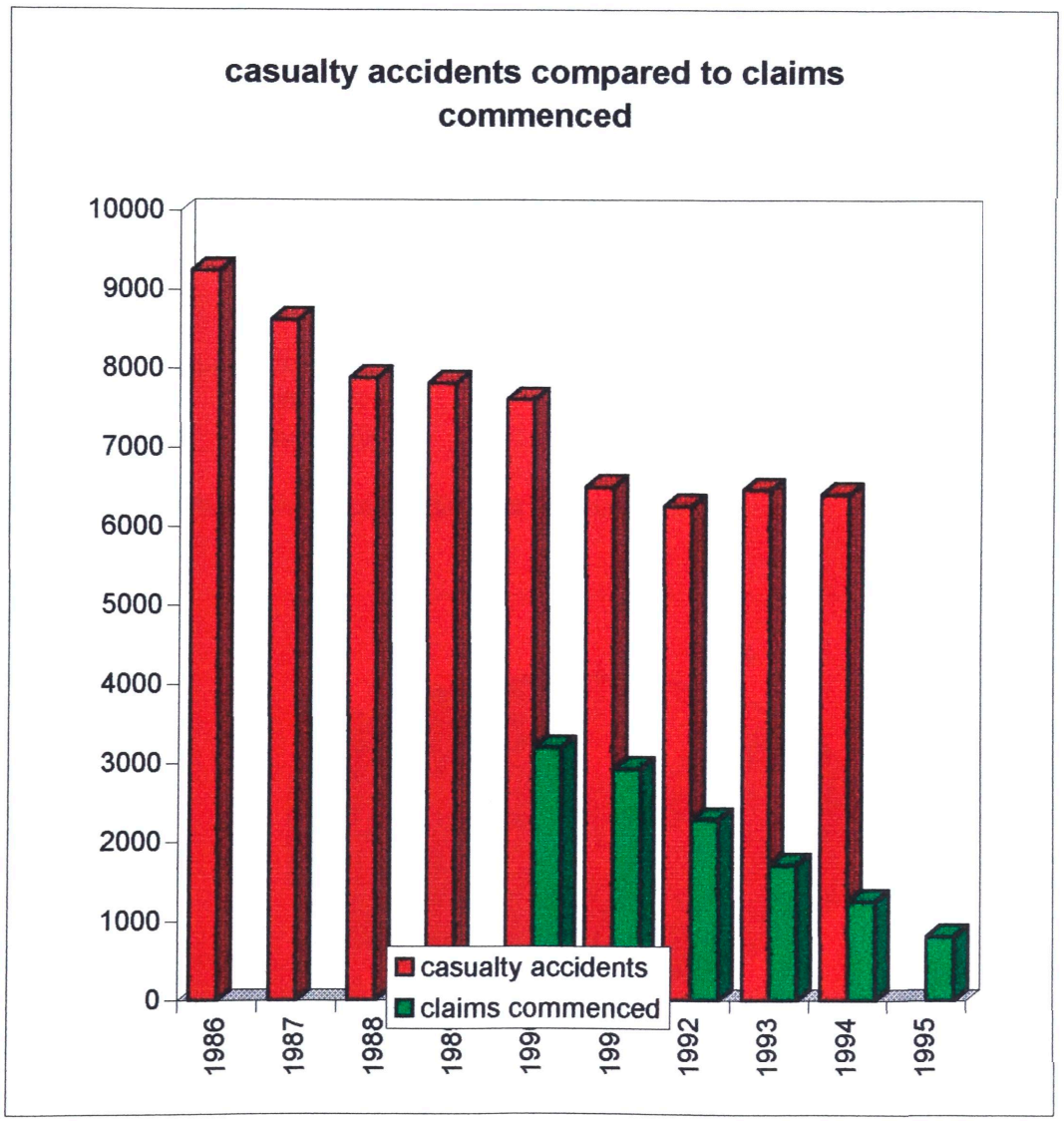
NB no figures are available for all accidents 1993- the figure used is an average of 1992/4
NB in 1988 the damages reporting limit was raised from $300 to $600
NB figures are for accidents not actual casualties or injured people
Source- SA Dept Road Transport, office of road safety.



Casualty accidents compared to claims commenced with SGIC

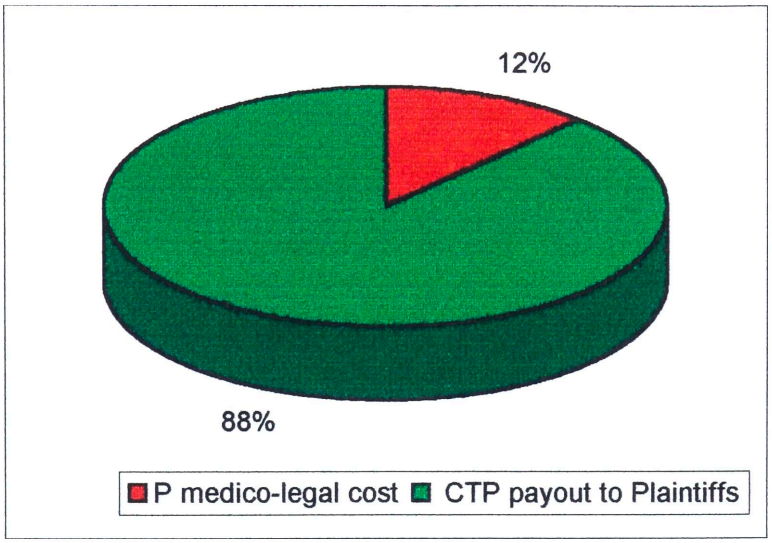
	casualty accidents	claims commenced
1986	9244	
1987	8619	
1988	7881	
1989	7815	
1990	7606	3204
1991	6506	2931
1992	6258	2284
1993	6467	1709
1994	6410	1256
1995		815

NB casualty accidents are per calendar year, claims commenced per financial year



SGIC 1991/2- Plaintiffs' medico- legal costs as a percentage of CTP payout to Plaintiffs

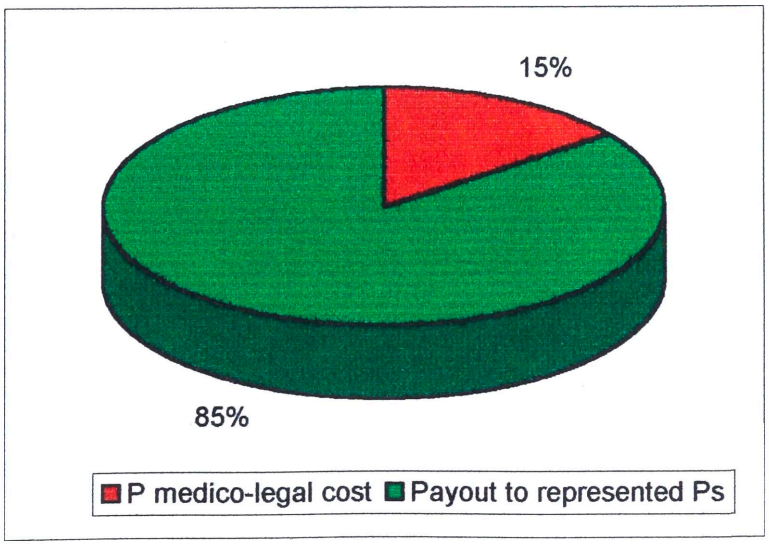
P medico-legal cost	24557602
CTP payout to Plaintiffs	179375849



SGIC 1991/2- Ps' medico-legal costs as percentage of CTP payout to represented plaintiffs

P medico-legal cost	18951671
Payout to represented Ps	109362390

note figure for payout is from a back calculation not original data



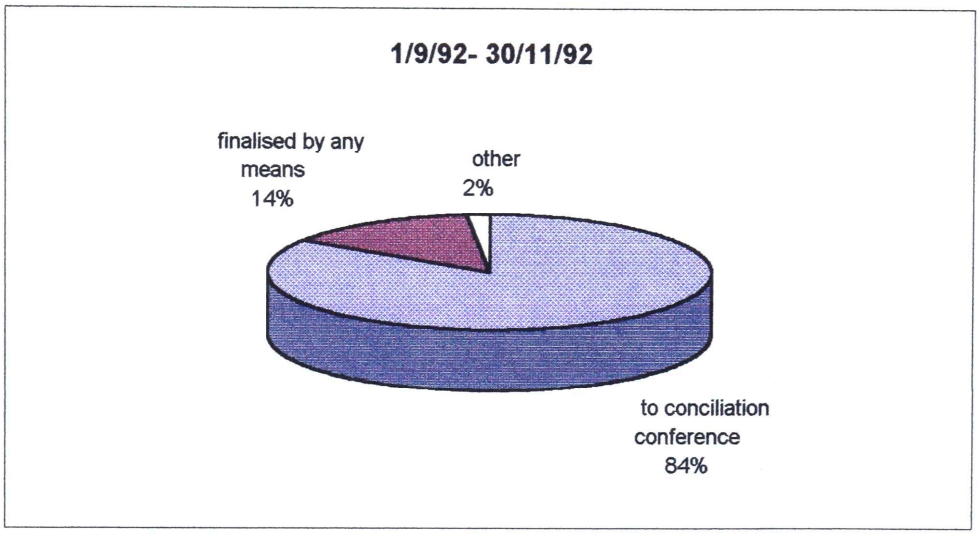
APPENDIX D

COMPARATIVE DATA ON THE STAGE OF FINALISING CASES

GENERAL CLAIMS- analysis of percentage finalised by directions hearing.

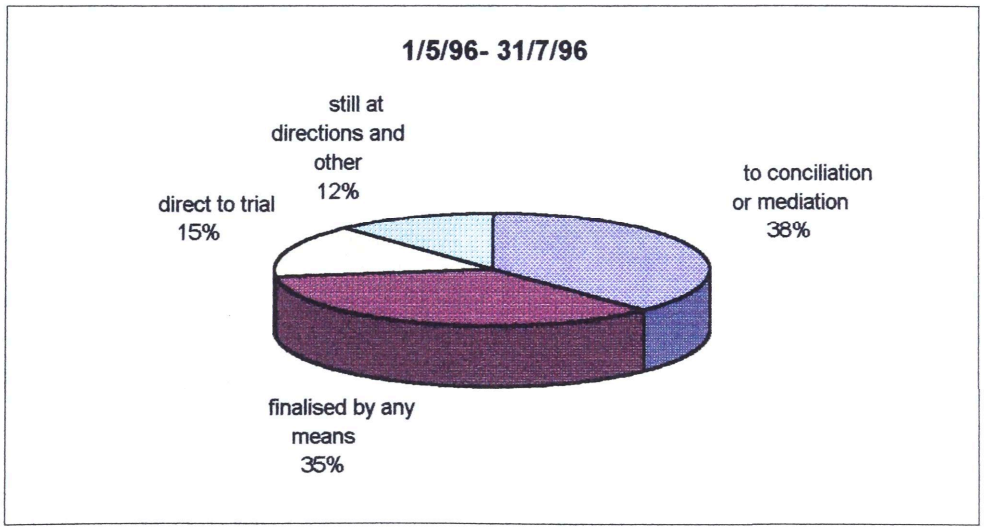
379 cases commenced 1/9/92- 30/11/92 and defended

to conciliation conference	319	84.20%
finalised by any means	54	14.20%
other	6	1.60%
total	379	100%



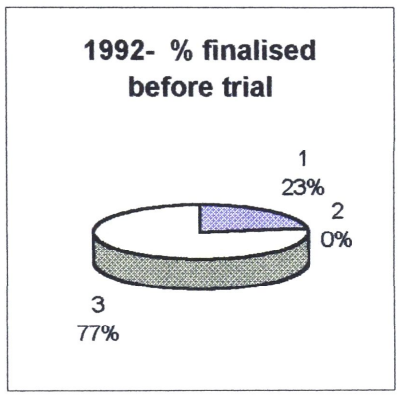
219 cases defended between 1/5/96- 31/7/96

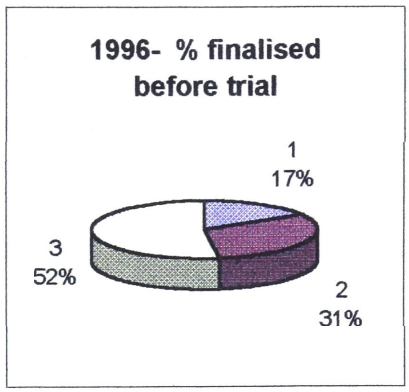
to conciliation or mediation	83	38%
finalised by any means	77	35%
direct to trial	33	15%
still at directions and other	26	12%
total	219	100%



SMALL CLAIMS- percentage finalised before trial and delay

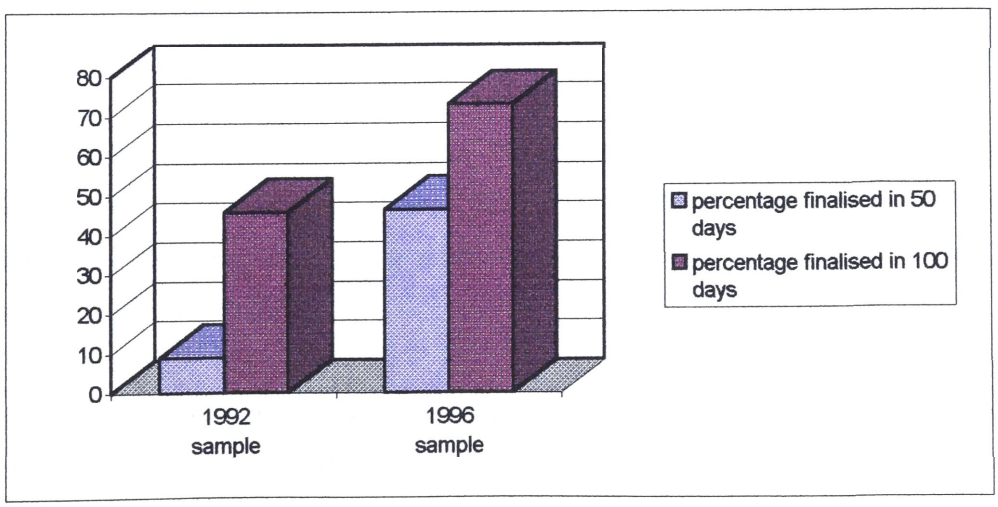
	1992 sample	1996 sample
finalised before trial or directions	122	84
finalised at directions	0	158
other	415	265
total	537	507





	1992 sample	1996 sample
percentage finalised in 50 days	9	46.5
percentage finalised in 100 days	46	73

NB- 1992 sample slightly overstated by the inclusion of some data at 60 & 120 days



APPENDIX E

QUESTIONNAIRE FOR LAWYERS

Eight lawyers were interviewed by the author loosely following the form of the questionnaire below. They were chosen by the author as experienced, competent and of sufficient seniority to feel free to be frank with me. They were and I thank them for that. They all practice to a significant extent in the Magistrates Court. They come from a major firm doing everything except family law and little criminal and both plaintiff and defendant work, a middle sized commercial and general firm doing both plaintiff and defendant work, a small general practice with a plaintiff personal injury emphasis, a small specialist debt collecting firm, a medium size general practice with a half its work debt collecting, a specialist costing practitioner with a general and debt collecting practice and two medium to large firms with a personal injury emphasis, one for the plaintiff and one for the defendant.

Questionnaire for Lawyers -

What is the profile of your firm? Number of partners, staff solicitors, PI emphasis, Plaintiff or Defendant?

On what basis do you charge your/this client, what explanation is given to the client of the basis of charging, the expected overall costs, the level of party/party costs and their relationship to solicitor/client costs, and to what extent is/was this information updated as the case progresses/d?

Have clients of yours chosen mediation. If so why, if not why not? Did that settle the case? If yes did what was your charge (including disbursements) at that point and did that save your client costs? If no what did the mediation cost your client and were there any benefits from it?

How many times have you been through the new process of requiring the client to attend the first directions hearing?

What advice did you give your client about the new process?

What effect did the requirement that your client attend the first directions hearing have- on you?

on your client?

Did the court information on costs/ mediation/ the conventional trial path influence your client or you in choosing mediation, settling the case or trial? In what way?

What effect did the introduction of the 90 day rule (rule 106(8)) which had effect in this court from the beginning of 1994 have on PI claims?

Does the magistrates cost scale influence the amount of work done on a file? In what way?

What is the effect, if any, of the cost penalties in rules 52 &53 and rule 59 ?

Small claims- what do you charge your client for small claims? Are the results satisfactory? Do you think the small claims limit should be increased? Why?

What are your costs of conducting a claim and at what points are they incurred(instructions to defend, filing defence, counterclaim, pretrial, trial)?

What is the relationship between party/party costs and solicitor/client costs? Does this become greater the longer the litigation goes on?

What are the differences in costs of personal injury litigation, debt collecting, other?

At what stage are disbursements incurred - filing defence, pretrial, trial? What are the types of disbursements. Are there differences between PI and other types of litigation?

Is it cheaper to conduct litigation in the Magistrates Court rather than in the Supreme and District Courts? If yes how much and why?

How could the cost of pleadings, discovery, 3rd party discovery be reduced?

Do you use the aid to proof of damage and does that save costs? How much?

Is the cost of multiple adjournments of pretrial hearings a significant cost burden?

What proportion of your cases in the Magistrates court actually go to trial?

What can be done to assist early settlement?

How many cases settle when independent counsel is briefed? Do you brief independant cousel and would it be useful to brief counsel earlier?

What are the medico costs (per report, giving evidence, other)? Who selects your clients experts? How many do you use? Do you ever discuss with SGIC the selection of an expert acceptable to both parties?

APPENDIX F

QUESTIONNAIRES FOR PARTIES

Interviews of parties to cases were conducted by Courts Administration Authority personnel as part of an assessment of the introduction of mediation. Questions were also asked about the cost implications of the new process that the party experienced. The parties were chosen at random with some alterations from the original selections being necessary due to some of those first selected not being available. More plaintiffs than defendants were interviewed because depite efforts to contact both it proved to be more difficult to contact defendants and arrange an interview with them. There were insuffient available to sample parties in general claims who declined mediation and went to trial.

SAMPLE 1 - Those who attended mediation and settled (small or general) - 9 parties were interviewed

Name of Interviewer .....

Call Date .....

Call Time (am/pm) .....

Could the respondent be contacted [ ] Yes [ ] No

If no, Callback 1 Date ..... Time.....

Callback 2 Date ..... Time.....

Callback 3 Date ..... Time.....

Survey

Hello my name is....., I work for the Courts Administration Authority and we are currently conducting a telephone survey about the option of mediation for resolving minor and general claims in the Civil Division of the Adelaide Magistrates Court. You should have recently received a letter about the evaluation and that you would be contacted.

Do you have approximately 30 minutes that I can talk to you about this matter?

(If **yes** continue, if **no** arrange time to callback.)

Callback Date..... Time.....

I understand that you were recently involved in a small/general claim action. We believe that your feedback about your experiences would be of great assistance to the Authority in providing a higher standard of service. Your feedback will also assist in evaluating any additional services that may be required to meet the future needs of the courts consumers.

All information you provide will be treated confidentially.

Would you like to participate in this survey?

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Defendant [ ]

.....

2. Action Number.....

3. Action: [ ] 1. Minor Civil [ ] 2. General [ ] 3. Other (please describe)

.....

.....

4. Type of Claim:

[ ] 1. Motor vehicle accident [ ] 2. Property [ ] 3. Building

[ ] 4. Personal injury [ ] 5. WorkCover [ ] 6. Defamation

[ ] 7. Contract [ ] 8. Other .....

5. Date Defence was lodged .....

6. Date of Directions Hearing .....

7. Date of mediation.....

8. Name of mediator .....

2. OUTCOME

9. Could you please tell me the terms of the settlement reached at mediation?

.....

.....

10. How satisfied were you with the mediated outcome?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

11. Please explain what factors contributed to your satisfaction or dissatisfaction with the mediated outcome?

.....

.....

3. CASE DURATION

12. How satisfied were you with the time it took for your matter to be resolved?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

13. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to resolve?

.....

.....

4. CASE COST

14. Was one of the reasons you chose mediation because you thought it would

cost you less than having the matter settled at a trial? Please explain.

.....

.....

15. How important was cost in your decision to choose mediation?

.....

.....

16. Do you believe that you saved money by resolving your claim through mediation? Please explain.

.....

.....

5. OUTCOME PARTICIPATION

16. How satisfied are you with the level of input you were able to have in deciding on the mediated outcome?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

Please explain

.....

.....

6. USE OF LEGAL REPRESENTATION (for general claims only)

17. Did you have legal representation at the mediation hearing?

.....

.....

7. OPERATION OF THE MEDIATION PROCESS

18. Why did you choose mediation? (prompt for more than one answer, "Was .....there any other reason that you chose mediation?")

.....

.....

19. At what stage of your claim were you made aware of the option of mediation?

.....

.....

20. Do you have any comments on the information provided about mediation at the directions hearing? (Eg. Was the information detailed enough to assist you to make an informed decision?)

.....

.....

21. How convenient was the location and time that the mediation was held? (Eg Would it have been helpful if the mediation had been held outside normal office hours or at a suburban Magistrates Court - Christies Beach, Elizabeth,

Holden Hill, Mt Barker, Port Adelaide?).

.....

.....

8. MANNER IN WHICH THE MEDIATION WAS CONDUCTED

22. During the mediation did you feel that the mediator treated both sides equally or favoured one side more than the other? Please explain.

.....

.....

23. Do you have any comments about the proficiency of the mediator?

.....

.....

24. In retrospect, do you believe that choosing the mediation path was the right or wrong decision? (Eg. If you were involved in a similar dispute, would you choose mediation?) Explain.

.....

.....

25. Would you like to make any additional comments on the use of mediation for dispute resolution?

.....

.....

9. PREVIOUS LODGEMENT - The next few questions are about previous experience with civil claims in the Magistrates Court. This is to see whether people think that the new system is an improvement over the previous system.

26. Have you previously been involved in another civil claim within the Adelaide Magistrates Court Civil Division?

.....

27. Action: [ ] 1. Minor Civil [ ] 2. General [ ] 3. Other (please describe)

.....

.....

28. Type of Claim:

[ ] 1. Motor vehicle accident [ ] 2. Property [ ] 3. Building

[ ] 4. Personal injury [ ] 5. WorkCover [ ] 6. Defamation

[ ] 7. Contract [ ] 8. Other .....

29. How long ago was the claim?.....

30. Do you think that the new system where parties are offered mediation is better than the previous system were mediation was not available? Please explain?

.....

.....

Thank you for your time and assistance

SAMPLE 2 - Small Claims settled at Directions Hearing- 10 parties were interviewed

The same preliminary matters set out in the first sample were attended to.

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Defendant [ ]

.....

2. Action Number.....

3. Type of Claim:

[ ] 1. Motor vehicle accident [ ] 2. Property [ ] 3. Building

[ ] 4. Personal injury [ ] 5. WorkCover [ ] 6. Defamation

[ ] 7. Contract [ ] 8. Other .....

4. Date Defence was lodged .....

5. Date of Directions Hearing .....

2. OUTCOME

3. Could you please tell me the terms of the settlement reached at the directions hearing?

.....

.....

7. How satisfied were you with the outcome of the directions hearing?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

8. Please explain what factors contributed to your level of satisfaction with the outcome from the directions hearing?

.....

.....

3. CASE DURATION

9. How satisfied were you with the length of time it took for your case to be resolved?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

10. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to be resolved?

.....

.....

4. CASE COST

11. Do you believe you saved money by resolving your case at the directions hearing?

.....

.....

12. How satisfied were you with the costs of resolving your case at the directions hearing?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

Please explain.

.....

.....

5. OUTCOME PARTICIPATION

13. How satisfied were you with the level of input you were able to have in the settlement reached at the directions?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

Please Explain.

.....

.....

6. USE OF LEGAL REPRESENTATION

14. During the course of your case, did consult a lawyer or some kind of legal aid? If so, which one?

.....

.....

15. Did your legal representative advise you to settle at the directions hearing?

.....

.....

16. Please explain your reason for settling at the directions hearing?

.....

.....

7. OPERATION OF THE DIRECTIONS HEARING

17. Previously, directions hearings were not offered for minor civil claims. Do you believe that directions hearings assist the resolution of small claims? Why/why not?

.....

.....

18. Would you say the directions hearing was

[ ] very useful

[ ] useful

[ ] not useful, for the resolution of small claims?

8. PREVIOUS LODGEMENT - The next few questions are about previous experience with civil claims in the Magistrates Court. This is to see whether people think that the new system is an improvement over the previous system.

19. Have you previously been involved in another civil claim within the Adelaide Magistrates Court Civil Division?

.....

20. Action: [ ] 1. Minor Civil [ ] 2. General [ ] 3. Other (please describe)

.....

.....

21. Type of Claim:

[ ] 1. Motor vehicle accident [ ] 2. Property [ ] 3. Building

[ ] 4. Personal injury [ ] 5. WorkCover [ ] 6. Defamation

[ ] 7. Contract [ ] 8. Other .....

22. How long ago was the claim?.....

23. Do you think that the new system where parties attend a direction hearing before proceeding to trial is better process? Please Explain.

.....

.....

24. Are there any other comments you would like to make?

.....

.....

.....Thank you for your time and assistance.

SAMPLE 3 - Small claims, declined mediation, judgement given at trial- 9 parties were interviewed.

The same preliminary matters set out in the first sample were attended to.

1. INFORMATION TO BE COLLECTED PRIOR TO CONTACT WITH RESPONDENT

1. Name of, Plaintiff [ ] Respondent [ ]

.....

2. Action Number.....

3. Type of Claim:

[ ] 1. Motor vehicle accident [ ] 2. Property [ ] 3. Building

[ ] 4. Personal injury [ ] 5. WorkCover [ ] 6. Defamation

[ ] 7. Contract [ ] 8. Other .....

4. Date Defence was lodged .....

5. Date of Directions Hearing .....

6. Date of trial .....

2. OUTCOME

7. Could you please tell me the terms of the trial outcome?

.....

.....

8. How satisfied were you with the outcome of your case at trial?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

9. Please explain what factors contributed to your satisfaction or dissatisfaction with the trial outcome?

.....

.....

3. CASE DURATION

10. How satisfied were you with the length of time it took from when the defence was lodged and when judgment was given at trial?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

11. Please explain what factors contributed to your satisfaction or dissatisfaction with the time it took for your case to be resolved?

.....

.....

4. CASE COST

12. Prior to trial, did you know the likely costs involved in pursuing a small claim in the Adelaide Magistrates Court Civil Division?

.....

.....

13. In retrospect, do you believe you would have saved money by opting for mediation and attempting to resolve the matter at an earlier stage of the litigation process? Please explain.

.....

.....

5. OUTCOME PARTICIPATION

14. How satisfied were you with the level of input you were able to have in the judgment given at trial?

[ ] 1. very satisfied

[ ] 2. satisfied

[ ] 3. unsatisfied

[ ] 4. very unsatisfied

Please explain

.....

.....

.....

15. Would you like to have had greater input into the outcome of your case.

Why/why not?

.....

.....

6. REASON FOR DECLINING MEDIATION

16. Can you tell me what you understand by the term mediation?

.....

.....

17. At what stage of your claim were you made aware of the option of mediation?

.....

.....

18. Do you have any comment on the information provided about mediation at the

directions hearing? (Eg. Was the information detailed enough to assist you to make an informed decision?)

.....

.....

19. Why didn't you choose mediation?

.....

.....

20. Are there any other comments you would like to make?

.....

.....

7. DIRECTIONS HEARING

21. As part of the process of resolving your dispute, you had to attend a directions hearing before you could proceed to trial. How useful was the directions hearing?

[ ] very useful

[ ] useful

[ ] not useful

Please explain.

.....

.....

22. Do you think it would be better if the matter had gone straight to trial? (in which case your matter would probably have been resolved earlier) Please explain.

.....

.....

Thankyou for your time and assistance.

APPENDIX G

INFORMATION PAMPHLETS

The Magistrates Court makes available to parties information pamphlets on legal costs, mediation, the conventional litigation path and preparing for a minor civil trial. These are reproduced below.

LEGAL COSTS - MAGISTRATES COURT: CIVIL DIVISION

Introduction

All too often people embark on a civil claim in the Magistrates Court without a proper appreciation of the risks and likely costs, especially if they lose the case. The purpose of this pamphlet is to assist people who are considering taking a matter to court to calculate the likely costs beforehand so that they can make an informed decision about whether or not to go ahead with a lawsuit.

The pamphlet also explains the rights of parties in relation to recovering legal costs and outlines the non-trial options available for settling civil claims in the Magistrates Court.

Party/Party Costs

A party represented by a lawyer who wins a case in the Magistrates Court is entitled to recover some of their legal costs. This cost entitlement is called 'party/party costs'.

Detailed cost schedules available from court registries can be used to estimate the likely party/party costs of a claim before the claim is started.

Cost Scales for General Claims

Claims for amounts greater than $5 000 are called general claims. There are two cost scales for general claims: one for routine actions and the other for complex actions.

On the routine scale in a trial that lasts only one day, a plaintiff (ie the party starting the claim) who wins is entitled to recover legal costs equal to about 25% of the judgment. For example, if a magistrate awards a plaintiff $10 000, the defendant will be required to pay the plaintiff that amount as well as about $2 500 towards the plaintiff's legal costs. A defendant (ie the party against whom the claim is made) who wins can recover legal costs equivalent to about 25% of the plaintiff's unsuccessful claim. For example, a losing plaintiff who claimed $10 000 from a defendant would be required to pay the defendant the amount specified in the judgment plus another $2 500 to help cover the defendant's legal costs. In complex actions, the proportions rise to about 30%.

The proportions provided above are only intended as a guide. If a claim involves many adjournments of directions and conciliation hearings the party/party costs are likely to be greater than these percentages. Also, claims frequently involve the additional cost of expert reports (eg medical reports or engineers' building reports) and/or fees for expert witnesses; these charges can add considerably to the cost of a claim.

Where a trial lasts more than one day, the daily cost of legal representation can be calculated from item 24 in the cost schedules that are available at registries.

If a party wishes to claim costs on the complex scale, they must notify the other party in writing. The advantage to the successful party of claiming costs on the complex scale is that they can recover a greater proportion of their costs. If the other party contests the notice to claim costs on the complex scale, it is left to the magistrate at trial to decide which scale will apply.

Minor Civil Action

One way of minimising legal costs is to have a claim heard as a 'small claim' or 'minor civil action'. Minor civil actions are claims for amounts of $5 000 or less. Under the provisions of the Magistrates Court Act, lawyers are not usually permitted to represent a party at the trial of a minor civil action so no party/party costs are payable. Witness fees are allowed, but in minor civil actions these are usually only $30 to $40 (see Scale 3 in the cost schedules available from registries).

It is important to note that claims of more than $5 000 can also be heard as minor civil actions, providing the other party agrees.

Lawyers' Charges

Before instructing a lawyer to represent you, it must be realised that even if you win the claim, the legal costs you are entitled to recover may be much less than the amount your lawyer actually charges. If you lose and costs are awarded against you, not only will you have to pay your own solicitor-client costs but the other person's party/party costs as well.

It is essential that you discuss your lawyer's charges before you get him/her to commence or defend a claim for you. To avoid problems later, get written confirmation of the fees and charges.

It is important to remember that there is no economic point in hiring a lawyer to win a claim if you have to pay all your judgment as well as the party/party costs to your lawyer. Nor is there any sense hiring a lawyer to defend a claim if you will end up owing more to your lawyer than the claim against you. There is also little point spending a lot of money on a claim against a defendant who has no money or assets to pay your judgment. Not only will you not be able to recover your judgment, but you will still have to pay your lawyer.

Alternative Dispute Resolution

The Civil Division of the Magistrates Court has recently introduced the option of

mediation as an alternative means of dispute resolution for minor civil actions and general claims. Mediation is provided by professionally trained court staff with accredited qualifications in mediation. It provides parties with an opportunity to negotiate a mutually agreeable resolution to a dispute rather than having to resort to court adjudication.

If the parties in a dispute decide to try and resolve the matter by mediation, a mediation conference will be held soon after the defendant has filed their defence. At the conference the mediator attempts to identify the parties' interests (rather than their legal rights) and bring them to a consent settlement that will accommodate those interests.

In addition to the speedier resolution of claims, mediation has the potential to provide considerable cost savings for litigants because the matter is resolved before most of the costs are incurred.

Offers to settle

The rules of the Magistrates Court, Civil Division, have been designed to encourage parties to make and accept reasonable offers to settle out of court. For general claims, the chief forum for negotiating out of court settlements is the conciliation conference, which is the last opportunity parties have to settle a matter before trial. A party who fails to make or accept a reasonable out of court settlement can incur considerable legal cost penalties.

The following example illustrates the cost penalties that can be incurred by an unsuccessful defendant: A plaintiff notifies a defendant that they are willing to accept an out of court settlement of $10 000. The defendant, however, does not agree to that sum and the matter goes to trial. The plaintiff subsequently wins the case and is awarded $11 000. The defendant is required to pay not only the judgment but **all** the plaintiff's legal costs from 14 days after the acceptance offer was made. That is, the defendant is penalised for failing to agree to the plaintiff's reasonable offer to settle out of court.

Similarly, plaintiffs who refuse to accept a defendant's reasonable offer to settle out of court are subject to cost penalties. Defendants who offer more than or equal to the judgment against them are entitled to party/party costs from 14 days after the offer was

made (Rule 59).

It is important for parties to make realistic offers at the final conciliation conference as further cost penalties can apply (Rules 52 and 53).

For more information about these cost penalties, the relevant rules are included in the cost schedules available at the Registry.

MEDIATION

The Civil Division of the Magistrates Courts has recently introduced the option of mediation for resolving claims and proceedings lodged in their courts.

This pamphlet has been prepared to help you understand **MEDIATION**, the advantages it has to offer, its advantages over going to trial and where it fits into the court trial process in Magistrates Courts.

WHAT IS A MEDIATION?

Mediation is an alternative way of resolving disputes or claims. It provides parties with an opportunity to negotiate a mutually agreeable resolution to a dispute rather than having to resort to court adjudication. The mediation is conducted by a neutral third party (mediator) who seeks to identify the parties' interests (rather than their rights) and to bring them to a consent settlement that will accommodate those interests. The mediator is neutral and does not decide which party is right or wrong or tell you what to do.

WHO WILL MEDIATE?

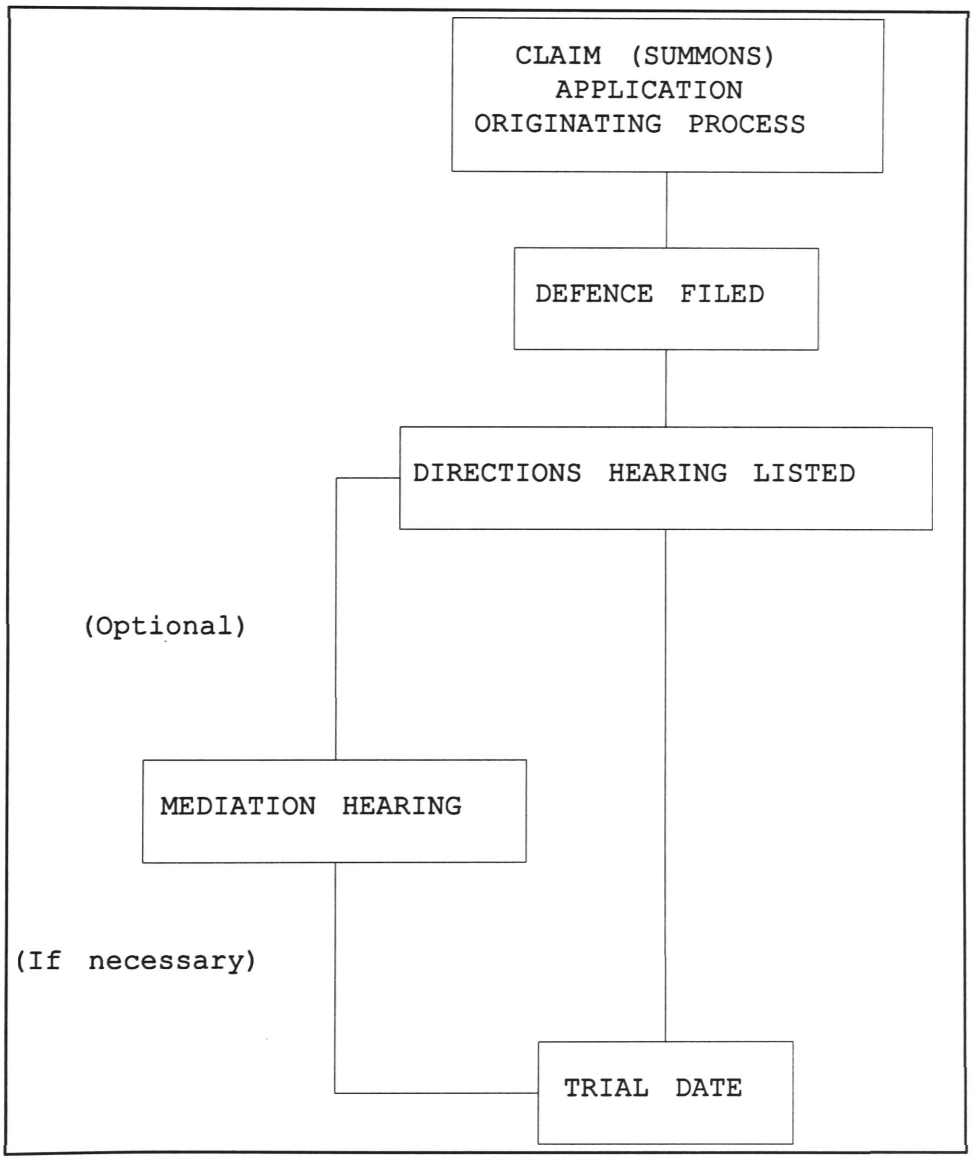
Mediation will be conducted by senior court staff who have received formal training. Magistrates are also available during the mediation process to assist with direction on matters and questions involving law. Should you not wish to use the mediator provided by the Magistrates Court, you can ask the Law Society to recommend a mediator.

WILL IT COST ME ANYTHING?

Mediation in the Magistrates Courts is provided without charge. This is one of the important advantages of mediation over more traditional means of dispute resolution such as a trial.

WHEN IS MEDIATION USED?

Your case can be referred to mediation if you ask for it at the first hearing called a Directions Hearing. This hearing is set down once a defence has been filed in your matter. It should also be noted that whilst mediation may not be the preferred option at the directions hearing it can still be an option at a later stage. Should either party wish to have their matter mediated at a later stage, you should contact the court where advice can be provided as to the procedure for applying to have the matter listed for mediation.



BENEFITS OF MEDIATION

Costs and Flexible Results

In most cases, an early resolution through mediation means all parties save costs. Mediation also allows you to reach more flexible solutions in a non-threatening environment free of legalistic language and process which better suit your needs. An example of this could be that if your matter involved faulty work and a claim for monies to have the work corrected, possible outcomes may be:

- an agreed adjournment to enable work to be carried out by either or both parties to assist with the resolution of the matter. In the event that the work is performed to the satisfaction of parties, the parties may not have to attend at the next hearing with the matter then considered to be settled;

- binding agreements endorsed by a court that are enforceable in a court should either or both parties not comply with the agreement

- agreement between parties for the payment of an amount of money by one of the parties in full and final satisfaction of the matter, with the payment of the sum of money being within a timeframe agreed between the parties.

Mediation allows for parties to reach agreed settlements with solutions of a wide and varied nature depending on the proceedings.

Speedier Resolution

Mediation is usually quick - helping you to get an early resolution before things get out of hand. At the very least, mediation should assist in defining the issues that need to be resolved should the matter proceed to the next step and eventually trial.

Control of Outcome

you have more control over the process and the outcome. This means that the agreement is more likely to be honoured.

Privacy and Confidentiality

The mediation is confidential and any agreement an also be kept confidential by agreement.

WHERE ARE MEDIATIONS HELD?

Mediations will be held in venues separate from the court. The rooms used are in a comfortable non-threatening environment where the opportunity is provided to have a relaxed and informal discussion involving parties, legal representatives if and where necessary and the mediator. Separate rooms are provided adjacent to the mediation room for private discussion during the mediation process in the event that you wish to have a discussion with your legal representative.

WHAT HAPPENS AFTER MEDIATION?

Should mediation be successful, a number of options are available to the mediator and the parties who have sought the mediation. The result of the mediation can be recorded in a number of ways.

. judgment for a sum of money agreed upon by the parties

. an agreement can be recorded

. case adjourned while parties carry out what they have agreed to do

. case can be dismissed

. a mixture of these alternatives

WHAT HAPPENS SHOULD A PARTY OR PARTIES NOT ATTEND?

Should a party not attend mediation, the matter will be referred to a Stipendiary Magistrate for a default judgment to be entered. Should both parties not attend, the matter will be referred to a Stipendiary Magistrate for direction. The matter may be dismissed.

ADVANTAGES OF MEDIATION

- **Costs and Flexible Results**

  In most cases, a successful resolution through mediation means all parties save costs. you can reach more flexible solutions to suit your needs.

- **Speedier Resolution**

  Mediation is usually quick - helping you to get an early resolution before things get out of hand.

- **Control of Outcome**

  You have more control over the process and the outcome. This means that the agreement is more likely to be honoured.

- **Privacy and Confidentiality**

  The mediation is confidential and any agreement can also be kept confidential by agreement.

ANY FURTHER QUESTIONS
CONTACT (address and phone no. supplied)

THE CONVENTIONAL LITIGATION PATH

Preparing for the Conciliation Conference

Now that you have attended the first directions hearing, you and your lawyer should now prepare for the next step in the litigation process, which is the conciliation conference. The court can give you a date for this about a month from the first directions hearing. Between now and the conciliation conference you and your lawyer should assess the evidence that you will be able to bring to trial and exchange information with the other parties. This is done through processes known as "discovery" (listing all relevant documents) and "inspection" (which allows each side to see the documents). Each party can ask for further and better particulars of the claim or defence. If other parties may have caused the problem that is the subject of the litigation, they can be joined by third party proceedings.

As a result of this process you and your advisers should have a good grasp of your prospects of success by the conciliation conference. The first purpose of that conference is to attempt to arrive at a settlement or compromise of the action. If that can be achieved, then the matter is at an end.

If the matter cannot be settled, then it will go to trial. The court will able to fix a trial date, usually about eight weeks after the conciliation conference.

Matters Proceeding to Trial

The court will expect you to think about how to simplify or limit the issues for trial. Trials are very expensive and should focus on the real issues and not on peripheral issues. You should work out ways of avoiding calling unnecessary evidence and limit the number of witnesses.

The Magistrates Rules provide several ways of dealing with routine matters, for example: using a Notice to Admit Facts (Rule 76); witness statements (Rule 80); and affidavit evidence (Rule 99). Each of these procedures can bring evidence before the court without actually calling witnesses.

You can ask questions of the other side before trial (interrogatories), again to avoid the necessity to call evidence.

Experts

If you are going to rely on experts, it will be necessary to obtain a written report from them and give that to the other side within three weeks. It is highly desirable that experts' reports be agreed. They are very expensive to call as witnesses.

Offers in Settlement

It is very important that you make realistic offers to the other side to settle the matter. These should be formally recorded at the conciliation conference or else it can affect your entitlement to or liability for party/party costs.

PREPARING FOR A MINOR CIVIL ACTION TRIAL

Lawyers

The general rule is that lawyers are not allowed at the trial. There are some exceptions such as if one party is a lawyer, or both parties agree, or if the court thinks a party would be unfairly disadvantaged if not represented (Section 38(4) of the Magistrates Court Act 1991).

You will need to present the evidence yourself. The court will assist you, as these trials are conducted as an inquiry by the court rather than an adversary contest.

Witnesses

The court is not bound by the Rules of Evidence and can act without regard to technicalities and legal form. However, the court will require evidence on key issues. Although you may present to the court a written statement of a witness, the court will not attach much weight to it without the witness being present to be asked questions about the witness's version.

There are some ways in which you can avoid the expense of bringing witnesses to court. You may need to prove the value of damage that you have suffered (for example the cost of repairing your motor vehicle, a front fence or a cracked driveway, etcetera). If you gave copies of quotes or invoices to the other party with the claim, that is sufficient unless the other party said they are contesting the quote or invoice. You should bring to court any quotes or invoices. You should have more than one quote.

If the other party is contesting the amount of your quote or invoice, then you may have to call the witness who gave you the quote to show that it is fair.

You can avoid calling witnesses by giving a Notice to Admit Facts (Rule 76), a witness

statement (Rule 80) or serving an affidavit on the other side (Rule 99). Each of these procedures requires you to take special steps several weeks before the trial. Court staff can advise you on these steps.

Experts

If you are going to rely on an expert report, you should send a copy of this to the other side not less than 21 days before the trial date. You may use one of the above procedures to avoid the necessity to call the expert, unless the other side contests the report.

Third Party Claims

If you admit that you owe some or part of the plaintiff's claim but say that someone else was also at fault or should be paying the plaintiff's claim, then you should take steps to join that party to the proceedings. Usually this is done by a Third Party Notice. You must not leave this until the trial but must do it straight away. You will need leave of the court to do this.

Interpreters

If you or any witness whom you are calling would be helped by having an interpreter, the court will provide an interpreter at no charge to you. You must tell the Court Trial Section straight away that you need an interpreter and any special dialect.

Costs, Witness Fees and Interest

Costs are kept to a minimum in minor civil actions, but the magistrate may award the winner compensation for the cost of issuing the claim, including lawyers' costs and nominal witness fees. The magistrate may also allow a successful party interest.

APPENDIX H

COST SCALES AND COST RULES MAGISTRATES CIVIL RULES 1992

THIRD SCHEDULE- COSTS

SCALE 1: ROUTINE ACTIONS

SOLICITOR'S FEES

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
1 Application in the nature of an application for an interim injunction.	70% of Supreme Court Scale	80% of Supreme Court Scale	90% of Supreme Court Scale
2 Pre-action Application.	80	120	150
3 a. Notice of Demand and registration of Lien and registration and Notice of Demand under the *Workers Liens Act 1893* and other notices of a like nature.	100	150	200
b. Notice of withdrawal/satisfaction of Lien and registration.	50	75	100
4 Filing an action (other than under Rules 37 and 38) provided that a defence and counterclaim will only be allowed as one item on the higher scale applicable.	4% of the judgment sum	4% of the judgment sum	4% of the judgment sum up to a maximum of $1200
5 Filing an action under Rules 37 and 38.	As allowed by the Court		
6 Routine request (of the nature of request for discovery, inspection). Item includes costs for perusal of reply.	40	70	100
7 Request requiring drafting (of the	100	150	200

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
nature of particulars, interrogatories). Item includes costs for perusal of reply.			
8 Notice to admit facts, filed offer, payment into court or other notice requiring particular instructions. Item includes costs for perusal of reply.	200	300	400
9 Reply to Request under item 6 and 7 response to notice under item 8 and Personal Injury particulars (Rule 68 Form 22). Making discovery (where required) for each.	100	150	200
10 Preparing filing and serving an Application including proof of service.	50	100	150
11 Simple affidavit.	30	40	50
12 Lengthy affidavit where it was required.	80	100	150
13 All aspects not otherwise specified of and incidental to preparing for trial including proofing witnesses, advice on evidence and law (solicitor and counsel) and delivering brief to counsel.	10% of the judgment sum	10% of the judgment sum	10% of the judgment sum up to a maximum of $3000
14 Arranging witnesses for trial - per witness (includes obtaining and filing and serving expert reports).	30	40	50
15 Issuing and serving summons to witness.	30	40	50
16 Filing request (Form 18) not otherwise provided for.	30	30	30

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
17 Request for Investigation or Examination Summons including attendance at the hearing.	50	50	50
18 Service of any document which is not in the usual course served by the Court and is not otherwise specified:			
a. Personal where required	60	60	60
b. Other	30	30	30
19 Preparing bill for taxation (includes attendance on taxation).	150	175	200

ATTENDANCE AND COUNSEL FEES

20 Attendance for inspection - any party.	80	100	120
21 Attendance at Listing Conference, Directions Hearing or routine Application.	40	60	80
22 Attendance at Application requiring special argument or at conciliation conference.	80	120	150
23 To advise on compromise or settlement for a person under disability.			
(a) Where quantum only is in dispute	150	230	300
(b) Where quantum and liability are in dispute	200	300	400
24 Attendance as counsel at trial (includes fee on brief and refreshers):			

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
FIRST DAY	500	600	800
SUBSEQUENT DAY	300	400	500
ATTENDANCE FOR JUDGMENT	50	80	100
25 Attendance on an application to set aside a warrant.	20	20	20

NOTES

A The Court may allow any larger or lesser amount for any item and any amount in respect of any other matter that the Court allowed at the time of making any order.

B All the above items are all inclusive of all costs for all incidental and necessary activity and advice for each item to the intent that no costs will be allowed in addition to the costs set forth for each item nor for anything not itemised.

C For the purposes of items 4 and 13, the costs calculated must be rounded to the nearest $10.

WITNESS FEES AND DISBURSEMENTS

1. Witness Fees — **Same allowed $1 - $60,000**

(i) Professional scientific or other expert witnesses per day. — $350 or such other amount ordered by the Court

(ii) Other adult person per day. — $150

(iii) Persons under 18 years of age per day. — $50

If the witness is released before or is required to attend after the luncheon break on any day, half a day will be allowed.

(iv) A witness will in addition be allowed:

(a) Travel expenses: Where the witness is normally resident more than 50 km from the trial court at the rate of 45 cents per km or the least expensive return air fare whichever is the lesser or the cheapest

		combination of both.
	(b) Accommodation expenses:	In the discretion of the taxing officer where the witness is required to be absent from his or her normal place of residence overnight for accommodation and sustenance per night $120 or such larger amounts allowed by the court at the time of or before judgment.
2.	**Photocopying**	50 cents per page
3.	**STD calls**	Actual cost

4. All Court Fees and other fees and payments to the extent to which they have been properly and reasonably incurred and paid. But excluding the usual and incidental expenses and overheads of a legal practice and in particular excluding postage, Telecom charges (non STD), courier expenses.

5.	**Expert Reports**	$300 or such other amount ordered by the Court.

THIRD SCHEDULE

COSTS

SCALE 2: COMPLEX ACTIONS

SOLICITOR'S FEES

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
1 Application in the nature of an application for an interim injunction.	70% of Supreme Court Scale	80% of Supreme Court Scale	Other than actions to which Item 5 applies, costs in actions of this class will be allowed on the basis of 90% of the Supreme Court Scale
2 Pre-action Application.	80	150	
3 a. Notice of Demand and registration of Lien and registration and Notice of Demand under the *Workers Liens Act 1893* and other notices of a like nature.	100	150	
b. Notice of withdrawal/satisfaction of Lien and registration.	50	75	
4 Filing an action (other than under Rules 37 and 38) provided that a defence and counterclaim will only be allowed as one item on the higher scale applicable.	6% of the judgment sum	6% of the judgment sum	
5 Filing an action under Rules 37 and 38.	As allowed by the Court		

ITEM	$1 - $10 000	$10 001 - $20 000	$20 001 - $60 000
6 Routine request (of the nature of request for discovery, inspection). Item includes costs for perusal of reply.	40	70	
7 Request requiring drafting (of the nature of particulars, interrogatories). Item includes costs for perusal of reply.	100	150	
8 Notice to admit facts, filed offer, payment into court or other notice requiring particular instructions. Item includes costs for perusal of reply.	300	400	
9 Reply to Request under item 6 and 7 response to notice under item 8 and Personal Injury particulars (Rule 68 Form 22). Making discovery (where required) for each.	150	225	
10 Preparing filing and serving an Application including proof of service.	50	100	
11 Simple affidavit.	30	40	
12 Lengthy affidavit where it was required.	80	100	
13 All aspects not otherwise specified of and incidental to preparing for trial including proofing witnesses, advice on evidence and law (solicitor and counsel) and delivering brief to counsel.	15% of the judgment sum	15% of the judgment sum	
14 Arranging witnesses for trial - per witness (includes obtaining and filing and serving expert reports).	30	40	
15 Issuing and serving summons to	30	40	

witness.			
16 Filing request (Form 18) not otherwise provided for.	30	30	
17 Request for Investigation or Examination Summons including attendance at the hearing.	50	50	
18 Service of any document which is not in the usual course served by the Court and is not otherwise specified: a. Personal where required b. Other	 60 30	 60 30	
19 Preparing bill for taxation (includes attendance on taxation).	150	175	

ATTENDANCE AND COUNSEL FEES

20 Attendance for inspection - any party.	110	160	
21 Attendance at Listing Conference, Directions Hearing or routine Application.	40	60	
22 Attendance at Application requiring special argument or at conciliation conference.	150	200	
23 To advise on compromise or settlement for a person under disability. (a) Where quantum only is in dispute (b) Where quantum and liability are in dispute	 150 200	 230 300	
24 Attendance as counsel at trial (includes fee on brief and refreshers):			

FIRST DAY SUBSEQUENT DAY ATTENDANCE FOR JUDGMENT	600 400 50	700 500 80	
25 Attendance on an application to set aside a warrant.	20	20	

NOTES

A The Court may allow any larger or lesser amount for any item and any amount in respect of any other matter that the Court allowed at the time of making any order.

B All the above items are all inclusive of all costs for all incidental and necessary activity and advice for each item to the intent that no costs will be allowed in addition to the costs set forth for each item nor for anything not itemised.

C For the purposes of items 4 & 13, the costs calculated must be rounded to the nearest $10.

WITNESS FEES AND DISBURSEMENTS

1. Witness Fees **Same allowed $1 - $60,000**

(i) Professional scientific or other expert witnesses per day. $350 or such other amount ordered by the Court

(ii) Other adult person per day. $150

(iii) Persons under 18 years of age per day. $50
If the witness is released before or is required to attend after the luncheon break on any day, half a day will be allowed.

(iv) A witness will in addition be allowed:

(a) Travel expenses: Where the witness is normally resident more than 50 km from the trial court at the rate of 45 cents per km or the least expensive return air fare whichever is the lesser or the cheapest combination of both.

(b) Accommodation expenses: In the discretion of the taxing officer where the witness is required to be absent from his or her normal place of residence overnight for accommodation and

sustenance per night $120 or such larger amounts allowed by the court at the time of or before judgment.

2.	**Photocopying**	50 cents per page
3.	**STD calls**	Actual cost

4. All Court Fees and other fees and payments to the extent to which they have been properly and reasonably incurred and paid. But excluding the usual and incidental expenses and overheads of a legal practice and in particular excluding postage, Telecom charges (non STD), courier expenses.

5.	**Expert Reports**	$300 or such other amount ordered by the Court.

SCALE 3: MINOR CIVIL ACTIONS

ITEM	$0-$500	$501-$1000	$1001-$2000	$2001-$5000
1 Filing an action (if prepared and filed by a solicitor)	$20 plus 10% of the claim up to a maximum of $200			
2 P I particulars	NIL	$30	$50	$80
3 Any attendance at Court by party or solicitor (where solicitor is entitled to attend)	$30	$30	$35	$40
4 Witness fees	$30	$30	$35	$40
	[or actual charge by witness if allowed by Court]			
5 Issue and serve summons to witness	$30	$30	$30	$30
6 Request for Investigation/ Examination summons including attendance at the hearing	$25	$30	$35	$40
7 Any other request (Form 18) for enforcement of judgment	$20	$20	$20	$30
8 All other court fees	as charged			
9 Other disbursements	to the extent allowed by the Court			
10 To advise on a compromise or settlement for a person under disability				
(a) Where quantum only is in dispute	100	100	100	100
(b) Where quantum and liability are in dispute	150	150	200	200

(Debt collecting fees in addition to the above amounts are not allowed.)

NOTE For the purpose of item 1 the costs calculated must be rounded up to the nearest dollar.

106 (1) Unless the Court orders otherwise, a successful party in an action (other than a minor civil action) is entitled on judgment to costs against an unsuccessful party, or any other party that the Court may order, in accordance with the following principles:

(a) where judgment is in respect of an action for a sum of money -

(i) a successful plaintiff is entitled to costs on the relevant scale in the Third Schedule applicable to the sum actually recovered;

(ii) a successful defendant is entitled to costs on the relevant scale in the Third Schedule applicable to the sum claimed;

(b) where judgment is in respect of any other action - a successful party is entitled to costs on the scale in the Third Schedule specified by the Court;

or

(c) where the action involved unusual difficulty or intricacy, or other proper cause exists - a successful party is entitled to costs on such percentage of the Supreme Court scale as the Court specifies.

(2) In a minor civil action, a successful party is entitled on judgment to costs against an unsuccessful party, or any other party that the Court may order, in accordance with the relevant scale in the Third Schedule.

(3) If, on the hearing of an action (other than a minor civil action), a successful party recovers a sum of money being $2500 or less, that party is, unless for special reasons the Court orders otherwise, entitled to costs only as if it were a minor civil action.

(4) Where proper cause exists, the Court may order that a successful party is entitled to costs on a solicitor and client basis.

(5) Unless the Court orders otherwise, a party is not entitled to costs on both a claim and counterclaim in the same action.

(6) Where there is no scale of costs applicable to an action or proceeding, the Court may fix the appropriate scale of costs on application of the successful party or at the request of the Registrar.

(7) (a) A party may, by notice in writing served on all other parties, certify that the nature of an action entitles the parties to costs on the relevant scale in the Third Schedule as a complex action and, unless any other party by notice in writing objects (including detailed reasons for the objection)

within 21 days of the service of the notice, a party entitled to costs in the action is entitled to costs on the relevant scale as a complex action.

(b) If a party so objects, the relevant scale may be determined by the judicial officer hearing the trial of the action.

(c) In any other case, unless the Court orders otherwise, the relevant scale for a complex action will not apply.

107 (1) Unless the Court orders otherwise, where costs of proceedings are reserved, such costs will abide the event.

(2) The Court may make it a condition of an action proceeding any further that a party, against whom an order for costs is made, must make payment of the costs within a time fixed by the Court.

108 (1) The Court may tax costs and allow costs in respect of the taxation.

(2) If costs cannot be agreed, the successful party may file and serve on the unsuccessful party a Bill of Costs in taxable form.

(3) If the unsuccessful party does not file and serve a written notice of objection to an item of the Bill of Costs (including detailed reasons for the objection) within 21 days of the service of the Bill of Costs, he or she will be taken to admit the item.

(4) Where a written notice of objection is filed, the Registrar will fix, and give notice in writing to the parties of, a date, time and place for the taxation, which may proceed in the absence of any party.

(5) Where costs taxed off represent 10%, or more, of the costs allowed and certified on a taxation, the successful party is not entitled to any costs in respect of the taxation.

109 The Court may award costs in respect of the exercise of its jurisdiction under the *Enforcement of Judgments Act 1991*.

110 The Court, notwithstanding that it has no jurisdiction to hear an action or proceeding, may award costs as if it had jurisdiction.

COST PENALTIES

52 (1) This rule applies to an action (other than a minor civil action) in which a party obtains a final judgment (other than by consent) for a sum of money being less than 50% of the amount claimed by the party at either

(a) the expiration of 21 days from the date of issue of a notice of trial;

or

(b) the date of a conciliation conference,

whichever is earlier *("the operative date")*.

(2) The costs to which the party is finally entitled will, unless at the time of giving judgment the Court orders otherwise, be calculated in accordance with the formula:

$$CE = \frac{(2 \times C \times SJ)}{SC}$$

where CE is the costs to which the party is finally entitled
C is the costs of the party (as agreed or taxed)
SJ is the sum of money awarded by the judgment (exclusive of costs and interest)
and SC is the amount claimed at the operative date.

(3) Where leave is granted to a party at a conciliation conference to amend the amount claimed by the party to a specified sum, such amendment will, for the purposes of this rule, be taken to be effective forthwith.

53 (1) This rule applies to an action (other than a minor civil action) in which a party obtains a final judgment (other than by consent) for a sum of money being 200%, or more than 200%, the amount contained in -

(a) an offer to consent to judgment filed in the Court;

or

(b) a payment of a sum of money to the Registrar,

made before or at either -

(c) the expiration of 21 days from the date of issue of a notice of trial;

or

(d) the date of a conciliation conference

whichever is earlier *("the operative date")*.

(2) The costs to which a party is finally entitled will, unless at the time of giving judgment the Court orders otherwise, be calculated in accordance with the formula

$$CE = \frac{2 \times C \times (SJ-FO)}{SJ}$$

where CE is the costs to which the party is finally entitled, provided that CE does not exceed the actual costs of the party on a solicitor and client basis
C is the costs of the party (as agreed or taxed)
SJ is the sum of money awarded by the judgment (exclusive of costs and interest)
and FO is the amount contained in

(a) the offer;

or

(b) the payment

and where in any case no offer or payment is filed or made then, for the purposes of this rule, FO will be zero.

54 (1) If the Court adjourns a conciliation conference, the operative date under rules 52 and 53 is postponed to the adjourned date.

(2) Rules 52 and 53 are subject to rule 59.

(3) If both rules 52 and 53 apply to the same action, neither will have effect.

(4) In rules 52 and 53 the word *"costs"* means party and party costs (including counsel fees) only and does not include disbursements, witness fees, experts' charges and other expenses of and incidental to the conduct of the action.

OFFERS TO CONSENT AND PAYMENTS TO REGISTRAR

55 (1) At any time before final judgment, a party may file and serve on any other party an offer to consent to judgment.

(2) The offer may be made subject to specified conditions.

(3) An offer may relate to liability, quantum, matters in issue in the action or any order, remedy or relief sought.

(4) A party may file and serve a notice of withdrawal or variation of an offer which has not been accepted.

(5) A party may file and serve an acceptance of an offer.

(6) A party may request the Registrar to enter judgment in the terms of an accepted offer and the Registrar must enter it accordingly.

56 (1) At any time before final judgment, a party may pay (with or without an admission of liability) to the Registrar such sum of money as he or she thinks sufficient to satisfy the claim

against that party, together with the costs of the other party and interest up to the time of such payment.

(2) At the time of making any such payment, the party so paying must give notice in writing to the other party of the payment.

(3) The other party may file and serve a notice in writing accepting the sum of money, and such notice will operate as full satisfaction of that other party's claim.

(4) If no notice of acceptance is filed the sum of money must abide the event.

(5) The Registrar must pay the sum of money to the party entitled to it in accordance either with the notice of acceptance or the outcome of the event.

57 (1) An offer to consent to judgment must specify whether the offer is inclusive of costs and interest, or if the offer is not so inclusive it must specify what is offered for the costs of the other party and what is offered for interest up to the date of such offer.

(2) If there is a failure to comply with sub-rule (1) the party accepting the offer is entitled to costs and interest or whichever of costs and interest is not specified up to the expiration of 14 days from the date of service of the offer in addition to the sum offered.

58 The extent of an offer to consent to judgment or payment of a sum of money to the Registrar must not be communicated to the judicial officer hearing the trial of the action until final judgment is given.

59 (1) In making an order as to costs at the trial of an action, the Court will take into account any offer to consent to judgment, or any payment of a sum of money to the Registrar, and any refusal or failure to accept such offer or payment.

(2) Unless the Court for special reasons orders otherwise -

(a) a plaintiff who obtains final judgment for a sum of money equal to or less than the amount of any such offer or payment by the defendant, if the offer has not been withdrawn before the time of judgment, is not entitled to costs after the expiration of 14 days from the date the notice of the offer was served or the payment was made and thereafter the defendant is entitled to costs on the scale applicable to the amount claimed by the plaintiff;

and

(b) a plaintiff who obtains final judgment for a sum of money equal to or more than the amount of any such offer by the plaintiff, if the offer has not been withdrawn before the time of judgment, is entitled to costs on a solicitor and client basis for the whole action.

As at May 1996

APPENDIX I

BILLS OF COSTS

Juanita Doe v. Roe Van Nguyen

Taxation of Bill of Costs on Judgments for the Plaintiff of $10,000 - routine action

Item 4	-	Filing an action - 4 %	$ 400
Item 6	-	Request for discovery - includes perusing reply	$ 40
Item 8	-	Notice to admit facts	$ 200
Item 8	-	Filed offer	$ 200
Item 9	-	Responding to request for discovery	$ 100
Item 10	-	Preparing application for order for discovery including proof of service	$ 50
Item 11	-	Simple affidavit	$ 30
Item 13	-	All aspects not otherwise specified of and incidental to preparing for trial including proofing witnesses, advice on evidence and law and delivering brief to counsel - 10 % of judgment sum	$1,000
		Arranging witness for trial - two at $30 each	$ 60
Item 20	-	Attendance for inspection of documents	$ 80
Item 21	-	Attendance at directions hearing	$ 40
Item 22	-	Attendance at conciliation conference	$ 80
Item 21	-	Attendance on application to obtain order for discovery	$ 40
Item 24	-	Attendance of counsel at trial - trial went for one day	$ 500
		Attendance for judgment	$ 50
		TOTAL PARTY/PARTY COSTS	$2,870

Witness fees and disbursements

Witness fees to adult non-professional witnesses at $150 each	$ 300
Photocopying - 50 pages at 50 cents per page	$ 25
Filing fee on commencement of action	$ 91

	$ 416
Total costs and disbursements	$3,286
Party/party costs as percentage of judgment	28.7%
Party/party costs, disbursements and witness fees as percentage of judgment	32.9%

A defendant's party/party costs in successfully defending a claim for $10,000 would be almost identical. The definition in the rules of filing an action and filing a defence are that they are, for costing purposes, the same and, as to the other items, one could expect a successful defendant to be entitled to the same extent as a successful plaintiff. If the matter is a complex action, it is on the second scale and the costs receive an uplift of two per cent in relation to item 4 - Filing an Action, five per cent in relation to item 13 - Preparing for trial and also some dollar increase on the lump sum fees. The percentage increase, therefore, is about eight per cent. Thus on a complex claim the party/party costs, without disbursements, will be about 36% of the amount of the judgment (or the unsuccessful claim) and, including disbursements and witness fees, will be about 40% of the judgment (or the unsuccessful claim).

This sample taxation of costs is at the top end of the $1-$10,000 scale. Consequentially, in relation to lower judgment sums or claims within that segment of the scale, the lump sum allowances will result in the cost bearing a slightly higher percentage to the judgment sum or claim than this

example. Professional witnesses and expert reports may substantially increase disbursements as the example below demonstrates.

If the case runs for more than one day or if there is pretrial activity beyond that set out in the example, then the party/party costs again may exceed those set out above. An example of this is set out below.

The following bill is an actual taxation of costs by a defendant (in effect SGIC) to a personal injury claim where the plaintiff failed to prove any relevant accident had caused any injury. Note that the disbursement for investigators is unusual, being for inquiry agents obtaining investigatory film and related matters. The medical disbursements are also high. This case is atypical having been fought hard and the plaintiff having changed solicitors several times resulting in many adjournments of pretrial hearings. It is taxed on the lowest scale, the plaintiff having reduced his claim to $9,500. Here the costs are 37% of the claim but with disbursements added they total 90% of the claim.

MAGISTRATES COURT (CIVIL DIVISION) SOUTH AUSTRALIA

BILL OF COSTS

Form

Office Use Only
Date of Filing
Date of posting

TRIAL COURT ADELAIDE ACTION No. Of
199
Address Education Centre
31 Flinders Street
ADELAIDE SA 5000 Phone No.

METHOD OF SERVICE

Registrar ☐ Defendant's Solicitors ☐
Party

PLAINTIFF(S): Deleted

SOLICITORS FOR PLAINTIFF: Deleted

DEFENDANT(S): Deleted

SOLICITORS FOR DEFENDANT: Deleted
Address:

BILL OF COSTS THE ORDER OF HIS HONOUR Deleted SM
DATED deleted

Scale: Routine action. Amount claimed $9,500

TAXED NO OFF	SCALE ITEM	ITEM	DISBURSEMENTS	CHARGES
1	4	Filing Defence		$380
2	6	Request and perusal of plaintiff's List of Documents		$40
3		Request and perusal of inspection of documents		$40
4	8	Notice to Admit Facts		$200
5	9	Making discovery		$100
6	9	Making supplementary discovery		$100
7	13	All aspects not otherwise specified of and incidental to preparing for trial		$950
8	7	Request for further and better particulars		$100
9	15	Issuing and serving summons to witness (1) Dr deleted (2) Royal		$30

		Adelaide Hospital		$30

TAXED NO OFF	SCALE ITEM	ITEM	DISBURSEMENTS	CHARGES
10	14	Arranging witness for trial: per witness including obtaining and filing and serving expert reports:		
		(1) Dr deleted		$30
		(2) Dr deleted		$30
		(3) Dr deleted		$30
		(4) Mr deleted		$30
		(5) Mr deleted		$30
		(6) Mr deleted		$30
		(7) Mr deleted		$30
		(8) Mr deleted (did not give evidence but arrangements were made for witness to attend court if required)		$30
		(9) Mr deleted (did not give evidence but arrangements were made for witness to attend court if required)		$30
		(10) Mr deleted (did not give evidence but arrangements were made for witness to attend court if required)		$30
11	21	Attending directions hearing:		
		24 July 1995		$40
		1 September 1995		$40

TAXED NO OFF	SCALE ITEM	ITEM	DISBURSEMENTS	CHARGES
12	22	Attending conciliation conference and/or attendance requiring lengthy or special argument: 6 October 1995 10 November 1995 15 December 1995 12 April 1996		 $80 $80 $80 $80
13	21	Routine application 8 March 1991		$40

TAXED NO OFF	SCALE ITEM	ITEM	DISBURSEMENTS	CHARGES
14	24	Attendance as counsel at trial:		
		(1) First day		$500
		(2) Subsequent day		$300
		(3) Attendance for judgment		$50
		Sub Total		**$3,480**
		Medical report deleted 8 May 1992	$480	
		Medical report deleted 22 November 1994	$450	
		Radiological report Drs deleted 21 December 1994	$430	
		Interpreter's fees 9 November 1994	$60	
		Investigator's fees	$2,093.60	
		Witness fee deleted	$183	
		Witness fee deleted	$350	
		Witness fee deleted	$290	
		Witness fee deleted	$350	
		Service fee of subpoenas (17 July 1996)	$80	

		(No. 14 continued) Photocopying STD phone call **Sub Total** **TOTAL COSTS AND DISBURSEMENTS**	$381.50 $2.16 **$5,150.26**	**$8,630.26**
			TAXED	**$8,630.26**

DATED the day of 1996.

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Allowed at $8,630.26

THIS BILL OF COSTS is filed by

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