The 1992 Supreme Court Special Sittings - A 3-Dimensional Perspective: The Judge, The Barrister and the Clerks

Billed as bigger than "The Last Emperor" (more Judges involved, more members of the profession, more cases to be dealt with in a fortnight than ever before, more coffee drunk ... etc. etc.), the Supreme Court of New South Wales's Special Sittings designed to dispose of the backlog in the Common Law list took place between 20-31 July 1992. In November 1991 1,229 cases were selected for inclusion in the Special Sittings. Selection itself had a remarkable effect in causing cases to settle. By 20 July 1992, the day the Special Sittings commenced, only 472 cases remained to be heard: 585 had been settled, 168 had been removed from the list, and 34 disposed of.

By 31 July 1992, only 3 cases were left and they were part-heard. 225 had settled before hearing, 136 had been settled during hearing, 88 had proceeded to verdict and 20 had been removed from the list.

As at 9 October 1992, 21 appeals had been lodged from cases heard during the Special Sittings.

The objective success of the Special Sittings has been such that two more such sittings are to be conducted in 1993, albeit in a slightly modified manner (see Practice Note 75). The exercise has already been emulated interstate: Victoria is currently conducting such a sittings billed as a "Spring Offensive".

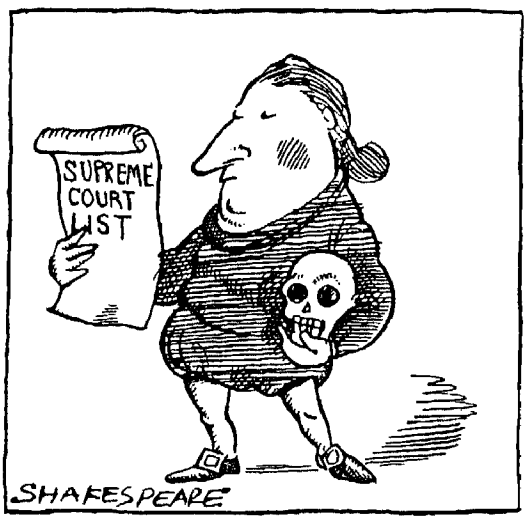
In order to assess the subjective success of the Special Sittings Bar News *obtained a bird's eye view of the exercise from three points of view: a judge, a barrister and the barristers' clerks. Not surprisingly, each had a slightly different perspective ...*

The Judge

Justice John Bryson presents the judicial perspective of Common Law lists in general and the 1992 Special Sittings.

When I first worked in a law office in 1955 somebody told me that cases took 50 months between being set down for trial and coming on for trial. As I was not long out of school much of the information I received about life and the world consisted of tall tales told by mischievous elders, and I dismissed this as another such story. With three and half centuries to fix things up since the thorough rubbishing in Hamlet's soliloquy, I knew it could not be true. But the truth soon dawned; it was true.

People who had been hit by motor cars burning rationed petrol while the British ruled India and Palestine, or during the Berlin blockade, appeared in court daily and poured out their troubles to believing jurors. As I grasped the truth, I became incredulous at the lack of outcry. I have seen the waiting time shorten and lengthen many times since then. Australia has experienced enough change for two or three revolutions since then, but the difficulty of managing the common law list seems to be a reliable constant in a mutable world.



The Court now has well over twice as many judges as it had then. In those days almost every common law case was tried by jury. The process seemed very elaborate but it is surprising to recall that most trials finished within about two days. They were conducted in a highly combative way, with a style of advocacy which hardly exists any more. The mainspring seems to have been a view that the jury was poorly educated and that no argument was too ridiculous to be given a go.

It was no longer true, even then, that the jury was poorly educated, but there was an amazing readiness to debate the undebatable, even descending to the right of way at intersections, with elaborate expositions for the benefit of the jury that it was their function and no-one else's to apply the negligence standard, and that the decision was special to the case before them.

It was treated as a serious character flaw to make any admission of any kind; even that the defendant was driving his own car. If any admission were made, opposing counsel seized on it and endlessly referred to it, apparently attributing to the jury the idea that a litigant who admitted something was a worthless person. This extended to the out-of-pockets; the plaintiff sat in the witness box reciting his chemist's bills and the amounts spent on taking taxis for x-rays, to be cross-examined on the availability of a tram.

The world changed, the rules changed, the juries faded away in most cases, styles of advocacy changed and it seems to me that the expectations of the court that people will fight issues which really exist have changed also. But lengthy common law lists remain. I suspect that there is some deep unanalysable

character trait in the people of NSW which makes them more ready to engage in litigation than the people of other States. But there is no proving this idea, so belief should be reserved. Disputes, the likely outcome of which seems transparently obvious in retrospect, seem to have remarkably long lives, to find settlement only immediately before or soon after the hearing commences.

The identifying characteristic of the NSW judiciary has been established in these pages by Sir Maurice Byers QC as genial brutality. I will not at the moment dispute this assessment, although I do not aim to fulfil it. In the past I remember a number of endeavours to reduce delays and speed up disposal rates, the main element of which was a diminution in geniality. The scheme for the Special Sittings of 1992, smilingly introduced by Chief Justice Gleeson in 1991 in the form of Practice Note 72, relied on a more holistic attack on the problems. The large disadvantage in the scheme was the running list; instead of a fixed day on which a case would be started, every case became a swinger, and stayed so from day to day until it was reached.

Against this disadvantage were many advantages. One advantage was the concentration of judicial resources; five teams of seven judges, each team with its own running list, team leader and Registrar. (In fact some teams were larger at times, as judges not involved in the Special Sittings became free for a few days and attached themselves to a team). The heart of the scheme was preparation, extending over the previous eight months, for the crowded fortnight.

Practice Note 72, sent to each solicitor involved in November 1991, in 37 pellucid paragraphs of cold command communicated the unmistakable message that the bugle had blown, the sleeping princess had been kissed and that the hour had arrived for determined action. The mood of the document may be gauged from paragraph 26(a) - "Where a case is struck out of the General List a letter will be sent directly to the plaintiff advising why the case was struck out ...". Detailed requirements were made about all preparations reasonably likely to be outstanding for the cases selected, for most part personal-injury claims which had been pending for some years, often over five years, where there had been a very full opportunity for preparation already. A full account of the state of preparation was required to be given to a Registrar at a call-over in March 1992. A full exchange of the statements of witnesses and the reports of medical and other experts, and of schedules summarising the particulars of the claims was required.

During the months of supervised preparation, the parties and their representatives were urged into positions of full knowledge and appreciation of their strengths and their weaknesses. In this process, settlement became achievable in many cases. By the opening of the Special Sittings on Monday 20 July, about three-quarters of all cases listed had been settled and 472 remained.

On the opening day, I faced a list of five matters, with hearing estimates which in sum exceeded a fortnight. By 4 o'clock, three of these had been settled, one after three hours of hearing; one had been adjourned and one was an hour into its hearing with a jury, a hearing which was to continue until 7 pm the following Friday. On each succeeding day I again faced a list of four or five matters but with the flexibility of listing before a team and with the aid of settlements, each case found a niche. Cases which I could not reach were sent off by my team leader, Grove J, who was able to find a place for everything.

Through the door of the court I was distantly aware of throngs of witnesses, litigants, jurors and lawyers proceeding purposefully hither and yon; but the jury case before me claimed my close attention. A modern and direct style of advocacy prevailed: no-one spoke down to jurors. Just as well, as they were conscientious, careful and intelligent; they would have laughed at the Serjeant Buzfuz style.

At the end of each day there was a progress report and, for the competitively minded, a comparison of the disposition rate of each group. After a week the pending case load had fallen from 472 to 138; 276 cases had been settled and 51 had been decided; 7 had been adjourned. By Wednesday 29 July there were only 35 left, but many of these proceeded to a verdict; any case which was going to be settled had been settled by then.

This initiative disposed of almost 2,000 cases; but thousands remain. It achieved success by the concentration of resources; the resources so concentrated were not available for a fortnight for cases of other kinds. Relative certainty of the date of commencement was sacrificed; and flexibility in assigning cases among judges in teams must have made for some uncertainties and confusion. Still, in my impression, the cases which were argued before me had been well prepared and were presented smoothly and comprehensibly.

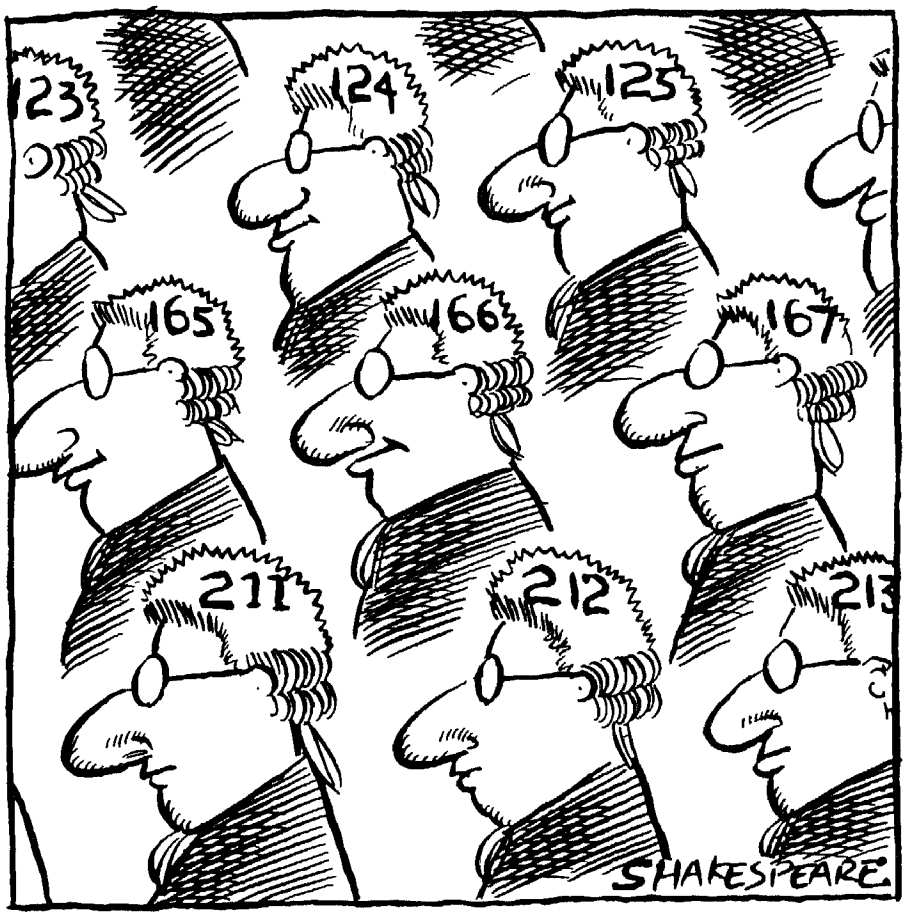
Special Sittings are to continue. Practice Note 75 sets out preparation for two Special Sittings in 1993, two weeks in May and two weeks in November, to involve almost all common law judges and Masters, and to be prepared for in similar ways. As long as delays in the common law list continue, I think it is to be expected that Special Sittings will also continue. In a perfect world, no pending litigation would have been started more than two years ago. I have never inhabited a perfect world, and much litigation is disposed of more quickly than that. Close management of pending case loads by judges and registrars, and (at least on some occasions) running lists without real certainty of hearing dates seem to be the shape of the future. ❑

The Barrister's View

Cliff Hoeben presents a personal view of the sittings.

By the way of disclaimer, I should point out that the following comments are personal to the author and are based upon his observations and experiences during the Special Sittings and are not necessarily the experience of the Bar generally. The opportunity has been taken, however, to refer to hearsay material concerning other counsel.

The earliest indications the Bar had that something different was occurring in July were the interlocutory steps which were being taken to prepare cases which had been placed in the Special Sittings. Instead of an advice on evidence, counsel were being asked to interview witnesses at a much earlier point in time and to settle or draft statements by those witnesses as to the evidence which it was expected (hoped) they would give at the hearing of the matter. At issues and listings conferences, registrars were analysing the merits of cases more closely than usual and much greater efforts were being made both by the profession and by registrars to settle the cases or, alternatively, to narrow the issues in dispute.



It was my experience that where counsel attended the issue and listings conferences, there was a much better chance of settlement. This is no reflection on the competence of solicitors but, where counsel attended, it usually indicated that the case had been more fully prepared and there was a greater appreciation of both the strength and weaknesses of the case. It was certainly easier to obtain a settlement where one could talk directly with the person who would be ultimately running the case. It also became apparent at those issues and listings conferences that some insurance companies had entered into the spirit of the sittings and were genuinely making efforts to resolve cases whereas others were not.

From my own point of view, I found that I was able to settle approximately a third of the cases in which I had been briefed before the sittings commenced. This was almost entirely due to the increased emphasis on identifying issues at the conferences and also the willingness of some insurance companies to try to resolve matters at an early point in time.

Of course, some of the interlocutory steps were a little unusual. Being briefed to underline or highlight parts of medical reports which were considered important was something none of us had done before. What use was ultimately made of some of these brightly coloured notations I never knew.

As the sittings approached, the dilemma facing the Bar was how to minimise the disruption to clients and solicitors by reducing occasions when briefs would have to be passed at the last moment. A number of discussions took place on an informal basis between members of the common law bar. Some suggested that barristers should only take briefs in one particular group. Another alternative which was followed by some defendants was to have a panel of barristers available between whom briefs could be rapidly passed. All were agreed that it was necessary to have a comprehensive advice prepared in each matter so that if other counsel were obliged to pick up the brief at short notice they could quickly learn the important features of the matter. It would be fair to say that none of the suggested solutions really worked.

I started the sittings with 20 matters - 15 defendant, 5 plaintiff. Like others, I waited with trepidation on the evening of Thursday 16 July. *Disaster!* Six matters listed on the first

day in six different lists over four different groups. Two of the matters were in group D at Darlinghurst. Friday was spent in feverish negotiations with other counsel in the same difficulty. Unfortunately, no settlements could be achieved and the two Darlinghurst matters were passed on Friday afternoon so that new counsel would have the weekend to work them up. Two gone, eighteen left.

The first day of the sittings, 20 July, could only be described as "different". I will never forget arriving on the eighth floor of the Supreme Court to find instead of the usual gentle whisper of legal principle, a milling throng of litigants, legal advisers, counsel and jury panels. Those of us who had got our early "blood and bones" experience in the Workers Compensation Commission, when ten or more matters used to be listed before one judge, were at least familiar with such a scene, but none of us ever expected to see it re-enacted in the Supreme Court.

One problem which was immediately apparent was that there was no room for private consultations with one's client. Every available room was used as a jury room. This led to some interesting conversations between legal advisers and clients taking place in the main corridor.

To my observation, although some of the conversations appeared to be rather heated, no-one was seen to come to actual blows. Once again, the scene was somewhat reminiscent of early days in the Workers Compensation Commission.

Between 10.00 am and 11.15 am I patrolled three floors of the Supreme Court attempting to settle some of my cases. My only consolation was that those counsel with whom I was dealing looked as harried as myself. All of us were waiting for one of our cases to start. The inevitable occurred for me at approximately 11.15 am. That case was a multi-defendant jury trial. It continued for the rest of the day.

Shortly after 4.00 pm I emerged to consult with my clerk about what was happening the next day. The score at that point was two matters settled, one matter passed, one running.

I was advised by my clerk that three matters were listed for the next day. As usual, they were in three different lists spread across three different groups. Having made telephone calls to my opponents on the Monday afternoon, it became clear that one matter could not possibly settle but that two had reasonable prospects and, in any event, they were well down their respective lists and might not start on Tuesday. I therefore passed the case which I regarded as being unsettleable and retained two.

In reaching that decision I failed to take into account the law of increasing catastrophe. If things are going badly, they will get worse. The unsettleable case settled shortly after I passed it, whereas the other two matters defied all attempts at settlement. Meanwhile, the matter which had started at 11.15 am on Monday continued.

That set the pattern for the first week. By Friday afternoon the Monday case was still running. The score at that stage was eight matters passed (seven of which settled shortly after they left my clinging hands), nine matters settled, one matter running and two matters fixed for the second week.

Although I felt somewhat hard done by that my original "portfolio" of twenty matters had been substantially reduced, it was nothing like that of a fellow junior who started the Special Sittings with sixteen matters. All of those matters were listed in the first two days of the sittings. Of the sixteen matters, he ran one, settled one, and was obliged to pass fourteen. The Special Sittings finished for him on Thursday of the first week and he took his family to the snow in disgust. There is the story of the silk who went into the sittings with three matters and had to pass two.

The problem with the Sittings from the Bar's point of view as I saw it was the unpredictability of matters starting. Counsel who had restricted themselves to matters in only one group found that it was just as possible to get jammed within a group as it was to be jammed between cases listed for different groups. Even when one had cases in the same list and it was unlikely that those matters would be reached, they could be removed from that list at short notice. Counsel concerned were in just as much trouble (particularly if they were in the case which was running) as if they had made no effort to restrict their commitments to cases in the same list.

The only solution to emerge was to be quick on one's feet, to have nerves of steel, for one's instructing solicitors to have nerves of steel and to have a fair share of luck. The best thing to come out of the sittings was the way in which so many matters were able to be resolved at the interlocutory stage. The losers were the plaintiffs who were placed under very great pressure by the sittings. That pressure was produced by not knowing when or whether witnesses would be available, particularly medical and expert witnesses, by not being sure whether counsel with whom they had been dealing over a period of time would be able to run their case and not being able to discuss the merits of their case in a relatively calm atmosphere.

As a one-off solution to the question of court delays, the Special Sittings would have to be regarded as a success. As an answer to court delays generally, and as something which ought be repeated on a regular basis, I have my doubts as to whether such sittings will survive the test of time. For the sittings to succeed, goodwill on the part of all those participating plaintiffs, practitioners, judges and, above all, defendants is essential. Once such Special Sittings become a normal event rather than something "special" I suspect that the disposal rate of cases will drop to that normally achieved by the Common Law Division.

Speaking as a veteran of the first sittings, I don't know whether my nerves will be able to stand a second. ❑

A Barristers' Clerk

Anon

God looked down on his slightly bored and staid judiciary and legal profession and decided what was needed to revive flagging spirits in these hard times was an old-fashioned tournament. The quest: to attack and reduce the common law waiting list. The tournament was to last two weeks, commencing on Monday, 20 July 1992 at 10 am and concluding at 4 pm on Friday, 31 July 1992.

He organised his crusaders (the Judiciary) into five platoons, A, B, C, D and E. Each platoon would consist of seven crusaders (Judges or Masters) supported by two squires (Registrar and List Co-ordinator). Leading each platoon was a captain or list judge.

God also decreed that all platoons, where possible, be equal in experience, ability, age and physical condition - thus the tall, short, thin and portly were evenly divided.

The defenders of the common law waiting list (we shall refer to the lists as the statistics) would be the other side of the profession: the barristers and solicitors, known as infidels, and their slaves (or clerks).

To umpire and overseer the tournament he appointed the Supervising List Clerk (David Beling), well-known for impartiality and fair play. He, in turn, had the protection of two mobile phone-toting henchmen - Warwick Soden and Brian Davies - a fierce duo to face when lodging a protest.

Months of pre-tournament skirmishes occurred. The media played an important role in building up the atmosphere.

Finally the great day arrived. The atmosphere was electric. The infidels and their slaves scurried about to secure the best positions. The crusaders paced nervously behind their barricades.

Then, as the clock on the Barracks Building struck the last chime at 10 o'clock, a cry rang out from the umpire ("Let the battle begin") and 35 crusaders lowered their tipstaves and charged headlong into the infidels. Oh! What a glorious sight! Never before in the history of the law in this State have so many owed so much to so few. Thirty-five bold and brave crusaders against approximately 400 battle-hardened infidels, armed with precedents and objections, backed up by their attentive clerks - oops, I mean slaves.

The battle raged for the first five days, both sides withdrawing behind their respective lines each evening to re-group and burn litres of midnight oil preparing battle plans for the next day. At the end of the first week, honours were fairly even. However, the Chief of the crusaders, although not honoured with a team captain's position in battle, had two brilliant ideas: first, he put a keg on in his tent on the first Friday night and many "high fives" were handed out to his weary troops; second, he called up a secret commando unit comprising Mahoney JA, Meagher JA, Rogers CJ Comm D and Rolfe J and threw them into the frontline. When this was detected by the slaves' intelligence unit, cries of "foul", "breaches of the Geneva Convention" and the fact that they were not even registered, were hurled at the umpire, but his two henchmen pointed their mobile phones in a menacing fashion at the slaves and their protests dissipated. "Play on," said the umpire, but it was all over, bar the shouting. By the evening of the eighth day, only a few pockets of resistance were left and they were cleared out by the tenth day. The Chief ordered another keg to be bunged in his tent, which was accompanied by more "high fives" and several choruses of *We are the Champions* rang out until late that night - a truly euphoric atmosphere.

Meanwhile, back in the infidels' camp, the ever-faithful slaves helped their warriors to their banks and were rewarded with pats on the head and promises of a lunch and a glass of claret. No doubt the tournament will be referred to with awe for many moons to come.

An overview of the tournament found that some statistics, or litigants, were discontented about the lack of feeling, but those behind them in the waiting list rejoiced because it had been shortened by twelve to eighteen months.

Crusaders and their squires, infidels and their slaves found a camaraderie that had not been seen for years.

Finally, the fat lady sang.

No correspondence will be entered into regarding the above and, like Justinian, the author has no material assets so it would be useless to sue. ❑