effect to the statutory intention *"that a person should not be entitled to retain compensation affected payments during periods for which a common law damages claim had recompensed him."*

Spender, J considered that section 1165(3) implied that there be no overlap between the lump sum preclusion period and any periodic payments period, and that therefore the approach adopted by the SSAT was correct. He therefore determined that the preclusion period should run from 23 April 1991 to 30 January 1993, should be suspended during the second period that workers' compensation payments were made, and should then resume on 21 June 1993 when compensation payments ceased.

This decision is obviously of immense significance for recipients of damages awards who have received compensation and then returned to work full time before again receiving compensation. This will often be the case, where a return to work is unsuccessfully attempted or surgery is required. In the writer's experience this decision has not yet changed the Department's method of assessing preclusion periods.

DSS preclusion periods must be carefully considered when relevant to advising clients about settlement. Spender J's decision is required reading for the prudent personal injuries lawyer. ■

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FRIDAY, MARCH 6, 1998
THE AUSTRALIAN FINANCIAL REVIEW

Court for doctors do-little

Andrew Burrell

The strong threat of medical negligence litigation means doctors could no longer treat patients in a "cavalier fashion", says Melbourne plaintiff barrister Mr Jack Rush QC.

Mr Rush, who has been involved in several high-profile medical damages cases, claimed the medical profession had improved its performance in recent years but still needed to "take a good look at itself".

"The days when doctors could treat people in a cavalier fashion have gone," Mr Rush said.

"Things like informing patients, that's improved in recent years, primarily as a result of cases that have found doctors to be guilty of negligence."

With thousands of costly and complex medical damages cases before the courts, there is growing anxiety – from both the medical and legal professions – about the steady rise in the number of patients suing doctors and hospitals.

Last week, the County Court of Victoria announced it was establishing Australia's first specialist law list for medical litigation in response to the rise over the past decade. Experts predict other States will follow. The Medical Defence Union's medico-legal consultant, Dr Craig Lilienthal, said while the union had no objections to the new list, it held serious concerns at the steep rise in claims.

He said the incidence of claims was doubling "about every five years", while the costs of medical litigation and the damages awarded were outstripping even the rise in claims.

"What we are concerned about is, among other things, the affordability of this process," Dr Lilienthal said. "As the cost of medical defence goes up and the cost of providing medical defence goes up, so the cost of obtaining it goes up.

"So we at the MDU have got to charge higher premiums and the doctors have to pass that on to their patients, so we all pay.

"Is that what the community really wants? We've already seen GPs in country areas stop [certain procedures], so already we're seeing services lost to the community."

Mr Peter O'Bryan, of Galbally & O'Bryan, said the recent rise in popularity of elective surgery – including procedures such as liposuction and laser eye surgery – and the medical profession's increasingly commercial nature, had contributed to the boom in medical damages claims.

"Patients were not adequately warned of the risks with certain procedures."

Patients were not adequately warned of the risks associated with certain procedures, he said.

"I think there's been a significant increase in persons bringing actions for elective surgery which have arisen principally out of the medical profession advertising in the newspapers – people going along expecting certain results and being very disappointed with the results," Mr O'Bryan said.

Victorian County Court Judge Tom Wodak, who will administer the new list, said the growing number of medical cases reflected an increasingly litigious society. Lawyers had begun "marketing themselves" by advertising no-win, no-fee arrangements and firms were specialising in certain types of cases.

However the establishment of the medical damages list did not necessarily mean there had been an increase in the number of negligent doctors and hospitals, he said. Australia had been at the forefront of medical litigation, especially in cases involving people who contracted HIV while undergoing medical treatment.

More recently, he had noticed a growing number of cases with allegations of failure to diagnose, especially involving terminal conditions. "I think [the HIV cases] demonstrated to the public that one didn't have to accept without question something that had happened to you, and that maybe you could sue," Judge Wodak said.

Judge Wodak said medical cases were generally longer and more expensive than other civil litigation – the average time for a case to reach trial is about 18 months – because they often involved complex technical evidence from medical and other scientific experts.

He said the establishment of the medical list would allow cases to be more easily fast-tracked through the County Court system, a process begun in earnest several years ago.