

Insurance Brief

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REVOLUTION IN THE DISTRICT COURT

Whether they like it or not, insurers are regular users of the Court. As such, they need to have a good knowledge of the Court's process so as to understand what the cost will be and when an outcome is likely to eventuate.

The current District Court and High Court Rules are generally fairly well understood and, while many have complained about their effectiveness, at least familiarity with the system enables insurers to plan and estimate the likely cost of litigated claims. However, recently suggested changes to the District Court Rules would see a startling upheaval in the way civil cases are run.

Earlier this year, a sub-committee of the Rules Committee (the body responsible for implementing and amending the Court's Rules) undertook an analysis of the way in which the civil section of the District Court operated. As a result, on 23 August last the sub-committee published draft recommendations for a radically new regime for the management of claims in the District Court.

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The changes proposed are too many to summarise here but some of the key points are:

- The plaintiff will no longer have to file proceedings as a first step. Instead the plaintiff simply serves its claim on the defendant.
- If there is no response from the defendant then the plaintiff files an affidavit of service and applies for default judgment or formal proof.
- If the matter is to be defended then the defendant will be required as its **initial** response within 20 working days to file at Court (but not serve on the plaintiff) a list of the witnesses intended to be called by the defendant, "*will say statements*" for each of the witnesses, a list and bundle of documents that will be relied upon at trial, along with a signed "*statement of truth*" and an address for service.
- The defendant would then serve on the plaintiff a notice that it has filed a response at Court. If the plaintiff wanted to proceed then the plaintiff would have to file a rebuttal of defences raised and address the essential facts in dispute.
- Additionally, the plaintiff would have to list witnesses intended to be called and give "*will say statements*" for each witness along with a list of all documents to be relied upon at trial.
- A judge will then look at the documents filed by the parties and assess if the matter should go to a "*summary trial*" (i.e. an immediate hearing) or if there are other more appropriate means of disposal (e.g. a judicial settlement conference or a full trial).
- If a matter goes to a summary trial, there would be little or no scope for interlocutory applications (e.g. interrogatories).



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Many of the other changes proposed are also "*radical*". The underlying rationale seems to be based upon a survey undertaken last year showing that 94% of claims filed are disposed of before a defence is filed. Thus, according to the District Court figures, only 6% of proceedings ever have defences filed and very few of these ever get to a hearing. The Court wants to impose a much more streamlined and "*economic*" method of dealing with these 6% of claims.

One clear consequence will be that the costs incurred (whether for a plaintiff or a defendant) will be much increased at the commencement stage. It is very likely that claims which are a "*punt*" will either never be initiated (because of the upfront cost) or will be quickly dealt with.

Another consequence is that the real issues in dispute will be quickly identified and it may well be that claims will be more quickly dealt with.

Whilst that would be a good thing, we anticipate that there would need to be a greater allocation of resources to the civil section than currently exists in order for the system to work. There will need to be specialist judges available who are familiar with civil issues and who can deal with claims in the allocation stage.

If there were a lack of judges with enough specialist skill available, then it is debateable whether the process would speed up at all.

The report emphasises efficiency and prompt disposal of claims. One problem with this is that there could be a tendency to treat all cases in the same way. If a case required full discovery or interlocutory applications (such as security for costs) then such issues may get lost beneath the Court's desire to bring matters to a speedy resolution.

These changes are still in draft form. Anyone wishing to have an input can make submissions although the closing date is 13 October 2004. If any insurer (or indeed anyone else) is interested or wishes to make a submission then a full copy of the proposed changes can be obtained by contacting the author at the email address below.

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DUTY OF CARE IN BUILDING CONSTRUCTION CASES

Sounding the Retreat from *Hamlin*

In June of this year the High Court in **Three Meade Street Limited v Rotorua District Council** held that a territorial authority did not owe a duty of care to a subsequent purchaser of a commercial building in circumstances where the council had approved a faulty construction.

In reaching that decision, the Court considered a decision of the High Court of Australia **Woolcock Street Investments Pty Limited v CDG Pty Limited** which had only weeks earlier held that an engineer did not owe a duty of care to a subsequent purchaser of a commercial building in respect of a faulty engineering design. The approach of the plaintiff in **Three Meade Street** had been to seek slavishly to apply the decision of the Privy Council in **Invercargill City Council v Hamlin** in which a duty was held to exist from a territorial authority to a subsequent purchaser of a residential dwelling. There the Privy Council held that although United Kingdom law would not permit such a duty, the unique circumstances of the New Zealand conveyancing environment permitted

such a duty to exist. **Three Meade Street** distinguishes **Hamlin** on the basis of the difference between a commercial building and a residential dwelling.

This may well see a retreat from the high water mark that **Hamlin** might have been seen to provide in terms of the imposition of a duty of care in the circumstances of "pure economic loss". The concept of a pure economic loss has had its importance diminished in New Zealand cases but changes may well be afoot. The Court of Appeal in **Attorney General v Carter** took what many plaintiff lawyers felt was a restrictive approach to duties owed by a Crown agency in its 2003 decision. The tide may be turning for an expansionary approach to the duty of care.

Either way, it may well be that the due diligence requirements effectively imposed on the purchasers of commercial buildings might yet be extended to investors in residential property for whom questions of commercial return are as much a

part of the purchasing decision as they are for commercial building owners. With the "leaky buildings" cases starting to reach trial in the Courts, there may be further movement yet on the scope of the duty of care in negligence.



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