From the President

COURT DELAYS

The Bar Council has been concerned about increasing court delays in both criminal and civil lists for some time. The root cause is not hard to find - increasing work without a corresponding increase in judges and ancillary facilities.

The reasons for the increasing work are again fairly simple - more cases, more cases being fought rather than settled, and cases taking longer to fight than hitherto.

Why these things are so is more complex. Contributing factors include increasing population; a rising crime rate; more vigorous detection and prosecution of a range of Commonwealth offences, in particular 'white collar' fraud; an increasing number of drug distribution conspiracy cases and the comparative affluence of those involved; the availability of legal aid; the use of litigation as a catalyst for social or political change by pressure groups; increasing sophistication of the economy; the deluge of information made available by the photocopier, the word-processor, the computer and the fax machine; the open-ended nature of many first instance hearings; increasing awareness of legal rights by the public; and the creation of new statutory rights.

Whether we like it or not these factors are unlikely to go away. The obvious and indeed necessary solution - the appointment of judges and the provision of ancillary facilities in proportion to the increase in work - is unlikely to occur.

There will therefore continue to be pressure for greater 'efficiency' in the judicial system. The Bar should support this without reservation, even if it involves rethinking some attitudes. However, we should be vigilant to ensure that the drive for efficiency is not used to cut away the rights of the citizen, diminish the role of the independent profession, or erode the terms and conditions of judicial office. Once something is lost it will not be regained. There is no necessity that justice be compromised in order that it not be delayed - money and resources can ensure that neither occurs. The executive and the politicans should not be let off the hook easily.

The Bar Council has recently decided to examine two possible avenues for taking some pressure off the judges, even though each will involve a re-examination of previous positions. The first is a system of Recorders, or the equivalent, whereby members of the Bar preside over criminal trials for a short period each year. The second is a court administered and funded system of Official Referees whereby members of the Bar act, in effect, as arbitrators to decide matters or questions referred to them, subject to appropriate appeal rights and the like.

Both of these suggestions have a long history in the United Kingdom. The Council has approved the Recorder proposal in principle and a working party consisting of Barker Q.C., Coombs Q.C. and Salts Q.C. has been established. The Public and Professional Affairs Director of the Association, Yvonne Grant, is preparing a paper on the Official Referee system for the Council.

It is not only the profession which must examine itself. One matter which lies firmly in the hands of the judiciary is the conduct of first instance hearings and supervision of that conduct by appellate courts. It is clear that the length of hearings continues to increase, and that the increase over the last decade or so has been very marked. I venture the view that one of the principal reasons for this has been the increasing unwillingness of judges at first instance to apply basic procedural and evidentiary rules and the lack of support at the appellate level for those judges who do apply the rules.

It is commonplace for parties, without any particular reason or explanation, to be permitted to split cases, re-open issues, recall witnesses and the like. Even more destructive of the economic despatch of business is the refusal by trial judges to rule on objections to evidence, particularly as to relevance. It is by no means uncommon for a trial judge to say that he agrees the evidence is irrelevant or otherwise inadmissible, but that he admits it in case the appeal court takes a different view. The Court of Appeal has, indeed, encouraged this. I do not stay to discuss the consequences of this approach in a comprehensive fashion. Suffice to say that in my opinion, it is unsound in principle (a trial judge should apply the law according to his own view not the view of some hypothetical appeal court), is impossible to explain to a litigant, but above all (for present purposes) is misconceived from a practical point of view. At least the following conditions would have to be met before a procedural or evidentiary ruling would lead to a new trial - the case must proceed to judgment; the party against whom the ruling is made would have to ultimately lose the case *and* would have to decide to appeal; the appeal would have to proceed to judgment; the judgment would have to turn on the ruling; the appeal court would have to disagree with the trial judge; the point must have been important enough to warrant a new trial.

Against these bare possibilities is the certainty that the trial will be lengthened by issues or evidence which the judge regards as irrelevant.□

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