

Student: Joanne Harrison
No: 9133844

UNIVERSITY OF WOLLONGONG

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Assessor: Dr Rick Moir

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INTRODUCTION

The jury system is frequently held to be one of the most important foundations of our democratic way of life. It has been called the "bulwark of our society". It has also been said that to take away a person's right to a jury would be against the express language of the Magna Carta and the right to a jury is one of the significant causes of our political stability.

As to the latter, Lord Devlin, a distinguished English Judge, writing extra-judicially, described the importance of the jury as follows:

"In a democracy law is made by the will of the people and obedience is given to it not primarily out of fear but from goodwill. But just as important as the frame of the law is its application. The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between Judge and jury, slowly and carefully worked out over several hundred years, secures that the verdict will not be demagogic; it will not be the simply uninhibited popular reaction. But it also secures that the law will not be applied in a way that affronts the conscience of the common man. Constitutionally it is an invaluable achievement that popular consent should be at the root not only of the making but also of the application of the law. *It is one of the significant causes of our political stability.*"¹
[Emphasis added.] (1981)

There is a popular belief that civil jury trials cost more and create delay. Even though this view has been held for many years, from my research, I have been unable to uncover any attempt at actually analysing delay and cost of civil jury trials with the exception of a sample of the time taken in jury and non jury trials in 23 trials by Mr Tim Kelly, solicitor.² I propose to examine civil jury trials in the Supreme Court of New South Wales and analyse the delay and cost of jury trials compared to non jury.

Much has been written about jury trials. Most of the literature is concerned with the role of juries in criminal trials. In 1987, Parliament amended the Supreme Court Act, 1970 to give judges a greater discretion to dispense with juries. In 1991, the New South Wales Government attempted to abolish juries in the majority of civil cases. The proposed legislation was never passed. As New South Wales is the only State in Australia to retain and widely use juries in civil trials, it may be that attempts will be made to abolish juries in the future on the basis of delay and cost.

¹ From article by McHugh J: *Jurors Deliberations, Jury Secrecy and Law of Contempt* (1988) M Findlay & P D Duff

² Debate: Second Reading Courts Legislation (Civil Procedure) Amendment Bill; 1 May 1991; Hansard p2856

In this research essay, the scope is not such as to make a judgment as to whether, in the interest of justice, civil jury trials should be retained. The purpose of this essay is not to examine in detail the philosophical, social and policy reasons for the retention of juries. I will briefly mention the arguments for and against the retention of juries.

For delay, I shall look at two samples, 25 files of each jury and non jury commenced in 1987 and jury and non jury matters included in the first Special Sittings conducted by the Supreme Court in 1993. I shall compare the results of my survey to the statistics of delay produced by the Supreme Court.

On the issues of costs, I shall look at 10 jury and non jury files which are submitted for the taxation of costs to ascertain whether or not jury trials are more expensive to the parties. I will also briefly look at the costs to the Court in providing juries in civil trials. The cost to the Court is difficult to ascertain as often the costs of civil juries are not treated separately from criminal juries.

1. LITERATURE REVIEW

Controversy surrounding the retention of juries in civil cases in New South Wales

The debate on whether the right to a jury that in civil matters in New South Wales should be preserved has been argued extensively and for almost every argument for or against a civil jury trial, a counter argument can be advanced.

1.1 Advantages of civil juries

In the article "*Speedier Justice (and Trial by Ambush)*", Mr Justice Wallace, Justice of the Supreme Court of New South Wales³, discussed delays in the Supreme Court in 1961 and proffered the two reasons, namely retention of the jury system and belated settlements. Although he was in favour of the abolition or serious modification of the jury system in civil action, he pointed out that the advantages of civil juries include the following:

"(1) In times of economic and social changes the minds of jurymen are more flexible and adaptable than those of judges - and any undue flexibility can fairly sufficiently be curbed by Courts of Appeal.

(2) It is of public importance that citizens should be assisting, at some self sacrifice, in the administration of justice. Members of the public thus obtain a direct knowledge of

³ (1961) 35 ALJ 124

the dignity and impartiality of our legal system and desirable confidence therein is maintained.

(3) Litigants are more content to receive defeat or disappointment at the hands of a jury than from a judge.

(4) Juries are better judges of fact than judges especially in cases involving fraud or other turpitude.

(5) Juries are traditionally an essential to our system of justice."

An additional "advantage" was discussed by the (then) Attorney General, Mr Dowd, in 1991. It is that:

"(6) The lengthy delay in jury trials, it is argued, encourages early settlement."

Mr Dowd added that:

"If this argument is in fact correct, it carries with it an undesirable feature. There is the implication that juries are being requisitioned for tactical purposes to induce plaintiffs to settle on less favourable terms."

and

"(7) A further advantage is that in cases where the rights and obligations need to be carefully weighed up, it is a matter of value for community standards and judges are not, in these cases, as well suited to apply mainstream community standards as is a civil jury of ordinary people⁴.

1.2 The disadvantages of civil juries

Wallace J also nominated that the factors operating in favour of the abolition or modification of the jury system in civil actions. The relevant ones are:

(1) The jury system adds enormously to the cost of litigation.

⁴ R D Dyer; Debate after Second Reading of Courts Legislation (Civil Procedure) Amendment Bill; 1 May 1991; Hansard p 2856

(2) The gross time lag in getting jury matters to trial is so unfair to litigants, particularly plaintiffs, that it simply ought not in an enlightened community be allowed to continue.

(3) The jury system is notoriously (and unarguably) time wasting and expensive. The delay in striking a jury, the lengthy opening and concluding addresses of counsel, the judge's summing up and law but by no means least the tendency to call too many expert witnesses (such as doctors) and to question them with a wealth of detail for the jury's benefit, the judge must sum up for the jury, all add enormously to time and cost.

(4) The system erodes the State's manpower appreciably.

Added to these are factors which Cole J considered in *Herriman v Pambula District Hospital*. This case is the most recent landmark decision in relation to the right to dispense with juries and is discussed in detail under the topic 'History of civil jury trials in New South Wales'. They are:

(5) The uniformity of judgments in similar cases are more likely in trials conducted by judges without a jury lead to the predictability of verdicts.

(6) The facility in trials without juries to discuss the appropriate range of verdicts, particularly for damages in non jury trials.

(7) The facility, in the event of appeal, to know the manner in which any verdict had been determined.

(8) The likelihood that predictability of outcome in non jury trials would result in settlement of other actions."

1.3 Use of civil juries in Australia

With the exception of South Australia, legislation provides for civil jury trials in the Commonwealth, territories or states. In most states, the right to a jury has been modified. New South Wales is the only State to widely use juries in civil trials.

Starting with the exception, in 1984, South Australia passed the Juries Amendment Act. Section 5 of that Act provides that no civil inquest shall be tried by a jury. "Civil inquest" means a "trial of any issues or inquiry of damages before a Court of civil jurisdiction. Prior to 1984, civil jury trials were almost extinguished by virtue of the Juries Act, 1927 (SA).

In Tasmania, section 29 Supreme Court Civil Procedure Act gives a general discretion to a Court to order a jury. All civil trials may be tried with or without a jury. However in 1987, seven juries were summoned in civil trials. The same number was summoned in civil trials in 1988. For those years only one civil case actually went to trial with a jury⁵.

In Queensland, sections 78 and 79 Common Law Practice Act, 1967 provides a discretion to the Court to dispense with a jury trial. Between 1 July 1991 and 30 June 1992, the Supreme Court heard only one jury trial⁶. In Victoria, section 25(e) and Supreme Court Rules 47.02 provides that contract or tort matters may be tried with a jury if either party applies, but the Court may direct a trial without a jury if "in its opinion the proceeding should not in all the circumstances be tried before a jury". Jury trials are still common in Victoria.

In the Northern Territory, section 86 Supreme Court Act, 1979 and section 7 Juries Act, 1962 provides that civil jury trials are to be tried without a jury unless it "appears just" to the Court to order a jury. In the Australian Capital Territory, provisions for a jury are almost identical to those in the Northern Territory (section 14 ACT Supreme Court Act, 1933).

In the Commonwealth Courts, there is a presumption against a jury. Sections 39-41 Federal Court of Australia Act, 1976 provides for trial without a jury although the Judge may order a trial by jury of the suit or issue of fact where "the ends of justice appear to render it expedient to do so".

The Western Australian legislation ties that Court to the legislation in the United Kingdom. In the United Kingdom, section 6 Administration of Justice (Miscellaneous Provisions) Act, 1933 provides a complete discretion to the Judge to order a trial with or without a jury, except where there are questions of fraud, libel, malicious prosecution and a few other issues. Even when these questions arise, the Judge can dispense with the jury if prolonged examination of documents or scientific or local investigation is required. According to the Supreme Court Practice (the White Book) an order for trial by jury is rarely made in England.

In England the cases show that in actions for personal injuries, a jury will not be ordered unless there are exceptional circumstances: *Ward v James* [1966] 1 QB 273; *Sims v William Howard and Sons Ltd* [1964] 1 All ER 918; *Hennell v Ranaholdo* [1963] 3 All ER 684. It is not exceptional circumstances that the injuries are severe nor if they are unusual: *Watts v*

⁵ Law Reform Commission

⁶ *Report on Queensland Jury Expenditure*; Constance Johnson, Senior Project Officer, Policy and Research Branch, Courts Division, Department of Justice and Attorney General; 1 October 1992

Manning [1964] 2 All ER 267 but it may be if the injuries are unique or nearly so: *Hodges v Harland and Wolf Ltd* [1965] 1 WLR 523.

1.4 New South Wales

Basically, in civil cases, either party may request a jury. There are exception, most notably, in "running down cases" (ie. those involving the use of a motor vehicle) neither party can requisition a jury. By the Supreme Court Act, 1970 (the Act), section 85, it is provided, relevantly:

"(1) Subject to sections 86, 87 and 88, proceedings in any Division shall be tried without a jury, unless the Court otherwise orders."

After this statement of general principle, specific provisions are made in section 86 for common law claims. Relevantly, the section provides:

"(1) In proceedings on a common law claim, except proceedings to which either of section 87 and 88 applies, issues of fact shall, if any party files a requisition for trial with a jury and pays the fee prescribed by the regulations made under section 130, be tried with a jury."

Section 87 contains specific provisions relating to running down cases in the Common Law Division. Relevantly, three should be noticed:

"(1) In any proceedings to which this section applies, the Court may, on the application of any party, and shall, on the application of all parties, order that the proceedings be tried with a jury.

(2) Subject to subsection (4), this section applies to proceedings on a common law claim in which - [damages or contribution are claimed, putting in broadly, arising out of the use of a motor vehicle].

(3) ...

(4) This section does not apply to proceedings for damages in respect of the death of or bodily injury to any person where the proceedings are based upon an act, neglect or default of the defendant for which, if proved, he would, as the employer of that person and not otherwise, incur liability to the plaintiff."

There then follow two special provisions dealing with particular kinds of common law claims:

"88. Proceedings on a common law claim in which there are issues of fact -

(a) on a charge of fraud against a party; or

(b) on a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage shall be tried with a jury.

89. (1) In any proceedings on a common law claim (except proceedings to which section 88 applies), the Court may order, despite sections 85, 86 and 87, that all or any issues of fact be tried without a jury.

(2) In any proceedings to which section 88 applies, the Court may order, despite that section, that all or any issues of fact be tried without a jury where -

(a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury; or

(b) all parties consent to the order.

(3) In any proceedings on a common law claim, issues of fact on a defence arising under -

(a) section 63(5) or section 64(1)(c) of the Workers' Compensation Act, 1926; or

(b) section 150(1)(e) of the Workers' Compensation Act, 1987, shall, despite sections 85, 86, 87 and 88, be tried without a jury."

In order to appreciate why New South Wales still retains juries in civil matters, it is relevant to briefly examine the history of juries in New South Wales.

1.5 History of Juries in New South Wales

According to McHugh⁷, we owe trial by jury to the Norman Conquest. Originally, the jury was a body of men, drawn from a particular locality, sworn to give a true answer (vere dictum, verdict) to some question of interest to the Crown. By the end of the seventeenth century the role of the juror had moved from witness to that of an adjudicator⁸.

A distinction must be drawn between the Supreme Court of New South Wales and the old courts at Westminster. The jury played a traditional part in the trial of actions at law in

⁷ Jurors Deliberations, Jury Secrecy, Public Policy and the Law of Contempt

⁸ Ibid, p57

England, but the jury system was not imported into New South Wales on the first settlement⁹. Juries were introduced by statute.

In New South Wales, the earliest court for the trial of civil actions, the Civil Court, which first convened in July 1788, did not provide for jury trial. Nor did the Supreme Court established by the Charter of Justice of 1814. The year 1819 marked the beginning of a concerted campaign for civil and political rights for emancipists centred on the jury issue¹⁰. It was the New South Wales Act of 1823 (4 Geo IVC 96), pursuant to which the present Supreme Court was later established by Charter issued by the Crown, which allowed the trial of issues of fact by jury if both parties agreed. By 9 Geo IV 683 (1828) the Court was afforded a discretion to allow trial by jury on the application of either party. There was also reserved to the local Legislative Council "by some general law or ordinance" to decide "the qualification, number and summonses and other rules for the constitution and proceedings" of such juries. In 1832, by Act of the Council 2 WM IV No 3, New South Wales provided for juries of twelve persons. In the words of the Act "every man described in the Jurors Books as an Esquire or person of higher degree, or as a Justice of the Peace, or as a Merchant (such Merchant not keeping a general retail shop) or as a Bank Director shall be qualified to serve on special juries.

The special provision reducing the civil jury on the normal case from twelve (which had been the traditional number in England) to four was introduced by the statute 8 Vic No 4 (1844).

In 1959, in *O'Brien v Commissioner for Railways*¹¹, in an application to the Privy Council for leave to appeal, Denning J made reference to a jury of four persons. Counsel informed Lord Denning that it is universal practice for a jury of four persons in New South Wales. The explanation was that it dates from a time when the population was apparently scarce and labour was extremely difficult to obtain, and since all civil actions were tried by juries, it was found quite impracticable to empanel twelve jurors for sufficient number of juries. A jury of four was later provided in the Jury Act, 1912.

By the end of the nineteenth century jury trial was certainly the normal mode of trial for disputed issues of fact on common law proceedings in the Supreme Court. Section 29 of the Jury Act, 1912 so provided.

⁹ *Caledonian Collieries Limited v Fenwick* (1959) 76 WN (NSW) 482 at p491; Windeyer Lectures of Legal History (1938) pp60-61

¹⁰ Neal; *The Rule of Law in a Penal Colony*; p177

¹¹ Unreported - see article by P H Henchman '*The New South Wales Jury of Four Persons*' 33 ALJ p235

In 1936, the Chief Justice of New South Wales said "the jury system should never be modified or cut down unless a very strong case is made¹²".

In the 1960's, in this State, as earlier in England, a controversy had arisen about the merits of jury trials of civil causes. The controversy was stimulated by a paper delivered by Wallace J "Speedier Justice (and Trial by Ambush)¹³". The paper canvassed various ways the right to trial by jury could be modified so that delays and cost could be reduced and a greater consistency in decision making could be promoted. At the conference, most of the commentators defended the civil jury by reference to legal authority, judicial opinion and personal experience. The paper proved influential. In 1965, following a change of government in New South Wales, Parliament enacted the Law Reform (Miscellaneous Provisions) Act, 1965. Now cases where persons were injured in the course of the use of a motor vehicle (these are known as running down cases) would normally be tried by a Judge without a jury¹⁴.

1.5.1 The decision in *Peck v Email Ltd* (1987) 8 NSWLR 430

In this case, the plaintiff sued his employer in negligence as he suffered the effects of an asbestos related condition. The defendant had filed a requisition for a jury. The plaintiff sought that the jury be dispensed with on the basis that there would be both a prolonged examination of documents and scientific investigation.

Section 89(1) was in terms different from that now appearing . The original subsection provided:

"(1) In any proceedings on a common law claim the Court may order, notwithstanding sections 86 and 88 of this Act, that all or any issues of fact be tried without a jury where -

- (a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury;
- (b) the proceedings are entered in the commercial list; or
- (c) all parties consent to the order."

Clarke J (as he then was) reviewed the medical evidence and pointed out that juries are asked, almost on a daily basis in this State, to decide relatively complex medical questions.

¹² From a paper read to the second legal convention of the Law Council of Australia in 1936 by the Chief Justice of New South Wales, the Rt Hon Dr Evatt "The Jury System in Australia"; 195 10 ALJ 49 at p58

¹³ (1961) 35 ALJ 124

¹⁴ Section 5(1) Law Reform (Miscellaneous Provisions) Act, 1965

However, His Honour concluded that there would be a scientific investigation which could not be conveniently made with a jury.

Clarke J reasoned:

"The *particular factor* which, in my opinion, takes *this case* out of the ordinary and separates it from most cases concerning asbestos related injuries is the issue concerning which of the employers was responsible for his ingestion of the critical fibres or dust." [Emphasis added.]

and then made the observation that at that time there were a large number of cases awaiting trial where the plaintiffs were very ill or dying. From the Court's viewpoint it is very difficult for the Court to provide expeditious trials for these parties. It is far easier to order urgent hearings for trial by Judge alone given the greater flexibility of this mode of trial and the Judge's ability to adjourn the trial from time to time. He concluded that, in urgent cases like these, Judges should be given an unfettered discretion to order trial by Judge alone except in respect of proceedings to which section 88 applies.

1.5.2 Amendment to section 89 Supreme Court Act in 1987

These comments caught the eye of the government and of the legislature. In 1987 amendments¹⁵ were introduced to the Supreme Court Act, 1970 to enlarge the discretion provided by section 89. This section in its current form has already been reproduced on page 3.

The Attorney General (Mr Sheahan), in his second Reading Speech, referred to Clarke J's judgment and made the following comments:

"...In practice, the right of a party to a common law action to elect pursuant to section 89(1) to have a matter tried by a jury will continue, but subject to this new discretion which will allow a court to decide otherwise. In exercising this discretion, the court will be able to have regard to all relevant circumstances and be able to make a decision consistent with the needs of justice *in each particular case*." [Emphasis added.]

Responding to the opposition spokesman on legal matters, Mr Dowd and other comments, Mr Sheahan indicated what was in his mind in proposing the amendment:

¹⁵ Supreme Court (Amendment) Act, 1987, assented to on 18 November 1987

"...This legislation provides, *not for the abolition of juries*, but for an increased discretion for judges to dispense with juries." (Emphasis added.) (Ibid at 14100.)

Interestingly, shortly after this amendment was passed, asbestos cases and the like were transferred to the newly created Dust Diseases Tribunal¹⁶.

1.5.3 The decisions in *Herriman v Pambula District Hospital* and the appeal: (1988) 14 NSWLR p387

The undisputed facts are as follows. Rebecca Herriman, who at the time this case was decided was 15 years of age, by her tutor, sues Pambula District Hospital alleging negligence. She claims that as a result of the failure of the hospital to carry out a standard test on her shortly after birth at the hospital, a disability which would have otherwise been detected and treated led to her suffering severe brain damage. It is claimed that, although she appears normal, she has the mental age of a child of some eighteen months. Unlike *Peck*, it was not suggested that there would be significant dispute about the facts or complex medical questions would be raised which would involve any prolonged examination of documents or consideration of scientific investigations.

Originally, a jury was requisitioned by the plaintiff who subsequently changed her mind and applied for an order that all issues of fact be tried without a jury. The hospital had not requisitioned a jury but it was agreed that had the plaintiff not done so, the hospital would have done so. Cole J decided in the plaintiff's favour but this decision was reversed in the Court of Appeal.

Cole J referred to some earlier decisions, and particularly one of his own, namely *Smoje v Trend Laboratories Pty Limited* (Cole J, 27 May 1988, unreported).

His Honour expressed the view that the discretion conferred by section 89 was "at large":

"In my view section 89 does not proceed from a presumption that if a party has exercised its right to requisition a jury pursuant to and in accordance with section 86, that thereafter that right prevails so that a significant reason must be shown why it should be deprived of that right in the exercise of discretion under section 89."

The Court of Appeal disagreed with this approach and said:

¹⁶ Dust Diseases Tribunal Act, 1989

"Cole J posed for himself a test which was wrong in principle. He appears to have made retention of the jury, not dispensation, the subject matter of the discretion; and regarded that element as dependent upon whether the case before him was 'of such singularity that it would be more efficiently, more shortly, or in a less costly manner litigated before a jury'."

In *Smoje*, Cole J dispensed with the jury and said:

"Following reference to numerous decisions in England concerning the discretion involved in that jurisdiction in considering whether personal injury actions should be heard with or without a jury and some general remarks about the respective merits and demerits of jury trials of civil actions, His Honour proceeded to list a number of considerations to which, he concluded: 'the authorities suggest that consideration may be had, in comparing trial with a jury with a trial by a judge alone'."

These considerations have been given earlier in this paper under the heading 'Controversy surrounding the retention of juries in New South Wales'.

Cole J referred to:

"Each of factors, the length of the trial, the predictability of verdicts and the settlement of other action, are likely to result in litigants *other than the parties to the action* in which the application is brought receiving a more prompt hearing; in the list of cases awaiting trial being reduced, and thus in justice being more efficiently and promptly administered. In my view that also is a factor to which regard may be had in exercising this discretion. If it be acknowledged, as in my view it must, that the purpose, scope and object of amending section 89 was to confer upon the Court a discretion to dispense with juries except in a limited class of cases, in order that justice may be more efficiently, promptly and cheaply dispensed, *not just to the particular parties but to litigants generally*, then regard may be had in exercising that discretion to the state of the lists, and the effect of dispensing with juries upon such lists and upon litigants other than the immediate parties.' [Emphasis added.]

In the appeal, Kirby JA examined Cole's decision in the light of the proper exercise of judicial discretion. He agreed:

"with the appellant that all of these matters referred to in *Smoje* are, as stated, observations of a general character relating to the nature of jury trials as such. They

are not particular to the question of whether a jury which has been summoned should be dispensed with in this particular case."

and concluded that:

"The basic flaw in Cole J's reasoning was in considering to be relevant as such, universal characteristics of jury trials. This was impermissible because the scheme of the legislation assumes that jury trials will continue to be available for proceedings on a common law claim such as this. Indeed, whether or not section 86 of the Act confers a "right", strictly so called, it does envisage that a party to proceedings on a common law claim will continue to have an entitlement to requisition a jury. Having done so (as the appellant is to be taken to have done here) the exercise of the discretion called for by section 89 requires the party seeking the alternative mode of trial to discharge the onus to satisfy the Court that it should exercise its discretion upon the *particular* application made, to order that the trial be had, despite that fact, without a jury. It is therefore not to the point to consider universal characteristics on jury trials.

Also impermissible is consideration of the consequences of the conduct of the trial with a jury for other cases standing in the list. A judge hearing an application under section 89(1) of the Act would have to shoulder an intolerable burden to decide between the competing claims of all cases awaiting hearing in the Court, or even in a particular sitting of the Court. He or she does not typically have the material to work out the budget allocation that will best achieve justice as between all parties in the list. Nor does he or she have the data to determine justly the competing claims to aggregate judicial time. This is not the purpose for which the discretion in section 89 was provided. To refer to such considerations is therefore, however well intentioned, to refer to matters which were not within the contemplation of the discretion conferred upon the judge by Parliament. It is also to question the premise upon which the discretion was conferred to discharge a jury, although lawfully requisitioned."

Samuels JA also examined the intention of the legislation like Kirby and concluded:

"It follows, to my mind, that the legislature, by expressing the 1987 amendment to section 89 in the way in which it did, and by leaving the group of sections in their present pattern, has plainly confirmed the individual litigant's right (in the class of case which section 86 contemplates) to have a trial with a jury and has affirmed that this right may be divested only if there are grounds for the proper exercise of the discretion

to order that a jury should be dispensed with. This approach to the matter is quite different from that adopted in England."

and agreed in general with what the President has written about the necessity to exclude from examination in the exercise the discretion matters which are wholly general universal and which raise only the inherent and inevitable consequences of employing juries in civil trials.

Mahoney JA dissented. He interpreted that the judge at first instance had a wider judicial discretion than Kirby P and Samuels JA. His reasoning was:

"It was submitted that it is not open to the court to order trial by judge because of matters which do not directly, in this way, affect the particular case. I do not think that such a general proposition should be accepted. In the exercise of other general powers, the court can and does have regard to matters outside the consideration which directly affect the particular case. It is, in my opinion, now generally recognised that it is part of the function of a judge to ensure that, subject to the requirements of justice and the interests of the parties, proceedings progress through the courts with due speed. As I shall indicate, each case, and the decision of it, must be determined according to the circumstances relevant to it. But it does not follow that the circumstances of other cases or of cases generally must be seen as irrelevant in determining what happens in a particular case."

The Court of Appeal urged a review of legislation to provide the Supreme Court with a wider discretion to dispense with juries than it believed was permitted on its interpretation of the Act.

It is interesting to note that in 1990, two years after *Herriman*, the Court of Appeal (Mahoney, Meagher and Handley JJJA) in *W Dzenko Structural and General Engineering Pty Limited v Fraser Hrones and Co Limited* (unreported, 751/88, 5 October 1990) took into account *general* considerations when upholding an appeal from Cole J who refused to grant an adjournment because the solicitors had failed to adequately prepare a case for hearing.

Handley JA, with whom Meagher JA agreed, said that it is important to bear in mind at a time when the courts of this State are under considerable pressure to reduce delays in the hearing of cases and volume of litigation that adjournments of cases which have been specially fixed for hearing involve prejudice to persons *other than litigants in question*.

These considerations have also been expressed by the Full Court of Victoria in *Apex Pallet Hire Pty Limited v Brambles Holdings Limited* (4 April 1988, unreported).

Proposed legislative amendments to abolish juries in the light of *Herriman*

In the light of *Herriman*, it was proposed that courts would retain discretion to order jury trials in cases where it was considered in the interests of justice required a jury. Jury trials would also be retained for cases where basic civil liberties may be an issues, such as those involving defamation, fraud, false imprisonment or malicious prosecution. These proposals are similar to the legislation in place in Western Australia and England.

The proposed amendments were to:

"Require that all civil actions be tried without a jury, provided that the court may order a jury -

(a) to hear issues of liability where a cause of action based on a charge of fraud or a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promises of marriage is involved; or

(b) where the court considers it in the interests of justice to order a jury."

On 14 March 1991 in the Second Reading of the Courts Legislation (Civil Procedure) Amendments Bill, Mr Dowd, the Attorney General, emphasised that the Government's primary concern in reforming the law is to remove the potential of unfairness which results from inconsistencies generated by two modes of trial, jury and non jury co-existing in the same jurisdiction. One of the inconsistencies, he said, was the different delay periods which apply to jury and non jury list. According to Mr Dowd, despite the fact that the jury list is substantially smaller in terms of case numbers than the non jury list, the delay applying to it is substantially longer.

In relation to cost, Mr Dowd reasoned:

"The resolution of civil disputes is consuming large and increasing amounts of society's resources. The jury list components of the civil justice system requires a disproportionately higher application of resources, not simply to support the jury system administratively but to cover also the costs of additional hearing time required for jury trials. The use of juries to hear a relatively small but time consuming and costly number of civil claims must now be considered a luxury, the continuation of

which must have deleterious effect on other components of the civil justice system. The logical response of the executive to this realisation in recent years has been to increase the jury requisition fee quite substantially. However, this has had the unfortunate effect of further exacerbating the general inequality between litigants in personal injury cases, because it makes the right to a jury trial dependent on the ability of the party to pay for the right. The inconvenience and monetary loss to jurors who are not compelled to adjudicate private disputes is also relevant. Jury fees are not, for the most part, sufficient to compensate jurors for lost working time and inconvenience. This financial loss and inconvenience is imposed on individual members of the public by the insistence of certain litigants on exercising a right to have a private controversy resolved by a jury with any demonstration that the public thereby benefits in terms of enhanced administration and delivery of justice."

On 1 May 1991 after the Second Reading, Mr Dyer of the opposition opposed the abolition of juries in civil trials on three grounds. They were:

- (1) Where a factual matter of duty of care is in dispute, eg. surgeon to a patient, a school authority to a student, a judge is not as well suited to apply mainstream community standards as is a civil jury of ordinary people.
- (2) The opposition disagreed with the assumptions that on average a jury trial takes longer to dispose of and involves greater resources of the Court than does a non jury trial hearing a similar claim.

Mr Dyer said that no records have ever been kept nor surveys conducted of the average length of jury trials as opposed to the length of non jury trials, nor of the average settlement rate in jury actions as opposed to non jury actions. It seems that the assumption that jury trials take longer to dispose of than non jury trials rests on the understanding that in a non jury matter there is no summing up and the opening addresses are much shorter. The average length of time for jury and non jury matters does not, however, take account of the differing settlement rates between the two types of trials, or any other factor that might exist.

His friend, Tim Kelly, had examined 23 files which may not be statistically significant. The result was that more jury matters settled and took less hearing time. Mr Kelly's survey will be discussed fully in Part 2 of this paper.

The third reason was:

(3) Due to changes in legislation, after 1 July 1987, only the most resolute and seriously disabled workers are likely to press on with common law claims against their employers. Thus, the delay in common law matters, whether the trial be by jury or not, will decrease markedly over the next few years.

Mr Dyer proposed five amendments to the Bill, the purpose of which were to continue to have jury trials in civil matters.

Ms Elizabeth Kirkby referred to representations made by the Bar Council, the Bar Association and Mr Kelly.

The Bar Council opposed the abolition of civil juries because it constitutes a significant but unjustifiable erosion of the rights of citizens to a trial before a jury, there are far more efficient ways to improve the legal system, the bill is illogical in eliminating juries for civil trials yet retaining them for complex trials such as defamation, fraud, malicious prosecution and false imprisonment. The Bar Council also says that there is no hard evidence that jury trials actually take longer than non jury trials and in any event, the Government imposes significantly higher fees for jury trials and there is no evidence that this fee does not recoup any additional costs involved.

The jury retention fee is under the topic of costs examined in Part C of this paper.

Ms Kirkby also referred to four points raised by the Bar Association. They were that:

- (1) Judges, by virtue of their position and education, tend to be remote from the view of the ordinary citizen regarding the quantum of damages;
- (2) If there are problems with the length of jury trials, then reforms enabling the tender of material not seriously in issue could be introduced.
- (3) plaintiffs cannot afford to pay the jury surcharge of \$500 per day; and
- (4) the continued presence of civil juries will provide a moderating and standard-setting effect on the awards of damages made by judges and considered by courts on appeal.

Ms Kirkby then placed on record that the Australian Democrats cannot support the Courts Legislation (Civil Procedure) Amendment Bill but will support the amendments to be moved in Committee by the opposition.

The amendments were put to the Committee who voted 21 in support and 18 against. The amendments were agreed to with the effect that jury trials are to continue in civil matters.

1.5.5 The current position with jury trials

As Mr Dyer predicted, the political need to dispense with a jury in civil matters has somewhat diminished. When *Herewood* was decided in 1988, there were 10,998 matters in the common law pending caseload - this number comprises of both jury and non jury matters. In 1988 the delay between the filing of a Notice to Set Down for Trial and the hearing was 3½ years for motor vehicle and non jury cases and 6¼ years for jury cases¹⁷. In March 1991 when Mr Dowd made his second reading of the Courts Legislation (Civil Procedure) Amendment Bill there were 7,338 pending cases. As at August 1993 there are 4831 pending cases¹⁸.

2. DELAY

According to Maureen Solomon and Douglas K Somerlot¹⁹, the most significant measure of delay is the age of the pending caseload computed for each major case type. The critical measure of delay describes the inventory awaiting processing, ie. cases whose delay the court can effect. While the time for filing to disposition is popular for its ease of computation and its relationship to system goals, it is less useful for management purposes because it describes history. Closed cases cannot be affected by changes in the pending inventory. Other measures which, while historical descriptions, provide a snapshot of delay are the time intervals between major case events and time between major case events and the time intervals between first assigned trial date and actual trial date.

2.1 Methodology

Although the age of each case type in the backlog may be the most significant measure of delay, this study seeks to compare the Court produced statistics of the backlog figures for jury and non jury matters and compare these to a sample of 25 files of jury and non jury matters commenced in 1987 to test the accuracy of these statistics. It is useful in this study to provide snapshots of delay at time intervals between major case events.

To give an overview, Table 1 (on the following page) is a flow chart of the Common Law listing process.

¹⁷ Article by Mr Justice Wood; *Supreme Court of New South Wales Common Law Delay Reduction Project*

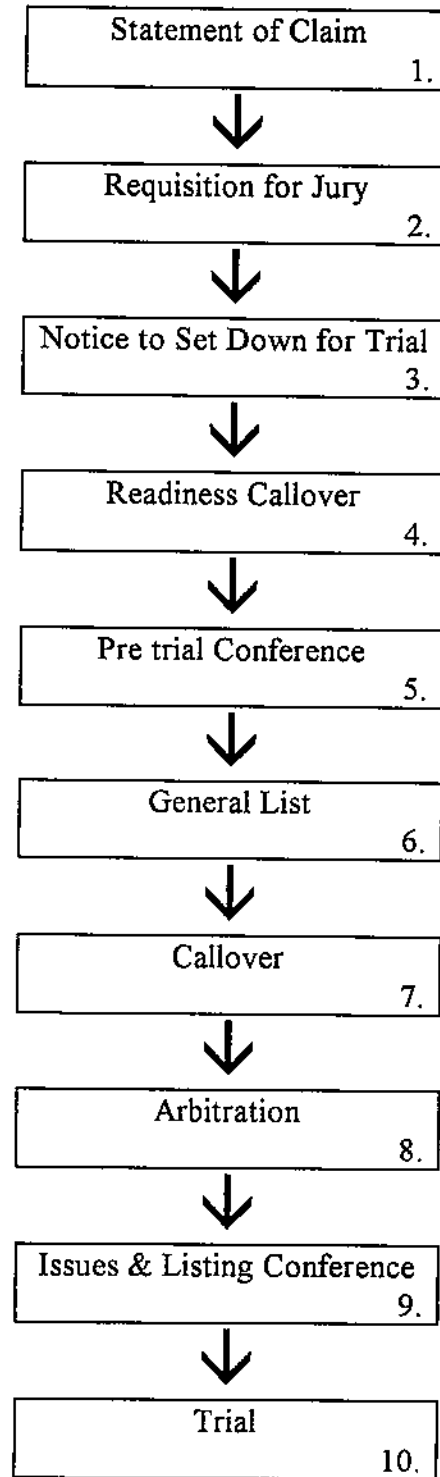
¹⁸ Part 3 Year to Date Statistics, Supreme Court of New South Wales List Report, August 1993, Manager Court Services, Supreme Court of NSW, p11

¹⁹ *Caseflow Management in the Trial Court Now and for the Future*; American Bar Association, Division for Judicial Services, Lawyers' Task Force on Reduction of Litigation Cost and Delay

Table 1

Common Law Listing Process - From Statement of Claim to Hearing

Jury and Non Jury Matters



*In non jury trials, step 2 is omitted.

2.2 Explanation of the flow chart

The procedures for listing common law matters have changed over the six years since 1987. In 1987/88, the Court focused on early resolution of cases. There was an early readiness hearing held approximately six months after the Notice to Set Down for Trial was filed. A Notice to Set Down for Trial (NSDT) is usually filed by the plaintiff. The Court measures delay as being the period from the date NSDT is filed to the date the matter is listed for trial or settled. It should be noted that often a NSDT is filed by the plaintiff's solicitor, not because the matter is in fact ready for trial but to secure a place in the waiting list.

In 1987 and 1988 at the readiness hearing, if the parties consented, the matter would be referred to a pretrial settlement conference. If the matter did not settle at conference, it would be referred to the general list. At the readiness conference, if the parties did not consent to a conference, the matter was referred to the general list. The pretrial conferences were an optional step in the process and it was intended that a matter would retain the priority it would have had if it had not been allocated a conference. Pretrial conferences were abolished in 1989. The focus in listing moved from early settlement to the matters that had been waiting in the general list the longest.

The matters then waited in the general list until they were called up to a directions hearing. Practice Note 65 provided that if the matter was not ready at the first callover it would be adjourned to another in two months time.

If the matter was still not ready, it went to the end of the general list, ie. started the waiting period again. If the matter was ready, it was allocated a compulsory Issues and Listing Conference (ILC). The purpose of an ILC is to try and settle the matter and failing that, to ascertain whether the matter is ready to go to trial. Both parties must attend with their legal representatives. If the matter is not ready, it goes either back to the end of the general list or to the List Judge. If, for example, it is a matter where a child has suffered brain damage and their condition will not stabilise for a number of years, the matter can be placed in the dormant list. This is an uncommon event.

At the directions hearing, the matter, if the cause of action is personal injuries, can be referred to arbitration at the Registrar's discretion. If a party applies for a rehearing after the arbitration, the matter does not lose priority. It is intended that a hearing date be allocated as if the matter had not been to an arbitration hearing.

From the ILC the matter is allocated a hearing date or an arbitration date.

In 1992 the common law listing procedure changed again with Practice Note 68. The emphasis is listed is still upon those matters that have been waiting the longest period of time for a hearing date.

2.3 Sample

The following criteria for the 50 files selected in this sample which should be noted are:

- (1) The files were selected in numerical order commencing 1 January 1987.
- (2) 1987 files were selected as all of these files would be finalised in 1993.
- (3) There was a spread of different plaintiffs' solicitors and defendants' solicitors acting in these matters. There was no bulk filing by one solicitor. The sample is representative of the solicitors who file Statements of Claim in the Supreme Court.
- (4) Defamation files were excluded as these matters are dealt with separately by a judge assigned to that list. The court procedure differs from the general common law procedure.
- (5) The files where the venue was other than Sydney were discarded. For example, there were 2 files where Goulburn was the nominated place for trial. The Supreme Court has only one sitting per year at Goulburn. These files would not reflect the delay in jury and non jury lists.
- (6) One file that has been transferred from Wollongong to Sydney was discarded. It was commenced in 1985 and would not properly reflect delay.
- (7) The non jury files include motor vehicle accident cases (denoted by MV in column 1). Motor vehicle matters can be dealt with by the Masters - 2 of which sit in Common Law. The effect of including motor vehicle matters means that the delay in these matters may be less than for non jury matters which could not be dealt with by a Master. Since 1992, Masters have been able to deal with non jury matters.
- (8) At callover (denoted by number 6 in non jury sample and 7 in jury sample) the matter of not ready at the first callover may have been allocated another callover dated in two months time. It is the later callover dated that has been referred to in that column. The settlement amount referred to in the Terms of Settlement do not accurately reflect the sum paid by the defendant to the plaintiff. Often the plaintiff may seek a redemption in the Compensation Court for the majority of the settlement amount
- (9) For the purposes of this sample, matters are treated as being finalised when a hearing or arbitration concludes. Of course, the parties may, in the case of a hearing, appeal to the Court of Appeal, or in the case of arbitration, may apply for a rehearing. In the sample, no appeals or applications for rehearing were filed.

JURY 1987

	1	2	3	4	5	6	7	8	9	10	11	12	13
(1) Statement of Claim filed	05.01.87	05.01.87	*p (1) 29.12.86	06.01.87	24.02.87	08.01.87	08.01.87	08.01.87	08.01.87	08.01.87	09.01.87	09.01.87	09.01.87
(2) Req for Jury filed by	D 02.04.87	D 28.07.87	D 13.03.87	D 10.02.87	D 12.08.87	D 26.02.87	D 17.11.87	D 21.04.87	D B/C 10.12.87	D 18.03.87	D 17.02.87	D 24.02.87	D 18.03.87
(3) NSDT	07.05.87	22.07.88		01.04.87	07.03.89	15.09.87	01.12.87	01.02.88	30.07.87	29.05.87	02.03.87	20.03.87	26.06.87
(4) Readiness Callover	19.07.87						22.06.88	20.09.88	08.12.87	19.11.87	17.09.87	24.09.87	15.12.87
(5) PTC								30.11.88	14.06.88			31.03.88	
(6) Jury general list								30.11.88	14.06.88	26.07.91	17.09.87	31.03.88	15.12.87
(7) Callover	30.11.90		17.12.92						13.09.91				
(8) ILC	03.06.91		04.05.93						19.02.92				
(9) Arbitration			22.06.93										
(10) Hearing										02.03.92			
Settlement date T/S Amount	03.06.91 T/S ILC \$135K	07.03.89 T/S \$6K	22.06.93 T/S Arb \$16K	08.07.87 T/S \$40K	08.01.90 T/S \$3K	13.11.87 T/S \$4500	20.05.88 T/S \$3300	10.09.91 T/S \$10K	10.12.91 T/S \$2500	02.03.92 before hg comm \$25K	16.11.88 T/S \$5K	02.04.90 T/S \$5K	27.10.88 T/S \$4.5K

(1) *p - by post

JURY 1987

	14	15	16	17	18	19	20	21	22	23	24	25
(1) Statement of Claim filed	09.01.87	09.01.87	09.01.87	09.01.87	09.01.87	09.01.87	09.01.87	09.01.87	09.01.87	05.01.87	09.01.87	12.01.87
(2) Req for Jury filed by	D 24.03.87	D 05.02.87	D 09.02.87	D 04.05.87	D 10.06.87	D 16.04.87	D 02.04.87	D 08.05.87	D 09.03.87	D 05.05.87	D 06.03.87	D 06.03.87
(3) NSDT	26.05.87	21.04.87	27.04.87	12.06.87	01.07.87	06.07.87	09.06.87	22.07.87	25.05.87	29.05.87	22.07.87	25.03.87
(4) Readiness Callover	19.11.87	22.10.87	22.10.87	15.12.87	15.12.87	23.02.88	15.12.87	23.02.88	19.11.87	19.11.87	23.02.88	24.09.87
(5) PTC		02.05.88	03.05.88			13.07.88	20.06.88			27.05.88	18.07.88	06.04.88
(6) Jury general list	19.11.87	02.05.88	03.05.88	15.12.87	15.12.87	13.07.88	20.06.88	23.02.86	19.11.87	27.05.88		06.04.88
(7) Callover	30.11.90			12.12.91		12.09.91	17.10.91		26.07.91			
(8) ILC	06.06.91							19.02.92				
(9) Arbitration							03.12.91			03.09.91		
(10) Hearing				21.04.92 23.11.92				06.04.92				
Settlement date T/S Amount	06.06.91 T/S not on file	06.10.88 T/S \$8.4K	23.02.89 T/S P \$2.5K	24.12.93 T/S \$32K	23.05.90 T/S \$5K	14.10.88 T/S \$5K	03.12.91 before arb \$8K	06.04.92 T/S before hg \$16K	08.05.89 T/S \$4K	26.11.91 T/S before arb \$65K	16.07.88 T/S at conf \$15K	18.09.89 T/S \$67353.68

NON-JURY 1987

	1	2	3	4	5	6	7	8	9	10	11	12	13
(1) Statement of Claim filed	05.01.87	MV 05.01.87	MV 05.01.87	MV 05.01.87	MV P 30.12.86	MV 05.01.87	06.01.87	06.01.87	MV 06.01.87	MV 06.01.87	06.01.87	06.01.87	06.01.87
(2) NSDT	12.05.87	21.05.87	18.06.87	05.08.88		16.09.87	23.03.89	23.02.87	09.08.87	08.11.88	09.07.87	15.07.87	
(3) Readiness Callover	19.11.87	11.11.87	09.12.87			12.04.88		10.10.87			08.12.87	09.12.87	
(4) PTC			14.03.88								15.06.88	10.03.88	
(5) Non jury general list	19.11.87	11.05.88	14.03.88					10.10.87			15.06.88	10.03.88	
(6) Callover	06.04.90		18.10.89	27.08.92		28.08.92	04.12.92	01.06.90	06.03.92	07.12.90	16.10.90	13.10.89	
(7) ILC	01.05.90		14.02.90				17.03.93	17.07.90	22.09.92		04.02.91	29.01.90	
(8) Arbitration				22.10.92				14.09.90		22.03.91			
(9) Hearing	05.07.90		09.04.90							30.08.91	19.04.91	30.03.90	
T/S Judgment date	before hg 05.07.90 T/S \$25K	25.09.89 T/S \$86K	settled T/S 2nd day of hg	Award given 29.01.92 115283.26	05.08.90 T/S \$20K	T/S Verdict for def	settled at conf T/S 109306.72	settled before arb comm-no terms filed	settled before conf T/S 31.03.92 \$195K	T/S before hg comm \$101K	settled T/S before hg comm \$60K	at hg T/S \$55K	Nice Disc 27.01.87

NON-JURY 1987

	14	15	16	17	18	19	20	21	22	23	24	25
(1) Statement of Claim filed	MV 06.01.87	06.01.87	MV 06.01.87	MV 06.01.87	07.01.87	MV 08.01.87	08.01.87	MV 08.01.87	08.01.87	MV 08.01.87	MV 12.01.87	12.01.87
(2) NSDT	15.07.87	17.06.87		23.11.87	03.12.87	05.08.87	19.05.87		12.06.87	30.05.88	08.07.87	22.05.87
(3) Readiness Callover	09.12.87	08.12.87		13.07.88	29.06.88	09.03.88			08.12.87	10.11.88		10.11.87
(4) PTC		07.06.88			14.10.88				06.06.88	15.03.89		
(5) Non Jury general list	09.12.87	07.06.88		08.02.89	14.10.88	08.03.91			06.06.88	15.03.89	17.08.88	10.11.87
(6) Callover	13.10.89	06.04.90	09.11.90						09.12.92		07.12.90	22.06.90
(7) ILC	29.01.90	25.10.90	09.07.91						16.03.92		02.09.91	
(8) Arbitration						21.02.92						
(9) Hearing	30.03.90			(5) 02.05.90					27.05.93			
T/S Judgment date	Settled at hg \$60K	Settled before conf T/S \$215K	Settled before conf T/S \$13K	09.03.89 T/S \$51,500	29.03.89 T/S \$10K	21.02.92 at arb T/S \$63,500	24.09.87 T/S \$3.5K	No action	27.05.93 T/S \$200K	15.06.89 T/S \$250K	02.09.91 at conf T/S \$64K	22.06.90 at c/o \$10K

2.4.1 Delay from NSDT to Trial* or Settlement*

From the statistics, the delay from NSDT to trial or settlement for the jury and non jury matters can be ascertained. The Court statistics only show delay from the date of filing the NSDT to trial or arbitration, ie. from NSDT to final determination. These statistics are shown below and in graph form over the page.

NON JURY

Time/Years	No. of matters	%
0 - 1**	4	16
1 - 2	2	8
2 - 3	6	24
3 - 4	10	40
4 - 5	3	12
over 5	10	4
Total	25	100

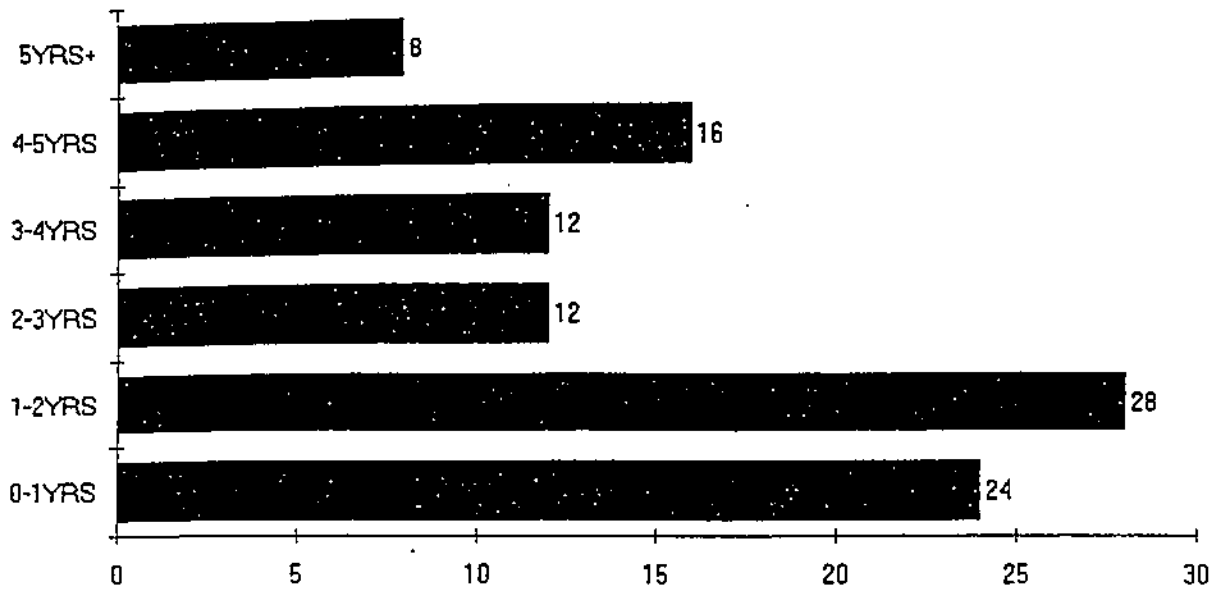
JURY

Time/Years	No. of matters	%
0 - 1	6	24
1 - 2	7	28
2 - 3	3	12
3 - 4	3	12
4 - 5	4	16
over 5	2	8
Total	25	100

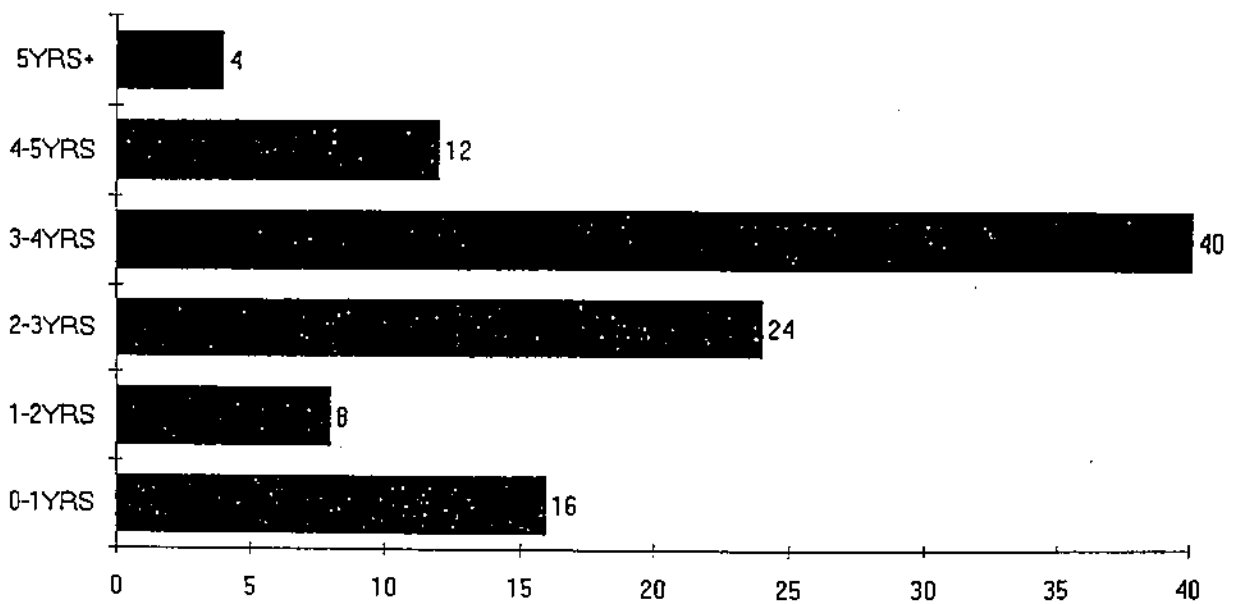
*Whichever first occurs

**In 2 non jury matters, no NSDT has been filed. As no court action takes place until the NSDT has been filed, the delay is treated as between 0 - 1 years.

JURY



NON JURY



2.4.2 Conclusions

It should be noted that in each jury case, it was the defendant who requisitioned a jury. The majority (52%) of jury matters were finalised by way of settlement in less than 2 years from the date of filing the NSDT. Whereas only 24% of non jury matters were finalised by way of settlement in that time.

On the other hand, the majority (54%) of non jury matters were finalised between 2 - 4 years from the date of filing the NSDT.

All non jury matters were finalised within 5 years but 8% of jury matters remained in the Court list for over 5 years.

Jury matters resolve by way of settlement earlier than non jury matters.

2.5 Delay from NSDT to finalisation by Court

2.5.1 Methodology

The period of delay was calculated from the date of filing of the NSDT to an arbitration or hearing date. Matters that settled prior to the allocation of a final determination were discarded.

2.5.2 NON JURY

No.	Date NSDT	Arb	Trial	Time
4	05.08.88	21.09.92		4 years 2 months
8	09.08.88	14.09.90		3 years 1 month
10	08.11.88		30.08.91	2 years 10 months
11	09.07.87		19.04.91	3 years 9 months
12	15.07.87		30.03.90	2 years 8 months
14	15.07.87		30.03.90	2 years 8 months
17	23.11.87		02.05.90	2 years 4 months
19	05.08.87		21.02.92	4 years 6 months
Average period of delay				3 years 2 months

2.5.3 JURY

No.	Date NSDT	Trial	Time
3	23.09.87	22.06.93	5 years 9 months
10	29.05.87	02.03.92	4 years 10 months
17	12.06.87	23.11.92	4 years 5 months
20	22.07.87	06.04.92	4 years 9 months
23	29.05.87	03.09.91	3 years 4 months
Average period of delay: 4 years 7 months			

2.5.4 Conclusion

It seems that if jury matters proceed to finalisation by the court allocating an arbitration or hearing date, average delay from the sample is 4.7 months. The delay for non jury matters is 3 years 2 months. Jury matters, according to this sample, take 17 months longer. Thus the delay for court finalisation of jury matters is longer. However, these statistics may not be reliable as there may be too few matters included in the sample to extrapolate these figures. Most of the matters in the sample that proceeding to court finalisation were dealt with in 1991 and 1992.

The statistics provided by the court²⁰ for delay in jury and non jury matters in 1991 and 1992 are:

<u>As at end December</u>	<u>No. of matters in general list</u>	<u>Oldest NSDT date</u>	<u>Delay</u>
<u>1991</u>			
Jury	1,123	01.11.88	3 years 1 month
Non Jury	2,101	01.11.88	3 years 1 month
<u>1992</u>			
Jury	842	08.08.89	3 years 4 months
Non Jury	1,907	06.09.89	3 years 3 months

Comparing the Court statistics with the sample, the delay in non jury matters according to the Court is about 3 years 2 months which is exactly what the sample shows. The sample

²⁰ D Beling, Manager Court Services, Supreme Court of New South Wales

results may be reliable. However the jury statistics show a different picture. The Court calculates delay in jury matters as about 3 years 3 months. The sample calculates the delay at 4 years 7 months. As there are only 5 matters in the jury sample as stated above, the results are unreliable.

2.6 Length of jury trials

This section of the paper examines the length of jury trials compared to non jury trials in Group 'C' Specialittings to ascertain whether jury trials take longer.

Wallace J in his article "*Speedier Justice (and Trial by Ambush)*"²¹ (see page 2 of this paper) says that jury trials take longer because of the time taken empanelling a jury, opening addresses to the jury, the large number of witnesses called, the closing addresses and the judge's summing up to the jury. In jury matters, not only are more witnesses called, but they are examined in more detail so that jury, unfamiliar with technical issues, can understand them. The former Attorney General, Mr Dowd, also referred to these factors creating delay in jury in his second reading to Parliament of the Civil (Amendment) Act, 1991²².

The reason why more witnesses may be called at jury trials may be attributed to Part 36 rule 13B of the Supreme Court Rules.

Part 36 rule 13B states that where an expert's report is served, it is admissible as evidence of the expert's opinion and where the expert's direct oral evidence of a fact upon which the opinion was formed would be admissible, as evidence of that fact, without further evidence, oral or otherwise.

For the Specialittings, Part 36 rule 13C was introduced. It created a presumption that the provisions of 13B(above) apply to proceedings without a jury and unless the court otherwise orders to proceedings on a trial with a jury.

Nevertheless, in the jury matters only four statements were read onto the record. One of the witnesses gave evidence in relation to his statement.

2.6.1 Methodology

Out of 229 matters originally placed in Group 'C' for the first Specialittings in 1993, 100 matters remained in the list after settlement conferences and callovers had been held. Only 4 jury and 6 non jury matters proceeded to a court determined judgment.

²¹ Ibid

²² Ibid

This sample may be too small to give reliable results. Perhaps a better sample would included all matters from both Special Sittings held in 1993. Due to time constraints, it is not possible for me to complete this task.

In each of the 4 jury matters the following details will be ascertained: the length of the trial from commencement to judgment; then time taken for various stages of the trial; empanelling the jury of 4; opening addresses; the number of witnesses and time taken by them to give evidence; closing addresses; judge's summing up; time taken for legal argument; and jury's deliberation. This information is taken from the Associates' record of proceedings. These notes are made during the actual hearing.

One matter was heard over 3 days to judgment. It commenced as a jury matter. On the second day the jury was dispensed with. This matter is not included in the sample.

It should be noted that one particular judge heard one jury matter and 2 non jury matters. Another judge heard one jury and one non jury matter.

The time taken for morning tea and luncheon adjournments was not included in the time calculations. Usually morning tea is 20 minutes duration and lunch is 1 hour.

When the actual court sittings commenced, there were 100 matters left in Group 'C'. Group 'A' had 85+ Group 'B' 90.

The 100 matters in Group C comprised of:

42 Jury

58 Non jury

100 Total

No distinction is drawn between motor vehicle and non jury matters as in paragraph as Masters now had power under the Supreme Court Rules to hear non jury matters.

The matters can be divided into the following categories; settled before hearing; settled during hearing; and matters heard to judgment. It is the last category that is the focus of this part.

2.6.2 Matters settled before hearing

	No.	% of matters
Jury	29	69
Non Jury	<u>32</u>	55
Total no. of matters	61	

There is little difference in settlement rates between jury and non jury matters at this stage.

Of the 100 matters, 62 settled before they were listed before a judge for hearing.

2.6.3 Settled during hearing

Jury

Settled $\leq$ 1 day	6
$\leq$ 2 days	1
$\leq$ 3 days	<u>1</u>
	8 - 19%

Non Jury

Settled $\leq$ 1 day	7
$\leq$ 2 days	4
$\leq$ 3 days	<u>1</u>
	12 - 21%

2.6.4 Matters heard to judgment

These matters are examined in detail in 2.7.2

Jury

Time taken $\leq$ 1 day	1
$\leq$ 2 days	2
7 days	<u>1</u>
	4

Non Jury

Time taken $\leq$ 1 day	3
$\leq$ 2 days	2
$\leq$ 3 days	<u>1</u>
	6

2.6.5 Not reached

Jury - 2

Non Jury - 4

2.6.6 Removed from Sittings

Jury - 1

Non Jury - 3

2.7.1 Length of Jury and Non Jury Trials

In the debate by the Legislative Council over the Courts Legislation (Civil Procedure) Amendment Bill on 1 May 1991, Mr R D Dyer of the opposition referred to a survey conducted by his friend, Mr Tim Kelly, solicitor, in relation to time taken in hearing jury and non jury trials. He qualified the results by saying that it might be argued that 23 claims are not necessarily significant and he would not differ from that should anyone want to make an argument. He said that in the absence of any better material, which had not been advanced by the Attorney General, he felt entitled to put the results by Mr Kelly.

Mr Kelly's Survey

Mr Dyer said that Mr Kelly's analysis revealed that of the 23 cases he examined, 17 came to trial with juries and 6 came on for trial before a judge alone. Of the 17 jury matters, 16, or 94 per cent, were settled after an average hearing time of 1.85 days. The average length of court hearing for all 17 jury matters was 2.35 days. Of the 6 matters tried before a judge alone the settlement rate was zero, and 100 per cent of them were litigated to finality at trial level. The average court hearing time of those 6 matters was 10.5 days. Further that all of the five non jury trials in respect of which judgment has been handed down so far have ended up in the Court of Appeal. The relevance of that remark is that those matters will take up even more of the court's time.

In Mr Kelly's sample it would seem that when the matters came to trial, more jury matters than non jury matters settled.

With settlements being taken into account the average time for a jury trial was 2.35 days, whereas the average time for a non jury trial was 10.5 days.

2.7.2 LENGTH OF JURY TRIALS IN GROUP 'C' - FIRST SPECIAL SITTINGS IN MAY/JUNE 1993

This sample differs from Mr Kelly's sample in that settlements are not taken into account.

Abbreviations

(d)	Witness called by the defendant
(p)	Witness called by the plaintiff
(V)	Verdict
(J)	Judgment
(P)	Plaintiff
(D)	Defendant
(K)	1000

JURY

Time taken (hrs/mins)	Trial 1	Trial 2	Trial 3	Trial 4
1. Empanelling jury & address by judge	0.09	0.15	0.07	0.15
2. Opening address	0.30	0.14	0.20	0.20
3. No. of witnesses	11	4	6	10
Type				
Plaintiff	2.50	0.45	2.18	7.15
Lay (1)	1.20	1.00	0.12	1.08
Lay (2)	(d) 0.40	0.12		
Lay (3)	(d) 0.27	0.22		
Dr (1)	(d) 1.00		0.50	0.25
Dr (2)	(d) 0.30		0.30	0.46
Dr (3)	(d) 0.27		0.06	(d) 1.37
Dr (4)	(d) 0.10		0.07	(p) 1.15
Dr (5)	(d) 0.08			(p) 0.05
Dr (6)	(d) 0.40			(p) 1.10
Dr (7)				(d) 0.35
Dr (8)				(d) 0.50
Expert on liability	1.10			
4. Witness time subtotal	9.22	2.19	4.13	14.26
5. Legal argument	2.16	0.30	1.25	
6. Closing addresses - (p)	1.25	{ 1.07	0.55	1.40
(d)	1.00		1.20	0.35
7. Judge's summing up	1.30	4.05	2.35	3.10
8. Jury's deliberations	1.20	0.50	2.00	2.10
9. Total time taken	16 hrs 53 m	9 hrs 20 m	12 hrs 18 m	21 hrs 56 m
10. Result	V for D	J for P - \$52K	J for P - \$140K	J for P - \$138K

Average time taken in jury trial - 15 hours and 7 minutes

NON JURY

Time taken (hrs/mins)	Trial 1	Trial 2	Trial 3	Trial 4	Trial 5	Trial 6
1. Opening address	0.05	0.18		0.28		0.10
2. Legal argument	2.33			1.45		
3. No. of witnesses	9	1	4			
<u>Type</u>						
Plaintiff	1.13	0.40	3.20	5.30	2.55	2.30
Lay (1)	0.27		1.30	1.40	0.30	
Lay (2)	0.20		0.30		1.00	
Lay (3)	0.50				0.30	
Dr (1)	0.40		0.15			
Dr (2)	0.55					
Dr (3) (d)	0.30					
Dr (4) (d)						
Expert on liability	0.13					
4. Witness time subtotal	3.28	0.40	5.35			
5. Closing addresses - (p)	0.25	0.25	1.0	2.0	{ 2.30	0.20
(d)				1.40	{	0.30
6. Judgment time taken	45 page judgment 3.25	0.30	34 page judgment 2 days later			1.00
9. Total time taken	9 hrs 56 m	1 hr 55 m	5 hrs 35 m	13 hrs 03 m	11 hrs 40 m	4 hrs 30 m
10. Result	V for D	2D pay \$6.58K	P-\$1.1M	\$531K	judgment reserved	P-\$362K

Average time taken in non jury trials - 8 hours

Conclusion

Out of the 100 matters left in Group 'C' First Special Sittings for 1993, 29 (69%) of jury matters and 32 (55%) of non jury matters settled before the actual hearing commenced. As there were more non jury matters listed, it works out that 69% of jury matters listed settled prior to the hearing commencing whereas only 55% of non jury matters settled at this stage. More jury matters settled before the commencement of the hearing.

Once the hearing commenced, 8 (19%) of jury matters and 12 (21%) of non jury matters settled. The settlement rate for jury and non jury matters was almost the same with non jury matters having a 2% higher settlement rate.

2.7.3 Conclusions

4 jury and 6 non jury matters were heard to judgment. This works out at 9.5% of jury matters and 10% of non jury matters proceeded to judgment. More non jury matters proceeded to judgment.

The other 6% of jury matters and non jury matters are not taken into account as they did not proceed - see paragraphs 2.6.5 and 2.6.6.

It seems that more jury matters settled earlier, ie. before the hearing commenced. Once the hearing commenced, the settlement rate between jury and non jury matters was almost the same. More jury matters (as a % of the total matters) proceeded to judgment than non jury matters.

It seems that Mr Kelly only looked at matters where settlements occurred during the hearing and those that proceeding to hearing, ie. periods of time referred to in paragraphs 2.6.3 and 2.6.4 of my sample.

The results of the two surveys cannot be compared as Mr Kelly includes settlements in his calculation of time of trial whereas my sample separates settlements those matters which proceed to judgment.

My sample shows that jury matters took on average 15 hours, ie. 3 days and non jury matter took on average 8 hours being 2 days of hearing time.

It would seem that both surveys are inconclusive as the number included in the samples are not representative of the population.

Mr Kelly's results can be subject to interpretation. If the 16 jury matters settled after an average sitting time of 1.85 days and after inclusion of the 17th matter which proceeded to judgment brought up the average sitting time to 2.35 days, it would appear that the one jury matter took about 10 days. He says that the average court hearing time for the 6 non jury matters was 10.5 days. It may be that the one jury matter was an unusual case which has skewed the figure in relation to jury trials or it may be that, in his survey, jury and non jury matters take roughly the same time if they proceed to judgment.

Again, I stress that my sample is probably too small and therefore the results are inconclusive. From my sample, if any conclusions can be drawn, it would seem that jury trials, on average, take a day longer than non jury trials.

It is also important to note that in non jury matters, no allowance has been made for the time taken by the judge in writing his judgment. The judgments in my sample were delivered promptly but a 45 page and a 34 page judgment take time to write.

3. COST OF JURIES

In this section the cost of juries to the Court and parties will be compared to those of non jury matters.

3.1 Cost to the Court

New South Wales jury panels are compiled from lists chosen randomly from the electoral roles. The jury pool is selected by computer and has no discretionary input from the Sheriff who controls the number of jurors summoned to each panel and the total number of people on the note. Particular groups of jurors or individuals cannot be chosen.

Procedure to call up juries

The Supreme Court issues a precept to the Sheriff nominating the number of jurors required.

The Sheriff then issues to each person selected as a juror a summons requiring the person to attend the Court at a specified time until discharged. The summons has to be served 7 days prior to the date the juror is required to attend Court²³.

Cost

The Sheriff issues approximately 22,000 notices to jurors each year. This includes both civil and criminal trials and includes both the District and Supreme Courts in New South Wales. The costs that is attributable to the Supreme Court civil trials cannot be ascertained.

A person selected for jury duty may apply to the Sheriff before or on the day of the commencement of the trial to be excused. Good cause must be demonstrated. A juror may also apply to the Court to be excused²⁴. Schedule 1 lists persons who are disqualified from serving as jurors, Schedule 2 describes persons who are ineligible to serve as jurors. Schedule 3 describes persons who may claim exemption as of right. There is no breakdown of the cost to the Sheriff or the Court for excusing jurors.

The Sheriff operates a recorded phone message (referred to on the jury notice) where summonsed jurors may phone on the day prior to when they are required to attend court,

²³ Section 27 Jury Act, 1977

²⁴ Section 38 Jury Act, 1977

informing them if they are excused. The Supreme Court publishes this information in its court list which appears in the Sydney Morning Herald each weekday. Again there is no breakdown of costs of providing these services.

Section 72 of the Jury Act, 1977 provides that a juror shall be entitled to be paid for his attendance at court whether he serves on a jury or not.

Between 1 July to December 1992, 107,598 people were summoned for jury duty. Prior to the trial date 38,260 of those people were told not to attend court, 69,338 were required to attend but of that figure only 30,523 attended court for jury duty. Only 9,467 actually served on a jury²⁵.

902 juries were empanelled between 1 July to 31 December 1992. These figures refer to both civil and criminal trials in both the civil and criminal trials.

Civil trials in the Supreme Court

Between 1 July to 31 December 1992, there were 137 Supreme Court civil trials (15.19% of all juries) as each civil jury panel costs of 4 persons²⁶. There would have been 648 jurors required for civil trials during that six month period. However, this figure does not include the extra people whose service was challenged. Mr Lennon, in his memorandum, allows six challenges per panel. This means that on the first day of each trial I should allow for the attended of 6 extra jurors. That is 137 trials x 6 = 822 summonsed jurors for one day.

The scale of fees paid to jurors is below:

SCALE OF FEES	
	\$
½ day	23
1-3 days	46
4-5 days	47
6-10 days	49
11-15 days	54
16-30 days	56
31-35 days	57
36-40 days	63
41 days>	70

²⁵ These figures are from a memorandum from the Sheriff, David Lennon, to Mr Justice Abadee dated 6 April 1993. These statistics were provided to the Jury Task Force

²⁶ Section 20 Jury Act, 1977

Plus 20c per kilometre for travelling expenses to and from home each day. Empanelled jurors are not paid any meal allowance. (Criminal jurors are paid a meal allowance.) Obviously these fees do not fully compensate jurors for their expenses including loss of wages.

Also according to the Sheriff, the average attendance for an empanelled juror is 3 - 4 days.

Using the information above, the cost of providing jurors for civil trials for the six month period 1 July to 31 December 1992 is as follows:

No. of jurors challenged on first day who were paid for one day's attendance (6 challenges x 137)

$$822 \times \$46 = \$37,812 \quad (1)$$

plus jurors who served (648) on average for 4 days

$$648 \times (3 \times 46) = \$89,424 \quad (2)$$

$$+ 648 \times 47 = 30,456$$

$$\text{Total cost (1) + (2)} = \$119,880 \quad (3)$$

Offset against this cost is

(i) Filing fee of \$530 for a requisition for trial

$$\text{ie. } 137 \times \$530 = \$72,610 \quad (4)$$

and

(ii) The daily retention fee of \$240 per day. Again, it is assumed that civil trials run for 4 days, then

$$137 \times 240 \times 4 = \$131,520 \quad (5)$$

$$\text{Total} = 204,130 \quad (6)$$

$$\text{Costs of civil jury for six months} \quad 119,880 \quad (3)$$

$$\text{Less fees collected} \quad -204,130 \quad (6)$$

$$\text{Balance - SURPLUS} \quad + 84,250 \quad (7)$$

Note: No allowance has been made for jurors travelling expenses.

3.1.2 Conclusion

Although by no means an accurate figure, it would appear that if the jury requisition fee and retention fees are taken into account, to offset the cost to the court of providing juries, the court may actually make a profit. However, from any profit, the amount claimed by jurors for travelling expenses must be deducted.

3.2 Cost to parties

In this section, 10 jury and 10 non jury files which have been submitted to taxation will be examined to see if jury trials are more expensive to the parties.

3.2.1 Methodology

Where one party has been ordered to pay the other party's costs, there is a procedure in the Supreme Court for the costs to be taxed by a Taxing Officer on a party/party basis.

Part 52 rule 23 of the Supreme Court Rules provides that party/party costs are those that are *necessary* and *proper* for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The amount for each item of work a solicitor performs is regulated by Schedule G to Supreme Court Rules. There is also a set scale for Counsels fees.

The tables of jury and non jury files appear on the next two pages.

Where an asterix appears in the column "taxed costs", it signifies that the bill has not yet been taxed by the Court. As a rule of thumb, when a bill is taxed by a Taxing Officer, the amount of 1/3 off the total amount of the bill of costs.

The number of 10 jury and 10 non jury files are too few to constitute a representative sample of files.

NON JURY

Type of Injury	1	2	3	4	5	6	7	8	9	10
NSDT	brain damage 23.05.87	back, fracture right hip 19.08.87	neck 31.10.86	fractured elbows 30.11.88	back & neck 27.04.90	face, fractured shoulder, back 13.08.87	dislocated right knee 10.06.87	set aside T/S in personal injury 27.03.90	brain damage tutor appointment 17.04.90	teeth, face, neck, back, knees 10.02.86
Hearing Date Amount	03.02.92	1 day 06.09.90 \$124,500 Judgment	4 days 14.04.93 18.04.93 19.04.93 28.04.93 \$265K	2 days 02.02.90 06.02.90 \$75K	2nd day T/S 09.10.91 \$100K	3 days 23.07.91 16.08.91 14.10.91 \$373K	1 day 25.09.91 \$360K	N/M dismissed 2 days 16.04.92 24.04.92	2 days 02.03.92 03.03.92 T/S J for P \$1M	3 days 16.04.91 17.04.91 18.04.91 J for P \$370K
Settled Date Amount	1st day of hearing 03.02.93 \$600K									
Taxed costs	\$32K	\$14K	\$20K	\$11K	\$20K	\$42K	\$29K*	\$5K*	\$62K*	\$40K*

**** AVERAGE COST TO PARTIES IN NON JURY MATTERS - \$27.5K**

3.2.2

JURY

	1	2	3	4	5	6	7	8	9	10
Type of Injury	knee, leg & back	back	left shoulder, back	exposure to steam & fumes, eyes, throat	MV hit pot hole, head, neck	back	RSI	head, back	defamation	burns, head, legs, feet
NSDT	23.09.88	11.01.84 in District Court	01.08.83	12.10.87 in District Court	27.06.79	12.04.85	15.08.88	06.08.87	none required	09.10.85
Hearing		2 days 20. 21.06.93 V for D	5 days 21, 22, 23, 24, 28.04.86 V for D	3 days 31.05.93 02, 03.06.93 settled V for P \$220K	6 days 13-20.03.84 V for D	4 days 21, 22, 23, 26.02.90 V for P \$104K	18.10.93 settled before hearing V for P \$70K	5 days 22, 23, 24, 27, 28.07.92 V for P \$935K	6 days 01, 02, 03, 04, 07 08.11.88 V for P \$18K	5 days 17, 18, 19, 20, 21.04.89 V for P \$12K
Settled at conference	26.05.92 \$105K									
Taxed costs	\$14K	\$17K	\$25K	\$30K	\$10K*	\$30K*	\$20K*	\$45K*	\$53K*	\$39K

****AVERAGE COST TO PARTIES IN JURY MATTERS - \$28.3K**

3.2.3 Conclusion

The average cost to the parties on a party/party basis for a jury matter is \$28.3K and the average cost in a non jury matter is \$27.5K.

Overall, the jury matters cost \$800 more than non jury matters. As the overall cost is around \$27 to \$28K, the amount of \$800 is insignificant.

4. CONCLUSIONS

4.1 There is a common perception that civil jury trials in the Supreme Court of New South Wales cost more and create more delay. The perception is not borne out by this research paper.

From the 1987 sample of jury and non jury files, the majority of jury matters (52%) were finalised by way of settlement in less than 2 years from the date of filing the Notice to Set Down for Trial. It took 4 years from the date of filing the Notice to Set Down for Trial for 54% of non jury matters. The jury matters settled earlier than the non jury matters. There is less delay in the settlement of jury matters.

4.2 From the sample, if a matter is to proceed to Court finalisation (ie. the matter does not settle) then there is more delay in the jury matters being finalised. According to the sample, the delay from the date of the Notice to Set Down for Trial to finalisation is 4 years 7 months. This period of delay does not correspond with the delay calculated by the Court. These statistics show delay of 3 years 3 months. The sample was too small. More files need to be considered.

The sample shows that the delay in non jury matters is 3 years 2 months. This corresponds with the Court produced statistics. The Court statistics show that the delay in the Court finalising jury matters is slightly more than non jury matters. The difference is the delay is marginal at 1 to 2 months.

4.3 The statistics from Group 'C' first Specialittings in 1993 show that the jury trials can take longer than non jury matters. From the sample, jury matters take 3 days and non jury matters take 2 days. It seems that these figures are unreliable because the sample is too small. I am not convinced that jury matters take longer than non jury matters but more research needs to be done on this topic. Perhaps all special sittings files for 1992 and 1993 could be examined together with files that proceed to judgment over a period of two years.

4.4 The cost to the Supreme Court of providing civil juries is minimal. When the costs of jurors are offset against the jury requisition and retention fees, the costs almost balance out.

However, as distinctions are not always drawn between civil and criminal juries, the calculations are not as accurate as they could be.

4.5 From the examination of taxed costs, the cost to the parties in jury and non jury trials appears to be the same. Again, the sample may have been too small to be accurate and a larger sample of 50 non jury and 50 jury files may give a more reliable result.

4.6 This paper suggests that overall jury trials do not create more delay and cost more to the Court and to the parties. On one hand jury matters appear to settle earlier than non jury matters yet if a jury matter is ready for trial, it takes longer in the waiting list to be allocated a hearing date. The cost to the parties of jury trials is almost the same as non jury trials and there is no extra cost to the Court for a jury trial.

It must be stressed, that I would feel more confident about these findings if more files had been included in the samples referred to in this paper.

5. FURTHER RESEARCH REQUIRED

In relation to delay

(a) Sample in Paragraph 2.3 - Only 25 jury and 25 non jury files were included. Perhaps 100 files of each non jury and jury files over 2 years would give a reliable result.

(b) Sample in Paragraph 2.5 - Instead of only one group of one special sittings being examined, all files in special sittings for 1992 and 1993 and all files which proceed to judgment over 2 years would provide a more reliable result.

(c) Sample in Paragraph 3.2 - Instead of 10 jury and 10 non jury files being included in the sample, 50 of each would provide a more reliable sample.

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