

2. PROCEDURE

Control of proceedings by the court

11.1 The common law approach was well described by the Ontario Law Reform Commission⁷⁶ -

"Traditionally, a controversy between individuals has been regarded as their own business, even after a court action has been commenced. Subject to an occasional 'purging' of the list, the judges and those responsible for court administration traditionally have assumed a passive role even up to the day of trial unless moved at the instance of one of the parties or their counsel. Rules as to time limitation have been set in operation only if a non-delinquent party chooses to invoke them. Where both counsel agree that a case should not proceed, the commonly held view among lawyers is that the court should have no right to force the matter on for trial or other disposition."

11.2 The Commission regarded this approach as one of the major contributing factors to delays in the court system. They recommended, by a majority, that the time from the commencement of the proceedings until they are ready for trial should be left, as at present, in the hands of the parties and their legal advisers but they unanimously considered that the court should exercise supervision of the proceedings from the time when the case is ready for trial to the time when it is reached.

11.3 Opinions on this subject are sharply divided. In England, the Senate of the Inns of Court and the Bar, referring to proposals for more direct and robust court intervention, expressed the opinion that such radical changes were neither necessary nor correct in principle.⁷⁷

11.4 Within the limited sphere of personal injury cases, the Personal Injuries Litigation Procedure Working Party⁷⁸ proposed that if within 18 months after the issue of the writ the action had not been set down for trial, the plaintiff's solicitor should be required to report to the court the stage which the proceedings had reached. After that period, it was proposed, the Court should have power, upon consideration of the report or otherwise, to issue a Court summons for the purpose of giving directions.

11.5 The Report of the Review Body on the Chancery Division of the High Court (the Oliver Report)⁷⁹ favoured a similar measure of court control in relation to all Chancery matters and thought the procedure and the time limit should be as similar as possible to those in Queen's Bench. Time should run from the beginning of the proceeding.

11.6 The Review Body appreciated that practitioners might argue that they knew better than the court where the interests of their clients lay and accepted that this is a legitimate argument. They thought the implementation of the proposal would call for tact and discretion. They concluded -

"In most cases, we believe, the appropriate form of intervention by the court will not be to dissect the prior handling of a case or to give precise instructions as to the next step to be taken, but rather by calling for a report on the state of the litigation to nudge the parties and their advisers into taking the appropriate next step."

11.7 While in one respect the traditional English system left the control of proceedings in the hands of the parties, on the other, the court retained a technical control in that at each stage the parties had to seek orders. The Personal Injuries Litigation Procedure Working Party that reported in 1979⁸⁰ pointed out that this procedure has been changing over the years, with steps that formerly needed orders now being governed by rule. They endorsed a recommendation made by the Winn Committee in 1968, that the summons for directions should be abandoned and that provision should be made by rule for automatic directions without summons and without order. These would come into operation on the close of the pleadings. They recommended extending the time for discovery of documents from 14 to 28 days, recognising that the time now prescribed is inadequate, but in other respects the change would enable an action to proceed more speedily. It would, incidentally, permit medical reports to be exchanged at an earlier stage, a subject which has been of concern in several countries.

11.8 The foregoing remarks do not, of course, apply to the Commercial Court, where the judge takes the practice direction and generally watches the progress of cases to ensure that they do not lose momentum.

11.9 In Ontario, the Williston Committee recommended⁸¹ that where an action has not been terminated within one year of the filing of the statement of defence, the court should have power to fix a deadline within which the case must be set down for trial or be dismissed for want of prosecution. Once the action had been on the list for a year, the registrar would send the parties notice of a hearing date for fixing the deadline.

Discovery and other interlocutory matters

12.1 The English practice regarding discovery has been criticised on the ground that each side is kept in the dark as to the nature and strength of the other's case up to the trial, one result of which is that time is wasted at the trial on peripheral issues that could have been cleared away at an earlier stage. It has been suggested that all evidence should be disclosed in the pleadings, including the names of all witnesses, so that counsel would be fully conversant with all aspects of the case. Such radical suggestions are unlikely to find favour.^{81a}

12.2 In Canada, much attention has been concentrated on discovery. The Law Society of Manitoba attribute much of the success of their courts, Queen's Bench and County Courts, to their process of discovery, which was revised in 1974. In particular, rule 285 provides that -

"any party to any action may, without order, be orally examined before trial touching the matters in question, by any party adverse in interest."

The examination by a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivery has expired and the examination by a defendant, at any time after he has delivered his statement of defence.

12.3 In Ontario, the Williston Committee concerned itself with the question whether the right to discovery should be extended to non-party witnesses. They thought this was often desirable in order to ascertain the facts prior to trial but they also appreciated that such examinations lead to additional costs and delay. They were aware that such a process has been abused in the United States.⁸² They recommended a compromise, to permit the examination, with the leave of the court, of any person who was at any relevant time an agent or employee of a party or of any potential witness where the court was satisfied that the applicant had been unable to obtain the relevant information from those he was entitled to examine or from the person sought to be examined.⁸³

12.4 These recommendations have not yet been adopted in Ontario but they do form the basis of the new rules of court enacted in New Brunswick in 1981.⁸⁴

12.5 It may be added for completeness that the Code of Civil Procedure, 1882, of India contains provision for the examination of the parties by the court prior to and as part of the framing of the issues. It incidentally helps the parties to know where they stand and what is the case they have to meet, and so conduces towards settlements.

12.6 In some jurisdictions, lists or affidavits of documents have to be produced as a matter of course and in some only on request. The Williston Committee recommended eliminating the necessity to serve a notice to produce and instead requiring the automatic delivery of affidavits of documents and requiring parties to take those documents to the examination for discovery and to the trial of the action without the need for any notice.

12.7 By an amendment to the Rules of the Supreme Court of Western Australia, enacted in 1978, the court was given power to limit the number of expert witnesses who might be called at a trial and also to direct the exchange of medical reports in actions for personal injuries and also reports from other expert witnesses or the substance of their evidence. The first of these powers was, obviously, to enable the court to expedite hearings and the second was intended to preclude the danger of an adjournment having to be granted to enable evidence to be considered, cross-examination prepared or rebutting evidence called.

12.8 The requirement that medical reports be exchanged in personal injury cases is now a common feature in most jurisdictions.

12.9 In Queensland, a practice direction issued a few years ago required solicitors in personal injury actions to file and exchange medical reports and other documents to be relied on before the action is set down for trial, but a report from the Law Society states that new material is all too often produced shortly before the hearing and frequently admitted in evidence, so defeating the purpose of the direction.

12.10 The Law Commission of India, in its 77th Report,⁸⁵ recommended that matters of a formal nature should be proved by affidavit rather than by oral evidence.

12.11 The use of affidavit evidence, where it is not likely to be challenged, is also being encouraged in New South Wales. More use of interrogatories and notices to admit is also being encouraged progressively by amendments to the rules of procedure.

12.12 In Belize, the law has been amended to allow the reports of medical officers to be accepted in evidence where cross-examination is not required.

12.13 In Ontario, the Williston Committee recommended a simplified procedure for the determination, prior to trial, of any question of law that might dispose of the action, shorten the trial or result in a substantial saving of costs.

12.14 The rules of procedure in New Zealand presently allow a question of law to be decided before trial but the courts have held that this provision is only available where the question, if answered one way, would be decisive of the whole case. It is understood that the new draft code will give the court a wide discretion to deal, prior to trial, with any question or issue, whether of fact or law or both, and whether or not a decision might be decisive of the case as a whole.

Time limits: extensions and adjournments

13.1 The present position in England where the enforcement of time limits is concerned is summed up in the report of the Personal Injuries Litigation Procedure Working Party (the Cantley Report)⁸⁶ -

"Under the adversary system the Court does not strike out a claim or defence save at the instance of the opposing party.... The function of court control is to prevent delay by neglect and oversight; but if the parties are brought before the Court and both insist on further delay, then in our view it is no function of the Court either to compel them to litigate or to strike out one or other party against the wishes of the other."

The Working Party did not favour any change.

13.2 The Royal Commission on Legal Services (the Benson Commission) issued a questionnaire, in answer to which the Bar agreed that time limits could be more rigorously enforced. The Bar remarked⁸⁷ -

"Unfortunately, rigid compliance with the time limits set by the Rules of the Supreme Court is possible only in the simplest cases: it is impossible in the vast majority of contested actions. As no solicitor can afford to be unyielding in the matter of extending time unless he is confident that he himself can conform with the time limits established over the Rules, there is a tendency for each side to grant extensions of time to the other - sometimes to the benefit more of the lawyers than of their clients. If possible, more realistic time limits should be established, and they should be more rigorously enforced. Large extensions of time should only be granted if the Court is satisfied either that all clients concerned genuinely agree or that the necessary work cannot be done otherwise."

13.3 The Benson Commission considered the passage from the Cantley Report quoted above and added^{87a} -

"We do not think this goes far enough. There is need for a determined effort to evolve a simplified scheme for litigation that will contain sanctions for non-compliance.... We have no doubt that standards must be improved and that advice and exhortation alone will be inadequate for that purpose unless backed by sanctions."

13.4 The Oliver Report considered the reasons why, in the public interest, delays are unacceptable. They said⁸⁸ -

"... we accept... that in practice there is a too frequent tendency on the part of some professional advisers to accept delays (for instance by agreeing to

adjournments and the extension of time) as a matter of business convenience rather than because it is in their client's interest. It would, we think, be wholly reasonable that where the court is asked to sanction delay by extending time or granting adjournments it should be entitled to satisfy itself that the application is one which is expressly authorised by the client."

It would at least ensure that parties did not have to pay the costs of adjournments agreed without their knowledge and even possibly against their wishes.

13.5 The Senate of the Inns of Court and the Bar of England accept that the courts should adopt a stricter attitude towards applications for adjournment, while the Law Society stress the importance, when an adjournment is granted, of the court fixing the next hearing date. At present too often hearings are adjourned generally with liberty to restore.

13.6 The Law Society also drew attention to the fact that it is sometimes the duty of a solicitor to delay proceedings when he believes that a "cooling-off period" is desirable, to make possible negotiations for a settlement.

13.7 In a paper prepared by the London Common Law Bar Association for the Law Society in September 1980, it was argued that consent applications for extension of time commonly arise because the time limits are unrealistically short.

13.8 From Western Australia comes the comment that counsel are usually ready to accommodate one another as regards adjournments.

13.9 In Alberta, rules were introduced in 1976 providing that no adjournment should be allowed by a judge by reason only of the consent of the parties and that if two adjournments had been granted, any subsequent adjournment would result in the action being removed from the trial list, to be re-entered only with the leave of the court.

13.10 In India, an Act of 1977⁸⁹ amended the Code of Civil Procedure to prevent unnecessary adjournments. Among stringent provisions is one that -

"no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party."

The fact that a pleader is engaged in another court is not to be a ground of adjournment, nor is illness unless the court is satisfied that another pleader could not have been engaged in time. Moreover, where a witness is present but a party or his pleader is not present, or the pleader is not ready to examine or cross-examine the witness, the court may record the statement of the witness and dispense with the examination or cross-examination. The Law Commission of India has also deprecated adjournments between the conclusion of the evidence and the arguments of counsel.⁹⁰

13.11 In Malta, a Bill was published in 1981 which provided, among other matters, that where a case has been set down for hearing and subsequently adjourned to an unspecified date or otherwise suspended and more than three months have elapsed, the Registrar is to include it in a list of suspended causes to be posted at the entrance to the court house. Such cases are to be deemed to have been deserted unless certain specific requirements are met within one month, a period which may be extended once only and then for not longer than two months.

13.12 In the Northwest Territories of Canada there has been a tightening of the procedural rules and greater insistence on the observation of time limits. For example, if no reply to the statement of defence is filed within ten days, the plaintiff is deemed to have joined issue with the statement and the pleadings are automatically noted closed. The rules also provide for both parties filing statements as to documents within ten days of the close of the pleadings. If either side fails to comply, the other side can move for dismissal for want of prosecution, or move to have the statement of defence struck out, as the case may be.

13.13 In the Isle of Man, the delay in the hearing of civil claims has been much reduced by a more rigorous insistence by the court that pleadings be delivered within the time prescribed by rules of court.

13.14 In New Zealand, on the other hand, sanctions against breaches of the rules prescribing time limits are rarely invoked.⁹¹

Setting down for hearing

14.1 The Beeching Commission recommended that solicitors should be required to certify that their cases were ready for trial at the time they were set down, subject only to obtaining final medical reports, where appropriate. Subsequently, the certificate of readiness was introduced in England, in 1971, but only for cases which were to be tried outside London.

14.2 The Cantley Report, published in 1979, referred to this and remarked of the practice that "it has not proved an unmixed blessing."⁹² They did not feel in a position to recommend its abolition, although they said they would prefer to see it abolished. They thought it was often a cause of delay -

"Setting down may start a round of negotiations. When these reach a stalemate the plaintiff files a Certificate of Readiness, having given the necessary 7 days notice to his opponent. This starts another round of negotiations and when the case is put into the warned list there is an application to take it out because negotiations are still proceeding."

Assuming that the certificate of readiness was to be retained, the Working Party thought it needed to be strengthened by provision for a court summons, with power to order an action to be struck out if, after it has been set down, a certificate of readiness is not filed within a stated time.

14.3 Ontario adopted the certificate of readiness in 1971⁹³ but it is omitted from the draft rules of procedure prepared by the Williston committee. These merely stipulate that an action is to be deemed to be ready for trial without the necessity for serving a certificate, and all other parties would be deemed to be ready for trial 60 days thereafter.

14.4 Alberta enacted a rule in 1976 making a certificate of readiness a prerequisite before an action could be set down for trial and cases are entered on the ready list strictly in the order in which the certificates were filed.

14.5 Manitoba introduced a certificate of readiness in the Court of Queen's Bench in 1979. It is for the lawyer with conduct of the case to file the certificate as soon as the case is ready for trial. If counsel are not prepared to sign, an appointment is made to appear before the prothonotary, who will set a trial date or terms of reference to bring the matter before the court. This applies to all civil and matrimonial matters, except uncontested divorces, for which Mondays are set aside, and certain family matters. The system is proving satisfactory.

14.6 Québec has a "certificate d'etat"⁹⁴ but in its present form, according to the de Grandpré committee, it is almost useless. The committee thought it should play a major role in their proposed procedure, and should always be accompanied by the answers to interrogatories and all essential documents, including reports of experts intended to be called.

14.7 Queensland recently introduced the practice of requiring the filing of a certificate of readiness for trial with a view to reducing delay by doing away with the necessity for a summons for directions. At first it was found to work reasonably well, but the Court Practice and Procedure Committee of the Law Society feel that it will have little effect where there are already delays from other causes.

14.8 New South Wales does not require a certificate of readiness, but proceedings are not given a date for trial in the Common Law Division of the Supreme Court until an officer of the court, usually the Prothonotary or his deputy or in complex cases a Master, has examined the court papers, conducted a directions hearing and satisfied himself that the case is actually ready to be tried.

14.9 In the Court of Appeal for England, the listing arrangements are being revised. Between the extremes of the very urgent appeal that must be heard almost at once, thus precluding substantial notice, and the exceptionally heavy case which requires long notice of a more or less fixed date, it is hoped to devise "a system of long-range forecasting, coupled slightly later with a more or less precise indication of the date for the hearing."⁹⁵ This will be worked out in conjunction with the profession and tested by experiment.

14.10 Some additional flexibility will be gained by keeping a list for the Civil Division as a whole, not, as in the past, separate lists for the courts.

14.11 Western Australia introduced a new method of listing cases in 1972. It is known as the "Rolling List." Very briefly, the system is this. A cause is entered for hearing and after seven days, if a summons to countermand the entry has not been issued or if issued has been dismissed, the List Clerk includes it in a list of cases for hearing in the subsequent month and numbers each cause consecutively. The list is called over by the Master about 14 days before the commencement of each monthly sitting, when causes that have been settled are struck out or listed for consent judgments; cases to be adjourned by consent are adjourned to a later list or struck out; and, as regards the remaining cases, a day is specified for each, so far as is practicable, before which the case will not be heard. A cause which is not reached during the month for which it is listed is given priority in the next month's list. Cases which are estimated to take more than four days or where there are exceptional circumstances, such as witnesses from outside the State, may be given firm dates for hearing, but these are the only exceptions. When the Rolling List was first introduced, it was not favoured by the legal profession, who thought it would cause inconvenience and who were doubtful if it would work. It has, however, proved to be satisfactory and is now regarded as an integral part of the system.

14.12 Almost all the civil courts of New South Wales use a "call-over" system and wherever multi-judge sittings are held, some form of "swinging list" system is used. Experiments are still proceeding to find ways of minimising the inconvenience caused when cases are not reached. Contested matrimonial cases are not placed on the regular ready list, but on a special ready list for which a judge is made available in the third week of each month. Generally, it is considered desirable for counsel to know two months in advance the dates when their cases will be heard. The system is, however, flexible and the clerk will always try to accommodate counsel, provided it would not mean ousting a case already listed.

14.13 New Zealand introduced a ready list in 1972. Dates for the hearing of civil cases in the High Court, whether before a jury or before a judge alone, are determined following either the filing of a praecipe to set down or an application to have the case entered on the ready list. Under both procedures the parties have to certify that the matter is ready for hearing and give an indication of the time it is likely to take. From the two lists, Registrars allot fixtures immediately prior to the commencement of the High Court sittings.

14.14 In the larger District Courts, a special fixtures system has been introduced for civil cases, with a clerk responsible for allocating hearing dates. The aim is to fix a hearing within 12 weeks of the application for special fixture. A speeding up of hearings has been achieved.

14.15 A new procedure for setting down for trial was introduced in the County Court of Winnipeg in 1980. Previously, a trial date could only be obtained by notice of motion. Now, a party may obtain a reserve trial date from the Trial Co-ordinator, either by telephone or by personal attendance. If all parties are in agreement on the reserve trial date, the filing of a Consent to Trial Date form will fix that date. If the parties are not in agreement, the party who obtained the reserve trial date must, within ten days, serve on the other party a Notice of Trial and Readiness form. The onus is then on the other party to apply by motion to a judge to set aside the reserve trial date, fix another date for trial or otherwise dispose of the matter. The system is supervised by a judge, who is designated the Supervising Judge.

14.16 Up to 1981 in The Bahamas an application for a hearing date had to be made to the clerk to a judge. Apart from the obvious objection that this allowed a party to choose the judge he preferred, it also led to an unfair distribution of work. Now, there is a clerk of the lists, to whom all applications for hearing dates must be made.

14.17 In South Australia an enquiry is currently under way to find means of expediting the business of all the courts. There have already been experiments to discover the best way of listing cases under the Small Claims Jurisdiction and those under the Limited Jurisdiction and experimenting has not ceased. At the moment, there is a small claims week in the first week of each odd month, when all the magistrates concentrate on small claims work, and some additional weeks. The remaining seven out of eight weeks are devoted to limited jurisdiction work. There are informal arrangements for weekly and daily callovers so that particular matters can be allocated even on the morning of the trial day. The essence of the system is flexibility.

14.18 In many parts of the Commonwealth, there is regular over-booking of the hearing list. This has long been practised informally in England and in Scotland. Manitoba also follows an over-booking system: if there are expected to be four judges available on a

certain date, the Trial Co-ordinator will fix five or six trial dates. This has worked out remarkably well, hardly ever causing an adjournment and making the maximum use of judicial time.

14.19 In Queensland, a practice direction issued by the Chief Justice, expressly directs the judge presiding at a callover to set down for hearing on each sitting day more trials than there are judges available.

14.20 In Singapore, over-booking is known as "notional fixing". This takes place quarterly in the High Court, when, if there are seven judges available, cases will be fixed for nine. This enables trials to take place earlier, because otherwise some of these cases would have to wait over until the next quarterly fixing. In spite of this over-booking, an average of about three days a week still become available because of the large number of cases that are settled. To fill these days, a Thursday mention is held by the Registrar, and urgent matters, such as applications for injunctions, are also dealt with then. At the quarterly fixings, the Registrar normally commences with cases that require more than a day (referred to as the Ordinary Cause List) and the remainder are grouped in fives, each group allotted to a week (the Short Cause List). It is these Short Cause cases that come up at the Thursday mention. The reasoning behind the system is that it is comparatively easy to "slot-in" one day cases into gaps as they occur in the list as fixed. Outside this system, there is a list of pending uncontested divorce petitions and these are put up for hearing on short notice (normally 48 hours), when days become available during the course of a week.

14.21 In the district courts and magistrates' courts there is a system of "double-fixing", that is to say, two cases are fixed for each hearing day. So many cases are settled or adjourned for other reasons that most of the cases are disposed of on the appointed days, only about 5% having to be adjourned.

14.22 Another method used in the subordinate courts is known as the "filter method." More cases are fixed for one court (called the Filter Court) than any court could possibly deal with. The other courts liaise closely with the filter court, which passes its excess cases to those courts able to take them. The filter court also adjusts the burden between the other courts by arranging for those that are over-burdened to send cases to courts that are free. It is realised that this causes some inconvenience to counsel but it does achieve the fullest use of judicial time and ensures that cases come to trial as soon as possible.

14.23 In the magistrates' courts of the Australian Capital Territories, civil and criminal matters used to be included in one mixed list: in the last year, a separate civil list has been instituted, with a magistrate sitting for two weeks at a time in charge of it. The list is overbooked by 60% but usually sufficient cases are settled to enable the list to be cleared. There is a daily call over of the civil list by the deputy clerk of the court, who makes notations of orders to be made by consent and these are later signed by the magistrate. This keeps the sittings of the court free from routine or formal matter. These changes are reported to have speeded up proceedings considerably.

14.24 By way of contrast, there is no deliberate overbooking in New South Wales and cases are booked on the basis of the number of judges expected to be available, yet in the opinion of the Bar Association the court is far too often over-optimistic, so that cases are frequently not reached and then have to be given another date, three to six months thereafter.

The pre-trial conference and the mini-trial

15.1 British Columbia appears to have been the first country of the Commonwealth to provide by rule for pre-trial conferences⁹⁶ but the procedure was optional and it appears that it was rarely invoked. This has been changed and the current rule empowers the court at any time to direct that a conference be held. Recently, the Chief Justice has required a conference in all cases that are likely to take more than four days, and the judge who presides at the conference is required to forward his evaluation of the case to the Chief Justice and his trial co-ordinator. It is believed that this has had the effect of shortening the time taken by trials.

15.2 A judge who presides at a pre-trial conference is not seized of the action, which may be tried by him or by any other judge.

- 15.3 The business of the conference, according to the rules, is to consider -
- (a) the simplification of the issues,
 - (b) the necessity or desirability of amendments to pleadings,
 - (c) the possibility of obtaining admissions which might facilitate the trial,
 - (d) the quantum of damages,
 - (e) fixing a date for the trial, and
 - (f) any other matters that may aid in the disposition of the action or the attainment of justice.

This has become almost a standard form in all jurisdictions that have adopted the pre-trial conference, but they do appear to have differed in the significance they have given to the last of the considerations.

15.4 Alberta included provision for conferences in its 1968 Rules of Court but again it was optional and again was little used, although it was said to have proved of value in several complex cases. As in British Columbia, the judge who took the conference was neither deemed seized with the proceeding nor prohibited from hearing the trial.

15.3 Nova Scotia introduced a rule in 1968 authorising a conference at the request of either party or of the judge. The Chief Justice is reported to have said⁹⁷ that conferences were held in 20% of cases, in two thirds of these at the request of counsel and in one third at the request of the judge. The conference normally took place before the judge who had been assigned to try the case. The Chief Justice said that it was not uncommon for the subject of settlement to be raised, when the judge would normally suggest that the parties might wish him to leave. Only if they wished him to remain would he do so. Generally, judges did not play an active role in canvassing the possibility of settlement, although judges did not all see their role in the same light. Here, again, the judges were convinced that the conferences led to shorter trials.

15.6 In 1969, Ontario began experimenting, at the instance of the Advocates' Society, with the pre-trial conference as a means of expediting trials. The scheme was a voluntary one and as some counsel declined to participate, it failed to develop. This may have been partly because it was regarded as an Americanism.

15.7 The Ontario Law Reform Commission, in their Report on the Administration of Ontario Courts, 1973,⁹⁸ expressed the opinion that a controlled experiment was worth considering, but they did not feel able to recommend it. The alternative was the introduction of rules making conferences mandatory. They felt that the initiative for this should come from the judiciary and the profession. They did recommend that if the system were introduced, a conference should not be conducted by the judge who would preside at the trial.

15.8 The experimental use of the system appears to have begun again in 1976⁹⁹ and it was formalised in the Supreme Court Rules of Practice. The relevant rule appears to have been based on the 1961 precedent from British Columbia but, following the Law Reform Commission's recommendation, it departs from that precedent by stipulating that -

"The judge who conducts a pre-trial conference in any action, cause or matter shall be deemed not to be seized of such action, cause or matter and shall not thereafter try or hear such action, cause or matter."

This provision is, however, qualified by a later subrule stating that -

"Nothing in this rule shall prevent a judge before whom a case has been called for trial from holding such a conference either before or during the trial without disqualifying himself from trying the action."

15.9 The Williston Committee in June 1980 commented that the rule -

"already has had a very dramatic effect in increasing pre-trial settlements."

They only suggested the minor amendment, that where a judge before whom a proceeding had been called for trial holds such a conference, it should not, without the consent of all parties, discuss the discharge of the jury, the settlement of liability, or the quantum of damages: in other words, a conference at that stage would be more of the nature of a summons for directions.

15.10 Today, the possibility of settlement is regarded in Toronto as the most important consideration where pre-trial conferences are concerned. It is considered -

"undoubtedly the best thing that has happened to the litigation process in many many years."¹⁰⁰

It is thought to result in a high degree of settlement at an earlier stage than might be achieved without pre-trial, if settlement would be achieved at all.

15.11 In the circumstances, it is not surprising that the Provincial Court (Civil Division) Project,¹⁰¹ the purpose of which was the development of simplified procedures and of methods of making civil remedies more accessible and reducing delays, empowered the court to convene a pre-trial conference for resolving or narrowing the issues, of its own motion or at the request of a party.¹⁰²

15.12 It is now proposed to introduce a comparable pre-appeal conference. There is a similar proposal under consideration in British Columbia.

15.13 There is no formal pre-trial conference procedure in Manitoba, but such conferences do take place by agreement between counsel and the judge and they are apparently fruitful.

15.14 There has been much experimentation with pre-trial conferences in New South Wales, both in the Supreme Court and in the District Court. The conclusion that has been reached is that while pre-trial systems can be "an intolerable nuisance and a further delaying factor" if allowed to become too complex or too prescribed, they can, if conducted with the right degree of formality and with the right blend of common sense and experience, be very effective. Pre-trial conferences in New South Wales are conducted before registrars and, in addition to settling matters preliminary to trial, they are proving very useful both in clearing "dead wood" from the lists and in bringing about early settlements.

15.15 There is a procedure very akin to the pre-trial conference in the Court of Petty Sessions of the Australian Capital Territories, where the parties, prior to hearing, come before the clerk to define the areas in dispute. This leads to most matters being settled without hearing, although that is not the purpose of the conference. This, and other administrative changes, has reduced the average time between the lodging and the hearing of a small claim from 16 weeks in 1979 to 6 weeks at the present time.

15.16 There is no pre-trial procedure in New Zealand but it is thought to be desirable and a draft Code that has been prepared contains a proposed rule that at the request of all parties a judge may at any time before trial convene a conference of solicitors or counsel for the purpose of negotiating a settlement of the proceedings or of any issue. The new Code has not yet been finalised. It has been suggested that at some later stage the court may be given power to call a compulsory settlement conference.¹⁰³

15.17 In England, the pre-trial conference was mentioned before the Review Body on the Chancery Division (the Oliver Report)¹⁰⁴ but they did not feel that the evidence before them was sufficiently explicit to enable them to do more than make a general recommendation that the feasibility of introducing some such procedure in the Division should receive urgent consideration. It should be noted that the Review Body was thinking of the introduction of the pre-trial conference for use in appropriate cases, not as a matter of course in all cases.

15.18 The London Common Law Bar Association, addressing the Law Society,¹⁰⁵ expressed themselves against any pre-trial review, which they thought would prove more time-consuming than the present summons for directions. They were not convinced that any such procedure would greatly reduce delay or greatly advance the time when actions are settled.

15.19 An experimental pre-trial review in matrimonial causes to secure the settlement of financial applications, begun in 1980, was not a success and has been discontinued.

15.20 Elsewhere in the Commonwealth there has been much less interest in the idea of pre-trial conferences. In Zimbabwe, the rules of the High Court used to provide for a pre-trial conference before a judge, but the rule has been changed to provide for the conference to be held by the parties themselves and for the matters agreed to be embodied in a memorandum for production to the court.¹⁰⁶ In default of agreement, an application for directions may be made to a judge. The reason given for the change is that it was hoped to make the occasion less stilted and provide a better atmosphere in which the parties could discuss the issues or attempt a settlement. It should perhaps be added that the attempt to reach a settlement is mentioned neither in the old rule or the new as one of the objects of the conference.

15.21 Botswana introduced a pre-trial conference when new rules of the High Court were promulgated in 1974. This is, however, a very different concept from the conferences of Ontario or British Columbia. In the first place, the object was the clarification of issues, the recording of admissions, production of agreed bundles of documents and such matters; it was not aimed at settlement. Secondly, the conference is not presided over by a judge or official: it is a conference of the attorneys and minutes of it must be produced to the Registrar before a case can be set down for hearing. It is, in fact, a substitute for the summons for directions and its purpose is simply to save time, inconvenience to witnesses and expense.

15.22 In Swaziland also the rules provide for a pre-trial conference leading to an agreed minute, but it has not been found to work satisfactorily because of the failure of practitioners to observe the rule, and the court has had to threaten punitive orders in costs in an attempt to compel compliance.

15.23 The Law Commission of India considered, in its Seventy-seventh Report,¹⁰⁷ whether the pre-trial conference should be introduced into the Indian system. They agreed with the conclusions of an earlier Report, the Fourteenth, that it was unnecessary and undesirable. They did not believe that it would save costs and they feared that a conference might degenerate into a "fishing expedition". They considered that the existing system was satisfactory for the clarification of issues and that there was nothing to prevent a judge from suggesting a compromise. After remarking that judges who try to induce the parties to come to a settlement are liable to be misunderstood but that a competent and experienced judge will have no difficulty in perceiving cases pre-eminently suitable for a compromise, they added -

"A few tactful words by the Judge at a suitable opportunity, without the appearance of taking a view on either side and without playing an unduly active role, may bring about the desired result."¹⁰⁸

15.24 The mini-trial is another procedure evolved in British Columbia, in which a judge hears statements from counsel but does not hear evidence. He then gives counsel an indication of what his decision would be, with all consequent recommendations. This procedure, like the pre-trial conference, is intended to narrow the issues and encourage settlements without any coercion.

15.25 The procedural side of the pre-trial conference, the simplification of issues, amendments to pleadings, admissions and fixing the date of hearing, are matters that can be dealt with on a summons for directions. It may be that in some cases these can be settled more satisfactorily at an informal conference but this would not justify the holding of conferences in all cases. As regards the simplification of issues, a note is attached as Appendix VI on the Indian system of framing issues. This is an old procedure but it may be worth consideration in this context.

15.26 When considering the pre-trial conference as an approach to settlement, it should be borne in mind that a settlement is only just if it accords with the rights of the parties. Many settlements are convenient but not just, in the sense that one party is accepting less than his legal entitlement or agreeing to pay more than is strictly due. A plaintiff may need cash and be glad to accept an immediate payment of less than is due, rather than wait, perhaps for years, to recover the full amount. A defendant may be willing to pay something to be free of the anxiety of an impending action. Each party may believe that he would succeed if the matter were to go to trial but be afraid to risk an order for costs if he should fail.

15.27 This prompts the question whether it is proper for a judge, whose duty it is to dispense justice according to law, actively to promote a settlement. It is arguable that where, on the pleadings, it seems likely that neither side will be wholly successful, there is no reason why the judge should not suggest to the parties that they might consider the possibility of settlement. Where, however, it appears at first sight that one side or the other may succeed outright, it would be wrong for the judge even to hint at settlement. The fact that the amount at stake is small in relation to the costs likely to be incurred is a reason for the lawyers to advise their clients that they would be wise to settle; the suggestion should not come from the judge, although he may show sympathy if asked to grant an adjournment to allow negotiation.

15.28 The references to "the judge" in the last paragraph are, of course, to the judge who is to try the case. In the Canadian pre-trial conference, unlike that in some states of America, a judge may preside who will not conduct the trial, and it is argued that this allows him to play a more positive role. It is suggested that this is dangerous.

An ordinary person, with little or no experience of the law, will find it difficult to resist even a mild suggestion from a judge, because he will feel that another judge trying the case will have a similar outlook. And a person who is convinced that he is in the right will doubt the impartiality of the court if a judge suggests that he should compromise.

15.29 This does not mean that the court may not indirectly help to promote a settlement. The clarification of the issues, on which where necessary the court should insist, may help the parties to realise just how wide or how narrow is the gap between them and the process of discovery enables the parties, or their advisors better to assess the prospects of success.

15.30 Where a pre-trial conference does not result in a settlement, a very full discussion of the facts and the law, including the evidence, such as apparently takes place in the United States, serves the purpose of preventing surprise when the issue comes to trial but it does also allow an unscrupulous person to trim his case and may, within limits, give him a second "bite at the cherry."

15.31 One side effect of the pre-trial conference may be mentioned. The Benson Commission pointed out¹⁰⁹ that the fact that a case has required one or more pre-trial conferences should be taken into account in deciding whether the position of the case in the list should be changed to enable counsel originally instructed to appear at the trial. They observed that in such a case, it is particularly important that the barrister with whom the client has conferred should represent him and they suggested that there is a need for guidelines in the matter.

Judgments and orders

16.1 In Ontario, if a judge has not given judgment within six months from the date of reserving judgment, the Chief Justice of the High Court may order a retrial or rehearing of the matter.¹¹⁰ This provision will be preserved if the Williston report is adopted.

16.2 The Law Reform Commission in 1973¹¹² recommended that a similar rule should be enacted as regards masters' judgments and that a party should be able to apply for rehearing where a decision has been reserved for more than one month.

16.3 Cyprus in 1965 enacted rules of court empowering a litigant in the Supreme Court to apply for any order that might be appropriate, including an order for rehearing before another judge, if a reserved judgment has not been delivered within six months. This has proved effective, as whenever an application is lodged under the rule, it results in the delivery of the judgment before the application is heard. Lists of reserved judgments in the District Courts have to be sent to the Supreme Court, and there is a duty on the Presidents of the District Courts to intervene where judges reserve judgments for more than three months. Even within these time limits, litigants are encouraged to write to the Chief Registrar of the Supreme Court or the Registrar of a District Court, asking for the delivery of a reserved judgment in cases where delay entails personal hardship.

16.4 In South Australia, the Chief Justice recently addressed the Law Society, inviting members of the profession to write to him, if they thought a judge of the Supreme Court was taking too long over the delivery of a judgment.

16.5 It was reported from Western Australia that there is no method there of requiring judgment to be given if a judge or magistrate is dilatory. Most judgments are delivered within a reasonable time but delays of a year or more have occurred and there was a recent case in which judgment was delivered 41 weeks after trial.

16.6 There are complaints from the Guyana Bar regarding delays both in the delivery of judgments and in the entering of court orders.

16.7 In India, the Code of Civil Procedure¹¹³ provides that where judgment is not pronounced at once, every endeavour should be made to pronounce it within fifteen days. It appears that this requirement is not honoured and the Law Commission of India commented most unfavourably, both in the 77th and the 79th Reports, on the delays that occur. They recommended that, save in exceptional circumstances, a reserved judgment should be pronounced within a week or, at most, a month.¹¹⁴

16.8 There were complaints in Belize that magistrates were slow to give their reasons when appeals were lodged following summary trials. The Supreme Court Rules were amended

to impose a time limit and giving a right of recourse to the Supreme Court if the limit were not observed. Apparently the enactment of the rule was enough to achieve the desired effect, and it has not been necessary to invoke it.

16.9 In Manitoba, reserved judgments are usually delivered within two months and there are no complaints. New Zealand and Swaziland have also indicated that they have no problems concerning reserved judgments.

16.10 In England, there were serious delays in the drawing up of formal orders and judgments in the Chancery Division. An order had to be bespoke, a process which involved lodging a statement concerning the parties, a letter of application and all necessary documents and informing all the parties that they were required to lodge such documents as were in their possession. A draft was then prepared and sent to the parties giving them time to object, and if there was no objection the draft was approved. The registrar might require the parties to attend on an appointment to settle the draft. In place of all these, the Oliver report recommended that all orders and judgments, except orders on motions and interlocutory orders by masters, should be drawn up automatically by court staff and a sealed copy sent out by post to the party having carriage of the order or judgment. This reform has recently been effected.

16.11 It is suggested that where there are problems of reserved judgments, a book might be kept in the Registry. It would only need to show the number of each case, the name of the judge and the date when judgment was reserved. As judgments were delivered, they would be struck out of the list. If the Registrar kept an eye on the list, he would notice any judgments that had been outstanding unusually long and remind the judge; also, when hearing lists were being prepared, a few days could be left free for any judge with outstanding judgments.

Execution

17.1 Comparatively little has been said by correspondents about execution, although informal complaints about delays in the process are common.

17.2 In Northern Ireland, a Judgments Enforcement Office was set up in 1970¹¹⁵ following the recommendations contained in the Report of a Joint Working Party published in 1965. Valuable information concerning the Office was received after this Report was finalised and appears as Appendix VIII.

17.3 In England, a Committee on the Enforcement of Judgments Debts which reported in 1969 (the Payne Committee)¹¹⁶ recommended sweeping changes, including the setting up of an Enforcement Office, to be attached to the county courts. The recommendation has not been implemented. One of the problems relating to such a change is whether the benefits that might result would be sufficient to justify more bureaucracy and public expenditure. The current trend is, in fact, away from the Payne recommendations, as the larger judgments of the county courts are now enforceable by the parties, as in the High Court. This was introduced to enable interest to accrue on such judgment debts, which presented practical difficulties when the debts were collected by the court.

17.4 Some of the other recommendations of the committee have been implemented, including an important extension of the garnishee proceeding, but these are not relevant to the subject of this paper.

17.5 The subject is a live issue in Scotland at the present time. The Scottish Law Commission issued five consultative memoranda on various aspects of "the law of diligence" and a report is being prepared in the light of the comments that have been received. Diligence is not an executive responsibility of the courts but proceeds on the instructions of the successful party to a sheriff officer, who is a private individual commissioned for executing judgments. The role of the courts is limited to granting specific authority for certain steps and there is no problem of delay so far as the courts are concerned.

17.6 Of Ontario, the Williston committee made the scathing comment that the Province -
"has become well known as one of the debtors' havens in the English speaking world due largely to the fact that the methods of collecting and enforcing judgments are archaic, expensive and ineffectual."

The Ontario Law Commission was then engaged in a study concerning the enforcement of judgments and the Williston committee thought it best to defer considering possible new rules until the Commission has reported.

17.7 The Law Reform Commission of Queensland considered the subject of execution exhaustively, comparing the Queensland provisions with those of England, New South Wales, South Australia and Victoria, but their recommendations have no direct bearing on the question of delay.

17.8 In South Australia, the existing bailiff system is said to have fallen behind in efficiency and a review of the procedure is currently in progress.

17.9 From Malawi, there are complaints of delay in the execution of writs of fieri facias due to a lack of sufficient assistant sheriffs and bailiffs, particularly in rural areas where these duties are performed by traditional courts officers.

17.10 In India, the Law Commission recorded that delays in the process of execution resulted largely from objections lodged solely to gain time, and they felt that the courts did not devote as much time as they should to matters of execution.¹¹⁷

17.11 In Tasmania, various proposals are under discussion, one of which is of particular interest: it is that the State should take a more active role in the collection of judgments, on the one hand, and the advising of judgment debtors in regard to their finances, on the other. While this proposal may be more social than legal in its implications, it is thought that it might relieve the courts by preventing the re-appearance of some debtors.

17.12 In the magistrates' courts of the Australian Capital Territories, a practice has grown up for judgment debtors who have attended the court for oral examination to be examined outside the court by the solicitor for the judgment creditor. This is only done by consent and only when both parties are legally represented, but it does save an appreciable amount of court time.

Taxation of costs

18.1 The last stage in the process of litigation, the rendering and taxation of the bill of costs is all too often extremely protracted.

18.2 The Law Society in England report that because of the complexity of the scales and the labour and expertise involved, it usually takes some months to produce a detailed bill. By the time the bill has been taxed and a certificate issued, six to nine months, sometimes even a year, may have passed since the trial. They recommend a sweeping reform -

"The multiplicity of archaic and illogical scales of costs should be abolished and replaced by a comprehensive, modern, and fair system of charging."

They argue that if this were done, the preparation of bills and the taxation proceedings could become simple steps easily accomplished, instead of matters of complexity.

18.3 A committee now sitting in New Brunswick to prepare new rules of court is proposing to include one which would have the effect of abolishing taxation in most instances in favour of the trial judge determining the amount of costs as part of his reasons for judgment. A large scale of fees would be provided for his guidance.

Appeals

19.1 The volume of appellate work in the Supreme Court of Ontario grew to an extent that had not been anticipated and the Attorney General therefore appointed a committee (the Kelly Committee) to examine the exercise by the court of its appellate jurisdiction. They reported in 1977,¹¹⁸ but there were divided opinions on the proposals and no action has been taken on the Report.

19.2 The Report contains one proposal of considerable interest. The Committee recommended the establishment of a Court of Appeal divided into two sections: one, referred to as the Juristic Section, was to hear appeals involving questions of law, the decisions upon which would be of importance to the public generally, or some segment of the public, as on-going expositions of the law, and to exercise a supervisory review power; the other, referred to as the General Section, would have the function expeditiously of hearing and disposing of appeals not involving questions of law of on-going public importance. They recommend that the number of judges on the Juristic side should be restricted and that appeals should only lie to them with leave.

19.3 The Committee also considered the question whether to retain the system of oral argument or to replace it by written briefs, with a very limited time for oral explanation. They came firmly to the conclusion that no time would be saved by the introduction of written briefs, while there would be a real danger that the court would not acquire so comprehensive an appreciation of the issues.

19.4 The matter of oral argument has been considered in other jurisdictions. In England, the working party under Lord Scarman considered that the system of written briefs and limitations upon the time allowed for argument has advantages, but that it was alien to the English tradition of oral presentation and argument and would not necessarily be less expensive. This view has recently been endorsed by the new Master of the Rolls, Lord Justice Donaldson.¹¹⁹ At the same time, he accepted that some preliminary reading by the judges would save time in court. The Scarman working party had suggested the use of 'perfected grounds of appeal.' The Master of the Rolls suggested as an alternative that the parties might provide the court in advance with a skeleton outline of their respective arguments annotated by reference to the documents and authorities. He thought the best method would be discovered from practice and that it was possible that different methods might suit different types of cases.

19.5 Mention has already been made¹²⁰ of the appointment of a registrar to the Civil Division of the Court of Appeal. Among his many duties will be that of seeing that the necessary documents, in logical and legal form, are before the court. He will be the listing officer of the court and he will have judicial functions.

19.6 Another change of importance is that benches will be smaller.¹²¹ Certain classes of appeal will be heard by a bench of two judges instead of three, except in cases of particular difficulty or involving important points of law, and incidental applications will be heard by a single judge sitting in chambers, instead of a bench of two judges.

19.7 It is also proposed to save the time of the court in some cases where written judgments have been prepared, by handing them down instead of reading them.

19.8 The Law Commission of India in 1979¹²² recommended that, while the presentation of arguments in civil appeals should continue to be oral, as an experiment the parties should be required to file a concise note of the material facts and all propositions of fact and law that are sought to be raised, with specific authorities noted under the appropriate heads.

19.9 The Law Commission also stressed the importance of trial judges maintaining control over the extent of cross-examination, to ensure that if the matter goes to appeal the record is not burdened with irrelevant and unnecessary material.¹²³

19.10 In Swaziland practitioners in opposed applications in the High Court are encouraged to file heads of argument, as a way of saving time.

19.11 In Cyprus, the Supreme Constitutional Court Rules were amended in 1975¹²⁴ to allow the filing of written addresses in revisional jurisdiction cases. It was already the practice in the District Courts to accept written addresses in certain cases with the consent of both parties.

19.12 In British Columbia, there are proposals for pre-appeal conferences, the dismissal of appeals for delay in bringing on the hearing and for the reduction of the length of the appeal records. In Ontario, also, the introduction of the pre-appeal conference has been recommended.

19.13 Generally, there are few complaints regarding delay in the hearing of appeals, although considerable delay is reported from Zimbabwe and Swaziland in the preparation of appeal records.

19.14 The problem of appeal records of undue length has arisen in several jurisdictions. It was considered in Ontario by the Law Reform Commission. After referring to the rule allowing special directions to save undue expense or delay with the comment that it is rarely invoked, the Commission went on¹²⁵ -

"The result is that appeals are commonly delayed pending receipt from the court reporter of copies of transcripts of the proceedings before the trial court when a full transcript is not required. Costs to the client are increased by the reproduction of certain unnecessary portions of the evidence, and the time of the Court is often wasted in examining evidence that is not relevant to the issues on appeal."

The Commission recommended that an application for directions be required to determine what portion of the evidence and exhibits should be reproduced.

19.15 In Québec, the rules have recently been revised, with the intention of encouraging parties to submit their cases to the Court of Appeal on an agreed statement of facts.¹²⁸

19.16 Where a verbatim record of the proceedings has been kept, the preparation of a full appeal record adds substantially to the cost of the appeal and may, unless there has been immediate transcription, involve considerable delay. Where an appeal is to be argued only on questions of law, there is clearly no need for a full record and a statement of facts should not be difficult to agree. If, however, the appeal is against findings of fact, it is not easy to decide which parts of the evidence can safely be excluded. When the evidence of a witness relates only to a particular issue and the decision on that issue is not subject to appeal, the evidence of that witness can normally safely be omitted. Where, however, the evidence of a witness relates to two or more issues, one of which is subject to appeal, the editing of the record of his evidence may involve more time and expense than reproducing it in full.