ELECTRONIC PRE-LODGEMENT NOTICES

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The South Australian Magistrates Court provides a pre-lodgement system which is available on a website. The purpose of this paper is to describe the background that led to the introduction of the system, the policy underlying it and its effectiveness.

The origins of this idea go back more than a decade to discussions by the author on: how to assist parties to resolve disputes outside the court system; how to resolve arguments over whether a plaintiff is entitled to the costs of filing a claim paid at about the time it is filed, and sometimes before it is served; and how to provide an affordable court service to collect small debts that do not justify the risking of the normal court filing fee.

Quite independently, a pre-lodgement system was introduced for personal injury claims in South Australia. Although it has no direct relevance for electronic issues, it is important to understand the policies of pre-lodgement, so I shall briefly discuss it.

The 90 Day Pre-Action Notice in Personal Injury Claims[1]

In South Australia, all third party personal injury motor vehicle insurance is held by the Motor Accident Commission (formerly SGIC). In 1991, SGIC had initiated informal conferences to deal with the backlog of

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1 The discussion of the 90 day pre-action notice is based on research from my 1996 thesis *An evaluation of some ways of limiting and reducing the costs to parties of conducting litigation in the Magistrates Court (Civil Division) in South Australia*, for a Master of Laws (Hons) degree at the University of Wollongong. Some of this material was published in Cannon, "Lower court pre-lodgement notices to encourage ADR", (2000) 2 *The ADR Bulletin* 9 at p 77. Graphs and other statistical data in the Appendix to that article are not reproduced here.

pre-1990 personal injury actions in the District Court. This led SGIC to establish in August 1992 a settlement conference team of experienced claims officers to endeavour to settle claims before legal proceedings were issued. This team resolved, on average, 100 claims per month, with a settlement rate of 85-95 per cent.[2] As evidence of the success of this approach, the average time to settle CTP claims reduced from 31 months in 1991 to 25 months in 1993.[3] In 1993 the Crown Solicitor made representations to the Chief Justice on behalf of SGIC. As a result, at the end of 1993, all civil courts in South Australia introduced rule amendments to provide that a plaintiff in an action for damages for personal injuries who fails to give at least 90 days notice of the claim to the defendant's insurer or the defendant is not entitled to the costs of preparing and filing the claim.[4] In the Magistrates Court this rule affected all actions commenced after 7 March 1994.[5]

Most defendants of personal injury actions are insured against liability. The purpose of r 20A(2) is to give the insurer an opportunity to settle the claim before the substantial additional costs of initiating a court action are incurred by the plaintiff and, if the claim is successful, paid for by the defendant. SGIC insures most defendants in personal injury claims in South Australian courts. The number of these claims has declined substantially. An analysis of data made available by SGIC has been conducted to assess to what extent the decline in personal injury matters commenced in the South Australian courts can be attributed to the introduction of this rule rather than to factors such as a change in policy by SGIC, a decline in the number of accidents, less incentive to claim due to a reduction in the level of general damages, or other factors. Legal practitioners who specialise in personal injury claims, both from the plaintiffs' and defendants' perspectives, have been interviewed to ascertain their views of the cause of this reduction in personal injury claims and the effectiveness of the new procedure.

Data from SGIC shows that a steady increase in the ratio of

2 John Winter (1994), "The ninety day rule", unpublished paper delivered to lawyers as part of the Law Society of South Australia CLE programme.
3 ibid p 3
4 Initially this was in r 106(8), but is now r 20A(2) as part of the general pre-lodgment scheme. The lawyer may still be able to charge the client, eg if instructions were given at the end of the limitation period and it was necessary to file without notice to avoid the claim being statute barred. In the higher courts the penalty is all costs.
5 After 28 October 1993 in the Supreme and District Courts (SA).

medico-legal expense to total payout and delay in closing files both peaked in 1991-92. This trend then reversed, and by 1993-94 both the ratio and the delay had been reduced significantly.[6] Further reduction in both was evident in 1994-95. This was due to claims being settled earlier, before the medico-legal costs involved in court proceedings were incurred. Between 1991-92 and 1994-95 the net amount paid to claimants (after deducting all medico-legal costs paid by SGIC and cost of assessors, private investigators and police reports) as a percentage of the total amount paid out increased from 77 per cent to 83 per cent. The defendant legal costs were reduced from nearly $18 million to $11 million and the plaintiff legal costs from nearly $23 million to $12 million; at the same time, probably because of the capping of damages by statute,[7] the payout to claimants reduced. In the same period the average age of the files closed decreased from 31 months to 25 months. These figures would tend to understate the reductions because they are based on an analysis of files closed in each year and include many older files which were not subject to the new settlement strategy. The reductions were clearly evident by 1993-94. The rule amendment was not introduced until the end of 1993. The time lag implicit in these figures suggests that the reduction evident by then was due to the efforts of the SGIC settlement team, rather than the rule change itself, and where the plaintiff was represented, a co-operative approach on the part of the settlement team and the lawyers.

In 1994-95 SGIC settled 3800 claims and did not instruct solicitors to act in 2556 (67 per cent) of them. No comparative data in other years is available but such a high percentage is further indication of the fact that many of these claims were settled before proceedings were filed.[8] The number of claims where court proceedings have been commenced has steadily declined. In 1995 only a quarter of the number of cases were commenced as in 1989. Over the same period all types of accident and particularly casualty accidents have shown only a slight decline. A comparison of casualty accidents and actions commenced in court shows that the actions commenced have reduced

6 I have not researched the reason for the cost increase leading up to the peak in 1991-92. The District Court introduced case flow management in 1990 which was too late to have contributed to these cost increases.

7 S 35a of the Wrongs Act 1936 (SA).

8 When a claimant files proceedings it is SGIC practice to instruct solicitors.

disproportionately. There may be a time lag of up to three years between the accident and the commencement of the claim in court[9] but that does not explain the fall in the latter. It is clear that the SGIC settlement team has been highly successful in settling claims before a case has been commenced in court.

Interviews with lawyers from firms specialising in plaintiff and defendant personal injury work confirm that the SGIC team settle a "huge" number of claims before legal proceedings are commenced. Plaintiff lawyers expressed the view that this was much better for their clients. A realistic pre-claim settlement saves stress and delay. It is obvious that it saves costs to both sides. Some thought the offers for the plaintiff's costs were adequate while others believed that they were rather low. There are some litigants who will only be satisfied with a court-determined result, however they are the exception.

The 90 day rule reinforced and institutionalised this change in approach. "The culture already had evolved that way." A level of trust and respect has built up between the SGIC settlement team and the plaintiff lawyers I interviewed. They saw this as the reason for the success of the new approach and the effect of the rule change as largely coincidental. The point was made that the rule does militate against cynical plaintiff lawyers who might otherwise issue a claim before negotiating just to build up costs. However some said the rule is not rigorously enforced. Some plaintiffs have apparently been allowed their costs even though they were in breach of the rule. This is not seen as a bad thing, by either side, but was mentioned to make the point that early settlements have not entirely been due to the rule change. Rather, the establishment by SGIC of a credible, competent settlement team making realistic offers, and the legal profession's acceptance of this cultural shift, were responsible for the reduction in court proceedings. This is reinforced by the reported experience with other insurers who do not make any realistic offers in response to the pre-action notice but continue to "play hard ball and die in the trenches over every claim".[10] The rule change by itself may not have resulted in

9 There is a limitation period of three years in commencing these claims. This can be extended but most are commenced within the limitation period.

10 Quoting a plaintiff's lawyer. This view is supported by the fact that data collected for general claims in 1996 showed three times as many non-SGIC personal injury claims settled by the end of the directions hearing. The much lower proportion of SGIC claims settled at this stage is consistent with SGIC having settled many before proceedings issued.

the settling of so many cases before proceedings were filed in a court. However, in conjunction with a proactive approach by SGIC to settle claims at the earliest possible time, early settlements have been achieved. This has in turn substantially reduced the cost burden to the litigants. On SGIC's figures the total legal costs paid in 1994-95 were $17.5 million less than the total costs paid in 1991-92. These figures do not include plaintiffs' solicitor client costs so are likely to significantly understate the saving. If SGIC has been relatively generous with its settlement offers, some money which might otherwise have been spent on medico-legal costs may have been spent on plaintiffs' damages. It is not within the scope of this paper to assess the implications of that but I suggest that in the context of the substantial reduction to general damages imposed by statute, there is no social harm if this small transfer has occurred.

The substantial reduction in general damages for personal injuries arising from motor vehicle accidents, imposed by statute in 1987, has reduced the economic attraction of litigating and has assisted SGIC in being apparently generous relative to the reduced entitlement. This may have been a factor in the apparent success of the 90 day pre-action notice. Even allowing for this, the initiative has been a significant success in reducing costs to the litigants and delay.

The success of this example of a pre-lodgement system was a factor in the adoption of a pre-lodgement scheme for all claims. Encouraging people in dispute to attempt to settle before commencing an action at court has demonstrated benefits in reducing costs and delay. I have mentioned that there was also a desire to make a clear prescription about the entitlement to costs when a debt was paid at about the time of a claim being filed at the South Australian Magistrates Court. By the time the scheme was introduced the Court had well developed ADR[11] and court-appointed expert schemes, and these were incorporated into the pre-lodgement system, with the intention of extending the Court's policies for litigation to disputes before they are filed.

Court-Issued Final Notices on the Internet

This procedure was introduced on 5 July 1999. It was part of a wider prescription to formalise the common law position that before a party

11 This is discussed in Cannon, "An Evaluation of the Mediation Trial in the Adelaide Civil Registry", (1997) 7 *JJA* 1 p 50.

can claim costs s/he should give a final warning that proceedings are about to be filed at court. The new rule (s 20A) provides:[12]

> (1) Subject to this rule and to any order of the court the plaintiff is not entitled to the costs for filing of a claim other than a counterclaim, a third party claim, a claim for non-compliance with an EPA, or a claim under the Workers Liens Act 1893, unless noticed in writing of the intended claim was given to the intended defendant not less than 21 days before the filing of the claim, or where sub-rule (2) applies in accordance with that rule, by any means authorised in these rules for service of a claim.
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> In an action for damages for personal injuries notice of the claim must be given at least 90 days before the filing of the claim and must be given to the defendant's insurer if the identity of the insurer is known to the intended plaintiff. Such notice must include notice of any intended claim for past and future economic loss and be supported by documents including medical reports setting out the nature and extent of the plaintiff's injuries and residual disabilities as known to the plaintiff at the time of the giving of the notice.
>
> (3) Notice of an intended claim may be given in accordance with Form 1A which notice must be filed with the Court and must bear the Court's seal. A plaintiff who is successful in a claim is entitled to recover from the defendant any filing fee for this notice.

The rule allows for giving notice by means other than the prescribed form, such as a lawyer's letter of demand, but the legal profession is increasingly using the prescribed notice. The form of notice is reproduced at the end of this article and allows the Court to put its own message across. The Court offers free mediation and expert advice to narrow disputes over technical issues before the costs escalate, although some cost recovery is considered if the expense of providing the services requires it. The mediation is provided on a pro bono basis by LEADR-accredited mediators. For these lawyers it is a community service and an opportunity to hone their skills. A panel of court experts provides advice to the Court at all stages of the litigation process.

Ron Szewczuwianiec in the South Australian Courts Administration Authority had the inspired idea of putting a website on the internet. At the time it was regarded as a bit farfetched. However, Ron stuck with the idea despite opposition from those who wanted other paper-based system alternatives. I am told our experience of a slow start,

12 Magistrates Court (Civil) Rules 1992, South Australia. This is includes amendments up to November 2001.

followed by an exponential increase is typical. Since the site first appeared in June 1999 we have issued 10,243 final notices. In the financial year ending June 2001 we issued 4827 and in October this year we issued what Ron has proudly proclaimed as the new world record, 609 for the month. This is in a court with about 40,000 annual civil claim filings.[13]

The inspired idea of making the form available on the internet is a great benefit to claimants, who can access it from any computer at any time, without having to incur the cost of using a collection agent or lawyer or attending a court registry in person. It is also a great benefit to the Court because notices can be issued without any investment of staff time. At court registries staff can access the internet site and obtain a final notice. Soon, computer access to the site will be available to the public at registries.

With its modest price of AUD$10 the notice fulfils the policy objectives of providing a cost effective court service to collect small debts. It encourages ADR outside formal court process, and gives clear guidance on when the amount claimed must be paid before costs and fees that can be passed on to the party are incurred. Where the notice is not effective in the potential plaintiff's view, a court claim can be commenced, and the Rules allow the final notice fee to be added to the amount of the total claim.

Since the form was originally prescribed it has been amended to encourage claims for uncontested debt to be dealt with outside the Court. The notice suggests the parties may sign an Enforceable Payment Agreement (EPA) in which the debtor acknowledges the debt and agrees to terms of payment, in return for the creditor not referring any default to credit referencing agencies. If default then occurs the creditor can commence a claim and obtain a summary judgment because the debt has been acknowledged. It is too early to evaluate the usefulness of this addition.

The court form and some explanatory literature designed for court users are set out below:

13 CCA Annual report 1999-2000 records 41,480 primary civil lodgements in the Magistrates Court Civil Division.

FORM 1A

FINAL NOTICE OF CLAIM
MAGISTRATES COURT OF SOUTH AUSTRALIA (CIVIL DIVISION)

FROM: (Plaintiff)
address, phone, fax nos.
TO:
address, phone, fax nos.
The plaintiff intends to file a claim in this Court against you for the sum of $
being for: (briefly describe the basis of the claim)

This notice provides an opportunity for you both to voluntarily negotiate a resolution without further involvement by the Court. This may save you costs, time and court appearances.
Details of your options, what they mean and how they work are on the reverse side of this notice.

If you are not able to reach a resolution within 21 days of service of this notice which is acceptable to you and the plaintiff, the plaintiff may file a claim against you at the Court.

(Note to creditors–if you are willing to accept instalment payments you may send an Enforceable Payment Agreement (EPA), form 1B with this notice)

IGNORING THIS NOTICE

If you ignore this notice the plaintiff may file a claim against you incurring court and other costs which you may have to pay if you lose the case. If the creditor obtains a judgment against you this will have a bad effect on your credit rating.

OPTIONS FOR PAYMENT IF YOU OWE THE FULL AMOUNT

Pay the full amount claimed to the plaintiff (do not send money to Court).

If you cannot afford to pay in full try to arrange instalment payments with the plaintiff. You can use an Enforceable Payment Agreement (EPA) where in return for you acknowledging the debt and making payments the creditor agrees not to commence a claim nor to report the debt to credit referencing agencies. You can obtain these from court offices. Keep a record of payments made.

Negotiate with the plaintiff for more time to pay in full.

The plaintiff is not entitled to debt collecting costs unless you agreed to pay them in your credit or other agreement with the plaintiff.

OPTIONS FOR SETTLEMENT

If the claim is in dispute, you can negotiate directly with the plaintiff to reach an agreement or, if the plaintiff agrees, you can use the free court mediation service (see "Mediation") and/or a court appointed expert (see "Experts").

If you owe some of the money you could pay that to reduce the amount in dispute.

MEDIATION

Court mediation is free and is an alternative way of resolving a dispute other than by court processes leading to a court trial. Mediation can only take place if both parties agree. You can choose either court mediation or other mediation services

EXPERTS

In many areas an independent court expert can provide an opinion on technical issues.

For information about Mediation or Court Experts ... [the form gives contact details at the Court]

HAVE YOU COMPLIED WITH RULE 20A?

Pursuant to rule 20A of the Magistrates Court (Civil) Rules a plaintiff should give a Defendant 21 days notice, in writing, of an intended claim. Otherwise a plaintiff risks being unable to recover their filing fee associated with a subsequent claim lodged with the Court.

The Pre-Lodgement System allows for individuals, businesses or organisations to issue a "Final Notice of Claim", which complies with rule 20A, prior to issuing a formal claim.

The System aims to encourage parties to resolve their dispute without needing to resort to the formal legal system.

This notice can be purchased for $10.00 either via the internet at **www.claims.courts.sa.gov.au** or over the counter at any Magistrates Court Registry.

The "Final Notice of Claim" provides the potential defendant with a number of alternative courses of action:

- to pay the plaintiff the money they seek,
- to negotiate a settlement with the plaintiff, which may include part payments
- to seek mediation, or
- to ignore the notice and run the risk that the plaintiff lodge a formal claim with the Court.

A "Final Notice of Claim" may result in the dispute being resolved without the need for a formal claim to be lodged with the Court.

Please note:
If you require a large quantity of Form 1As to be processed by a registry you should contact your nearest registry for details.

PRE-LODGEMENT SYSTEM[14]

WHAT IS THE PRE-LODGEMENT SYSTEM?

The Court Process Review recommended that a Pre-Lodgement System be implemented in the Civil Division of the Magistrates Court of South Australia.

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- to pay the plaintiff the money they seek,
- to negotiate a settlement with the plaintiff, which may include part payments
- to seek mediation, or
- to ignore the notice and run the risk that the plaintiff lodge a formal claim with the Court.

14 I acknowledge the work of Jim Macdonald and Melana Virgo in preparing these information brochures.

HOW DOES THE SYSTEM WORK?

Individuals, companies, organisations, law firms, government agencies and anyone who can access the internet is able to visit the Pre-Lodgement website.

The address of the Pre-Lodgement web site is:
www.claims.courts.sa.gov.au

Once access to the website is gained, the user will be asked to log on. This requires the user to create a log on name and password. Thus frequent users, such as law firms or government agencies etc, will use the same user name and password.

Once the user enters a valid user name and password, they will then proceed to the next screen.

The next screen requires the user to enter their credit card details for payment of generating the notice. There are two checks which are conducted at this stage. The first internal check makes sure that the user has entered the correct amount of numbers for the credit card and also checks the expiry date. If an error is made the transaction will not proceed and the user will be notified that an error has occurred and to check the details they entered and resubmit their details. The second external check ensures that the credit card is valid, ie it has not been reported as stolen. Upon authorisation the user will see another screen which informs them that their transaction has been successful.

Brief instructions are then given as to how to generate their claim form. The user then completes the details required and clicks on "Generate Notice". The notice is then displayed. The user then prints the notice. The transaction is complete.

Any queries regarding the use of the website should be directed to:
claims@courts.sa.gov.au

WHY USE THE PRE-LODGEMENT SYSTEM?

The Pre-Lodgement System aims to encourage individuals, businesses and organisations to resolve disputes without pursuing formal dispute resolution processes within the judicial system.

The Pre-Lodgement System allows for a more cost efficient means of resolving disputes. It is perceived that individuals, businesses and organisations who would normally not pursue formal civil claims because of the costs will use the Pre-Lodgement System, thus providing access to justice for the whole community.

To ensure against the loss of costs, anyone who wishes to sue must