

**CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:  
VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

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**Preface**

During 1975 the Law Foundation of New South Wales made available to this Commission a grant so that research might be undertaken overseas in comparative court procedure. The Commission advertised the availability of four research scholarships which were awarded to Mr. J. R. T. Wood of the New South Wales Bar and to Messrs. C. Bilinsky, J. Bishop and N. R. Carson, Solicitors of New South Wales.

Reports, based on that research, were made to the Commission and are being published in several volumes of which this, containing the work of Mr. Bishop, is the second. The reports represent the personal views of the researchers.

Publication of the reports at this stage is intended to elicit comment, or suggestions for reform of procedure in this State, having regard to developments overseas. Written comments or suggestions should please be made to Mr. B. Buchanan, Secretary of the Commission, Box 6, G.P.O., Sydney 2001.

The Commission renews its thanks to the Law Foundation for having made the research possible and it gratefully acknowledges the contribution to the project of the then Chairman of the Commission, the Honourable Mr. Justice C. L. D. Meares, at whose initiative it was first organised.

## **CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

### **I. Introduction**

In 1975 I was awarded a Research Scholarship by the N.S.W. Law Reform Commission for the purpose of investigating civil and criminal procedures in the United States, Canada, England, India, Sri Lanka and Singapore. The Research Scholarship was funded by the Law Foundation of New South Wales. I left Australia in mid-September, 1975 and returned in mid-January, 1976.

The terms of the Research Scholarship required that I prepare a report of my investigations and make specific recommendations for improvements to the systems and procedures of courts in New South Wales. The second requirement presents the main difficulty. It is generally not possible to transpose procedures wholesale from one country to another. What is suitable overseas may not be suitable here. Further, the ingrained conservatism of the legal profession presents a major stumbling block; generally a considerable period of time is needed to persuade judges and lawyers to leave well-trodden paths of existing practice. Moreover, there is the ever-present problem of lack of finance. All of these matters have been kept well in mind.

The most significant matters investigated were: (1) voluntary arbitration of small claims, London and Los Angeles; (2) night courts for small claims, New York (heading II); (3) mandatory arbitration of civil claims to a maximum limit of \$10,000, Philadelphia; (4) arbitration of medical malpractice actions, New York; (5) absence of pleadings in courts of limited jurisdiction, Singapore; (6) examination for discovery, Edmonton and Toronto (heading V); (7) pre-trial review in courts of limited jurisdiction, London; (8) pre-trial in civil cases, Halifax (heading III); (9) voluntary and mandatory settlement conferences in civil cases, Los Angeles (heading IV); (10) evidence on commission by agreement, Rajasthan, India; (11) videotape of medical evidence, Columbus (Ohio); (12) videotape of trials, Columbus (Ohio); (13) court-appointed medical experts, New York and Los Angeles; (14) "screening" of appeals in civil cases, New York; (15) research teams for appellate judges, California and Michigan; (16) multi-track voice writing, Boston (heading IX); (17) computer-aided transcription of shorthand notes, Chicago; (18) adjournments in civil and criminal cases, Los Angeles and San Francisco (heading VI); (19) summary traffic trials, San Francisco (heading VII); (20) parajudicial adjudication of traffic charges, San Francisco (heading VII); (21) administrative adjudication of traffic charges, New York; (22) night courts for traffic cases, Los Angeles (heading VIII); (23) statutory time limitations for prosecutions in criminal cases, United States generally; (24) "screening" of criminal prosecutions, New York and Chicago (heading XIII); (25) "screening" of private criminal prosecutions, Philadelphia and Columbus (Ohio) (heading X); (26) employment-centred diversion of criminal charges, San Francisco and Minneapolis; (27) statutory diversion of drug offenders, Boston; (28) discovery by the prosecution, Chicago (heading XIV); (29) discovery by the accused, Chicago (heading XV); (30) pre-trial in criminal cases, London and the United States generally (heading XI); (31) committal proceedings, England and Wales (heading XII); (32) criminal "short cause" programmes, Los Angeles; (33) jury waiver, United States and Canada generally; (34) prosecutorial plea bargaining, Portland and the United States generally; (35) the formalization of plea bargaining, Chicago; and (36) recommendations as to sentence by prosecutors, Anchorage and Los Angeles.

The ideas here discussed constitute only a moderate percentage of the matters investigated overseas. Unfortunately, a number of matters, some worthy of serious consideration, were omitted to keep the report within reasonable bounds. In all I have made recommendations in respect to 14 major subjects.

In analysing each subject I have generally followed the same procedure. First, I have described a procedural reform in a specific jurisdiction. In many cases the jurisdiction chosen was one of many where the idea has been successfully implemented. Second, I have evaluated the significance of the new procedure in that jurisdiction. This has not always been easy because of the paucity of statistical material. Impressions I formed from judges,

court administrators and lawyers generally have often been. my guide. Whilst in some situations the comments were conflicting, on many occasions there was so complete a consensus that conclusions are stated without qualification. Third, I have described the relevant procedures operative in New South Wales. Finally, I have assessed the merits or otherwise of introducing the innovation, in whole or in part, into the court systems of New South Wales.

I use the personal pronoun "I" throughout the report as it is apt for recording impressions. And impressions have played a significant role in the formulation of this report. I have read much of the material, such as it is, on the subjects discussed. Unfortunately, written materials, irrespective of their quality, do not tell all. Moreover, many matters are difficult, if not impossible, to grasp in the abstract. There is a world of difference between studying another court system and seeing it in operation under the guidance of its participants, for which there can be no substitute.

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**II. Night Courts for Small Claims - New York**

The New York City Small Claims Division, which is part of the Civil Court of the City of New York, handles approximately 70,000 consumer complaints each year. There is a Small Claims Division conveniently located in each of the five counties comprising the City of New York. In the counties of New York, Kings and Queens, sessions are held four nights each week, in the Bronx three nights each week and in Richmond County once a week. In addition, in New York County a Small Claims Division, held in East Harlem, provides a bilingual service particularly for Spanish speaking residents of New York City. I witnessed the operation of the mono-lingual Small Claims Division in New York County.

The New York City Civil Court Act and Rules provide that to commence a proceeding a claimant or someone on his behalf must appear at the office of the Small Claims Division having jurisdiction. A suit may be brought only by an individual or on his behalf. Corporations, partnerships, associations, assignees or insurers may not sue; they may only be sued. The claim must be for money only and must involve a claim not in excess of \$ 1000. Cases of a complicated nature may in the court's discretion be transferred to the regular division of the court. Moreover, the appearance of lawyers is not encouraged; indeed, if both sides appear with counsel, the case must be transferred to the day-court. Out of 70,000 claims filed annually more than 68,000 are filed by claimants without an attorney.<sup>1</sup>

The claimant supplies the intake clerk with the following information: (1) his name and address; (2) the defendant's name and address, place of business or employment; (3) the nature and amount of his claim; and (4) all dates and other relevant information concerning his claim. Thereupon he pays the required fee, secures a notice of claim, and the small claim proceeding is commenced. There are no formal pleadings on the part of either party to the action.

The hearing date is fixed for not less than 15, nor more than 30, days thereafter, as required by statute. The claimant or person representing him is given a form notice setting forth the date, time and place of the hearing, and directing him to be present with his proof and witnesses, if any, in support of his claim. Subpoenas are available to compel the attendance of witnesses. The clerk then forwards to the defendant by registered mail the notice of claim which includes the date, time and place of hearing. By this notice the defendant is directed to produce witnesses or proof of any defence at the appointed time and place and he is further advised that, if he fails to appear, judgment may be entered against him. If a defendant, in his answer to a claim, asserts a cause of action against the claimant, that cause of action will be heard with the original claim. However, if the counter-claim demands recovery of damages in excess of \$1000, the entire case is transferred to the regular day-time proceedings of the court.

Each calendar call at 6.30 p.m. in the respective counties usually consists of 120 to 200 cases. Prior to calendar call, litigants are advised that they may have their cases tried before the presiding judge (a judge of the Civil Court) or before an arbitrator. The latter are experienced attorneys, usually seven to ten being in attendance each night. Approximately 80 per cent of the cases tried in the Small Claims Division are tried before the arbitrators.<sup>2</sup> The decision of the arbitrators is final and binding. An appeal does not lie from a judge's determination unless it can be shown that substantial justice was not done according to substantive law.

Where parties agree to arbitration they acknowledge their consent in writing and are assigned a hearing room. At the head of the table sits the arbitrator and, on the sides, the claimant and defendant. The arbitrator's first duty is to effect a settlement, if possible. Failing that, he proceeds to take sworn testimony without a record. To facilitate hearings in the Small Claims Division statutes and rules governing the practice in the Supreme Court are not followed. Rather, the court is obliged to render "substantial justice" according to the rules of substantive law but 14 without regard to the rules of evidence or practice".<sup>3</sup> The form of the hearing is the same as for a trial. The parties testifying are duly sworn; the claimant presents his case and a right of cross-examination is afforded to the other side; witnesses may give evidence and be cross-examined; exhibits are introduced; the defendant presents his version of the claim; he may be cross-examined; and witnesses in his support may be called. Upon conclusion of the hearing the arbitrator reserves his decision and, after the parties have left, he makes a note of his finding.

Most matters are settled. If a claim is not settled and the parties proceed to trial, a claimant securing judgment will be awarded his disbursements for filing and mailing the summons. Where a judgment is not paid, the claimant may secure execution on the defendant's property upon payment of a \$5.00 fee to the Sheriff or City Marshal. This fee is another expense chargeable to the debtor.

In New South Wales a small claims system has been operative since 1974. The Consumer Claims Tribunal Act, 1974,<sup>4</sup> provides for the constitution of a Consumer Claims Tribunal by a referee sitting alone. A referee is appointed by the Governor, holds office for a term not exceeding seven years, and is eligible for re-appointment. Claims may be lodged with the Registrar of the Consumer Claims Tribunal or any Clerk of Petty Sessions. The Tribunal has jurisdiction to hear only consumer claims which are defined by the Act. Orders made by the Tribunal are limited to \$1000 or the performance of work not exceeding \$1000 in value (the increased limit of \$ 1 000 applies from 25 June, 1976).

Evidence is required to be given on oath but the hearing is conducted in an informal "round table" atmosphere. The Tribunal is not bound by the rules or practice as to evidence and may inform itself of any matter in such manner as it thinks fit. The Act prohibits representation of the parties by a solicitor or barrister, unless all parties to the proceeding agree and the Tribunal considers that a party will not thereby be unfairly disadvantaged. To the date of writing all parties have been unrepresented.

The referee uses his best endeavours to bring the parties to a settlement acceptable to all before making an order. Where this is not possible the referee makes an order which is, in his opinion, fair and equitable to all the parties to the proceeding. The Tribunal may make an order dismissing the claim, or requiring a party to the proceeding, other than the claimant, to pay money to a person within a specified time, to perform work, or to take other steps to rectify a defect in goods or services within a specified time. The proceedings of the Tribunal are not subject to review by any court, except where it is alleged that the Tribunal had no jurisdiction or that a denial of natural justice to any party to the proceedings has occurred.<sup>5</sup>

There are substantial similarities between the small claims procedures in New York and New South Wales. However, the small claims system in New York raises some significant matters for comment. The first matter concerns the hearing of small claims at night. The small claims procedure in New York is undoubtedly popular; as stated above, approximately 70,000 claims are filed each year.<sup>6</sup> However, in the United States, some reservations were expressed to me about the justification for, and popularity of, night courts. Certainly there is an argument for the introduction of night courts on a limited basis as an alternative for the working man or woman who cannot get time off work or can do so only with great difficulty. The New South Wales Government accepted

this argument and introduced night courts from 19 July, 1976. On Monday and Tuesday, hearings are scheduled for 6, 7 and 8 p.m. At this early stage the demand for night hearings is moderate only.

Secondly, the small claims procedure in New York is clearly part of the court system; the Small Claims Division is part of the Civil Court of the City of New York. In New South Wales the Consumer Claims Tribunal is clearly separated from the court system, being under the control of the Minister for Consumer Affairs and Minister for Co-operative Societies. It is difficult to understand why. Section 31 of the Act provides that the evidence material to the proceeding shall be given on oath, and section 32 provides that the issues in dispute shall be resolved by the Tribunal on the evidence adduced before it. These sections show that the referees are required to act judicially. Moreover, section 25 provides that orders made by the Tribunal may be enforced through Courts of Petty Sessions. Despite the informal procedures of the Tribunal it is clearly a court and should be administered by the Department of the Attorney General and of Justice, which is responsible for all courts. Moreover, the Tribunals should be not only administratively but, wherever possible, physically within the court -system. I recommend below an extension of the claims that may be brought in the Small Claims Tribunal. If this recommendation is adopted additional facilities and personnel will be required. It seems to me that, for reasons of economy and efficiency, the Tribunals, wherever possible, should be closely linked with existing Courts of Petty Sessions.

The third matter concerns the status of claimants. I recognize the problems inherent in a proposal to extend the right to bring a claim to those other than consumers. Indeed, under the New York City Civil Court Act small claims courts are closed to, *inter alia*, corporations, partnerships, associations, and assignees of small claims. One reason for restricting claims to consumers is that some small claims systems have been transformed into collection agencies for business concerns.<sup>7</sup> These business concerns consider the use of the small claims procedure to be an attractive alternative either to selling the claim to a collection agency, or to prosecuting the defendant through the slow and costly mechanisms of the regular part of the court. I do not recommend that proprietary companies be given access to the Tribunal but there is a case for granting limited access to the Tribunal to proprietors of small businesses. Many small businessmen appreciate the small claims procedure because it is a quick, cheap and final procedure. This proposal may not be politically acceptable to governments generally but it seems fairer to all concerned.

The final issue concerns the nature of the claims that may be brought in a small claims system. In New York City the Small Claims Division, in effect, possesses jurisdiction over any cause of action which is brought solely for a money judgment not in excess of \$1000. Prior to 1963 the term "small claims" included all claims, causes of action and counterclaims under \$300, with the exception of certain real property actions. In 1963, however, small claims in New York City were restricted to actions solely for a money judgment (the limit of jurisdiction was subsequently raised to \$500 and then to \$1000 to keep pace with inflation).<sup>8</sup> By contrast, the Act in New South Wales is limited to, *inter alia*, claims "arising out of a contract".<sup>9</sup> There are proposals now under consideration whereby claimants will be able to sue for the return of rent deposits ("bond money") and where disputes arise from the performance of professional services.

My recommendation is that the ambit of claims should be broadened to include actions in tort, at the very minimum. Indeed, the fundamental question ought to be, what categories of claim should be excluded from the small claims procedure, rather than what categories should be included within it. The Consumer Claims Tribunal provides a simple, inexpensive, prompt and informal means of resolving relatively small disputes. Perhaps most importantly, the Tribunal may achieve a fairer result than that obtained in the normal adversary proceeding. At present, litigants for claims under \$1000 must generally bring their actions in Courts of Petty Sessions. Where a party is unrepresented the magistrate will usually give a sympathetic hearing to his case and stretch the rules of evidence and procedure. This is particularly so where the issue in dispute is confined to an issue of fact. Where

questions of law are involved, the represented party is clearly in an advantageous position. If the unrepresented litigant were able to bring his claim before the Consumer Claims Tribunal this problem would not arise.

### Footnotes

1. *Manual, Small Claims Part: Civil Court of the City of New York* (amended October, 1975), p. 6.
2. Determan, "The Arbitration of Small Claims," *Forum* (1974), P. 840.
3. New York City Civil Court Act, 1804.
4. Act No. 16, 1974.
5. Consumer Claims Tribunals Act, sections 20-21;
6. It is arguable that there is too much pressure on the claimant to submit to arbitration and that the work-load of the arbitrators - up to 15 cases per night - is too heavy, thus causing some matters to be rushed.
7. "The Nature and Operation of the New York Small Claims Courts", 38 *Albany L.R.* (1974), pp. 196, 203-205.
8. *Id.* 198, note 27.
9. See definition of "consumer claim" in section. 4 (1).



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### III. Pre-Trial Conferences in Civil Cases - Halifax, Nova Scotia

The typical pre-trial conference is a conference attended by counsel and a judge or other judicial officer a few weeks before the trial date. I propose to deal briefly with the United States experience before turning to the English and Canadian situation generally, and then to refer in detail to the position in the Province of Nova Scotia.

In the United States the pre-trial conference became prevalent with its introduction into the Federal Rules of Civil Procedure in 1938.<sup>10</sup> It has since been adopted in one form or another in most State jurisdictions as well as in the federal district courts.<sup>11</sup>

As enumerated in Rule 16 of the Federal Rules the principal functions of a pre-trial conference are to consider: (1) the simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and of documents, so avoiding unnecessary proof, (4) the limitation of the number of expert witnesses; (5) the advisability of a preliminary reference of issues to a Master for findings to be used as evidence when the trial is to be by jury; and (6) such other matters as may aid in the disposition of the action. In some jurisdictions the pre-trial conference has been devised primarily to promote settlement, but the more common view is that a pre-trial conference is not properly a device for that purpose, although settlement may in some instances be a by-product of pre-trial.<sup>12</sup>

It is difficult to make statements of general application about the use of pre-trial conferences in the United States. In most State jurisdictions the device has application State-wide although in some States it has effect only in metropolitan areas. In some jurisdictions pre-trial conferences are mandatory but, in many, the use of pre-trial is within the discretion of the trial judge. Also, the nature of the pre-trial conference varies widely from jurisdiction to jurisdiction. In some courts it is used regularly but in a perfunctory way whereas, in others, it is employed intensively. The conference may be conducted either formally or informally by the judge in open court or it may be held in chambers. Usually it is a conference with only the judge and counsel in attendance although in some conferences the parties may also be present. Generally a formal pre-trial order, embodying the agreements and stipulations of counsel, is prepared by the judge, either as his own summary or as a result of proposals by counsel for the respective parties. At the trial, the order of the judge at the pre-trial conference normally constitutes part of the official file or record of the case and, in most jurisdictions, that order is binding on the trial judge unless he permits amendment. There may also be varying policies concerning the time at which a pre-trial conference is held, but the trend is to hold the conference when the case is nearing trial.

The usefulness of pre-trial conferences is a matter on which there is little agreement. The view that trials are shortened and settlement rates increased has been expressed by many judges in the United States based upon personal observations of the operation of pre-trial. Maurice Rosenberg's study of pre-trial conferences in New Jersey, the only major scientific study so far, does not support these claims.<sup>13</sup> Professor Rosenberg selected 1500 personal injury cases to be tried by jury as a control group and 1500 such cases at random as an experimental group. The rule, making pre-trial mandatory, was suspended for the experimental group, and pre-trial was not held in cases in that group unless requested. Pre-trial conferences, as usual, were held in all cases in the control group.

The Rosenberg study found that pre-trial conferences did not shorten trial time and did consume substantial amounts of judicial time. Further, the study showed that there was no increase in the number of cases settled before trial, although it must be recognized that the major goal of the pre-trial conference in that State was not the promotion of settlements but the clarification of issues. The study revealed, however, an improvement in the quality of trials following pre-trial - the lawyers were better prepared, a clear presentation of the opposed viewpoints was more common, gaps and repetition in the evidence were reduced, and tactical surprise was curbed.

The pre-trial conference has generally not taken root in Common Law countries outside the United States. The procedure followed in England is known as the "summons for directions". The major purpose of this proceeding is to consolidate in one hearing various interlocutory applications. A secondary objective is to obtain admissions and stipulations and generally prepare the case for trial.

In Canada, the Provinces of British Columbia, Alberta and Nova Scotia have rules of general application authorizing the holding of pre-trial conferences. In British Columbia the procedure was, at its inception in 1961, to be used at the option of counsel and was rarely invoked. More recently, in Vancouver, it has been decided that every case which is estimated to take two days or more must be submitted to a pre-trial conference. The judge assigned to the case does not preside at the trial conference. It seems that the savings in time have been considerable. In Alberta, pre-trial was introduced in 1969. Being invoked only at the instance of counsel, it is rarely used, but has been effective in a number of complex cases. The rule authorizing the use of pre-trial conferences in Nova Scotia was, adopted in 1968 and provides for a pre-trial conference at the request of either party or at the direction of the court. At the end of 1975 pre-trial conferences were being conducted in 75 per cent of all cases in the Supreme Court of Nova Scotia.<sup>14</sup>

The pre-trial conference in Nova Scotia is probably the most successful pre-trial conference in the Common Law countries, outside the United States. I have, therefore, chosen this conference for detailed examination. The information below is drawn from personal discussions with Chief Justice Gordon Cowan of the Trial Division, Supreme Court of Nova Scotia, and from material he provided for me.

The procedure in Nova Scotia is governed by Rule 26 of the Nova Scotia Civil Procedure Rules. This rule, which is based on Rule 16 in the Federal Rules of Civil Procedure, is applicable in all cases, whether jury or nonjury, and regardless of the expected length of the trial. If it appears that a case is likely to be long the judge will, in the absence of an application by counsel, suggest that a pre-trial conference take place. The conference generally takes place two weeks before the trial. It is felt that, if held earlier, counsel are not prepared but, if held close to the trial, the positions of the parties have tended to harden, witnesses have been subpoenaed and there may be a feeling that matters ought to be thrashed out in court rather than at the pre-trial conference.

In Nova Scotia the judge assigned to the case normally conducts the pre-trial conference. The advantage of having the same judge preside at the pre-trial conference and at the trial is obviously that he is well acquainted with the case and is better able to deal with questions arising during the course of the trial. The objection is that, if there has been some discussion of settlement in which the judge has been involved, it would be difficult for him to be impartial and uncommitted during the trial. The general feeling is that, if the judge does take an active part in promoting discussion of settlement, it is desirable that a different judge preside at the trial when no settlement is reached. The Chief Justice leaves the decision with counsel. In any case, whether settlement is discussed or not, a request that another judge hear the case is automatically granted. It is of interest that over the seven years of the experiment no request has been made.<sup>15</sup>

The court does not regard the obtaining of settlements as the main purpose of the pre-trial conference. It is stressed that the main purposes are the definition and simplification of the issues, obtaining admissions of facts and documents, and exploring other matters which may avoid unnecessary proof and wastage of time. It is not uncommon for the subject of settlement to be raised at the conference. If the subject is raised, the presiding judge will usually suggest that the parties may wish him to leave in order that they may have a free discussion in his absence. In rare cases disclosure will be made to the judge concerning the negotiations for settlement by the parties and even as to the differences in money terms. In certain cases the parties may ask the judge to indicate generally the way in which he would decide, assuming certain facts are established. The judge leaves it to the parties to raise the question of settlement and only if the parties ask the judge to remain and listen to the discussion will he do so.

A pre-trial conference is held in an informal way in a judge's conference room. The judge and counsel are present.

It is usual to start with the statement of claim and to ascertain what matters are agreed and what contested. It often appears that the defendant will not admit an allegation in the statement of claim in the form in which it is stated but is prepared to admit it subject to certain qualifications and reservations. Sometimes he is prepared to admit it provided that the plaintiff agrees to call certain witnesses or company officers and make them available for cross examination. A similar procedure applies to a consideration of the statement of defence.

The second matter for consideration is the listing of documents, the admission of copies or originals and the making of admissions as to the sending and receipt of such documents. Although the Nova Scotia Rules provide for full disclosure of documents prior to trial it is found in many cases at pre-trial conferences that important documents have not been disclosed.

The third matter for discussion is whether there is a preliminary question of law which can be submitted and decided in advance of the trial. Whilst a question of law can be submitted by consent without a rule providing for pre-trial conferences, it has been found that the existence of the rule tends to make it easier to have these questions raised and submitted in advance.

The fourth question which arises at times is whether, in cases where there are questions both of liability and damages, the trial can be split. It may be possible to have liability determined in the first instance, deferring the hearing as to damages until after the question of liability is decided. In many cases, once the question of liability is resolved, the question of damages can be settled.

After discussion has taken place concerning the various matters raised, a memorandum is dictated by the judge. Some judges use their secretaries or a court reporter and dictate a memorandum in the presence of counsel. In some cases a memorandum is dictated following the conference. When the memorandum is typed, the judge signs sufficient copies to provide one for the court file, one for each of the parties and one for himself.

The Chief Justice is convinced of the value of the pre-trial conference. His impression is that the Bar generally and judges of the County Court and of the Trial Division of the Supreme Court using the procedure regard the pre-trial conference as worthwhile. It is felt that, as counsel are compelled by this procedure to narrow and define the issues preparatory to trial, the procedure shortens the trial and facilitates settlements. In addition, it has been found that the conference at times identifies a case which is not ready for trial; hence, in advance of the trial date, the case may be postponed for a week or two or even longer, but always to a definite date. It is an incidental advantage that the pre-trial conference may be held informally, as the realization that it can be ordered stimulates opposing counsel to hold early, and often fruitful, discussions.

It is surely significant that, although the procedure did not commence until 1968, it was invoked in 20 per cent of all cases in 1971 and, by late 1975, in 75 per cent of all cases. The interests of counsel and judges is readily demonstrable: two-thirds of the conferences are requested by counsel, and one-third by the judge assigned to hear the case.<sup>16</sup>

In New South Wales there is no provision in the Supreme Court Rules for the holding of a pre-trial conference in the Common Law Division. The major step in pre-trial procedure is known as the "directions hearing" which is provided for in Part 26 of the Rules. That procedure commenced on 3 March, 1975. Common law actions were initially listed for directions before a judge; but, more recently, they have been listed before a Master of the Common Law Division. Since early in 1976 the legal representatives of the parties have been required to appear

before a Deputy Prothonotary in the first instance. If there is no preliminary issue in dispute the Deputy Prothonotary lists the matter for hearing. He has no power to make orders and, if any preliminary matter is contested, the case must be referred to a Master for directions. Once the Master has resolved all preliminary issues, the case is returned to the Deputy Prothonotary who lists the matter for hearing.

The hearing for directions is set in train by the Prothonotary who, about eight weeks beforehand, notifies all parties in writing of the date fixed for the directions hearing. In respect of claims for damages for personal injuries it is required that the plaintiff serve on the defendant's solicitor a schedule, in triplicate, not less than six weeks before the date fixed for the directions hearing. The schedule indicates briefly the essential allegations proposed to be made at the final hearing of the proceedings. Medical reports, accounts, receipts and other documents must be annexed to the schedule.

The contents of the schedule vary from case to case but, basically, the schedule presents the substance of all claims to be made: for example (1) particulars of the negligence or other cause of action; (2) particulars of injuries sustained; (3) particulars of all continuing disabilities; (4) details of all out-of-pocket expenses and, if those expenses are continuing, a statement to that effect; (5) details of loss of income and, if applicable, the name and address of each and every employer during the 12 months preceding the accident with details of net earnings during that period of employment; (6) the identity of each and every employer since the accident, if applicable, with details of periods of employment, capacity in which employed and net earnings; and (7) particulars of alleged loss of earning capacity and future economic loss including, where appropriate, the names and identity of comparable earners relied upon by the plaintiff and the rates of pay claimed to be applicable to those earners.

A statement is entered by the defendant's solicitor in the space provided in the schedule against each allegation that the particular allegation is "admitted", "denied" or "not admitted". If any allegation of contributory negligence is made by the defendant, particulars of the contributory negligence are specified in the space provided in the schedule. Not less than three days before the day fixed for the directions hearing, the original of the completed schedule is required to be filed by the defendant's solicitor and a copy served on the plaintiffs solicitor.

If, in a claim for damages for personal injury the schedule has not been duly completed or if, at a directions hearing in any common law claim the legal representatives are not fully instructed on all relevant matters, or if the Master is for any reason not satisfied with the progress made at the directions hearing, then a date for hearing may not be fixed and the Master may make whatever orders regarding costs or otherwise he considers justified. Upon the satisfactory conclusion of the directions hearing a date for final hearing, approximately eight weeks ahead, is fixed.

Scale costs on a party and party basis, in respect of the appearance at the directions hearing, including costs reflecting the work involved in preparing the schedule in accident cases, are allowed on taxation. Where counsel attends at the directions hearing a special conference fee of \$30.00 is allowed on taxation. In the event of settlement of an action at or after the directions hearing this special conference fee is allowed to counsel in addition to the full brief-on-hearing fee (assuming a brief-on-hearing has been delivered), plus any other properly incurred fees.

The general purpose of the directions hearing in New South Wales, and of the pre-trial conference in Nova Scotia, is to prepare the case for trial. Pre-trial in both cases is designed to strip the case of all confusing and extraneous issues and to get to the heart of the matter so that it may be properly and efficiently determined. There the similarity ends. It is true that the directions hearing ensures that the pleadings are in order, that discovery has taken place and that the parties are ready for trial; in short, it provides the occasion for stock-taking. However, the directions hearing is a weak and incomplete substitute for the pre-trial conference. The hearing for directions is standardized and perfunctory, consuming only a few minutes in most cases. In practice the hearings are attended by solicitors who have generally not briefed counsel and who are therefore rarely in a position to discuss the issues or to negotiate a settlement.

On the other hand, pre-trial conferences in Nova Scotia may last an hour or more where the case discussed is long and complex. It takes time for the judge and counsel to probe the case in depth and to narrow the issues for trial. It is not surprising that the New South Wales hearing for directions contributes little, either to the preparation of a case for trial, or to the production of a settlement. On the other hand, an effective pre-trial conference in Nova Scotia may not only shorten the hearing, in some cases substantially, but may also lead directly or indirectly to a settlement of the dispute.

I recommend the introduction of a new rule to the effect that, in any proceedings in the Common Law Division, the court may itself, or on application of any party, direct the parties to appear before it for a conference. At that conference the matters to be considered would include - the simplification of the issues; the necessity or desirability of an amendment to any pleading, affidavit or notice; the possibility of obtaining admissions of facts and of documents that will avoid unnecessary proof; the limitation of the number of expert witnesses; and any other matter that may aid in the disposal of the proceedings. The proposed rule might also provide that, following the conference, the court may make an order reciting the results of the conference and giving such directions as the court deems advisable. A further feature of the proposed rule would be that the order, when entered, should control the subsequent course of the proceedings, unless modified at the trial or hearing to prevent injustice. The conference should be held two weeks before the trial. In general, its procedural aspects might follow those used in Nova Scotia, at least in the early stages of the experiment.

In my view, the conference should be conducted by a Master of the Common Law Division, not a judge - notwithstanding that the judge might be different from the one presiding at the trial. Some believe that, wherever possible, the pre-trial conference ought to be conducted by the same judge who is to hear the case. One argument in support of this view is that, for reasons of economy, the judge who masters the essentials of the case at pre-trial is best equipped to preside at the trial. A further argument is that settlement negotiations are a natural by-product of the pre-trial conference where the status of the judge provides the "clout" that is so effective in encouraging settlements.

The latter contention points up the problem of appointing a judge to conduct pre-trial conferences. The primary aim of the pre-trial conference is to narrow and define the issues for trial. But the conference also is an ideal forum for the discussion of settlement. The atmosphere for settlement is probably never better than at pre-trial.<sup>17</sup> Indeed, I believe that the presiding officer has a responsibility before, during and after a pre-trial conference to encourage the parties to effect a settlement. However, active participation by a judge in settlement negotiations would be a departure from his ordinary judicial function. A judge is not a conciliator; he ought not to be put in the position of usurping the proper function of counsel, whose duty it is to advise his client as to the most appropriate disposition of his case. For this reason it seems to me to be essential that a Master, not a judge, should preside at the pre-trial conference and over any settlement negotiations which may ensue.

A substantial number of the cases brought in the Common Law Division are running-down cases in which the Government Insurance Office is the real defendant. Almost all of the remainder are personal injury cases arising out of factory or building accidents, accidents on public transport, or accidents on premises where the plaintiff was not an employee of the defendant. Apart from these cases there are defamation cases, building cases, other contract cases, professional negligence cases, assault cases and others. Mr. Kevin Quinn, Deputy Prothonotary of the Supreme Court of New South Wales, informs me that approximately 60 per cent of all cases are set down to last one day or less. Most of these cases are running down cases. Of the remainder approximately 20 per cent are set down to last two days or less, while those cases expected to last three days or more constitute no more than 20 per cent of all cases. In my view it is not enough to wait for counsel to request pre-trial. Experience suggests that this will not happen very often, although the Nova Scotian experience showed that, once pre-trial was made mandatory in certain cases, counsel requested it in a substantial number of other cases (two-thirds of all cases where a pre-trial conference was conducted). The problem is, therefore, to determine which cases should be selected for pre-trial.

I do not envisage that, in New South Wales, a pre-trial conference would be held in 75 per cent of cases, as in Nova Scotia. Indeed, the cases selected for a pre-trial conference should be limited in number, particularly at the inception of the scheme. The case would have to be sufficiently prepared for a full assessment of liability and quantum to be made; counsel would therefore have to be fully briefed, and an appropriate scale fee would be

payable to solicitors and counsel. The Evershed<sup>18</sup> and Winn Committees commented adversely upon the expense of using counsel in pre-trial conferences. The Winn Committee concluded that the adoption of the pre-trial conference would so complicate, delay and increase the cost of litigation that it should be rejected.<sup>19</sup> But the Committee did examine the suggestion that a pre-trial conference should “always or usually” be held.<sup>20</sup>

My investigations overseas do not support such a wide use of the pre-trial conference. Whilst, in the United States, the pre-trial conference is frequently employed there is a trend away from making it mandatory. The pre-trial conference in the United States generally figures prominently in the conduct of complex cases, and it is with this type of case that the greatest benefits have been discernible. In my view, therefore, pre-trial conferences should at first be scheduled for those cases expected to occupy three days or more. Depending on the results of that experiment, some consideration should be given to scheduling a pre-trial conference for those cases expected to occupy two days. However, scheduling pre-trial conferences for cases occupying one day or less would be simply a waste of time and money.

The choice of a Master who has a sympathy for, and interest in, pre-trial and settlement conferences is absolutely essential to the success of the experiment. Pre-trial would require hard work on the part of the Master and of counsel because it involves “digging” into the case so as to uncover its essentials. The pre-trial conference is useless if the parties merely go through the formalities. Chief Justice Gordon Cowan recognizes that a good deal of the success of the practice depends upon the individual judge. This view is shared by others in the United States to whom I spoke on the subject of pre-trial. A judge who understands the system and who wants to make it work is able to narrow and define the issues. He can then allow the parties to agree, with or without reservations, to most of the relevant facts, leaving other facts in issue. The system works only as effectively as the one who works the system.

## Footnotes

10. Karlen, *Procedure Before Trial in a Nutshell*, (1972) pp. 217-218.

11. *The Improvement of the Administration of Justice*, American Bar Association, (1971) p, 78.

12. *Ibid.*

13. Rosenberg *The Pre-trial Conference and Effective Justice* (1964).

14. Cowan *Pre-trial Procedure in the Province of Nova Scotia*, (20 October, 1975) p. 2.

15. *Id.* pp. 3-4.

16. *Id.* p. 2.

17. *The State Trial Judge's Book*, National Conference of State Trial Judges, (1969) pp. 87-89.

18. *Final Report of the Committee on Supreme Court Practice and Procedure* (Cmnd. 8878)

(1953) para. 217.

19. *Report of the Committee on Personal Injuries Litigation* (Cmnd. 3691) (1968), paras 353-355.

20. *Id.* para. 353.

**CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:  
VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

**IV. Mandatory Settlement Conferences in Civil Cases - Los Angeles, California**

There are few jurisdictions in the Common Law countries where the parties to a common law action are required to attend a settlement conference, separate and distinct from a pre-trial conference, with a judge to discuss the settlement of their dispute. Such a procedure obtains in the Superior Court for Los Angeles County, California. Authority for the holding of a mandatory settlement conference is contained in the California Rules of Court which provide: "To ensure the prompt disposition of civil cases, each superior court should require settlement conferences in all ready cases . . ." <sup>21</sup> The mandatory settlement conference procedure came into operation on 12 October, 1971.

I pointed out above <sup>22</sup> that, whilst pre-trial conferences are primarily intended to simplify issues, make suitable amendments to the pleadings, limit the number of expert witnesses, obtain admissions of facts and generally prepare cases for trial, they are instrumental in effecting a large number of settlements at once or shortly after they are held. The distinctive feature of the mandatory settlement conference in Los Angeles County is that it is entirely separate from, and additional to, the pre-trial conference. The settlement conference is held subsequently to the pre-trial conference and approximately three weeks before the trial.

The mandatory conference is also additional to the emphasis that the court for many years has placed on voluntary settlements. Where parties to a case have requested that a judge attend a conference, the court has met the request. There is a formalized procedure, set out in printed forms, for settling cases on a voluntary basis. Attorneys on the record may, at any time prior to trial, submit a stipulation requesting judicial assistance in the possible settlement of the dispute. The stipulation must be signed by all attorneys on the record. To assist the court the stipulation must contain specified information - efforts made to effect settlement, specific areas of dispute, contentions of each party, special problems, estimated time for trial, and estimated time for the settlement conference if more than one hour. A detailed, itemized statement of all damages must be provided. All books, records, documents, depositions, photographs, diagrams, maps, bills, contracts and memoranda relating to the case must also be provided on the day of the conference.

Counsel attending the conference must be completely familiar with the facts and law relating to the case. The rules require all persons to be present whose consent will be necessary to bind the parties to any settlement. The voluntary settlement conference arises by agreement and can take place at any time. However, my impression is that it is not invoked very frequently.

The procedure for the mandatory settlement conference is also formalized. To facilitate the conduct of the conference the Superior Court provides a policy memorandum which details the obligations of the parties and of their counsel in respect to the conference. Generally, each plaintiff and each defendant must be present, except where a party's consent is unnecessary for the settlement of the case, with their respective counsel. Corporate bodies must be represented by a responsible officer authorized to make all decisions regarding the case unless a third party, such as an insurance company, has the necessary authority. Where a party who might be liable for damages has insurance coverage, the insurance company must provide a representative who is authorized to make all decisions regarding the case. Counsel for the plaintiff must bring a list of all special damages claimed, plus corroborating evidence, and, where appropriate, both counsel must bring copies of medical reports. In the policy memorandum it is prescribed that each attorney attending a settlement conference has a duty to be "intimately familiar" with the evidence pertaining to liability and damages. Sanctions for failure to comply with any of the requirements contained in the memorandum may involve vacation of the trial date, dismissal or a monetary penalty.

The Superior Court provides, for the guidance of its judges, a weekly summary of jury verdicts. The summary contains a full statement of the facts of the accident, injuries, special damages, offer, demand, verdict and the ratio of the verdict to the offer and demand. This information is invaluable because it helps to show counsel who are unrealistic in regard to offer or demand what is likely to be the result of the case at hand. Further, where an attorney is dealing with a difficult client, he can show that client the probable result by reference to the summaries of recent verdicts.

The Superior Court has, until recently, allowed settlement conferences to be conducted by various judges. A new procedure restricts this task to judges who have shown interest and competence in effecting settlements. The enthusiasm and ability of judges in conducting settlement conferences had varied widely. It should be noted that, in the United States, judges are not always drawn from the practising profession. I was informed that the most effective judges in this area are those who were outstanding trial lawyers. This is not surprising; it was clear from my observations of these conferences that much depends on tactics and skilled negotiation.

Perhaps the form of the settlement conference can be best explained by illustration. In one settlement conference witnessed by me the only issue was that of quantum of damages. A previous conference having shown that the case might be settled, a second conference had been scheduled. Both parties waited outside the judge's chambers whilst the judge discussed the issues with their counsel. The plaintiff, who was a dancer by profession, wanted \$10,000 for his injuries; the defendant would offer no more than \$6,000. The main problem was that the plaintiff had an exaggerated view of his potential as a dancer and, therefore, an unrealistic view of his loss. The judge disclosed to both counsel, at the conclusion of the first conference, that he had assessed the damages at \$6,000. He sent the defendant's counsel out of his chambers whilst he had a discussion with the plaintiff's counsel. The judge emphasized the weaknesses of the plaintiff's case and the expenses of a jury trial. It could not be said that the judge put heavy pressure on the plaintiff's counsel but he left him in no doubt that the case should be settled. Plaintiff's counsel conferred with his client who requested \$7,000 and a settlement was effected in this sum. I was greatly impressed with the skill shown by the judge in moving the parties towards a settlement without actually telling them what they must do. However, the "clout" of the judge was undoubtedly a factor in producing the settlement.

It is difficult to assess the effectiveness of settlement conferences with any degree of precision. Certainly the statistics quoted by the Los Angeles Superior Court must be treated with caution. In the information booklet provided by the Superior Court it is claimed that more than one out of four cases are settled at the mandatory settlement conference.<sup>23</sup> However, the percentage of cases proceeding to trial was decreasing prior to the introduction of the mandatory settlement conference (12 October, 1971) and has generally continued to decrease by a relatively small percentage since that time (1968 - 24 per cent of all cases went to trial; 1969 - 23.8 per cent; 1970 - 20.8 per cent; 1971 - 16.8 per cent; 1972 - 14.9 per cent; 1973 - 13.8 per cent; 1974 - 13.0 per cent; 1975, January to September - 13.3 per cent). It seems, therefore, that the conference is settling many cases that would be settled in the ordinary course of events.

Impressions formed on my research tour suggest that well conducted pretrial conferences are a more significant factor in the settlement of cases than settlement conferences. Settlements are facilitated when as much information as possible is available to the parties so that they become aware of the strengths and weaknesses of the opposing case. But this is not to say that machinery for the settlement of claims ought not to be provided and used in appropriate cases. My investigations overseas lead me to believe that many of the cases settled as a direct or indirect result of settlement conferences would, but for the conferences, proceed to trial. I cannot support this opinion with facts and figures; it is merely an impression formed from my discussions and observations. Further, a significant advantage of the settlement conference is that it brings forward the point of time at which a case is settled, thus "hardening" the calendar (list) and ensuring that fewer cases are removed from the calendar



because of last-minute settlements. The earliest possible settlement of a case is undoubtedly beneficial when settlement itself is possible. It avoids the wastage of time and money occurring when settlement is deferred until the day of the trial, an occurrence all too common both in New South Wales and in the Common Law countries generally.

In the Common Law Division of the Supreme Court of New South Wales a settlement conference of the type found in Los Angeles County does not exist. As from 3 March, 1975, all common law actions in the Supreme Court were listed for a "directions hearing" before a judge of the Supreme Court but, more recently, "directions hearing" have been listed before a Master of the Common Law Division. The hearing for directions is set in train by the Prothonotary who notifies all parties in writing of the date fixed for the directions hearing approximately eight weeks beforehand. I set out elsewhere details of this hearing.<sup>24</sup> Upon satisfactory conclusion of the directions hearing a date for final hearing is fixed.

The major purpose of the hearing for directions is the preparation of the case for trial. It is designed to strip the case of all extraneous issues and get to the heart of the matter so that it may be properly and efficiently determined. A subsidiary aim is to encourage the early settlement of cases. Unfortunately, the hearing for directions is standardized and perfunctory, consuming only a few minutes in most cases. The hearings are attended mainly by solicitors who have generally not briefed counsel and are therefore rarely in a position to discuss the issues or negotiate a settlement. It is not surprising that in only a small percentage of cases are terms of settlement filed at the hearing for directions. It is true that the directions hearing ensures that the pleadings are in order, that discovery has taken place and that the parties are ready for trial; in short, it provides the occasion for stock-taking. For this reason the continuation of the directions hearing may be considered justified. However, the directions hearing cannot be regarded as effective in producing settlements.

If settlement conferences were to be introduced in New South Wales it would be necessary, first, to appoint a suitable person to preside at the conferences and, second, to appoint a special day and time for the conference at which the presence of counsel would be required. Both of these matters present problems.

In respect of the first matter there seem to be two schools of thought. One asserts that the presence of a judge at a settlement conference is absolutely essential because his status gives him the "clout" necessary to encourage settlements. The other school of thought says that active participation by a judge in settlement negotiations is a departure from his judicial function. The overwhelming body of professional opinion in New South Wales would surely adopt the latter point of view. To have a judge preside at such a conference runs contrary to the fundamental principle that a judge is not a conciliator and should not be put in the position of usurping the proper function of counsel, whose duty is to advise his client as to the most appropriate course of action. It is not for a judge to say what decision a party ought to make.

In my view the appointment of a Master to conduct settlement negotiations could be an effective compromise. He does not have the standing of a judge, and a Master's involvement in settlement discussions should be generally acceptable to the profession, particularly as the negotiations can have no bearing on the trial, which must be heard by a judge. Further, a Master's experience and status would give his opinions some weight and he could well be instrumental in encouraging settlement. In the United States, judicial officers of comparable stature preside at pre-trial or settlement conferences. The Magistrates Act gives the United States District Court the authority to establish rules. Pursuant to that legislation United States magistrates may be assigned such duties as are not inconsistent with the Constitution and laws of the United States. These additional duties specifically include assistance to a District Judge in the conduct of pre-trial or settlement hearings. The United States magistrates have been very effective in this area.<sup>25</sup>

The second matter concerns the time and expense involved in a special settlement conference. The problem stems from the division of the profession into barristers and solicitors. It is my view that representation of the parties at the settlement conference would rarely be undertaken by solicitors, so barristers would be drawn into the process. At the conference the case would have to be sufficiently prepared for a full assessment of liability and quantum to be made. Counsel would therefore have to be fully briefed and an appropriate scale fee paid to solicitors and counsel. It follows that to hold a settlement conference in every case would be out of the question. A settlement conference is an extra step in pre-trial procedure, the expense of which would have to be offset by a high percentage of the settlement conferences being successful, but that result is by no means assured.

At the opposite extreme, it would be inappropriate to set up machinery for a voluntary settlement conference only; experience shows that mere exhortation is not enough. Undoubtedly, the economic utility of the settlement conference in the United States is closely related to the fusion of the two branches of the profession. Admission to practice entitles a lawyer to perform every function associated with legal representation, from interviewing and advising a client to appearance at trial or hearing and upon appeal. It is rare for one attorney to engage another to conduct a trial or hearing and it requires the consent of the client, who ordinarily expects that the attorney he has engaged will conduct the case personally at all stages. Moreover, unlike lawyers in New South Wales, American lawyers often work on the basis of a contingency fee which usually does not relate to the amount of work done but to the amount received, whether on settlement or after trial. For these reasons the problem of legal costs in pre-trial procedure seems less significant in the American legal system.

My recommendation is that a settlement conference should be an important adjunct to a pre-trial conference<sup>26</sup> and not a proceeding in its own right. As noted above,<sup>27</sup> approximately 60 per cent of cases in the Common Law Division of the Supreme Court are set down to last one day or less. Most of these cases are running-down cases. Of the remainder, approximately 20 per cent are set down to last two days or less and those cases expected to last three days or more constitute no more than 20 per cent of all cases. My recommendation is that a pre-trial/settlement conference be scheduled for those cases set down to last three days or more. If successful in those cases, I suggest that the experiment be extended to those expected to last two days or more. There may well be other situations where, following discussion between the Master and the parties' legal representatives at the directions hearing, the Master considers a pre-trial/settlement conference desirable. However, scheduling pre-trial/settlement conferences as a matter of routine for those cases set down to last one day or less would involve a waste of time and money.

I stress that the conference, though primarily designed to narrow the issues for trial, must aim at settling the case, if at all possible. There is no better time for the consideration of settlement than the pre-trial conference. An effective pre-trial conference exposes counsel to the fundamental strengths and weaknesses of each case and counsel are thus better able to evaluate the case in terms of settlement figures. It is not enough for the Master to ask counsel whether or not there have been negotiations towards settlement and leave it at that. Wherever possible, the chances of settlement should be explored in depth. At present two methods are used to resolve civil disputes - settlement and adjudication. There is a need to introduce conciliation as a third method for the resolution of disputes. The value of conciliation is that it enables a third party, who is independent of the other two parties, to encourage the parties to settle the case. Most cases are settled and an increase in the present proportion of settlements by only a small percentage would greatly reduce the delay in disposing of those cases which finally reach the court.

## Footnotes

21. Section 9(d), as amended, effective 1 January, 1974.

22. Heading III.

23. *Information about ... Los Angeles Superior Court*, (1 August, 1974) p. 11.

24. Heading III, pp. 15 -16.

25. See generally Naythons, "The Civil Settlement Conference", 9 *Forum* (1973) p. 75.

26. See Heading III.

27. *Id.* p. 17.

## **CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

### **V. Examinations For Discovery - Toronto, Ontario**

An interesting method of oral discovery used widely in Canada is a procedure known as "examination for discovery". I witnessed the examination for discovery in operation in Toronto, Ontario, and had extensive discussions on the subject with court administrators and the judiciary throughout Canada.

Basically, examination for discovery is an oral examination of a party before trial touching the matters in question by any party adverse in interest. Most of the American jurisdictions do have some provision for oral examination for discovery in the form of what are generally called "depositions on oral examination". The focus of this discovery technique is on examination, not cross-examination, of the opposing party. The examinations enable the examining party to know the case he has to meet, to procure admissions which will dispense with other formal proof at trial and to procure admissions which will destroy his opponent's case.<sup>28</sup> In the Canadian Provinces there is widespread agreement that the examination for discovery makes an important contribution to settlement of litigation.

The Rules of Practice and Procedure of the Supreme Court of Ontario, subject to express statutory provisions, regulate the conduct of examinations for discovery in that Province.<sup>29</sup> The rules provide for the institution of proceedings to be followed by a series of steps designed to narrow and define the issues and generally to prepare a case for trial. They consist of the exchange of pleadings in which admissions of material allegations are made, and of examination for discovery, production of documents, medical examination, inspection of property, cross-examination on an affidavit and examination of a witness on a pending motion. The rules do not provide for a pre-trial conference as in Alberta, British Columbia, Nova Scotia and most American jurisdictions.

The rules provide that a party to an action, whether plaintiff or defendant, or if a corporation is a party, any officer or servant of such corporation, may without order be orally examined before the trial touching the matters in question by any party adverse in interest. The party, officer or servant may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness, except as provided in the rules. The rules provide that a corporation may apply to the court for the examination of an officer or servant in lieu of the officer or servant selected to be examined by the opposing party. Further, after the examination of an officer or servant of a corporation, an opposing party is not at liberty to examine any other officer or servant without an order. Where an infant is a party, any opposing party may examine the next friend or guardian of the infant. There are special provisions for the examination of infants and mentally incompetent persons.

Any witness examined is subject to cross-examination and re-examination. Where any person neglects or refuses to attend for examination, refuses to be sworn or to answer any proper question put to him, proceedings may forthwith be had for attachment. For such refusal or neglect the court may dismiss the action where such person is the plaintiff or an officer or servant of a corporation plaintiff, or may strike out the defence, if any, where such person is a defendant or an officer or servant of a corporation defendant. If, however, a person under examination objects to a question put to him, the question and the objection shall be noted. The validity of the objection shall be decided by the examiner whose decision shall also be noted. Any direction or ruling of the examiner is subject to review upon any motion without an appeal.

The person to be examined or any party to the action shall, if so required by subpoena or notice, produce at the examination, in relation to the matters in issue, all books, papers and documents that he could be required to produce at the trial. Further, where at his examination a person admits that he has in his custody or power any such document, the examiner may direct him to produce it for the inspection of the party examining, and for that purpose allow a reasonable time.

The production of a record of the examination is crucial to its success. The rules provide that the examination, unless otherwise ordered or agreed, shall be taken in shorthand by question and answer. It is not necessary for the depositions to be read over to, or to be signed by, the person examined. The rules further provide that a copy of the depositions, certified or signed by the examiner, shall be received in evidence saving all just exceptions.

The American deposition is a discovery device similar in principle to the Canadian examination for discovery. Under the Federal Rules of Civil Procedure<sup>30</sup> either side, without leave of the court, may, on reasonable notice, examine the other party on oath before an officer authorized to administer oaths, 20 days or more after the action is commenced. A subpoena is required for examination of a witness not being a party to the action, unless he or she consents to be examined. Examination and cross-examination proceed as at the trial. The deposition may be used at the trial as evidence *per se* and, amongst other things, to contradict or impeach a deponent as a witness.

Discovery by oral deposition in the United States is used in about one case in two. Lawyers generally regard it as useful although lawyers retained on a contingency basis use it more often than others. Among the main advantages claimed are: witnesses are examined when their memories are fresh; the procedure binds the party to a version of the facts at an early stage; testimony is perpetuated in the case of death or indisposition at the trial; it leads to better prepared and conducted trials in cases which are not settled; and it leads to earlier and fairer settlements. It is conversely alleged that: this form of discovery encourages "fishing expeditions"; insistence on discovery at inconvenient places or times may be used as an instrument of harassment; the taking of depositions is expensive in terms of time, money and manpower; and, since depositions are expensive, a rich party may use them to gain a tactical advantage. Research in this area suggests that the deposition in the United States is neither so good nor so bad as claimed.<sup>31</sup>

Examinations for discovery are similar to the American model with one significant restriction; only parties (or in the case of companies, their servants) may be examined. The exception is Nova Scotia which, in effect, adopted the American procedure in 1972. Since the scope of questions permitted is very wide and the rules of evidence do not normally apply, this restriction does not prevent adequate disclosure of the case, as counsel may examine a party as to facts which he knows only by hearsay from witnesses who will be called at the trial. Canadian lawyers regard it as improper, without good reason, to lead evidence at the trial which has not been disclosed on discovery.

Without exception, Canadians speak in the highest terms of the contribution that the examination for discovery makes in most cases to the settlement of litigation. In Ontario the examination procedure is used in all civil cases. One counsel in Toronto estimated that 80 to 90 per cent of all running-down cases there are settled as a direct result of the examination. At the other extreme, examination for discovery was said to be very ineffective where there are emotionally charged issues, as in proceedings for divorce and ancillary matters.

The Evershed Committee<sup>32</sup> in 1953 and the Winn Committee<sup>33</sup> in 1968 considered that examination for discovery was unsuitable for introduction into England, partly because it substantially increased the costs of litigation. This objection still seems valid in respect to civil procedure in New South Wales. An examination requires a special room, some means of recording the proceedings, and the presence of the parties and their legal representatives. Most importantly, counsel would have to be fully briefed for the examination and an appropriate fee would have to be paid to solicitors and counsel. General use of the examination for discovery would therefore not be justified unless there were some assurance that the examination would lead to a settlement of most cases. The fusion of the two branches of the profession seems to be the circumstance that makes the procedure relatively inexpensive in Canada. The lack of a split profession allows lawyers (in some cases, junior lawyers) from the office handling the case to conduct the examination. In my submission, the expense of introducing examination for discovery would be disproportionately high when balanced against the results likely to be obtained.

## Footnotes

28. *Report on Administration of Ontario Courts*, Ontario Law Reform Commission, (1973) p. 91.

29. Regulation 545, 1970, under the Judicature Act and the Matrimonial Causes Act, Rules 326-346.

30. See Federal Rules of Civil Procedure, Rules 26-30.

31. Claser, *Practical Discovery and the Adversary System*, (1968) p. 51ff. The conclusions of this survey are summarized in Justice Report, *Going to Law - A Critique of English Civil Procedure*, (1974) paras 129-133.

32. *Op. cit.* note 18, paras 219-221.

33. *Op cit.* note 19, para. 355.

## **CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

### **VI. Adjournment In Civil And Criminal Cases - Los Angeles And San Francisco, California**

It is significant that in some American jurisdictions, where during recent years there has been a substantial reduction in huge backlogs of civil and criminal cases, one of the key principles of court administration has been the refusal of applications for adjournments except in emergencies. In a number of American jurisdictions I observed the savings in time and money that occur where a court adopts a stern approach to applications for adjournments, even applications by consent. I have selected two jurisdictions for detailed comment; in respect to civil proceedings, the Superior Court of the Central District of Los Angeles, 1971-1975, and, in respect to criminal proceedings, the Superior Court of California in San Francisco, 1970-1975.

Procedure in civil matters in the Los Angeles Superior Court is governed by the California Rules of Court. These rules<sup>34</sup> provide that a "firm policy" should be adopted in regard to applications for continuances (adjournments). Counsel are reminded that dates assigned for the various steps in the trial process are to be regarded as "definite court appointments" and that a continuance will be granted only upon an affirmative showing of "good cause" requiring the continuance.

It is required that any continuance, whether contested or uncontested or stipulated to by the parties, should be applied for by noticed motion with supporting declarations. If the request for a continuance is made by any other method the application will be granted only in an emergency. In general, the necessity for the continuance should have resulted from an emergency. That emergency should be of a type which, having occurred after the trial-setting conference, could not have been anticipated or avoided with reasonable diligence and which could not be properly provided for other than by the granting of a continuance. In particular, the court is to consider the declarations supporting the motion and the diligence of counsel, particularly in bringing the emergency at the first available opportunity to the attention of the court and of opposing counsel, and in attempting in other ways to meet the emergency.

The court is also to consider the nature of any previous continuances, extensions of time or other delay attributable to any party, the proximity of the trial or hearing date, the condition of the court's calendar (list) and the availability of an earlier trial or hearing date, if the matter is ready for trial or hearing. The court decides whether the continuance may properly be avoided by the substitution of attorneys or witnesses, by the use of depositions in lieu of oral testimony or by the "trailing" of the matter for trial or hearing.

The rules specify what under normal circumstances would be considered good grounds for granting the continuance of a trial date - for example, death or illness of a trial attorney, essential witness or expert witness; unavailability of a trial attorney or witness; substitution of a trial attorney; or a significant change in the status of the case.

The rules<sup>35</sup> also provide that: "any continuance ... should be applied for by noticed motion, with supporting declarations, to be heard only by the Presiding Judge or by a judge designated by him". The Presiding Judge is selected on the basis of his administrative qualifications and interest rather than solely by rotation and seniority. He assumes supervisory responsibility for the conduct of the ordinary business affairs of the court. These include matters of court records, systems and procedures, personnel, finances and so on. The policy of bringing all applications before the Presiding Judge is important because it standardizes the policy on applications for adjournments.

It was made clear to me in my discussions with judges and court administrators in Los Angeles that the rules on continuances are strictly enforced. The general practice of the Superior Court is aptly described in their information booklet: "all cases scheduled for trial, unless settled, go to trial except in an emergency".<sup>36</sup> |

understand that when the new policy on continuances was introduced there were some complaints from counsel but, in due course, they accommodated themselves to the new standards.

The effects of the new approach to continuances have been dramatic.<sup>37</sup> In the Central District of Los Angeles County Superior Court, (the Central District handles more than 60 per cent of all the civil cases of the court), continuances fell from as high as 55 per cent of a calendar in a month to where, in June of 1974, they were about 6 per cent. From January to September, 1975, about 10 per cent of the cases in the calendar were continued.

Undoubtedly the new policy has also played an important role in the general speed-up of the civil list, although it must be recognized that the new attitude to adjournments was one component of a general programme, introduced on 12 October, 1971, to reduce the serious backlog in civil cases. A mandatory settlement conference and voluntary arbitration plan were the other main elements of the programme. The backlog had peaked at 27,353 cases in July, 1971. On 1 May, 1974 that is to say, 2 1/2 years after the introduction of the new measures the backlog was 19,927 cases, the first time since September, 1969, that the civil case backlog had sunk below 20,000 cases. This improvement was also seen county-wide - the backlog was 42,815 in October, 1971, and 35,058 in May, 1974. The time to trial from filing an at-issue memorandum was reduced from 25 months in October, 1971 to 11 months in May, 1974: (in jury cases, from 33 months to 23 months). These improvements county-wide were effected despite an increase of 10.7 per cent in civil filings in 1973 over 1972. Although statistics for 1975 were not available at the time I visited Los Angeles, I was informed that the improved position had been maintained during the year.

The benefits derived from a strict policy on applications for adjournments also obtain in criminal procedure. The Superior Court of California in San Francisco (1970-1975) provides a good illustration of the benefits which can accrue from this policy.<sup>38</sup>

The California Rules of Court<sup>39</sup> provide that, in criminal cases, the court should adopt a "strict standard" for the granting of continuances and should not grant continuances except upon affirmative proof in open court that "the ends of justice" so require. The rule is general in character but I was informed that, as with civil procedure in Los Angeles, continuances are not allowed except in an emergency. Further, as in Los Angeles, a strict approach to applications for continuances was introduced as one component of a general programme to reduce huge backlogs of cases.

In January, 1970, there were 504 felony cases pending in San Francisco Superior Court. By January, 1971, the pending case load had swollen to 788 cases (1,003 defendants). The rate of increase was growing each month. It was not uncommon in bail cases to find delays of 12 months between filing date and trial. The assignment of additional courts, the installation of computers, and the implementation of certain standards of practice, resulted in a dramatic reversal of the trend of increasing backlogs of cases. The new standards of practice involved: (1) combining arraignment, plea, pre-trial and trial setting into one or, at most, two court sessions; (2) instituting a strict policy against continuances; (3) mandatory pre-trial conferences; and (4) disposing of more cases as misdemeanours in the Municipal Court.

The new policies came into effect in October, 1970. In the first year of the system, 788 cases pending as at January, 1971, were reduced to 563 cases by December, in spite of the filing of a record 2,507 new felony cases in the Superior Court during that year. The success has been continuous since then, 1973 being the third consecutive year in which backlogs were reduced. There were 141 cases pending in the Superior Court at 1 January, 1974. The drop from 788 cases to 141 is placed in proper perspective when it is considered that, in the three years from 1 January, 1971 to 1 January, 1974, there were 6,644 felony cases filed in the Superior Court and during that same period there was a total of 7,291 dispositions (i.e., trials, changes of plea, dismissals, etc.). No difficulty is now experienced in bringing any case to trial within the statutory 60 days from filing in the Superior Court. In fact, I was advised that the average time between the filing of a case in the Superior Court and its completion is now 35 days.



The implementation of a policy of refusing applications for adjournments except in emergencies has obviously had a significant impact on the backlogs of civil cases in the Los Angeles County Superior Court and of criminal cases in the Superior Court of California in San Francisco. However, the problem of delay caused by adjournments is of particular significance in the United States: it is unlikely that reforms in New South Wales will reap benefits of the magnitude described above. The United States has only one class of lawyers all of whom may do any kind of legal work, in court or out. As the legal profession is not divided into barristers and solicitors and it is not accepted that an advocate can be expected at the last minute to take a case prepared by someone else, any lawyer who is "double booked", or who has been recently substituted as counsel, can usually obtain an adjournment. Adjournments are freely asked for and freely granted.<sup>40</sup>

A further consideration is that in Los Angeles and San Francisco the new attitude to adjournments was only one part of a total package designed to cure serious backlogs of cases. Under able administrators the courts in both cases considered the whole court system and determined that their policies on adjournments constituted one area, among others, requiring reform. Whilst I was given personal assurances that the new attitude to adjournments was most important, I was left in no doubt that the other reforms were of considerable significance. There is always the danger of oversimplifying the question of delay, which in reality is highly complex. In considering that question in New South Wales it is necessary to recognize an effective policy on adjournments as only one aspect, albeit a very important one, of an effective court system.

Nevertheless, the fact remains that the practice of adjourning cases without good reason is a basic obstacle to a responsible system of justice. I accordingly recommend that, in civil and criminal cases, the Courts of Petty Sessions and the District and Supreme Courts review their policies on applications for adjournments. There should be a review not only of steps preliminary to hearing or trial but also of the hearing or trial itself. The fundamental principle is that each, court appearance should contribute productively to the ultimate disposition of the case. Where cases are fixed for hearing or trial they should proceed, except in an emergency. This should mean that an application for an adjournment will be refused unless an exceptional reason supporting the application is provided. Practitioners well know that in some courts they can present what is less than a good reason and obtain an adjournment. The result is wasteful of time, money and resources. A firmer approach to applications for adjournments would possibly be unpopular with the profession for a time but, once it is established that delay for the sake of delay will not be condoned, the system should operate more smoothly and more productively.

## Footnotes

34. Section 9 (b), as amended, effective 1 January, 1974.

35. *Ibid.*

36. *Op. cit.* note 23, p. 10.

37. *Id.* pp. 10-11.

38. Calcagno, *The San Francisco Master Calendar System for Criminal Cases*, (1975).

39. Section 10(d), as amended, effective 1 January, 1974.

40. Karlen *Judicial Administration: The American Experience*, (1970) pp. 71-72.

## **CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

### **VII. Summary Traffic Trials - San Francisco, California**

From 1 October, 1971, to 31 December, 1973, the Judicial Council of California undertook a traffic project in Oakland-Piedmont Municipal Court and in Santa Monica Municipal Court. The project was to determine the feasibility of disposing of minor traffic citation cases with a single appearance by the defendant and without the police officer's presence in court. The procedure is not unique but it has not been formalized or tested to the extent that it was done in this project. I investigated the new procedure in Oakland-Piedmont Municipal Court.

A defendant receiving a traffic citation in this district has a number of options. In some cases a mandatory appearance in court at a specified time and place is necessary. The offences for which a mandatory appearance is required include high speed offences, failing to obey an order of a peace officer or fireman, giving false information to a police officer and drink/drive offences. In most cases the defendant is required to post bail within 15 days of the date he received the citation. Usually the defendant may post bail by mail and, in most cases, he is sent a courtesy notice shortly after receiving the citation indicating the amount of bail. He may also appear in person at the bail window and post bail at that time. In the majority of cases bail will be forfeited if the defendant does not wish to make any further appearances. If the defendant wants to contest the case he may post bail with the clerk and either appear on a date selected from the arraignment calendar or obtain a regular trial date. Alternatively, he may arrange an immediate appearance as described below. This is known as a "summary traffic trial".

Defendants appearing at the traffic bail window are notified that in addition to the options of posting bail and obtaining a date for arraignment or for trial from the clerk they may have a prompt hearing before the Traffic Trial Commissioner. A defendant wishing to take advantage of this procedure is given a written statement of his legal rights and of recommended procedures. The statement informs the defendant that, if he so wishes, he may have on that day a trial based on his testimony and the information on the citation which will be received as evidence. The defendant is also informed of his right to a trial at a later date with the officer or other complaining witness present. It is further stated that under some circumstances a regular trial is required on a not guilty plea. This happens in only 5 per cent of cases.<sup>41</sup> It may be that the Commissioner does not want to decide the case without the officer present, or the defendant may desire the presence of the officer, or a jury trial. In such cases the defendant's appearance is treated as an arraignment and he is given a trial date.

The defendant has his hearing usually within an hour and frequently within 10 or 15 minutes. The calendar (list) is scheduled in such a way that there are specific times set aside for these hearings: 10.15-10.30 a.m.; 11.45-12 noon; and 2.45 p.m.-3.00 p.m. The schedule is also arranged between 3.00 and 4.00 p.m. in such a way that immediate appearances are allowed as time permits. The police officers use the comment portion of the citation to give an abbreviated description of the violation. The Commissioner then is supplied with a factual basis for weighing the people's case against the defendant's.

A majority of the defendants enter a guilty or "no contest" plea, usually with an explanation. They merely want to be heard with regard to mitigation of the penalty, more time to pay the fine or paying the fine by instalments. About 30 to 40 per cent of those who plead not guilty and have a summary trial are found not guilty, compared with a figure of about 20 to 25 per cent found not guilty after a regular trial.<sup>42</sup> It should be noted, however, that the statistics understate the not guilty findings for both the summary and regular trials since, if a case involves multiple charges and the defendant is found guilty on any charge, the case is counted as a guilty finding. Frequently the summary trial cases in which the defendant is found not guilty are those in which there is no contradiction of the information on the citation. For example, a defendant cited for failing to yield while making a left turn may state that the oncoming driver motioned him to proceed. There has been only one appeal involving a summary trial.

This procedure has considerable advantages for the defendant. First, it allows him to come to court at his convenience on any day, morning or afternoon, within two or three weeks of his receiving the citation, with the

likelihood that his case will be adjudicated without the necessity of any further appearances. The ability to select their own date and time is undoubtedly a very substantial asset to defendants who may have difficulty appearing at a specified date and time. Second, there are savings in court time. There has been no attempt to measure the average court time required for summary traffic trials. But clearly they take less than the 12 minutes average time for minor traffic trials as measured by the Judicial Council's weighted case load study. A very liberal estimate of the time consumed in a summary traffic trial is five minutes each.<sup>43</sup> Third, there are savings for police officers. In traffic trials a police officer is required to appear in court and spend an average of two hours awaiting trial and testifying.<sup>44</sup> Fourth, there are savings for the public generally in that, since no prosecutor is present at these trials, there is obviously a substantial saving in time for the District Attorney. Fifth, time and labour that would otherwise be spent in issuing and serving subpoenas, are saved. Finally, this type of trial creates, for the large segment of the public who appear in traffic courts, a more positive image of the judicial branch of government, and of those courts in particular.

It seems to me that the circumstances which have made the summary traffic trial a successful innovation in Oakland, California, also obtain in New South Wales. In most cases the defendant merely wants to give an explanation to the court. He desires neither a full trial, nor more than one court appearance.

I recommend therefore that the procedure for a summary trial be adopted in New South Wales. The Law Reform Commission has put forward a *Draft Proposal* with a view to restricting court appearances in minor traffic matters to those where there is a real issue to be determined. This proposal has two main features. First, it adopts the self-enforcing notice proposed by Mr. Farquhar, C.S.M.<sup>45</sup> His proposal is that a notice should be served by the police officer upon the alleged offender advising him that, unless he pays the penalty or files a notice requiring a hearing, a warrant may issue for his committal to prison. If the penalty is not paid nor a hearing requested, a notice of issue of warrant is served before the warrant is executed. At this stage the person may apply to have the penalty set aside and the matter heard in court.

It is not appropriate in a report of this nature to debate this issue in detail. However, I do not share the enthusiasm of others for this proposal. Undoubtedly it would save considerable time and expense in court proceedings, but it would also create a considerable amount of work, particularly in the execution of warrants. Perhaps more importantly, the proposal that a person be committed to prison without a court appearance, unless he takes action of some kind, may be construed as an attack on civil liberties. Whilst the idea has worked overseas it may not be practicable in New South Wales.

The Law Reform Commission also proposes that most of the minor traffic matters be heard by a chamber magistrate, not a magistrate. I agree entirely with the substance of this proposal. If all minor traffic matters were first brought before a chamber magistrate court time would be confined mainly to those cases where there is a significant factual issue to be resolved. One aim of the Summary Traffic Trial Project in California was to test whether subordinate judicial officers, such as commissioners and referees, might be used to adjudicate traffic citation cases, releasing judges to dispose of the more complex cases. From the point of view of cost and efficiency this experiment was very successful.<sup>46</sup>

Section 18 B of the Motor Traffic Act, 1909 provides that, for certain traffic offences, a member of the police force or prescribed officer may serve a notice (known as a "traffic infringement notice") on the alleged offender to the effect that, if the person does not wish to have the matter determined by a court, he may pay the penalty prescribed for the offence. Regulation 130A (2) provides that the prescribed offences for the purposes of section 18B of the Act are those set out in Schedule K of the Regulations. They are the less serious driving and vehicular offences and carry penalties up to \$50. The most common are: exceed speed limit by more than 15 k.m.h.; disobey a traffic control light signal; disobey a "stop" or "give way" sign; cross or drive on offside of separation lines; not signal intention; exceed speed limit by not more than 15 k.m.h.; not wear seat belt; drive contrary to notice; unlawfully make "U" turn; inefficient silencer; and smooth or unsafe tyres.

It has been put that a little more than 60 per cent of the penalties payable pursuant to a traffic infringement notice are paid, yet very few of the remaining offenders contest the charges.<sup>47</sup> The consequent delay and expense in processing these cases through the courts are obvious. There are probably two causes. First, there is some delay in making the prescribed payment. Second, some people, whilst not wishing to defend a traffic infringement notice, want to make a court appearance to give an explanation. The defendant might want to say that he was only one of a number of persons all of whom were exceeding the speed limit, yet he was the only one charged; that he was on a straight road where no traffic was likely to be affected by his failure to use his trafficator; that he has a good record; and so on. As none of these taken alone would justify dismissal of the charge, it is obviously undesirable that a normal court hearing be required to consider them.

A person served with a traffic infringement notice has two options: he may choose to pay the fine or to have the matter dealt with by a court. If he does not pay the fine within 21 days the Police Traffic Branch forwards to him by post a summons advising him of the date, place and time of the hearing. At the same time the Police Traffic Branch forwards to the relevant police station the breach report and the alleged offender's traffic record, if any. I recommend that this procedure be retained with one amendment. The summons should indicate that, before the hearing date, the recipient of the summons may, as an alternative to a hearing before a magistrate: (1) pay the fine; (2) forward to the court in a statutory declaration any matter he wishes to put in answer to the charge, in mitigation of penalty or in support of an application for time to pay; or (3) request an appointment with a chamber magistrate to whom he could put orally any of the matters mentioned in (2). The proposal, if adopted, would open up a number of possibilities that are illustrated hereunder.

X receives a traffic infringement notice. He pays the penalty prescribed;<sup>48</sup>

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons and pays the penalty prescribed;

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons. He forwards to the court a statutory declaration setting out matters in answer to the charge, in mitigation of penalty or in support of an application for time to pay. A chamber magistrate considers the material forwarded, the breach report and X's traffic record, if any. The chamber magistrate dismisses the charge, confirms, reduces or waives the penalty, grants time to pay or remits the charge for hearing in open court;

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons. He requests an appointment with a chamber magistrate. X puts before the chamber magistrate matters in answer to the charge, in mitigation of penalty or in support of an application for time to pay. The chamber magistrate considers X's statement, the breach report and X's traffic record, if any. The chamber magistrate dismisses the charge, confirms, reduces or waives the penalty, grants time to pay or remits the charge for hearing in open court;

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons. Without prior appointment X presents himself at the courthouse. He is offered the opportunity of a hearing before the chamber magistrate on that day. The chamber magistrate considers X's statement, the breach report and X's traffic record, if any. The chamber magistrate dismisses the charge, confirms, reduces or waives the penalty, grants time to pay or remits the charge for hearing in open court;

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons. X does not attend on the day of hearing and the matter is dealt with *ex parte* by the chamber magistrate.

X receives a traffic infringement notice. He does not take action within the specified period of 21 days. He is served with a summons. He attends on the day of hearing and the matter proceeds in the usual way.

Inasmuch as the cases in question ordinarily entail the imposition of a relatively small fine, it is not economically feasible for a defendant to employ a solicitor or counsel or make multiple appearances, nor do such cases warrant the amount of time spent by magistrates, prosecutors and police in an adjudication process designed for more serious criminal offences. According to my recommendation the chamber magistrate would "screen" these less serious cases to determine whether a court hearing is desirable. It is submitted that, if this procedure were adopted, there would be very few such cases. Only a small number of cases involve decisions on difficult issues of fact. In explaining why he was apprehended an alleged offender necessarily must assert either mistake or deliberate falsehood on the part of the apprehending officer. If the second of these issues is raised, a full hearing in court is obviously desirable, but there seems to be no reason whatsoever why a chamber magistrate could not make a decision on the first of these issues. Moreover, there is no denial of the alleged offender's rights. The findings of a chamber magistrate may be appealed to the magistrate where the matter proceeds as an adversary hearing in the normal way. If this recommendation were adopted, the full adversary procedure would be confined primarily to those matters where a substantial issue is presented for the court's decision.

#### **Footnotes**

41. *Summary Traffic Trial Project*, (March, 1974) p. 12.

42. *Id.* p. 11.

43. *Id.* pp. 21-22.

44. *Id.* p. 22.

45. Farquhar, *An Appraisal of Three Years' Management of the Summary Courts, 1971-1974*, pp. 58-60.

46. *Summary Traffic Trial Project*, (March, 1974) pp. 24-26.

47. Farquhar, *op. cit.* note 45, p 59.

48. Representations may be made in writing to the Police Commissioner, and the Adjudication Process Section of the Police Traffic Branch will consider these representations, as at present.

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**VIII. Night Courts For Traffic Cases - Los Angeles, California**

In 1965, section 72300 of the Government Code of California was amended to require Municipal Courts with four or more judges in Los Angeles and Orange Counties to remain open and hold sessions at least one night a week to hear traffic matters. In 1967, the amendment was extended to San Diego County also.

At present 13 courts must hold night sessions; three additional courts voluntarily hold night sessions. Thirteen of the courts restrict night sessions to arraignments, pleas, sentencing and fixing dates for trial in traffic matters. Two courts (Whittier, Harbor) conduct traffic arraignments and traffic-citation court trials (non-jury) at night, and one court (Downey) handles all matters except jury trials.

Fifteen courts hold weekly night sessions and one court holds sessions twice a month. The general practice in Los Angeles and San Diego Counties is for night court personnel to have morning leave on the day of a night session. In Orange County the courts generally pay overtime for night work although there may be some allowance of time off to compensate for time worked at night.

The hours that the clerks' offices are open to the public vary. In five of the clerks' offices the night session hours commence at 5 p.m.; in another five at 6 p.m. The remaining clerks' offices open at 6.30 or 7 p.m. Closing hours are 9 p.m. in 10 of the clerks' offices, 8.30 p.m. in three others and 10 p.m. in the remaining three. Courtroom hours also vary with the starting time between 5 p.m. and 7.30 p.m., and the closing time generally at 9 p.m.

In 1970 the Judicial Council of California conducted a study of the operation of night sessions in traffic cases with a view to determining policies on night courts generally.<sup>49</sup> The following documents were submitted to the Municipal Courts:

- (1) A questionnaire surveying the traffic procedures followed in each Municipal Court;
- (2) An opinion questionnaire to be completed by each court clerk in courts not having night sessions;
- (3) A letter to all judges in courts having night sessions, except Los Angeles Municipal Court, requesting comments regarding the need for night sessions, the problems of night sessions and the types of proceedings that should be held at night; and
- (4) A request for information and opinions from clerks of courts having night sessions.

It was found that night sessions are not an added expense to the counties. They are partly funded by revenues derived from a special night court assessment, which is a percentage of the money collected for traffic violations, other than parking violations.<sup>50</sup> With only four exceptions, night courts have not occasioned additional cost, because the staggering of staff hours has avoided any need to pay overtime rates. Even in the courts that pay overtime to the night staff, the revenues are about three times greater than the administrative cost, despite the fact that the night staffs are larger than needed, and personnel are assigned tasks not related to the night sessions. No serious personnel problems seem to have resulted from night courts: staffing has not been difficult as many of those involved like the arrangement. In a small number of courts, however, some of the deputies, especially married women with families, prefer not to work at night.

The number of persons appearing before a judge at night sessions varies from court to court. The average number of such appearances per night session in Los Angeles is about 730 and in San Diego 240. In other courts the average varies from 50 to 150. Figures from some courts indicate that appearances on traffic matters at night sessions constitute from 20 to 40 per cent of the total number of court appearances for such matters. The number of night court appearances compared with the total number of defendants who forfeit bail, plead guilty or are tried seems to range from 3 to 14 per cent, with an average of 7 to 8 per cent.<sup>51</sup>

The Judicial Council found that the effect of night sessions on the workload of the courts is not entirely clear.<sup>52</sup> It does not appear that night sessions generally result in more pleas of not guilty and more court (nonjury) trials. Nor does it appear that night sessions necessarily result in significantly more appearances. Some court administrators feel that night courts have not affected their day-time work load while others state that day-time arraignments have dropped appreciably because of the night sessions.

The Judicial Council considered that the greatest benefit of night courts was derived by people who were concerned about losing time from work.<sup>53</sup> Approximately 75 per cent of ordinary traffic matters are disposed of by forfeiture of bail or dismissal without a court appearance. A proportion of this group would probably prefer to make an explanation to the court or contest the matter but are deterred from doing so because of the loss of time and wages that would be involved. In practice 20 per cent of defendants charged with ordinary traffic offences plead guilty or have the matter dismissed after a court appearance. Most of those who plead guilty in court seem to appear in order to make representations that they hope will result in a reduction of penalty. Although the time taken for that purpose normally is a minute or two, the court attendance can mean the loss of half a day or more of work.

The Judicial Council considered that, for this large group of defendants, night sessions serve the greatest need. If found a general consensus that there should be a facility for traffic arraignments to be conducted at night, if there are to be night sessions at all. Since only the defendants need to appear, a traffic arraignment calendar (list) at night does not inconvenience others. In contrast, traffic court trials require the presence of the arresting officer, possibly other witnesses, a deputy district attorney or city attorney, and are more likely to cause custody problems.

Further, it was found that many defendants who request a trial either do not appear at the time set for trial or else change their plea to guilty at that time. Courts normally compensate for this by setting far more cases on the trial calendar than could possibly be heard if all went to trial, but this practice obviously creates far greater problems at night, with only one department operating, than it does during the day when all departments are open. The Judicial Council doubted whether the benefit to the relatively few people who would be served by holding court trials at night would counterbalance the many problems that would be created.<sup>54</sup> It stated that defendants wanting court trials would probably be better served by being able to select firm dates and times for trial, with a corresponding assurance that they would not have to lose a day's work for a 10 minute court appearance.

On the basis of the experiment in California, it is my recommendation that night courts for traffic cases, on a limited scale, should be part of the New South Wales legal system. My view in this regard has been overtaken by events. During the preparation of this report the New South Wales Government announced that an experiment in night traffic courts in Bankstown, Blacktown and North Sydney would commence before the end of 1976. Night traffic courts dealing with all traffic offences, whether or not contested, came into operation in Bankstown, Blacktown and North Sydney on 2 November, 1976, and in Wollongong and Newcastle on 9 March, 1977. The experiment ran for six months and, by direction of the Minister of Justice, the Honourable R. J. Mulock, M.L.A., was continued for a further period. At the time of writing this report only about 400 cases have been heard at night. This figure represents but a fraction of one per cent of traffic infringements, even excluding parking cases.

## Footnotes

49. "Night Sessions in Municipal Courts", *Judicial Council of California Report*, (1970) pp. 44-52.

50. *Id.* p. 45.

51. *Id.* pp. 49-50.

52. *Id.* p. 50.

53. *Id.* pp. 50-51.

54. *Id.* p. 51.



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### **IX. Multi-Track Voice Writing - Boston, Massachusetts**

In Boston, Massachusetts, I investigated a new form of court reporting called multi-track voice writing. Voice writing involves recording court proceedings by means of the human voice. In the new procedure the voice writer's whispered speech is recorded on one channel of a multi-track tape recorder. The voice writer dictates the official verbatim record of proceedings in final form. All information necessary for the final transcript, including identification of participants, punctuation, non-verbal activities of participants, and other information required to produce the official transcript, is captured on tape by the voice writer. The voices of the participants in the court proceeding are simultaneously recorded on another track of the multi-track system, the microphones placed before the different speakers being monitored and adjusted by the court writer. Thus, the court has available for replay the voice writer's official record and the voices of all participating speakers.

Voice writing is a refinement of the stenomask system. In the stenomask system the reporter repeats verbatim the courtroom testimony into a microphone encased in an insulated mask. The voice writer does not use any mask; his speech is received by a standard microphone. Further, the voice writer uses a multi-track system in place of the single track recorder presently used by stenomask reporters. Again, while stenomask reporters are either self-taught or attend courses emphasizing only dictation speed, the voice writer is required to pass a qualifying examination and complete a four to five months training programme, in order to attain dictation proficiency and to learn courtroom procedures and nomenclature.<sup>55</sup>

A project conducted by the National Center for State Courts in Denver, Colorado,<sup>56</sup> evaluated the feasibility of multi-track voice writing as an alternative court reporting system and concluded that voice writing was superior in many respects to manual or machine shorthand.<sup>57</sup>

First, voice writing enables court reporters to be trained more cheaply and quickly.<sup>58</sup> In the United States many courts find it difficult to obtain competent court reporters for either full-time or temporary service. The same problem obtains in New South Wales; in fact, there is a growing shortage of court reporters skilled in shorthand. The limited availability can, in part, be attributed to the length of time required for training. Most new shorthand writers take two or more years to attain the speed and accuracy required to produce a high quality verbatim record, and additional time in court to familiarize themselves with court nomenclature and procedures. On the other hand, multi-track voice writers require less than five months - three to four months of classroom training and several weeks of courtroom exposure.

Second, voice writers can achieve, on average, higher levels of proficiency.<sup>59</sup> Where a certified court reporter examination is given in the United States the licensing body usually requires proficiency levels of 175 words per minute for single voice testimony (jury charge, opening statements) and 200 words per minute for multiple-voice testimony (95 per cent accuracy required). These levels are considered difficult for shorthand writers to reach and maintain over a prolonged time period, although very competent shorthand writers can reach higher speeds. Voice writers were tested at speeds of 200 words per minute for single-voice testimony and 220 words per minute for multiple-voice testimony. Voice writers can maintain these speeds over a prolonged period and can dictate at speeds of over 250 words per minute.

Third, the voice writer's record of the proceedings may be verified.<sup>60</sup> In most courts there is no way of checking the court reporter's notes. The court and counsel are to a large extent dependent upon what the stenotypist or shorthand reporter heard and recorded. Because the voice writing technique preserves both the court reporter's official record of proceedings and the actual testimony on a single tape, the system allows for simultaneous review of the court reporter's official record and the courtroom testimony.

Fourth, it is not necessary for a voice writer to be available during the transcription process.<sup>61</sup> Since a shorthand writer must be relied upon for the transcript, the record cannot be reviewed until an official transcript is prepared by the court reporter. However, a court reporter may die, become incapacitated or leave the jurisdiction after he has taken his shorthand or stenotype but before he has completed the transcription. Ordinarily, no one else is capable of deciphering his notes. By contrast, if voice writing is used, the court has available the unedited record of proceedings on one track of the tape and the voice writer's record on the other.

Finally, voice writing is more accurate in recording non-English testimony.<sup>62</sup> With manual shorthand or stenotype there is verification neither of the translator's communication in the foreign language to the participant nor of the statements made by the foreign-speaking participant. Statements made by a voice writer are dictated only in the English equivalent of the foreign-speaking participant's statements. However, all statements made by the translator and the foreign-speaking participant are recorded on a separate track. If questions arise concerning the accuracy of the translations, the court has available for review a record of both the non-English statements and the translation.

The National Center studies suggest that both multi-track voice writing and audio-recording are in many respects superior to manual or machine shorthand techniques. The remaining question is whether or not voice writing is superior to audio-recording.

The National Center has completed a further study<sup>63</sup> showing that audiorecording in New South Wales is superior to manual shorthand in the following respects: it is cheaper; daily transcripts can be finished more quickly - by 4.45 p.m. instead of 7 p.m. - and delayed transcripts can be provided at least as quickly as by manual shorthand trials are faster - no interruptions are caused by a reporter's inability to hear or by his inability to write shorthand fast enough to keep up with the speakers; mistakes can be more easily corrected; the accuracy of interpretations of a foreign language can be checked; and there are no interruptions caused by court reporters coming into and going from the courtroom.

In the audio-recording system a person in court monitors the recording and takes appropriate notes on a log sheet (spellings, index entries);-typists then transcribe the testimony from the tape recording. The multi-track recording system uses a court reporter who has a more difficult task; in contrast with a "logger" who merely monitors the audio record, a voice writer monitors, and concurrently prepares an official audio record of, the proceedings. Whilst additional personnel are not required for voice writing, a voice writer would receive a higher salary than a "logger". Again, voice writing uses more sophisticated, and thus more expensive, equipment. On the other hand, the voice writer saves time and expense because he produces a higher quality audio record. The voice writer may require the speaker to repeat inaudible or mumbled statements which are then recorded in the voice writer's clear diction. Since the record is better the cost of transcription will be lower. Indeed, it has been suggested that the typing rate from voice written material is at least double the rate of typing from direct voice recording.<sup>64</sup>

It may be that the lower courts, where there is a high volume of cases but a small number of appeals and requests for transcripts, would be best suited to audio-recording systems. If a court knows which type of proceedings have a high probability of requiring a transcript, voice writers can be used to ensure the highest possible quality of official record. Thus, if a multi-track system is installed, a small pool of voice writers can be on hand to cover proceedings where an appeal is likely. Whatever the ultimate arrangement, the case for multi-track voice writing as an alternative court reporting system is strong, and my recommendation is that it be introduced in New South Wales on an experimental basis.

Shorthand and audio-recording techniques are noiseless and unobtrusive court reporting systems. In the National Center project voice writers were extensively observed by judges, lawyers and court administrators. There was practically unanimous agreement that the demeanour and professionalism of the voice writers were satisfactory and that the voice writing system did not disrupt the trial or distract any participants.<sup>65</sup> From my observations in Boston I support this opinion.

## Footnotes

55. *Multi-Track Voice Writing: An Evaluation of a New Court Reporting Technique*, National Center for State Courts, (Executive Summary, 1973) pp. 4-5.

56. *Ibid.*

57. *Id.* pp. 74-84.

58. *Id.* p. 75.

59. *Id.* pp. 75-76.

60. *Id.* p. 76.

61. *Id.* p. 78.

62. *Id.* p. 84.

63. *Court Reporting: Lessons from Alaska and Australia*, National Center for State Courts (1974).

64. Ebersole, "Improving Court Reporting Services", *Federal Judicial Center*, (1972) p. 11.

65. *Multi-Track Voice Writing: An Evaluation of a New Court Reporting Technique*, (October, 1973) p. 82.

**CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:  
VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

**X. Diversion of Public Criminal Prosecutions - Columbus, Ohio**

The City Attorney's office in Columbus, Ohio has developed a diversion programme, known as the "Night Prosecutor Program", for channelling many offences, resulting from personal disputes, out of the court system. The programme, which was inaugurated in November, 1971, is currently located in the Prosecutor's Office in the Central Police Station of Columbus. By means of hearings held in the evenings, the hearing officer helps antagonistic parties to resolve their disputes in face-to-face confrontations as soon as possible after the event which prompted the criminal complaint. I observed the hearings and had extensive discussions with a co-founder of the project, Professor John Palmer of Capital University Law School, Columbus. The other co-founder is the City Attorney, Mr. James Hughes.

The principal objectives<sup>66</sup> of the programme are: (1) to reduce court congestion by assisting citizens to solve their personal problems by agreement; (2) to ease tensions between parties involved in a dispute by helping them find an equitable solution to their problems; (3) to prevent the person at fault acquiring a criminal record, which could result in his losing his job or being denied gainful employment at a future date; (4) to provide a forum for the working poor at times which do not interfere with their jobs; (5) to speed the dispensation of ' justice to citizens who become involved in minor criminal conduct; (6) to act as a clearing-house by directing the public to other agencies for aid in solving social problems - for example, Alcoholics Anonymous, Salvation Army, Volunteers of America, the Ombudsman, churches and mental health organizations; and (7) to promote faith in the American legal system by listening to all grievances and by encouraging the citizen to feel that the law and the government care what happens to him as an individual.

The office of the City Prosecutor, headed by the City Attorney, Mr. James Hughes, screens all criminal matters involving private citizens and decides which cases are appropriate for diversion into the Night Prosecutor Program. In general, these are matters in which there is a continuing relationship between the parties, such as in the case of families, neighbours, landlords and tenants, or employers and employees. Should the Night Prosecutor Program fail to resolve the dispute, criminal remedies are still available.

Instead of an affidavit being prepared, signed and filed with the Clerk of Courts, a complaint is lodged and an administrative hearing scheduled for approximately one week later. This is a significant time saving for the complainant: it would probably take months for the case to reach trial. Notice is sent to the person accused, advising him of the fact that a complaint has been made against him, and stating the basic charges and the time of the hearing. The notice does not carry the legal force of a subpoena. However, if a party does not attend, as requested, the other may file a criminal complaint in the usual way.

All hearings are scheduled in half-hour blocks between 6 p.m. and 10 p.m. Hearings are held in a private room in the Office of the City Prosecutor, in the presence of the hearing officer, the complainant, the respondent, attorneys (in rare cases) and witnesses, if there are any. The main tasks of the hearing officer are to discover and expose the issues which precipitated the original dispute and to act as mediator and conciliator. The hearing officer conducts the hearing informally, inviting each party to tell his side of the story without interruption. The hearing officer may ask questions and the parties or witnesses may talk with each other in an attempt to work out a solution to the underlying problem. Hearings are "free-flowing", without regard to the rules of evidence, burdens of proof, or other legalities. Emotional outbursts are common and are not discouraged: without shouting, crying and other expressions of emotion, the basic truth often does not surface.

Early in the programme it became apparent that, since few of the disputes involved questions of law, hearing officers required the skills of a mediator rather than an extensive legal background. As a result the project was revised to include law students as hearing officers, with the Night Prosecutor acting as consulting supervisor. The legal background of the hearing officers generally proved to be more than adequate for the task.

In 1974 some 6,180 disputes were scheduled for hearing by the Night Prosecutor Program. In only 3,274 (52 per cent) of these did the parties appear. In most of the other cases both parties failed to appear and no further action was taken. Of all cases processed only 328 criminal complaints were authorized and cases scheduled for court hearing. The programme also handled 4,227 bad cheque cases of which 237 resulted in the authorization of criminal complaints. In gross figures, a total of 10,407 criminal complaints was processed by the Night Prosecutor Program and only 565 criminal complaints were authorized. Thus, a total of 9,842 cases was diverted from the criminal justice system.<sup>67</sup>

During 1974 a "call back" programme was initiated. About 30 days after hearing, the parties were contacted by a hearing officer to find out how matters stood. In more than 90 per cent of cases called during 1974 a satisfactory solution had been achieved. Of the remainder only 1.2 per cent had a further contact with the criminal justice system through a police run or new filing.<sup>68</sup>

In the first nine months of 1975 there was a trend similar to that which obtained in 1974. Of 10,582 cases scheduled for hearing only 5,098 cases were heard. The "call back" programme showed that 93.72 per cent of all cases heard resulted in a solution of the underlying problem and that in only 1.2 per cent were new criminal charges filed. Thus 98.8 per cent of all cases heard by the Night Prosecutor were diverted successfully from the criminal justice system.<sup>69</sup>

In New South Wales criminal proceedings are initiated in most cases by a police officer. However, any person may initiate proceedings by laying an information before a justice of the peace or a magistrate. Proceedings, once commenced, take basically the same form as those initiated by the police. In cases instituted by the police a police prosecutor generally conducts the prosecution whereas, in the case of the private information, the informant and the defendant may appear in person or through their counsel. In practice, the parties in a private prosecution are often unrepresented and the proceedings are conducted informally. The defendant, if convicted, may be fined and/or placed on recognizance, or imprisoned.

Every year thousands of private criminal charges are processed in New South Wales. Most charges concern disputes arising within a family or between neighbours, and involve only minor injury to person or property. In many cases the disputants have consulted the police who have refused to initiate proceedings, generally because the injury or damage complained of is trivial.

It is difficult to make generalizations on the time taken in hearing private criminal charges. In a few Courts of Petty Sessions in the metropolitan area of Sydney two or three days may be required. At the other extreme, in some areas, charges like this may occupy far less than a day. On the average approximately one day of weekly court time in suburban areas is devoted to hearing private criminal charges.

Before an information is filed, the complaining party sees the chamber magistrate who canvasses the merits of the dispute and attempts to settle it by some means other than court proceedings. In most cases this is very successful; the disputes which reach court constitute only a small fraction of all complaints made at the courthouse. It is regrettable, but unavoidable, that some of these are trivial or unmeritorious.

In my submission there are a number of compelling reasons for introducing an arbitration programme, similar to the "Night Prosecutor Program", into New South Wales.

First, I believe that many people take court proceedings because other procedures for dealing with their personal problems are not available. Many persons are easily dissuaded from pressing charges, and they are relieved that it is not necessary when they find another recourse available. An arbitration process permits the parties the satisfaction of airing their grievances without having to resort to criminal proceedings. Once the problem is out in the open the disputants often realize they can solve it without further formal assistance.

Second, in family and neighbourhood disputes, both parties are often equally culpable. The complaining party is the one who wins the race to the police station or courthouse. Here an arbitration process is particularly suitable because it encourages compromise between the parties without the need to determine guilt or innocence. The purpose of the hearing is not to determine right or wrong, nor is it to impose sanctions. Rather, the fundamental goal is to reach a mutually satisfactory settlement, whether by restitution, or by a promise to discontinue the source of grievance. The parties are able to present their own versions of the incident without interruption from others. The hearing officer, as a mediator, merely moves the discussion towards reconciliation. The criminal justice process is not suited by nature to working out compromises and solutions to personal problems. The courts consider only whether a crime has been committed and, if so, who is guilty of committing it.

Third, an arbitration programme conducted in the evening is likely to be convenient to the parties in conflict. In Columbus, evening hearings are conducted on weekdays and Saturdays to enable working persons to participate without loss of wages or fear of loss of employment. In the suburban Courts of Petty Sessions in Sydney a hearing on one night a week would probably meet present needs. The importance of not compelling the parties to miss work cannot be over-emphasized. Whilst observing a similar, but day time, diversion programme in Philadelphia, I heard a respondent husband complain about losing time from work because it was the fifth time his wife had "dragged" him into court. An arbitration programme held in the evening thus acknowledges the problems of the less privileged.

Finally, arbitration hearings are responsible for considerable savings in time and expense. I have already discussed the considerable savings in court time effected by the "Night Prosecutor Program"; from January, 1974, to September, 1975, only 1.2 per cent of those cases where an arbitration hearing was conducted resulted in the filing of a new criminal charge. One cost study<sup>70</sup> undertaken in Columbus indicates that the cost per case heard in the "Night Prosecutor Program" is US\$27.10. If the computation is based on cases successfully resolved the cost per case is US\$30.30. However, if the computation includes those disputes which were presumably settled without direct intervention - that is, where cases were scheduled but charges were withdrawn prior to the hearing - the cost per case is only US\$20.12. By comparison, a rough estimate of the cost of processing a criminal misdemeanour through the Columbus court system, from the filing of an affidavit to the end of trial, is US\$100; and this estimate could go as high as US\$250 a case, depending on the ultimate disposition.

My recommendation is that an arbitration hearing be conducted in those cases where the complaining party has discussed the dispute with the chamber magistrate and, after receiving his advice, decides to proceed with the

charge. The purpose of the hearing is to settle the dispute, if at all possible, and the opposing party must therefore be encouraged, but not compelled, to attend. If the attempt at settlement fails, the aggrieved party may still seek redress in court by taking proceedings in the usual way. It may be that a chamber magistrate could preside at the arbitration hearing, and in fact some chamber magistrates are already available at night in certain parts of New South Wales. Consideration could perhaps be given to the appointment of additional chamber magistrates from the Petty Sessions Branch to preside at these hearings. Certainly the presiding officer must have some legal knowledge as he must be able to advise the parties of their legal position and of the penalties prescribed by law. For the convenience of the parties some hearings should be conducted in the evening; in most suburban courts this would mean that hearings were held on only one night of the week. I suggest an experiment in a few courts to determine whether it makes a contribution to improving the criminal judicial process. The results of the Columbus programme suggest that the experiment could well be successful.

### Footnotes

66. *Manual, Citizen Dispute Settlement*, U.S. Dept. of Justice, (1974) pp. 3-6.

67. Palmer, "The Night Prosecutor", 59 *Judicature* (1975) pp. 26-27.

68. *Ibid.*

69. Statistics for 1975 provided for me by Professor John Palmer.

70. *Op. cit.* note 66, p. 34.

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**XI. Pre-Trial Conferences in Criminal Cases - Central Criminal Court, London**

In the Central Criminal Court in London there is a step between committal and trial at which counsel on both sides appear before a judge for the purpose of determining the issues and settling various preliminary matters prior to the start of the trial. The procedure is commonly referred to as a "summons for directions", a term borrowed from civil procedure. It was first used informally, and only in cases known to involve potentially lengthy hearings, by presiding judges of Circuits after the creation of the Crown Court. As a result of an initiative by the Criminal Bar Association an experimental procedure, on more formal and defined lines, was instituted at the Central Criminal Court in November, 1974. Whilst in London I heard many favourable comments about this innovation.

The procedure is commenced by an application from either party once the case has been listed. The hearing is normally held not earlier than 14 days before the date fixed for the trial. The hearing, which the accused is entitled to attend, may be in chambers but any orders are made in open court. Counsel are expected to be able to inform the court of: the pleas; the necessary attendance of prosecution witnesses; any notices of further evidence; any additional witnesses who may be called (including a written summary of the evidence those witnesses are expected to give if detailed statements have not been taken from them); any admissions of facts or exhibits under section 10 of the Criminal Justice Act 1967 (U.K.); the probable length of the trial; any issues relating to the mental or medical condition of the accused or a witness; any point of law or question relating to the admissibility of evidence that may arise; the names and addresses of witnesses whom the prosecution might reasonably call, but does not intend to call; and any alibi not already disclosed in accordance with the provisions of section 11 of the Criminal Justice Act.

An agreement reached at the hearing may not be binding but, if at the trial there is a departure from the directions previously given, the court may call for an explanation and visit any abuse of the process of the court, or waste of time, with a sanction reflected in the order for costs. Where a hearing has taken place in chambers in the absence of a shorthand writer, counsel at the trial have at times differed on the precise ambit of admissions. Obviously all admissions should be reduced to writing at the hearing.

The experimental procedure has been used for long and complex cases. I received information from a number of sources that it has considerably reduced the length of the subsequent trials. The results have been so encouraging that the Lord Chancellor has requested Circuit administrators to consider the introduction of the procedure on a formal basis at the main Crown Court centres. However, it is generally agreed that, while the procedure is apt for long cases, it is unnecessary for short and uncomplicated cases, since it would involve too much time, trouble and expense. At the Central Criminal Court an advantage exists in that it has usually been possible for the same judge to hear the summons for directions and to preside at the trial. Again, in that court, accused persons have been able to attend the hearing of the summons for directions without any complicated arrangements being necessary. The same advantages may not be obtainable in provincial court centres.

I recommend that a pre-trial conference for lengthy criminal trials be introduced on an experimental basis in Sydney.

The date for the pre-trial conference should be fixed at the call-over when the case is given a final trial date. The English experience suggests that the conference date should fall on a day within 14 days of the date set for trial. Administrators of the new scheme believe that, if the conference date is kept close to the trial date, there is a



greater chance of securing the attendance of the counsel who would conduct the trial. In practice the requirement in the Practice Rules, that hearings for directions be attended by “counsel briefed to conduct the case on trial or in special circumstances counsel specifically instructed”, has proved to be essential. It has been found that, where counsel are incapable of accepting responsibility for decisions, or of giving accurate information, the hearings have little purpose. As pre-trial conferences would be confined to major trials, and can make substantial savings in time and expense, there seems to be no reason why counsel should not be paid on the basis of a full brief-on hearing fee. At the Central Criminal Court in London, counsel attending a hearing for directions are paid at a refresher rate which is considered by some to be too low.

The same judge should preside at the pre-trial conference and at the trial. It is generally accepted that one reason for the success of the London experiment is that the same judge can usually hear the summons for directions and preside at the trial. Clearly, savings in time are enhanced where the judge trying the case has previously mastered its details.

In London I was assured that discussions between the trial judge and counsel, in chambers and open court, had not led to any judicial involvement in plea bargaining. It is fundamental to the success of pre-trial conferences in New South Wales that the judge does not become so involved. I investigated many pre-trial conferences in the United States where, in one form or another, they are very common. Generally their purpose is, not merely to dispose of all foreseeable procedural and evidentiary matters prior to trial, but to settle the case if at all possible. It is accepted that a judge may, upon request, suggest what may be a just disposition should a plea of guilty be entered. That such judicial involvement greatly facilitates the administration of criminal justice through its encouragement of guilty pleas is one of the justifications given for its existence. However, judicial involvement in plea negotiations has been denounced in England<sup>71</sup> and Australia.<sup>72</sup>

The procedure at the pre-trial conference should be similar to that now being used at the Central Criminal Court in London. Specifically, counsel in New South Wales should be able to inform the court of:

- (1) the pleas to be tendered at the trial;
- (2) prosecution witnesses to be called at the trial, as shown on the committal documents, and of the availability of such witnesses;
- (3) statements of evidence to be given by prosecution witnesses, additional to the evidence given at the committal hearing;
- (4) any additional witnesses who may be called by the prosecution and of the evidence that they are expected to give or, if detailed statements of these witnesses are not then available, a summary in writing of the evidence that they are expected to give;
- (5) facts which are admitted, and which will be reduced to writing within such time as may be agreed at the hearing;
- (6) exhibits which are admitted;
- (7) prosecution witnesses whose attendance at the trial will not be required by defence counsel;
- (8) any alibi not previously disclosed in accordance with section 405A of the Crimes Act, 1900;
- (9) issues, if any, then envisaged as to the mental or medical condition of any accused person or of any witness;

(10) any point of law which may arise at the trial, of any question as to the admissibility of evidence which then appears on the face of the papers and of any authority on which either party intends to rely as far as can reasonably be foreseen at that stage;

(11) the probable length of the trial; and

(12) any other significant matter which might affect the proper and convenient trial of the case.

The court should be empowered to order a pre-trial conference either of its own motion or upon the application of either the Crown or defence counsel. The most important factor influencing the court's decision should be the length and complexity of the case. I understand that the duration of cases at the District Court level is approximately as follows:- up to two days, 40 per cent of all cases; up to three days, 70 per cent of all cases; and up to four days, 80 per cent of all cases. In the Supreme Court the distribution is approximately as follows: up to two days, 20 per cent of all cases; up to three days, 75 per cent of all cases; and up to four days, 85 per cent of all cases. It may be that a pre-trial conference for cases expected to last five days or more (15 to 20 per cent of all cases) would result in a saving of time and money, although the experiment should commence with the most complex cases in the first instance.

My investigations do not support a general proposition that pre-trial conferences should be essential to the disposal of all indictable offences. In many of the smaller cases the benefits would be minimal and would be far outweighed by the time and expense involved in pre-trial conferences. Such a conference not only adds an extra step to the judicial process, but also requires that counsel be fully briefed for it. It would clearly be absurd for the court to hold a pre-trial conference for all indictable offences. On the other hand, if the innovation is confined to the expectedly lengthy and complex case, there could well be a considerable saving in time and expense.

## Footnotes

71. *R. v. Turner* [1970] 2 W.L.R. 1093.

72. *R. v. Bruce* (Unreported) High Court of Australia: 21 May, 1976.

## CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE

### XII. Committal Proceedings - England and Wales

Until 1968 there was only one form of committal proceedings in England and Wales. This procedure, which is still used in some cases, requires that the justices hear the witnesses for the prosecution, whose evidence is recorded in the form of written depositions. The accused must be present and he may be legally represented. The defence may cross-examine witnesses. The accused may give evidence and he may call witnesses, but he need not say anything or produce any evidence. Usually the defence is reserved; that is to say, no indication is given of whether the case will be defended or what the defence may be at the trial. The justices then decide whether the accused ought to be committed for trial and whether he ought to be released on bail or kept in custody to await his trial.

In England and Wales the Criminal Justice Act 1967 (U.K.) introduced substantial changes in respect to committal proceedings. The relevant sections of the Act came into force on 1 January, 1968. Basically, the Act introduced a procedure whereby the accused can be committed for trial upon evidence contained only in written statements, without consideration of the evidence by the magistrates, provided that he is legally represented and consents to this procedure being followed. The Act also introduced substantial changes in regard to public access to, and publication of, committal proceedings, but I do not propose to discuss that subject in this report.

Section 1 of the Act empowers the examining justices, or a magistrate, to commit the accused for trial, not only on the basis of written statements without oral evidence, but also without the justices or magistrate having considered the contents of the statements unless: (1) the accused, or one of several accused persons, is not represented; or (2) the legal representative of the accused, or of one of several accused persons, has requested the court to consider a submission that the statements disclose insufficient evidence to support a committal. The section provides a number of safeguards for the accused - for example, the written statements must comply with a prescribed form; all the evidence of the prosecution and defence (if any) before the court must consist of written statements; and all accused persons must be legally represented. The procedure cannot be used if the accused is a person under 17 years of age.

If the prosecution does not want to use committal proceedings, it must serve on each of the accused persons or on their solicitors, copies of the statements of the prosecution witnesses. If the prosecution believes that it is possible to make out a *prima facie* case without tendering the statement of a particular witness, or without calling him to give evidence, even though he may be the principal witness, that is a matter within its discretion. The prosecution cannot be compelled to use the statement of a witness at the committal proceedings.

The written statements served on the accused are equally admissible as the same evidence would be if given orally by the witness. The statement must be signed by the witness, and contain his declaration that he believes it to be true and that he is aware that he may be prosecuted for wilfully making a false statement. If any accused person objects to the admission of a written statement before it is tendered in evidence, the committal proceedings must take their ordinary course.

The examining justices or magistrate may commit the accused for trial without considering the contents of the statements, where the accused: (1) having seen the statements, does not elect to have any of the witnesses called to testify; and (2) does not submit that there is insufficient evidence to put him on trial. The court may, of its own motion or on the application of any of the parties to the proceedings, require a witness to give oral evidence.

As noted above, committal for trial previously involved, in every case, the hearing of oral evidence by the magistrates and the recording of the evidence in the form of depositions. This was an extremely laborious and time-consuming procedure. It did provide an opportunity for cross-examination of the prosecution witnesses. However, in the many cases in which the defence did not intend to resist committal, it served little useful purpose beyond disclosing the evidence - often the minimum necessary to ensure committal - upon which the prosecution intended to rely. The procedure was particularly wasteful of manpower and time in cases where the accused intended to plead guilty in the higher court. The opinion in England is unanimous that the procedure of committal, without consideration of the evidence by the magistrates, has relieved them of a heavy burden in the large majority of cases and has generally effected a substantial saving of time.

The procedure in committal proceedings in New South Wales is similar to that which previously obtained in England and Wales. Where a person is charged with an indictable offence it is generally necessary for a magistrate to conduct a preliminary hearing to ascertain whether or not there is a *prima facie* case so as to justify committing the accused for trial to the District Court or to the Supreme Court.

The charge is formally read to the accused but no plea is taken. The depositions of every witness are then taken down in writing in the presence of the accused. The deposition is read either to or by the witness and is signed by him and by the magistrate, except where the magistrate directs that the deposition shall be taken down by shorthand, stenotype machine, sound-recording apparatus or other authorized means.

It is proper for counsel to examine every avenue of defence open to the accused and, for this purpose, to cross-examine exhaustively the witnesses for the prosecution. Counsel has the advantage of being able to ask questions which may elicit answers unfavourable to the accused but which will not be heard by a jury. When the prosecution case has been completed the accused may make a statement, give evidence himself and/or call witnesses in his defence. At the conclusion of the hearing the magistrate may discharge the accused or commit him for trial.

Criticisms made of committal proceedings in England before 1968 could be applied to the procedure in New South Wales. Committal proceedings in this State can be very slow and expensive. Ideally the defence should use the hearing to test fully the prosecution case. But often the proceedings serve to present the prosecution case and little else. The wastage in time and money is particularly acute when the accused pleads guilty in the higher courts after being committed for trial.

At the same time, the traditional form of committal procedure in New South Wales serves two primary purposes. First, it ensures that a person will not be required to stand trial for an indictable offence unless a *prima facie* case has been established.<sup>73</sup> It thus serves as a safeguard against speculative prosecutions by requiring that the evidence be such that, if uncontradicted at the trial, a reasonable jury may convict upon it. Second, committal proceedings give to the accused full notice, not only of the charge against him, but also of the evidence which will be called to support the charge.<sup>74</sup> At the conclusion of the proceedings the accused knows substantially what case has to be met. He has an opportunity of deciding how to plead and of seeking to obtain the evidence needed to answer the prosecution's case.

There are other advantages. Committal proceedings enable witnesses to give their evidence whilst the matter is still fresh in their minds; the reliability of witnesses is tested, and the prosecution may discover weaknesses in its case at a time when they can still be remedied. Committal proceedings may lead to a withdrawal of the prosecution by the entry of a *nolle prosequi*, may help in the proper framing of the indictment, may assist in estimating the length of trial, and may encourage a plea of guilty through the presentation of a strong case for the prosecution.<sup>75</sup>

There is a strong body of opinion in England which holds that the primary aim of committal proceedings is not satisfied under the new procedure. It is put that a significant number of persons are committed for trial on evidence which does not justify a committal. It is not possible to support this opinion statistically but, from the many conversations I have had on the subject, I have no doubts that it is well-founded. Several reasons have been advanced to explain why cases are committed for trial when a submission of "no case to answer" would stand a fair chance of success. One reason is that solicitors do not always have time to prepare the case for a contested summary trial and they find it easier to agree to a committal under section 1 of the Criminal Justice Act 1967 (U.K.) and then brief counsel. Another reason is that some solicitors undertake more business than they, or their staff, can cope with efficiently. A further reason is that defence lawyers consider that delay may assist their clients. And it is said that the prosecution often welcomes the consent procedure because it allows more time to strengthen what may be a very weak prosecution case.

There is no move in England for the abolition of the committal procedure in its new form. That would be seen as a retrograde step, as the advantages of the new procedure demonstrably outweigh its disadvantages. To revert to the old form of committal, in all cases, would be impracticable because of the burden it would impose on magistrates and staff. The new system is on a firm footing, subject to finding a solution to the problem caused by weak cases being committed to the Crown Court.

One suggested solution is that provision should be made for magistrates to consider, on the basis of written statements, whether there is a case to answer. Such a provision could either require them to read the statements or simply enable them to do so. The James Committee has raised two valid objections to this suggestion.<sup>76</sup> First, it is not practicable because it would, in obliging magistrates to read the statements, impose an unacceptable burden on them and an even heavier burden on their clerks, who would also need to read the papers. Even if the power were only permissive, it would be necessary, in virtually every case, for some preliminary examination to be made of the papers in order to decide whether to refer them to the bench. Second, the suggestion is not desirable because it offends against the fundamental concept of a committal under section 1 of the Criminal Justice Act 1967 (U.K.) which is a committal without consideration of the evidence by the court.

Another solution, proposed by the James Committee, is that, before a person is committed for trial under section 1 of the Act, the person conducting the prosecution, and the defence advocate, should be required to sign a certificate to the effect that they have examined the statements of the witnesses and are satisfied that the case is suitable for committal for trial under the section, without consideration of the evidence by the court.<sup>77</sup> The James Committee suggested that this procedure be made statutory.

It felt that this procedure would remind the prosecuting police or solicitor to consider whether the offence charged was supported by the evidence, and, if so, whether the interests of the parties and the administration of justice would be better served by either reading the statements to the court or hearing the evidence of some or all of the witnesses. It also considered that this innovation would ensure that the accused's solicitor examined the statements and satisfied himself, on the evidence disclosed, that the case was a suitable one for committal under section 1. A specific sanction was not thought necessary or advisable, because the legal profession could be

trusted to act in accordance with the duty owed by them to their clients and to the court. Abuse of the system would be very uncommon and the court could give directions to the taxing officer if it were necessary that he take account of any exceptional cases. No additional measures were considered necessary.

I do not share the Committee's enthusiasm for this proposal. If my assessment of the position in England is correct, the present problem can be primarily attributed to pressures placed on solicitors through shortages of time, staff and finance. The solution to the problem should involve a procedure which reduces these pressures. In my view the parties may initially pay some attention to the formal requirements of the new system, but it would not be long before the procedure became a meaningless routine, with weak cases proceeding to the Crown Court as before.

I recommend that there be introduced in New South Wales a new form of committal proceedings of the type now in use in England and Wales; that is to say, a person, with his consent, may be committed for trial on the basis of written statements, without consideration of the evidence by the magistrate.

I further recommend that this innovation be made subject to conditions similar to those now obtaining in England and Wales. The most important conditions are that: the accused is not less than 18 years of age; the accused and any co-accused persons are legally represented; the written statements, which constitute the evidence for the prosecution, are in the form of statutory declarations or statements verified by affidavit; and the accused and any co-accused persons consent to committal for trial without consideration of the evidence by the magistrates. The court may, of its own motion or on the application of any party to the proceedings, require a person who has made a statement to attend to give oral evidence.

Under the present procedure, committals can be measured in hours or days and, at times, weeks and months. The new procedure takes only a few minutes. It saves the time not only of courts but of witnesses, with considerable saving of expense and mitigation of inconvenience as a result.

The problem, experienced in England, of weak cases proceeding to the Crown Court is a matter of concern. It is not easy to determine whether, in New South Wales, weak cases will proceed to the District Court and to the Supreme Court for jury trial. Indeed, it is difficult to know how popular the new form of committal will be.

In my view, it would be wise to experiment by allowing the new procedure to operate in a small number of courts and by assessing, not only the extent to which the new form is used, but also the quality of the cases in which the consent procedure is adopted. However, it would be unwise to commence this experiment unless cases where the accused has been committed for trial can be thoroughly "screened" before trial. In my view, a more thorough "screening" procedure can be introduced without undue expense.

In New South Wales, power to set in motion a trial for an indictable offence is restricted to the Attorney General, the Solicitor-General and the Crown Prosecutor, although, in practice, most prosecutions are conducted by Crown Prosecutors. Some offences cannot be prosecuted by a Crown Prosecutor without the leave of the Attorney General. But Crown Prosecutors are prosecutors in their own right, not delegates of the Attorney General.

Normally, the filing of an indictment by a Crown Prosecutor is preceded by the laying of an information by a police officer in a Court of Petty Sessions. Thereafter a preliminary hearing results in a committal for trial. The depositions of evidence at the preliminary hearing are sent to the Crown Prosecutor who decides whether there is sufficient evidence to justify a trial. The Crown Prosecutor may reframe the charge, add new charges, or prefer a different charge entirely. He may decide that the evidence is insufficient and decline to proceed. If an indictment is filed the prosecutor can still bring proceedings to a close before final adjudication by entering a *nolle prosequi*, which is simply a notice of discontinuance.

In determining whether to file an indictment, a Crown Prosecutor in Sydney has two major sources of guidance. First, prosecution witnesses at the committal are generally tested in cross-examination by a solicitor or counsel for the accused. In Sydney the accused is represented in approximately 90 to 95 per cent of committals for trial. Of course the testing of the prosecution case is not always as thorough and extensive as it ought to be. However, the defence advocate's cross-examination is to some extent supplemented by questions from the magistrate, who must be satisfied there is a *prima facie* case before committing the accused for trial.

Second, the Crown Prosecutor is assisted by a report prepared by a legal officer from the office of the Clerk of the Peace. It includes formal information, such as the name of the accused, details of the charge, a statement of the facts, a list of the witnesses and a summary of their evidence, a list of additional witnesses and a summary of what evidence they are expected to give, observations and comments on the strengths and weaknesses of the prosecution case, and a recommendation on the appropriate charges.

If the consent procedure is introduced the Crown Prosecutor will not have the assurance that his witnesses have been tested in the lower courts. In my view this disadvantage can be offset by giving to the Clerk of the Peace a more important role in "screening" a case before trial. At present, witnesses for the prosecution are rarely interviewed prior to indictment. There seems to be no reason why officers of the Clerk of the Peace should not then interview important witnesses. A lawyer can form a very good idea of the reliability of a witness by "cross-examining" him on his statement prior to trial.

The responsibility for presenting a case to answer to a jury remains that of the Crown Prosecutor. If he elects to proceed he must sign an indictment in his name. If he is unsure whether or not a critical witness is reliable it is his responsibility to use the assistance available. Should weak cases be presented before the court he must shoulder the blame. In New South Wales there cannot be any doubt as to who is in charge of the prosecution case and who is responsible for it.

The innovation I propose will not be without expense. All accused persons must be represented for the new procedure to operate. But I have already pointed out that, in Sydney, most accused persons are represented at their committal for trial. It would not be unduly expensive to close the remaining gap by authorizing solicitors from the Public Solicitor's Office to conduct these committals. The professional staff of that office already provide legal aid in committal proceedings where offences fall within section 476 of the Crimes Act, 1900, *i.e.*, those indictable offences triable summarily with the consent of the magistrate and of the accused. Further expense would have to be incurred in expanding the office of the Clerk of the Peace. However, in most indictable offences, the success of the prosecution case turns on the reliability of one or two witnesses. Thus, most witnesses would not have to be interviewed. In many cases the principal witnesses are policemen, and a preliminary interview would not be warranted. Any additional expense must be balanced against the considerable savings that would be effected by the new procedure. In my view, the case for experimenting with committals for trial by consent is a convincing one.

## Footnotes

73. Criminal Law and Penal Methods Reform Committee of South Australia, *Third Report on Court Procedure and Evidence*, (1975) p. 7 1.

74. *Ibid.*

75. Frohlich, "Committal Procedures in England and Australia", (1975) 49 *A.L.J.* p.561.

76. *The Distribution of Criminal Business between the Crown Court and Magistrates' Court*, Cmnd. 6323, (1975) para. 234.

77. *Id.* Paras 235-239.



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**XIII. "Screening" of Criminal Charges - Cook County, Illinois**

In the United States the federal government and each of the 50 States has its own separate system of courts. Each of the 92 districts in the federal system has its own United States Attorney whose role is to represent the federal government in, *inter alia*, prosecuting in federal courts all federal crimes committed within his district. However, the United States Attorneys are not concerned with the great bulk of crimes committed in the United States, for they handle only federal crimes. Most crimes involve State laws and are prosecuted in State courts by District Attorneys and, occasionally, by Attorneys-General.<sup>78</sup>

In most States police officers generally exercise unfettered control over the specific criminal charges to be brought against defendants. A far better system, used by all United States Attorneys and in a few States, brings major prosecutorial decisions under the control of the United States Attorney or District Attorney by requiring that all felonies and serious misdemeanours be "screened" and approved by his office before filing. This programme requires prosecutors to be available to "screen" felony or serious misdemeanour charges proposed by the police. I investigated "screening" of criminal charges in Cook County, Illinois, where the procedure is of recent origin and has been very successful.

Until 1971, a systematic programme for pre-charge prosecutorial "screening" did not exist in Cook County, except for advice given by duty assistant prosecutors. That advice was often rejected by police within the county as they were not obliged to seek the advice of the State's Attorney in felony cases. In 1971 a programme was instituted, in co-operation with the Chicago Police Department, requiring prior approval by an Assistant State's Attorney of all search warrants requested by the police and of the preferring of all homicide charges. By 1972 that programme extended throughout the county.

Starting in February, 1972, the State Attorney's office began to "prescreen" all serious felony charges on the south side of Chicago. A Police Department General Order forbade certain felony charges within that area unless first approved by one of the prosecutors assigned to that special duty. Assistant State's Attorneys were stationed in offices near police stations in Chicago to provide 24 hour legal assistance to police officials in cases involving serious felonies. In 1973 the felony "screening" programme was expanded city-wide and, in 1974, county-wide.

In 1974 the programme was also expanded by adding to the list of felonies subject to "screening". The revised programme included homicide, rape, robbery, aggravated battery, burglary, attempted burglary and related offences, various offences relating to vehicle thefts, major non-vehicular thefts involving over \$2,500, kidnapping except where family related, arson, bombing, cartage thefts, deceptive practices involving confidence games, sale of heroin for \$100 or more, possession of heroin with street value of \$500 or over 30 grammes in weight, sale of cocaine for \$100 or more, possession of cocaine with street value of \$500 or over 30 grammes in weight, sale of marihuana worth over \$150 in street value, possession of marihuana with street value over \$500 or in excess of one pound, any sale of stimulants and barbiturates over \$50 in street value, possession of more than 100 capsules of stimulants or barbiturates, and any other cases where the watch commanders deemed advice or assistance appropriate.<sup>79</sup>

Prior to the implementation of the programme in Chicago, the investigating police made the decision to charge usually at the patrolman level, subject only to revision by a supervising sergeant or, in exceptional instances, his

watch commander. It was believed that police in Chicago charged at the highest possible level and left it to prosecutors and judges to reduce or dismiss charges where the law or evidence so required.<sup>80</sup>

The results of the "screening" programme seem to confirm this belief.<sup>81</sup> For the six months from February, 1972, the "screen-out" rate in the south side of Chicago was about 20 per cent. That is to say, about one-fifth of the felony charges proposed by the police were either rejected entirely for prosecution or were charged as misdemeanours only. The programme thus "weeded out" many cases that should not have been prosecuted and strengthened, through on-the-spot prosecutorial advice and direction, the cases that were charged as felonies. In 1973, when the felony "screening" programme was expanded throughout the city, the "screen-out" rate rose almost to 30 per cent. In 1974 the "screen-out" rate in Chicago dropped to 25 per cent as the State's Attorney assumed a more vigorous prosecution of rape charges.<sup>82</sup>

The Commission inquiring into the criminal justice system in Cook County was so convinced of the importance of "pre-screening" that it sought funds to enable the State's Attorney to expand his suburban and city "screening" staff to the capacity necessary to "pre-screen" on a 24 hour basis all felony and serious misdemeanour charges throughout the county. The Commission regarded this expansion as a matter of urgent priority.<sup>83</sup>

"Pre-screening" of criminal charges in the United States has many advantages. First, it saves time and expense by eliminating frivolous matters from the criminal judicial process and by restricting charges to those supported by a *prima facie* case. Second, it avoids stigmatization of defendants who should not have been charged so seriously or at all. Third, it reduces the expenses of defendants who must meet not only the heavy expense of bond money for serious charges, but also counsel's fees, which are several thousand dollars in most felony cases. Fourth, it eliminates the feeling of unease experienced by witnesses or victims who do not understand why charges, once approved, are later reduced or dismissed. Fifth, it ensures that serious criminal cases are properly prepared from the beginning with immediate legal direction from the prosecutor. Sixth, "screening" lessens discrimination in criminal prosecution in that the decision to prosecute is based on matters of policy that ensure a more evenhanded administration of the prosecution process. Finally, in restricting overcharging, "screening" lessens the incidence of plea bargaining by limiting the options that a District Attorney can offer to the accused.

In New South Wales almost all prosecutions are conducted or are commenced in Courts of Petty Sessions. These prosecutions are generally conducted by "police prosecutors". The police prosecutors are trained specifically to act as advocates for the informant in Courts of Petty Sessions and as assistants to coroners. A police prosecutor is usually of the rank of sergeant or above, and has no other duties in the prosecuting branch save those arising from his function as an advocate.<sup>84</sup>

Police prosecutors have little or no influence on the formulation of the charge. An investigating policeman in Sydney may consult a police prosecutor at the central prosecution office in Sydney, at court, or over the telephone, to obtain some guidance on the charge to be preferred. The question is generally about the relevant law and not about prosecution policy. Although police officers have little formal legal education, they generally exercise unfettered control over what criminal charges should be preferred against the accused, at least in the first instance. The policeman thus determines prosecution policy in his own individual way.

Before the decision to prosecute a criminal offence is taken three major tests should be satisfied.<sup>85</sup> First, it must be asked whether the facts disclosed in the statements of the witnesses constitute a criminal offence. Here the

prosecutor's responsibility is to consider whether there are any fatal defects in his case. The second test is whether there appears to be a reasonable prospect of conviction. The answer may depend not only upon the probative value of the evidence but also upon the whole of the surrounding circumstances. Third, it must be asked whether it is in the public interest to initiate proceedings. Public prosecutors have traditionally enjoyed a broad discretion to determine the extent of society's interest in particular criminal prosecutions.

An investigating policeman is inadequately trained to consider these issues. Indeed, his training is primarily concerned with whether or not, and by whom, a crime has been committed, not with proof of that crime. The prosecutor should play the principal role in deciding whether the evidence supports any charges and whether it is in the public interest that those charges be laid. These are decisions for which the prosecutor has been specially trained and for which he should be held responsible.

I have recommended elsewhere in this report<sup>86</sup> that the Crown Prosecutor, assisted by the Clerk of the Peace, should adopt a more thorough "screening" of criminal charges prior to indictment. This recommendation was made in conjunction with another proposal that New South Wales should adopt the English committal procedures and allow the accused to be committed for trial on the basis of written documents without consideration of the evidence by the magistrates.

If these recommendations were adopted, the committal proceedings would take place within a few weeks of the initial court appearance, as is the case at present with a committal for sentence under section 51A of the Justices Act, 1902. The committal documents would then be forwarded to the office of the Clerk of the Peace where the Crown Prosecutor would "screen" the charge before indictment. In this respect he would be assisted, as at present, by a report, on the merits of the case, prepared by a legal officer from the office of the Clerk of the Peace. In this report comments would be made on the strengths and weaknesses of the Crown case and on what, if any, should be the appropriate charges. On the basis of the committal papers and report the Crown Prosecutor would determine whether or not to find an indictment.

Since the prosecution case has not been tested at the committal, it will be necessary in some cases for the main prosecution witnesses to be interviewed prior to the preparation of the report. There will need to be an increase in the staff of the office of the Clerk of the Peace for this to be done, because interviewing of witnesses before indictment is done only rarely at present. As I pointed out in the section on committals, the increase in staff will probably not be substantial because, in most criminal cases, the strength of the prosecution case turns on one or two witnesses. Where the leading witnesses are policemen, for example, where the accuracy of a record of interview is challenged, the interview will generally not be necessary.

On the other hand, I make no recommendation for the introduction of "pre-charge screening" in New South Wales. "Pre-charge screening" in this State would have similar benefits to those which I have outlined in regard to the American jurisdictions. However, as a practical matter, I cannot see how such a programme could be implemented without spending large sums of money. A programme in which prosecutors were on call near police stations round-the-clock would be expensive, even if the programme were limited in scope. Another consideration is that the "screen-out" rate, *i.e.* the percentage of charges proposed by police either not pressed by prosecutors or reduced in seriousness, of 20 to 30 per cent in Chicago is unlikely to be duplicated here. My impression is that the police at times charge an accused person with an offence less serious than that warranted by the facts, either to ensure that the offence is dealt with summarily or to make it possible for that person to elect for summary proceedings under section 476 of the Crime Act, 1900. The "screening" of cases prior to charge is better than "screening" at a later stage because the correct charge, if any, is preferred from the outset. But my impression is that the "screen-out rate" in Sydney would not approach that in Chicago. For these reasons, the emphasis in New South Wales at present should be on "pre-indictment screening", not on "pre-charge screening".

## Footnotes

78. Karlen, *Anglo-American Criminal Justice*, (1967) pp. 24-29.

79. *Report and Recommendations of the Commission on Administration of Criminal Justice in Cook County*, Chicago Bar Association (1975) Appendix L.

80. *Id.* p. 70.

81. *Id.* pp. 71-72.

82. *Id.* p. 72.

83. *Id.* p. 75.

84. St. John, "The Role of the Police in Courts", Chappell and Wilson, *The Australian Criminal Justice System*, (1972) p. 493.

85. *The Prosecution Process*, (Univ. of Birmingham, 1975) pp. 26-30.

86. Heading XII, pp. 54-55.

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**XIV. Discovery by the Prosecution - Cook County, Illinois**

On 1 October, 1971, the Illinois Supreme Court introduced new rules relating to criminal discovery. These rules provide for extensive discovery of the prosecution case<sup>87</sup> and give the prosecutor access to matters in the hands of the defence.<sup>88</sup> The State must generally disclose to defence counsel the information set out below and overleaf.

The names and last known addresses of the States' witnesses must be disclosed, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements and a list of memoranda reporting or summarizing their oral statements. The requirement that the State furnish any substantially verbatim report of any oral statement is an enlargement of the American Bar Association Standards. The issue regarding production of these memoranda is raised initially by a defence motion alleging their existence with the request that they be produced and examined by the court *in camera*.

Any written or recorded statements must be disclosed as must the substance of any oral statements made by the accused or by a co-defendant, with a list of witnesses to the making and acknowledgment of such statements.

A transcript is required of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Any reports or statements of experts made in connection with the particular case are to be disclosed, including results of physical or mental examinations and of scientific tests, experiments or comparisons. The rule explicitly calls for the production of negative and positive results, although the requirement to disclose negative results seems superfluous in view of *Brady v. Maryland*<sup>89</sup> which punishes the failure of a prosecutor to provide information from his file tending to negate guilt or mitigate punishment.

Any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use at the hearing or trial or which were obtained from, or belong to, the accused, must be disclosed.

Any record of prior criminal convictions which may be used for impeachment of the persons whom the State intends to call as witnesses at the hearing or trial is to be disclosed under the rules.

Disclosure is also required of any electronic surveillance, including wiretapping, of conversations to which the accused was a party, or of his premises.

Any material or information within the possession or control of the State, tending to negate the guilt of the accused or to support a reduced punishment should be disclosed. As noted above, this is an application of the doctrine in *Brady v. Maryland*.

Relevant material and information not covered by the rules must be discovered if so ordered by the court in its discretion.

Upon defence counsel's request and designation of material or information, which would be discoverable if in the possession or control of the State, and which is in the possession or control of governmental instrumentalities, the State is required to make a *bona fide* effort to cause this material to be made available to defence counsel. If the State's efforts are unsuccessful and the material or instrumentalities are subject to the jurisdiction of the court, the court may in its discretion use any of its inherent powers to ensure compliance with its orders.

Discovery is not a matter of right. It is initiated only on the presentation of a written motion. Moreover, the rules apply only to felony cases after an indictment or the filing of an information. The rules are not applicable in juvenile proceedings.

There are some matters not subject to disclosure. First, disclosure is not required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the State or members of its legal or investigation staffs. Second, disclosure of an informant's identity is not required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Third, disclosure is not required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the accused.

The court may also deny disclosure authorized by the rules if it finds there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, unnecessary annoyance or embarrassment resulting from the disclosure and outweighing any usefulness of the disclosure to counsel. For a long time the prime reason for denying discovery in the criminal area was the fear that discovery would be abused by unscrupulous defence counsel. It was argued that prosecution witnesses would be bribed or subjected to undue harassment or embarrassment. Discovery is regarded as an extraordinary remedy to be used only in the most exceptional circumstances.

The introduction of the new discovery rules has had four principal results.<sup>90</sup> First, there has been a dramatic speed-up in the time required to prepare a case for trial. Cases which used to take from 75 to 90 days to bring to trial can now be brought in no more than 45 days.

Second, the new rules have shortened the trial itself. Prior to the adoption of the rules Illinois did not require the prosecution to furnish the defence with a copy of any statements of witnesses until the witnesses had actually testified. Frequently, recesses to chambers were necessary after each prosecution witness testified in order to transfer his statement to the defence. Defence counsel had to be given time to read the statement before beginning his cross-examination. Where statements were lengthy or complicated the case might be recessed overnight, or a witness withdrawn from the stand and cross-examination postponed until defence counsel had fully digested the contents of the statement. Under the new rules defence counsel can begin his cross-examination immediately.

Third, an increase in the number of pleas of guilty has been noted since the adoption of the new rules. Conversely, in more cases a *nolle prosequi* has been filed by the State, or the charges have been dismissed. The rules have thus benefited both sides.

Fourth, plea bargaining has been more meaningful and productive because each side knows the other side's evidence and can accurately evaluate its own case. A more realistic compromise may be achieved.

Caution must be exercised in interpreting these results. As noted above, new rules in Illinois, expanding discovery by the defence, were introduced at the same time as those requiring a more complete discovery of the prosecution case. The benefits described must therefore be seen as resulting from extensions in mutual discovery. Reservations must be held concerning the applicability of these results to New South Wales because, as I have argued elsewhere in this report,<sup>91</sup> the type of discovery by the defence practised in Illinois would be anathema to the legal profession in New South Wales.

Nevertheless, I can say that, on the basis of my discussions about prosecutorial discovery, there is growing support for the proposition that broad discovery by the prosecution contributes greatly to the administration of criminal justice. I cannot support this proposition statistically; indeed, it is a very difficult matter to measure. However, numerous discussions in the common law countries, particularly the United States, leave me in no doubt that the criminal process works best when the prosecution puts all its cards on the table.

At present in New South Wales full discovery of the prosecution case, as a matter of right, occurs only in respect to offences tried on indictment. It is accepted that one of the primary purposes of committal proceedings is that they should give to the accused full notice, not only of the charge against him, but of the evidence which will be called to support the charge. The accused is always provided with a copy of the depositions taken at the committal. If the depositions do not disclose the whole of the prosecution case, it is the practice of the Clerk of the Peace to provide copies of the statements of additional witnesses prior to the trial.

Discovery of the prosecution case may occur in other ways. First, a magistrate during a committal, if satisfied that a request by defence counsel for the statements of prosecution witnesses has some legitimate forensic purpose, may direct that these statements be supplied in order that the accused may make "full answer and defence".<sup>92</sup> Second, whilst in a summary matter it is not usual practice for an accused person to be supplied with particulars of the offence charged, he is entitled to such particulars of the alleged offence as are reasonably necessary to enable him to defend himself.<sup>93</sup> Third, it is not uncommon for policemen or police prosecutors to allow solicitors or defence counsel to see copies of the statements of witnesses prior to trial. However, it is only in respect to offences tried on indictment that the accused is entitled to full discovery of the prosecution case prior to trial and, even then, discovery does not occur before the committal.

I now deal with some preliminary issues before coming to my recommendations about the widening of discovery by the prosecution in criminal cases.

One issue concerns the form in which the prosecution is to provide its evidence. The most satisfactory method of acquainting the accused with the case against him is by supplying him with copies of the statements of witnesses. An alternative method is to provide the accused with a written summary of the facts which the prosecution alleges against him. I have rejected this alternative. A statement of facts does not reveal the identity of the witnesses and this may be a matter of some importance to the defence.

Secondly, a statement of facts represents the prosecution's appraisal of the evidence whereas the statements of the prosecution's witnesses may, from the accused's point of view, be capable of a different construction.

A third issue is that the preparation of a separate document, to serve as the statement of facts, is likely to involve more work for police than the making of an additional copy of the statements of prosecution witnesses. One objection advanced against additional criminal discovery is the extra burden that it places on the prosecuting authorities in preparing statements. My recommendations for additional discovery in New South Wales will not involve much additional work because they are confined to indictable offences and to the more serious summary offences where statements are already prepared; an extra copy is all that is required.

Of course, these statements must be edited to exclude irrelevant, inadmissible and prejudicial material. The necessity to edit the statements has been raised as another objection to the provision of statements to the defence, primarily because of the extra burden placed on the prosecuting authorities. Evidence before the James Committee on the extent to which it was necessary to edit statements for the purpose of committals under section 1 of the Criminal Justice Act 1967 (U.K.) was conflicting; in some areas most statements are edited, but in others it is found to be necessary only exceptionally.<sup>94</sup>

My recommendation presupposes that the statements will be provided only at the request of the accused. In my view the provision of statements in most criminal cases in New South Wales will not be required. Police in New South Wales make regular use of a question-and-answer technique called a "record of interview". In most criminal cases the accused admits his guilt and the record of interview records his admissions. Whether or not the accused signs the record of interview he is provided with a copy of the document. His legal representative, with the assistance of this document, is able to advise the accused about the wisdom of contesting the charges. It seems to me, therefore, that requests for statements of prosecution witnesses in advance of trial will be limited.

A second issue is the scope of criminal discovery. Impressions formed on my research tour suggest to me that, wherever discovery is to be made, it ought to be as complete as possible. I do not propose in this report to discuss this issue in detail, but it is my view that, where discovery is ordered, it should be full discovery of the prosecution case. Thus, in addition to the statements of prosecution witnesses, discovery may include the inspection of any books, papers, documents, photographs or tangible objects which the prosecution proposes to tender at the hearing or which were obtained from or belong to the accused.

A third issue concerns the means whereby the accused person is to receive copies of the statements. I suggest that in the interests of uniformity the court will inform the accused, when he first appears in court, of his right to have the statements. At the first hearing his solicitor or counsel will sign and hand to the magistrate a form requesting the prosecution's statements. At the same time a copy will be served upon the police prosecutor. Some provision must be made for the magistrate to refuse the request if it is in the interests of justice to do so' It may be that, in a rare case, the prosecution believes that the prosecution witnesses may be intimidated or that for some other reason it would be contrary to the interests of justice to provide the statements requested.

If the magistrate accedes to the prosecution's request a summary of the facts contained in the statement will be served on the accused. If the magistrate, however, does accede to the accused's request, he will direct that the statements be served within a certain time, say one week, and will fix a further date for plea or mention, say two weeks. The accused, with legal advice, will determine in the intervening period what course of action he proposes to take. In the event that he requests and is provided with statements, the prosecution will, without further application by the accused, serve upon him copies of any additional statements upon which it intends to rely. If the prosecution calls a witness whose statement has not been served, the accused may waive his right to the statement or obtain an adjournment to enable the statement to be served.

It now remains to determine to what offences should discovery by the prosecution, in the form described above, apply. In New South Wales there are three categories of criminal offences: those triable only on indictment; indictable offences triable summarily with the consent of the magistrate and of the accused; and summary offences.

Elsewhere in this report<sup>95</sup> I have recommended changes to committal proceedings. In short, I have proposed that a person may be committed for trial upon evidence contained only in written statements, without consideration of the evidence by the magistrates, provided that he is legally represented and consents to this procedure. The discussion which follows presupposes the introduction of this reform.



I recommend that full discovery be made in offences triable only on indictment. Of course, discovery is now made in respect to offences triable by indictment but, as noted above, my recommendation is that discovery may be requested and granted when the accused first appears before a Court of Petty Sessions; at present, discovery takes place during the committal proceedings. If discovery takes place at the outset, the accused, with legal advice, is able to make an informed decision on the best course of action available to him. He may decide: to plead guilty and be committed for sentence to the District Court or to the Supreme Court; or to plead not guilty and to request committal proceedings with one, some, or all of the witnesses present; or to plead not guilty and to consent to committal for trial on the basis of the prosecution's statements and without consideration of the evidence by the magistrate.

If early discovery is to be made with offences triable only on indictment, it follows that discovery should be made in those indictable offences triable summarily with the consent of both the magistrate and of the accused. Indeed, there is an even greater need for early discovery of the prosecution's case, in that the accused's election has a bearing on whether the case proceeds to the higher courts. The James Committee, in considering the distribution of business between the Magistrates' Courts and the Crown Court, did not claim that a greater measure of disclosure would have a pronounced effect on the distribution of business, but believed that it would make a significant contribution towards preventing cases being committed for trial unnecessarily.<sup>96</sup>

My second recommendation, therefore, is that full discovery be made, at the outset, in those offences triable summarily with the consent of the magistrate and of the accused. If this were done the accused might make an informed decision on whether: to plead guilty and be committed for sentence; to plead guilty and request that the matter be dealt with summarily; to plead not guilty and request that one, some or all of the prosecution's witnesses attend for cross-examination at the committal; to plead not guilty and consent to committal for trial on the basis of written statements; or to plead not guilty and request that the matter be dealt with summarily.

My third recommendation concerns discovery in cases triable summarily. In my submission there are a number of compelling reasons for discovery of the prosecution case in charges triable summarily.

First, whilst a minimal supply of particulars may occasion no injustice to a guilty person who may be presumed to know the precise circumstances in which the offence was committed, it is otherwise with an innocent person who lacks knowledge of the facts and circumstances of the alleged crime with which he is charged. Without this knowledge he will be unable to instruct his legal advisers properly or to take steps to marshal the evidence necessary to establish his innocence. The guilty are usually unlikely to be assisted by the disclosure of the nature of the case since, having committed the offence, they must have full knowledge of the crime. It follows that the procedure would be unlikely to facilitate the preparation of dishonest defences and interference with prosecution witnesses. This opinion is supported by the fact that this risk is already taken in all cases in which there is a committal for trial, without untoward results.

Second, the quality of advocacy suffers by reason of the disparity between summary trial and trial on indictment. The conduct of a defence by an advocate both in terms of presentation and cross-examination depends substantially for its effectiveness on careful prior consideration and decision. The barrister who conducts a defence in the higher courts has full knowledge in advance of the trial of the prosecution case, including details of the testimony and sight of the exhibits. When a barrister or solicitor is required to conduct a case before magistrates, he must formulate a policy and improvise his cross-examination whilst he is learning for the first time the evidence of the prosecution witnesses and whilst he is making his own record of it. Similarly, whilst the barrister in the higher court may prepare in advance of the trial objections on points of law or as to the admissibility of evidence with a general outline of his address to the court, all of these matters must be performed *ex tempore* by the solicitors and barristers in Courts of Petty Sessions.

Third, the prior communication to the accused of the case for the prosecution on summary trial would probably increase the number of pleas of guilty. One of the strongest impressions from my investigations overseas is that the revelation of the prosecution case at an early stage speeds the criminal process through its encouragement

of guilty pleas. I think, too, that practitioners in the criminal jurisdiction in New South Wales are of the same opinion.

Finally, the current practice, by which the defence must depend not upon the rights of the accused but upon the goodwill of the police prosecutor, is inadequate. An unrepresented accused, or one whose legal adviser is *persona non grata* with a particular prosecutor, is subject to a substantial disadvantage. Surely, matters which affect so seriously the liberty of the individual should be matters of right, not of grace.

In my submission, the case for discovery of the prosecution case in summary matters is a strong one. I propose that the procedure for discovery be the same as that proposed for indictable offences. If, at the accused's first court appearance, the magistrate accedes to his request for copies of the prosecution's statements, the magistrate fixes a date for compliance with his order and a further date for plea or mention, to enable the accused to determine his course of action.

However, my recommendation must be qualified in two ways. First, the proposal should be confined to the more serious of the summary matters. It would be absurd in trivial cases to impose upon police the responsibility of providing statements of the prosecution witnesses, or a summary of the facts. If the proposal were, however, to be confined to the more serious offences, the police need only make and supply an additional copy of statements already taken. Second, my proposal should not be implemented immediately. My recommendations concerning discovery in indictable offences would require substantial innovations, and it would be desirable to see how they work in practice. If they are generally acceptable and contribute to the disposition of criminal cases more efficiently an extension of discovery to summary offences might then be considered.

## Footnotes

87. Rule 412.

88. Rule 413

89. 373 U.S. 83 (1963).

90. Strayhorn, "Full Criminal Discovery in Illinois: A Judge's Experience", (1973) 56 *Judicature* pp. 279, 280.

91. Heading XV.

92. *Attorney General for N.S.W. v. Findlay* (1976) 50 A.L.J.R. 637.

93. See *Ex parte Grinham; Re Sneddon*, (1961) 78 W.N. (N.S.W.), 203 at 204 and the authorities there cited.

94. *Op. cit.* note 76, para. 223.

95. Heading XII, pp. 53-55.

96. *Op. cit.* note 76, para. 212.

## CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE

### XV. Discovery by the Accused - Cook County, Illinois

The rules concerning criminal discovery introduced by the Illinois Supreme Court on 1 October, 1971, in addition to providing ample means for an accused person to discover the prosecution's evidence, give the prosecution access to a wide variety of information in the hands of the defence. I investigated the new discovery procedures in Cook County, Illinois.

The requirements for discovery are contained in Rule 413 and fall into four categories: (1) the person of the accused; (2) medical and scientific reports; (3) defences; and (4) additional discovery.

The first category involves discovery in relation to the person of the accused. Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the accused, among other things, to: appear in a line-up; speak for identification by witnesses to an offence; be fingerprinted; pose for photographs not involving re-enactment of a scene; try on articles of clothing; permit the taking of specimens of material from under his fingernails; permit the taking of samples of his blood, hair and other materials of his body not involving unreasonable intrusion upon his person; provide a sample of his handwriting; and submit to a reasonable physical or medical inspection. For such purposes the prosecution may, upon notice, require the accused and his counsel to be present at a designated time and place. The rule states that none of these activities can be required of the accused in the absence of his counsel.

Second, certain reports are subject to discovery. Any reports or statements of experts, in the possession or control of counsel for the defence, are included. Examples are reports, results, and related testimony, concerning physical or mental examination of persons, or concerning scientific experiments or tests. Constitutional safeguards permitting, the rule enables a trial court, on written motion, to order that reports like these, or information about them, be made accessible to the State for inspection and copying. But those portions of reports containing statements made by the accused may be withheld if defence counsel does not intend to use any of the material contained in the report at a hearing or trial. It was decided in *People v. Speck*<sup>97</sup> that these requirements did not violate the lawyer-client privilege. The self-incrimination question remains unresolved.

The third category of discovery by the accused involves the defences that he is required to disclose. The rule provides that, subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defence counsel shall inform the State of any defences he intends to make at a hearing or trial. If within his possession or control, he is to furnish to the State: (a) the names and last known addresses of persons he intends to call as witnesses; (b) their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements; (c) any record of criminal convictions known to him; and (d) any books, papers, documents, photographs or tangible objects he intends to use as evidence or for impeachment at a hearing or trial. The requirement that the defence counsel give notice of defences includes both "affirmative" defences, e.g., insanity, and "nonaffirmative" defences, e.g., consent to intercourse in rape cases. The notice may include alternative and inconsistent defences.

The scope of the final category, additional discovery, is entirely within the discretion of the court. Rule 413 provides that the court may order the defence to make additional discovery to the State where the State shows it to be material and reasonable.

Rule 415 provides that if, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order the party to permit discovery of material and information not previously disclosed, grant a continuance (adjournment), exclude such evidence or enter such other order as it deems just under the

circumstances. It is further provided that wilful violation by counsel of an applicable discovery rule, or an order issued pursuant thereto, may subject counsel to appropriate sanctions by the court.

The discovery procedures adopted in Illinois are in line with the American Bar Association Standards but are wider than in most American jurisdictions, Canada, England or New South Wales. In the United States "notice of alibi" legislation has been enacted in 16 States. Fourteen States have also enacted legislation requiring notice of insanity and of the intention to raise the special pleas. In Canada, prosecutorial discovery by the accused in criminal cases, in the sense of disclosure forced by a sanction of inadmissibility, does not exist.<sup>98</sup> There is in existence the judicially developed requirement of early disclosure of alibi evidence; but the sanction is restricted to judicial comment on the credibility of that alibi when not disclosed at an earlier time.

In 1974 the Law Reform Commission of Canada recommended that discovery by the defence should not be required. Rather, it contended that a formal discovery system in favour of the accused would itself encourage the defence to make discovery.<sup>99</sup> I was advised by the Commission that an experiment in Montreal designed to prove this contention, had failed and that other alternatives were being considered. In England, legislation has been enacted requiring notice to be given of alibi evidence. Section 11 of the Criminal Justice Act 1967 (U.K.) requires a notice of intention to raise the defence of alibi, and details of the intended alibi evidence. Inadmissibility of the non-disclosed evidence and even of the alibi testimony of the accused is the sanction. In New South Wales notice of alibi is required to be given under section 405A of the Crimes Act, 1900, which is in terms similar to section 11 of the Criminal Justice Act 1967 (U.K.).

In New South Wales the issue is whether legislation should compel the defence to disclose to the prosecution information, additional to alibi evidence, to enable the prosecution to prepare for the defences and defence testimony expected to be presented at the trial.

Broadly speaking, there are two principal arguments in favour of more extensive discovery by the defence. Proponents of the first argument point to the general trend towards expansion of discovery in favour of the defence. It is argued that, as a matter of fairness, if discovery in favour of the defence has been expanded, this advantage ought to be balanced by a similar extension of discovery in favour of the prosecution. The second argument emphasizes the analogy between civil and criminal proceedings. It is put that, in civil cases, the adversary system works best if discovery is reciprocal and each party is as fully prepared as possible to counter the evidence of the other. This is suggested as a model for the criminal process which also operates in an adversary setting.

There is merit in these arguments. More extensive pre-trial discovery by the accused may reduce the use of surprise as a trial tactic; it may deter fabrication of defences and the presentation of perjured testimony; and it may avoid unnecessary litigation by giving the prosecution the opportunity to omit a piece of evidence which is clearly mistaken. However, to require more extensive discovery by the accused in advance of the trial would introduce a fundamental change to the nature of the criminal process. Its effect would be to compel persons accused of crime to assist the State in prosecuting them. In my submission, such an innovation would be generally unacceptable to the profession in New South Wales.<sup>100</sup>

I recommend that the defence ought not to be compelled, in advance of the trial, to disclose to the prosecution information additional to alibi evidence. I have recommended elsewhere in this report<sup>101</sup> that, for long and complex criminal cases, District Courts and Supreme Courts should introduce a pre-trial hearing procedure similar to that now operating in the Central Criminal Court in London. This pre-trial hearing would, *inter alia*, provide an opportunity for the defence to make disclosures and admissions. The judge would ask defence counsel whether there were to be any formal admissions of facts or exhibits. That recommendation does not contradict the recommendation in this section that there should be no extension of discovery by the defence in advance of the trial. The issue under consideration here is whether the defence should be *compelled* to make discovery of matters additional to that of alibi. There should be no compulsion in the pre-trial procedure used for

important and complex cases. The judge would merely encourage defence counsel to make formal admissions, if possible, so that the issues might be narrowed and the trial shortened.

## **Footnotes**

97. (1968) 41 Ill. 2d 177.

98. *Discovery*, Working Paper No. 4, Law Reform Commission of Canada (1974), paras 64-69.

99. *Ibid.*

100. There are other objections to this innovation - for example, the problem of enforcement - but, as the innovation is unacceptable in principle, it serves no purpose to discuss them here.

101. Heading XI, pp. 47-49.

## **CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 2 - INNOVATIONS IN CIVIL AND CRIMINAL PROCEDURE**

### **Summary of Recommendations**

#### **Consumer Claims**

The Consumer Claims Tribunal should be administered, like other courts, by the Department of the Attorney General and of Justice. The Tribunal should be closely linked with the existing Courts of Petty Sessions.

Limited access to the Tribunal should be granted to proprietors of small businesses. The ambit of claims that can be brought before the Tribunal should be broadened to include, at the least, actions in tort.

#### **Pre-trial Conference**

The Supreme Court Rules should be amended to permit, in the Common Law Division, a direction, by the court itself or on the application of a party that the parties attend a conference two weeks before trial.

The recommended conference would be conducted by a Master.

To enable the case to be sufficiently prepared for a full assessment of liability and quantum, counsel should be fully briefed before a pre-trial conference. At the outset, pre-trial conferences should be directed only for cases expected to occupy three or more days.

#### **Settlement Conference**

As an experiment, it would be useful to appoint Masters to conduct settlement negotiations, but those negotiations are not appropriate in every case.

A settlement conference should be an adjunct to a pre-trial conference, not a proceeding in its own right.

Barristers should represent the parties to settlement negotiations.

Settlement conferences should be held only where a case is expected to occupy three or more days, with possible future extension to those expected to occupy at least two days.

#### **Examination for Discovery**

Examination for discovery, because of its expense, would not be an acceptable innovation in this State.

#### **Adjournments**

The courts should review their policies about adjournment applications in civil and criminal proceedings, to ensure that adjournments are only granted on compelling and "exceptional" grounds.

### **Summary Traffic Trials**

There should be adopted a summary traffic trial procedure like that operating in Oakland, California, U.S.A.

The recommended procedure contemplates making available Chamber Magistrates to assess whether cases that are not serious need go to a court hearing.

### **Night Courts in Traffic Cases**

Night Courts for traffic cases should be continued in New South Wales.

### **Court Reporting**

The system of court reporting called "multi-track voice writing" should be introduced experimentally in New South Wales.

### **Night Arbitration of Personal Disputes**

An arbitration programme (usually held in the evening), like the "Night Prosecutor Program" of Columbus, Ohio, U.S.A., should be introduced in this State.

The arbitration hearing should be conducted after the complaining party, on taking the advice of a Chamber Magistrate, remains determined to proceed with his charge. Chamber Magistrates (more of whom might need to be appointed for the purpose) could preside at the hearings.

### **Criminal Pre-trial Conference**

A pre-trial conference for long criminal trials should be introduced experimentally in Sydney.

The conference should be appointed when a trial date is set, and should be within 14 days of the trial. It should be presided over by a judge.

The judge who presides at the conference should also preside at the trial, but he should not become involved in "plea bargaining".

The conference procedure should be similar to that now used in the Central Criminal Court, London.

The court should be empowered to order a pre-trial conference either of its own motion or upon the application of the Crown or of counsel for the defence.

### **Committal Proceedings**

A person who consents to the procedure should be committed for trial on the basis of written statements, but without consideration of the evidence by the magistrate.

If this recommendation is adopted it should operate subject to conditions like those effective in England and Wales; particularly that the accused be legally represented.

At first, a procedure like this should be undertaken experimentally in a small number of courts.

The Clerk of the Peace should have a more important role in "screening" cases before trial.

### **"Screening" of Criminal Charges**

There should be a more effective system of "screening" criminal charges: it should be "pre-indictment screening" not "pre-charge screening".

### **Requiring Discovery by Prosecution**

On the trial of offences triable only by indictment, full discovery should be available at the request of the accused person on his first appearance at Petty Sessions.

If that recommendation is adopted, full discovery at the outset should be made available in respect of indictable offences triable summarily with the consent of the magistrate and of the accused.

There are compelling reasons for extending full discovery to charges triable summarily. The procedure should be the same as that proposed for indictable offences, but should be confined to serious offences, and should not be introduced until discovery in indictable offences has been proved successful by experiment.

### **Requiring Discovery by Accused**

The defence should not be compelled, in advance of the trial, to disclose to the prosecution information additional to alibi evidence.



**CONSULTANTS PAPER 5 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE:  
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