

**JUDICIAL CASE MANAGEMENT**

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**INTRODUCTION**

The metaphor of the judge as referee has evolved in recent years to reflect an increased judicial case management role. Previously, the image was of the judge as referee standing in the middle of the pitch, waiting for the teams. When they arrived, he blew the whistle and refereed the game. Nowadays, the judge is portrayed as the kind of referee who goes into both changing rooms before the match. He warns particular players about spitting and being offside and mentions that he will be keeping an eye on them. When he has said everything he needs to, he leads the teams out to the pitch, rather than waiting for them. Then he starts the game, controlling it throughout.<sup>1</sup>

The practice of judges managing the conduct of civil cases emerged in the USA in the early 1970s, prompted by the pressures of rising caseloads and concern about increasing costs and delay. It created what some perceive as a new model of judging. This considerably expanded case management role is now “virtually a universal phenomenon”<sup>2</sup> throughout the common law world.

This article examines the way judicial case management has developed and the various tools which have emerged to enable judges to carry out such functions. It then looks at the approach of appeal courts to case management decisions and considers the risks associated with case management.

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<sup>1</sup> “Sharing UK Experience on Enhancing Efficiency and Accountability of the Judiciary: with particular reference to Judicial Case Management”, Speech by Sir Igor Judge, March 2006, India.

<sup>2</sup> “Case Management in New South Wales”, Address to the Annual Judges’ Conference at Kuala Lumpur, Malaysia by Chief Justice Spigelman of New South Wales, 22 August 2006.

### I. OBJECTIVES OF JUDICIAL CASE MANAGEMENT

The first objective of case management is to make more efficient use of the scarce commodity of court time. Some evidence exists to support the claim that it does so. In the USA, the RAND Institute for Civil Justice concluded it was associated with a significantly reduced time to disposition.<sup>3</sup> In England and Wales its introduction is reported as having been very successful, with “the adjournment culture” in civil cases now virtually gone,<sup>4</sup> and, in criminal proceedings, a significant reduction in the length of most terrorist cases.<sup>5</sup> In New Zealand its introduction has led to significant reductions in the time between filing and disposal of cases.<sup>6</sup>

The second objective of case management is to reduce litigation costs. Lord Woolf’s hypothesis was that, by increasing the efficiency of the litigation process, costs would be reduced. Research in England and Wales suggests, however, that this has been proved incorrect.<sup>7</sup> Early judicial case management appears associated with significantly increased costs to litigants. Some cost increases appear to be consequential upon the Woolf reforms, in that the requirements of the Civil Procedure Rules<sup>8</sup> and case management orders by courts cause parties to incur costs which would not previously have been incurred.<sup>9</sup> One critic has suggested that over-involvement of judges in case management results in an increase in the costs of all litigation, whether cases that settle or cases that proceed to trial.<sup>10</sup>

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<sup>3</sup> Resnik, “Managerial Judges” (1982) 96 *Harvard Law Review* 376.

<sup>4</sup> “Sharing UK Experience on Enhancing Efficiency and Accountability of the Judiciary: with particular reference to Judicial Case Management”, Speech by Sir Igor Judge, March 2006, India.

<sup>5</sup> *R. v. Khyam and others* [2008] E.W.C.A. Crim. 1612.

<sup>6</sup> “Delivering Justice For All: A Vision for New Zealand Courts and Tribunals”, New Zealand Law Commission, Report No 85, March 2004, p. 197.

<sup>7</sup> Peysner and Seneviratne, “The Management of Civil Cases: The Courts and Post-Woolf Landscape”, Department of Constitutional Affairs Research Series 9/05, November 2005, p. 72.

<sup>8</sup> Hereafter referred to as “the CPR”.

<sup>9</sup> Lord Justice Jackson, “Review of Civil Litigation Costs: Preliminary Report”, May 2009, para. 1.2

<sup>10</sup> “Have the Woolf reforms Worked?”, *The Times*, 9 April 2009.

The third objective of judicial case management is fairness. Lord Woolf emphasised that the active management of litigation was an essential means of dealing with cases justly.<sup>11</sup> If litigation decisions are left entirely to the parties, this frees them to use expense and delay to gain unfair tactical advantages. Judges have expressed frustration at delaying tactics being used to obstruct the resolution of the real issues<sup>12</sup> and believe that active judicial management discourages “interlocutory procedural games and gamesmanship”.<sup>13</sup>

## II. MODELS OF JUDICIAL CASE MANAGEMENT

Various jurisdictions have introduced judicial case management arrangements. Rather than viewing these as a series of incremental changes, it may be helpful to view jurisdictions as moving through different phases of case management development, which might be tentatively classified as: a Traditional Model, an Initial Model, a Developed Model, and an Advanced Model.<sup>14</sup>

### A. *The Traditional Model*

The Traditional Model leaves the responsibility for the initiation, conduct, preparation and presentation of civil litigation with the parties.<sup>15</sup> However, even this model allows for some case management functions to be exercised. In *Ashmore v. Corporation of Lloyd's*<sup>16</sup> Lord Roskill observed:

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<sup>11</sup> “Access to Justice: Final Report”, Lord Woolf, July 1996, Chapter 1, para. 4.

<sup>12</sup> Speech by Robert McClelland, Attorney-General of Australia, at the Australian Financial Review Legal Conference 2008, Melbourne, 17 June 2008.

<sup>13</sup> “The Woolf Reforms after 9 years: Is civil litigation in the High Court quicker and cheaper?”, Sir Igor Judge, Speech to the Anglo-Australasian Lawyers Society, Sydney, 16 August 2007.

<sup>14</sup> The names of the models, while not particularly important, have been chosen to indicate progression in judicial case management. It is important to note that particular jurisdictions may evolve through the models at different speeds, depending on the different drivers for change.

<sup>15</sup> Jacob, *The Fabric of English Civil Justice* (1987), pp. 12-13.

<sup>16</sup> [1992] 2 All E.R. 486, 488.

In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues.

This did not only apply to civil cases. In *R v. Hepworth*<sup>17</sup> the court said that a criminal trial was not a game where one side was entitled to claim the benefit of any mistake made by the other, and a judge's position in a criminal trial was not merely that of an umpire to see that the rules of the game were observed by both sides. A judge was an administrator of justice, not merely a figure head. He had not only to direct and control the proceedings according to recognised rules of procedure, but to see that justice was done.

In the Traditional Model, the courts have been prepared to use their inherent jurisdiction to manage proceedings. For example, to protect their resources from wasteful expenditure, the courts have exercised powers to intervene in respect of vexatious litigants.<sup>18</sup>

Nevertheless, weakness existed in the Traditional Model as there was a reluctance to exercise judicial power to case-manage. The parties traditionally controlled the pace of litigation, and the court's role was generally passive. Pre-Woolf civil litigation in England and Wales was described as resembling:

... a ritual dance between opponents who circled each other displaying their claws in a series of interlocutory battles set

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<sup>17</sup> [1928] A.D. 265, 277.

<sup>18</sup> "Vexatious Litigants and Access to Justice: Past, Present, and Future", Speech by Sir Anthony Clarke, Italy, 30 June 2006. At least six litigants in the 1880s and 1890s were, under the court's inherent jurisdiction to prevent the abuse of its processes, made subject to orders restraining their ability to commence new proceedings.

against a measure of mutual incomprehension about the true nature of the dispute, while judges looked on wringing their hands but unable to intervene as their role was to be neutral referees, rather than driving the litigation on to its conclusion.<sup>19</sup>

The Traditional Model therefore had to change, as the procedure which had served well for hundreds of years was not able to cope efficiently with the volume and complexity of modern litigation.<sup>20</sup>

### *B. An Initial Model*

Many jurisdictions reacted to the weaknesses in the Traditional Model by introducing more explicit case management powers. Lord Woolf viewed judicial case management as crucial to the changes which were necessary in the civil justice system in England and Wales.<sup>21</sup> In Ireland it was recognised that judicial case management involved active oversight by the court of the progress of court proceedings and represented a fundamental change of approach. This signalled a significant transfer of the responsibility for the management of civil litigation from litigants to the courts and practical steps were taken to manage cases and lists.<sup>22</sup> In the USA a wide array of managerial practices which judges had developed were codified.<sup>23</sup> With the introduction of such powers came a greater judicial willingness to use both new and previously held powers to control proceedings.<sup>24</sup>

However, the Initial Model of case management has had limited impact. For example, after case management was introduced in New Zealand, there remained a strong view that the

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<sup>19</sup> Peysner and Seneviratne, "The Management of Civil Cases: The Courts and Post-Woolf Landscape", Department of Constitutional Affairs Research Series 9/05, November 2005, p. 1.

<sup>20</sup> *Commissioner of An Garda Siochana and another v. Adebayo and Others*, [2006] I.E.S.C. 8.

<sup>21</sup> Lord Woolf, "Access to Justice : Final Report", July 1996, para 1.1.

<sup>22</sup> *Working Group On A Courts Commission*, Sixth Report, Conclusion, Dublin, November 1998. (Pn. 6533).

<sup>23</sup> Civil Justice Reform Act, 1990.

<sup>24</sup> "Judicial Case Management And The Duties Of Counsel", Speech To The Bar Practice Course, Brisbane, 24 February 1999, Mr Justice Hayne.

pace of litigation was for the parties to control, and judges should play no part in it. While some judges embraced the case management culture, many others did not.<sup>25</sup> There were differing levels of judicial commitment. While case management reduced delay, it was described as “tinkering” with a seriously flawed system and no more than “a finger in the dyke”.<sup>26</sup> The New Zealand Law Commission took a similar view, commenting that case management had changed the traditional model only to an extent. While the case management system had much to commend it, there were still opportunities to improve it.<sup>27</sup>

An Initial Model of case management is therefore one where powers are modest and limited, either in actual scope, or because of judicial reluctance to exercise them.

### *C. A Developed Model*

In the Developed Model, judicial case management becomes the norm in the superior civil courts. Judges seek to control proceedings in their progress towards trial and at trial.<sup>28</sup> An example of this is the UK Public Law Outline (PLO)<sup>29</sup> and its accompanying practice direction for use in public law Children Act cases.<sup>30</sup> The PLO contains four aspects.

The first of these is an overriding objective. Overriding objectives in UK law derive from a recommendation of Lord Woolf. He emphasised that the purpose of rules was to guide the court and litigants towards a just resolution of a case. While rules

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<sup>25</sup> “Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View”, Mr Justice John Hansen, The 2006 F.W. Guest Memorial Lecture, Otago University.

<sup>26</sup> “Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View”, Mr Justice John Hansen, The 2006 F.W. Guest Memorial Lecture, Otago University.

<sup>27</sup> “Delivering Justice For All: A Vision for New Zealand Courts and Tribunals”, New Zealand Law Commission, Report No 85, March 2004, p. 199.

<sup>28</sup> “Judicial Case Management And The Duties Of Counsel”, Speech To The Bar Practice Course, Mr Justice Hayne, Brisbane, 24 February 1999.

<sup>29</sup> *The Public Law Outline: Guide to Case Management in Public Law Proceedings*, April 2008, Ministry of Justice. Hereafter referred to as “the PLO”.

<sup>30</sup> *Practice Direction: Guide to Case Management in Public Law Proceedings* [2008] 2 F.L.R. 668.

contain detailed directions for the steps which must be taken, the effectiveness of those steps depends on the spirit with which they are carried out. The overriding objective encapsulates the fundamental purpose of those rules and provides a compass to guide courts and litigants.<sup>31</sup>

The second aspect of the PLO is a set of fundamental principles concerning judicial case management. First of all, judicial continuity: each case is allocated to one or two case management judges who are responsible for every procedural stage through to the final hearing. Secondly, active case management: each case is actively managed with a view to furthering the overriding objective. Thirdly, consistency: each case is, so far as possible, compatible with the overriding objective, managed in a consistent way. Fourthly, the use of case management “tools”: each case is managed by using the appropriate tools.

The third aspect of the PLO is a detailed articulation of the concept of “active case management”, which is divided into twenty separate elements.<sup>32</sup> The concept of “active case management”<sup>33</sup> elevates “aspirations into regulatory requirements” in order to achieve the overriding objective. The extensive list of the elements of active case management is neither exhaustive nor prescriptive, but constitutes a checklist to be applied in each case. It serves to emphasise the “active” nature of the management required, and the obligation to intervene and exercise initiative in the furtherance of the overriding objective. This approach is required from the very outset.<sup>34</sup>

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<sup>31</sup> Lord Justice May L.J. (ed.), *Civil Procedure* (2<sup>nd</sup> ed., October 1999), para 1.3.1.

<sup>32</sup> Many of these may be regarded by any case management judge as general good practice. They include, for example, the judge dealing with as many aspects of the case as he can on the same occasion and controlling the use and cost of experts. They also include considering whether the likely benefits of taking a particular step justify any delay which will result and the cost of taking it; and where possible dealing with additional issues which may arise from time to time in the case without requiring the parties to attend court.

<sup>33</sup> The concept was introduced into the CPR in England and Wales in 1999 following the Woolf reforms.

<sup>34</sup> *Civil Bench Book* (Judicial Studies Board for England and Wales, November 2006), para 3.1.

The fourth aspect of the PLO is a set of case management tools. These include the Case Management Record, the Timetable for the Child, and the Issues Resolution Hearing.

While the Developed Model clearly possesses a much greater expectation of judicial case management, it too suffers from weaknesses. The PLO, which is a highly structured approach to public law children's cases, has been criticised on the basis that it is so bureaucratic that it results in delays at the start of the process.<sup>35</sup>

#### *D. An Advanced Model*

The previous models of case management have emphasised the management of civil litigation, but the Advanced Model moves beyond this and contains explicit powers for managing criminal litigation also. Judicial case management in criminal proceedings is "a much more recent phenomenon",<sup>36</sup> and has been considered a modern necessity because the criminal trial has changed so much. Until relatively recently a long trial lasted for one or two weeks. Now, it is not unusual for trials to last for many months, if not for years.<sup>37</sup>

The Auld Review concluded that the role of judicial case management in criminal proceedings had now come to the fore. The rationale for this was that the parties were not preparing their respective cases for trial as speedily or as efficiently as they should, and were not co-operating appropriately with each other on disclosure and identification of the issues. Accordingly, police, prosecutors and defence lawyers needed "the goad of the court" to make them perform their roles properly, and the defendant needed it to encourage him to focus on the nature of his defence, if any. The vehicle for the application of the goad was a pre-trial hearing.<sup>38</sup> The Auld Review identified that there was a problem

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<sup>35</sup> Gillen, "A Public Dysfunction", *Community Care*, 15 January 2009.

<sup>36</sup> "Sharing UK Experience on Enhancing Efficiency and Accountability of the Judiciary: with particular reference to Judicial Case Management", Speech by Sir Igor Judge, March 2006, India.

<sup>37</sup> *Report of the Review of Large and Complex Criminal Case Procedures*, Lesage Code, November 2008, Ontario, ch. 4.

<sup>38</sup> "Review of the Criminal Courts of England and Wales", Lord Justice Auld, September 2001, para 204.

of keeping more complex cases within proper bounds and avoiding unnecessary expense and inconvenience.<sup>39</sup> Case management would not, however, remove responsibility to the judiciary.

Auld considered that police, prosecutors and defence lawyers should take the primary responsibility for moving cases on. They should concentrate on improving the quality of the preparation for trial rather than trying to compensate for its poor quality by indulging in a cumbrous and expensive system of often unnecessary and counterproductive court hearings.<sup>40</sup>

There is greater sensitivity over judicial case management in criminal proceedings. Lord Hope has observed that “the opportunities for judicial intervention in the management of cases are significantly greater in civil cases than they are in criminal cases, where the liberty of the subject is at issue and everything depends on the accused having a fair trial”.<sup>41</sup> It is not, however, a concomitant of the entitlement to a fair trial that either or both sides are entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate.<sup>42</sup> In *R v. Ulcay; R v. Toygu*<sup>43</sup>, the court said:

It is however equally elementary that the processes designed to ensure the fairness of his trial cannot be manipulated or abused by the defendant so as to derail it, and a trial is not to be stigmatised as unfair when the defendant seeking to derail it is prevented from doing so by robust judicial control. Such a defendant must face the self-inflicted consequences of his own actions.

The Criminal Procedure Rules identify an overriding objective that cases should be dealt with justly. This includes dealing with it “efficiently and expeditiously” and taking account,

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<sup>39</sup> Review of the Criminal Courts of England and Wales”, Lord Justice Auld, September 2001, para 207.

<sup>40</sup> Review of the Criminal Courts of England and Wales”, Lord Justice Auld, September 2001, para 220.

<sup>41</sup> *Arthur J.S. Hall and Co. v. Simons* [2000] 3 All E.R. 673.

<sup>42</sup> *R v. Jisl, Tekin, Konakli* [2004] E.W.C.A. Crim. 696.

<sup>43</sup> [2008] 1 All E.R. 547.

among other things, of “the needs” of other cases. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day’s stressful waiting for the remaining witnesses and the jurors and, no less important, continuing and increasing tension and worry for other defendants, some of whom are remanded in custody, and witnesses in trials which are waiting to be listed.<sup>44</sup> The court must further the overriding objective and must actively manage the case. An indication of how this responsibility is to be fulfilled includes the need to achieve “certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case”.<sup>45</sup> In addition the court may timetable the trial itself. The parties may be required to provide a timed batting order of live witnesses, details of any written or other material to be adduced and advance warning of any point of law.<sup>46</sup>

Closer judicial management of criminal proceedings in England and Wales may be seen in various *dicta* from the Court of Appeal. In *R v. Chaaban*<sup>47</sup> Judge LJ said that trial management is one of the judge’s most important functions. To perform it he has to be alert to the needs of everyone involved in the case. The judge should not overlook the community’s interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests. Similarly, in *R. v. L.*<sup>48</sup> the court emphasised that active case management, both pre-trial and throughout the trial itself, was now regarded as an essential part of the judge’s duty; and that the profession must understand that this had become part of the normal trial process.

An Advanced Model also may contain special case management approaches for therapeutic jurisprudence.<sup>49</sup> In particular, there may be a more collaborative style of case

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<sup>44</sup> *R v. Jisl, Tekin, Konakli* [2004] E.W.C.A. Crim. 696.

<sup>45</sup> Rule 3.2 of the Criminal Procedure Rules 2005.

<sup>46</sup> “The Criminal Justice System in England and Wales: Time for Change?”, Lord Judge, Speech to the University of Hertfordshire, 4 November 2008.

<sup>47</sup> [2003] E.W.C.A. Crim. 1012.

<sup>48</sup> [2007] E.W.C.A. Crim. 764.

<sup>49</sup> Therapeutic jurisprudence is the intellectual framework for problem-solving courts such as domestic-violence courts or drug-treatment courts. It seeks to integrate judicial case management with treatment services, close supervision and immediate response to criminal behaviour.

management to promote the psychological and physical well being of offenders, which is the foundation of therapeutic jurisprudence. In this collaborative approach, the judge, prosecution, defence counsel, drug treatment providers, and probation representatives work together to monitor the treatment process of each offender to help them change their behaviour.<sup>50</sup> This approach requires judges to modify their judicial style and to embark on a new form of “court-craft”. Judges employing this approach are more active, collaborative, less formal, more attuned to direct communication with litigants, more attuned to the personal circumstances of individuals who appear before them, and more positive in their interactions with them.<sup>51</sup>

### III. JUDICIAL CASE MANAGEMENT TOOLS

The tools which judges use to manage cases will vary according to a number of factors. Firstly, the nature of the case: different types of cases require different types of management. The degree and intensity of management must be proportionate to what is in dispute, to the complexity of the matter, and to how effectively the parties are managing their litigation. The Canadian courts have indicated “case management will be used only to the extent it is required and otherwise parties and their counsel will be left to run their own cases”.<sup>52</sup> Secondly, the availability of tools provided in the jurisdiction concerned: the statutory framework and procedural rules will vary. Thirdly, the willingness of individual judges to exercise case management powers: experience indicates that some judges are more willing to use case management powers than others.

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<sup>50</sup> Senjo Leip, “Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process” (2001) *Western Criminology Review* 3(1).

<sup>51</sup> Popovic, “Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary” (2002) 20 *Law in Context* 128.

<sup>52</sup> *Amayo v. Mawji*, 2006 CanLII 18519 (ON. S.C.) The objective is to target case management on the cases that truly require it: *Tibbits v. York Central Hospital*, 2005 CanLII 2928 (ON. S.C.).

*A. Managing Written Evidence*

It is now common in many jurisdictions for the parties to serve written evidence before trial. This practice avoids ambush and permits the judge to read the material prior to the hearing, thereby saving court time. The use of written evidence in substitution for oral evidence is a reform to enable parties to know what evidence they have to meet. Such an approach in some cases promotes settlement and in other cases makes for a fairer trial.<sup>53</sup> However, problems regarding the length and content of witness statements have arisen in many jurisdictions. In Australia there has been a tendency in many cases for witness statements to be overly long, repetitive and to contain much that is inadmissible. The cause of this is, in part, an attempt to assist in readability; but the consequence is unnecessary distraction, additional argument, delay and further costs. Large portions of witness statements, plainly inadmissible or not relevant to an issue in dispute, are inserted to give context. Frequently, however, they merely add to the length of the material and provoke objections which take additional time to determine.<sup>54</sup> To prepare an effective witness statement in a complex case, substantial input is required from the witness. The lawyer must spend sufficient time with a witness, so that he understands what the witness is trying to say. This in itself increases costs, even before several iterations of the statement have been drafted and comments from the witness and counsel have been taken into account. Often what appears to happen is that a witness statement ends up being a carefully crafted document more akin to submissions than to the story of a witness.<sup>55</sup>

How can courts attempt to manage this problem? In Hong Kong, a Working Party on Civil Justice Reform concluded that a practice direction should issue giving notice of the court's intention to curb excessive and prolix examination and cross-examination by more stringently excluding irrelevant evidence

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<sup>53</sup> "Review of Civil Litigation Costs: Preliminary Report", Lord Justice Jackson, May 2009, p. 401.

<sup>54</sup> "Litigation and ADR", Speech by Judge Pagone, of the Supreme Court of Victoria, Construction Law Conference, Melbourne, 22 May 2008.

<sup>55</sup> "Review of Civil Litigation Costs: Preliminary Report", Lord Justice Jackson, May 2009, p. 403.

and, where relevance of the evidence has been rendered marginal by repetition and prolixity, treating the evidence produced by further reiteration as inadmissible on the ground that it was insufficiently relevant to qualify as admissible.<sup>56</sup> In England and Wales, the Commercial Court Long Trials Working Party considered that the court would, in appropriate cases, order that witness statements be kept within a certain length. It concluded that the court has the power to do so in furtherance of the overriding objective.<sup>57</sup>

### *B. Managing Oral Evidence*

Counsel's duty to the court extends to the whole manner in which a client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently as possible.<sup>58</sup> In *Giannarelli v. Wraith*,<sup>59</sup> in the High Court of Australia, Mason C.J. described counsel's duty regarding the management of oral evidence:

In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.

Where counsel does not do so, judges can manage oral evidence in a number of ways. These include limiting the time that may be taken during examination in chief and cross-examination, limiting the number of witnesses to be called, and limiting the total time that may be taken by a party in presenting

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<sup>56</sup> Final Report of the Chief Justice's Working Party on Civil Justice Reform, Hong Kong, 3 March 2004, paras 575-583.

<sup>57</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, para 72.

<sup>58</sup> *Arthur J.S. Hall and Co. v. Simons* [2000] 3 All E.R. 673.

<sup>59</sup> [1988] 165 C.L.R. 543, 556.

its case.<sup>60</sup> The trial judge has clear authority at common law to control and prevent “repetitiousness”.<sup>61</sup> Every examination and cross-examination will have strong points and weak points, and most counsel engage in some degree of repetition. Time limits on examinations and cross-examinations encourage counsel to focus on the strong points and to avoid repetition.<sup>62</sup> Sir Anthony Clarke has observed that a key feature of case management is that the trial process should be as focused as possible. His experience was that not many cross-examiners did better if they had three days rather than one, and that co-operation between counsel was crucial.<sup>63</sup> A trial judge may reasonably engage with counsel in a discussion as to how long they anticipate their examination lasting, and then setting a reasonable but flexible target for counsel. If the witness proves difficult or evasive or long-winded, or if some new issue arises unexpectedly during the evidence, the target can be adjusted. Most counsel work well under this discipline.<sup>64</sup> In Australia, the Family Court has held that a judge has a duty to halt examination or cross-examination where such examination is “peripheral, time consuming and unlikely to make any significant difference to the overall outcome”.<sup>65</sup> One US judge described her approach to managing oral evidence in the following way:

I expect the trial to go continuously, swiftly – big gaps and three-day openings are counter-productive. I tell lawyers up front that I expect them to be ready with the next witness. At the end of each day and in breaks in the case, I ask them how much time they expect to spend on cross-examination.

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<sup>60</sup> “Case Management in New South Wales”, Address to the Annual Judges Conference at Kuala Lumpur, Malaysia by Chief Justice Spigelman of New South Wales, 22 August 2006.

<sup>61</sup> Lesage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, Ontario, chapter 4.

<sup>62</sup> Lesage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, Ontario, chapter 4.

<sup>63</sup> “The Supercase – Problems and Solutions: Reflections on *BCCI* and *Equitable Life*”, Sir Anthony Clarke, KPMG Forensic’s Annual Law Lecture 2007, London, 29 March 2007.

<sup>64</sup> Lesage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, Ontario, chapter 4.

<sup>65</sup> *Costa v. Costa* (unreported), Australian Family Court, 8 August 1996.

I lean on lawyers in open court and in front of the jury if I think they are wasting everyone's time. Cross examination that is excessively repetitive and irrelevant confuses everyone and is not helpful to finding the truth. When I really get exasperated and they have asked a question for the fourth time, I will say, "Mr. So-and-so, we have heard that before. Move on". Never once has a conviction been reversed because of a case management issue.

In *R. v. L.*<sup>66</sup> the Court of Appeal for England and Wales observed that raising with counsel the need to call witnesses is what a judge ordinarily ought to do as part of good trial management. As a case develops, there is often the need to review what evidence remains necessary. It is plainly right for the judge to remind counsel what has already been established during the course of the trial and to question whether, in the light of that, further evidence is necessary. The judge should put all the points fairly and squarely to counsel. There should be nothing approaching improper or unfair pressure. If counsel does not agree with the judge's view, it is counsel's duty to seek to call the witnesses. If a judge indicates that a witness should not be called because his evidence is inadmissible or irrelevant (because, for example it had ceased to be relevant given the course the trial had taken), but counsel wishes to call the witness, then counsel should seek a ruling. If the judge rules that the evidence of the witness is not relevant or is inadmissible and accordingly refuses to admit the evidence, the ruling could be challenged on appeal.

In some contexts the trend towards reducing oral evidence may be even more radical. The Patent Court Code of Practice makes provision for "streamlined" trials either by agreement between the parties or where the court, applying the overriding objective, indicates that it is appropriate. In a streamlined trial all factual and expert evidence is in writing; there is no requirement to give disclosure of documents; cross-examination is confined to those topics where it is necessary; and the total duration of the trial is normally not more than one day.<sup>67</sup>

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<sup>66</sup> [2007] E.W.C.A. Crim. 764.

<sup>67</sup> "The Civil Justice System and Legal Profession – The Challenges Ahead", Mr Justice Lightman, The 6th Edward Bramley Memorial Lecture, University

*C. Managing Counsel's Submissions*

The best advocates have a considerable ability to go straight to the heart of a case, put the most persuasive arguments in support of it succinctly and logically, and then sit down. However not all counsel are of that standard.<sup>68</sup> Hence judges may need to manage counsel's submissions.

The first available tool is requiring submissions to be filed in written form. Some suggest that courts must increasingly encourage the use of written submissions and skeleton arguments in order to focus submissions. Although they do not desire to see oral argument severely limited, they consider that "the age of rambling submissions lasting days must come to an end".<sup>69</sup> A number of decisions support this approach. In *A. v. A.*<sup>70</sup> the High Court in England and Wales observed that the provision of written submissions gave all parties the opportunity to prepare their final submissions at leisure and such submissions enormously eased the burden on the judge. Similarly, in *R. v. K.*<sup>71</sup> the Court of Appeal emphasised that, when dealing with matters preliminary to the trial, the judge's case management powers permitted him to deal with pre-trial issues exclusively by reference to written submissions and, if he saw fit, by submissions limited to a length specified by him. He was not bound to allow oral submissions. In some jurisdictions many preliminary matters are dealt with administratively, with written arguments from both sides, without the need for an oral hearing.<sup>72</sup> Such submissions may be transmitted by email.<sup>73</sup> This may be a more effective way of utilising court time and minimising costs.

A second case management tool is the imposition of time limits on counsel's submissions. It has been suggested that one of

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of Sheffield, 4 April 2003 and "The Patents Court Guide", 12 November 2003, available at [www.hmccourts-service.gov.uk/infoabout/patents/crt\\_guide.htm](http://www.hmccourts-service.gov.uk/infoabout/patents/crt_guide.htm).

<sup>68</sup> "Judicial Case Management And The Duties Of Counsel", Speech To The Bar Practice Course, Brisbane, 24 February 1999, Mr Justice Hayne.

<sup>69</sup> Address of Godfrey Smith, Attorney General of Belize, at the Ceremonial Opening of the Belize Supreme Court, Belize City, 21 January 2002.

<sup>70</sup> [2007] E.W.H.C. Fam. 99.

<sup>71</sup> [2006] E.W.C.A. Crim. 724.

<sup>72</sup> "The Criminal Justice System in England and Wales : Time for Change?", Lord Judge, Speech to the University of Hertfordshire, 4 November 2008.

<sup>73</sup> *R v. Khyam and others* [2008] E.W.C.A. Crim. 1612.

the factors prolonging trials in complex criminal cases in England and Wales is the reluctance of some judges to curtail prolix counsel. By comparison US judges are more inclined to restrain lawyers' verbosity.<sup>74</sup> The experience of the courts has generally been that time limits encourage better advocacy as long as they are reasonable. Every argument has its strong points and its weak points and time limits force counsel to focus on the former while providing a deterrent against repetition.<sup>75</sup> The New South Wales Court of Appeal has observed that time limits on submissions are now accepted responses to lengthy litigation.<sup>76</sup> Reforms being considered for the Australian Federal Court include providing broad powers to give directions that limit the time for submissions.<sup>77</sup> A similar trend may also be developing in the UK. The Commercial Court Long Trials Working Party recommended that the normal procedure in all cases should be that the judge and the parties, at a convenient time during the trial, would discuss and decide on the time to be allowed for oral argument by each side.<sup>78</sup>

A third potential management tool relates to the payment of counsel. An Australian judge has suggested that perhaps the time has come to introduce a provision empowering judges to make an order limiting the hearing days for which counsel can be paid.<sup>79</sup>

#### *D. Preparatory Hearings*

A case management tool which exists in most jurisdictions is the pre-trial hearing. Developed in the civil litigation field, it is

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<sup>74</sup> de Grazia, "Review of the Serious Fraud Office", June 2008, p. 106.

<sup>75</sup> Lesage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, Ontario, chapter 4.

<sup>76</sup> *Ingot Capital Investments Pty Ltd and others v. Macquarie Equity Capital Markets Ltd and others* [2008] N.S.W.C.A. 206.

<sup>77</sup> "A Legal Framework for a Modern Competitive Economy", Speech by Robert McClelland, Attorney-General of Australia, Law Institute of Victoria, Melbourne, 3 October 2008.

<sup>78</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, para 154.

<sup>79</sup> "Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View", Mr Justice John Hansen, The 2006 F.W. Guest Memorial Lecture, Otago University.

now also a routine feature of the criminal process. Pre-trial hearings may perform a number of useful functions, including plea and charge discussions between the prosecution and the defence; resolving any outstanding disclosure issues; ensuring procedural steps have been attended to; providing a defendant with a sentence indication if requested; and ensuring the case is ready for trial when a not guilty plea has been entered.<sup>80</sup> At pre-trial reviews in Hong Kong for example, counsel must inform the judge of any admitted facts; whether there will be objection to the admissibility of prosecution evidence and how long such will take to hear; trial length estimates; and any point of law which may arise at trial.<sup>81</sup> Preparatory hearings also take place in summary proceedings. In New Zealand one element of case management is the status hearing. Such hearings identify the issues in dispute and any matters in agreement; provide a sentence indication if requested; and assess how long a hearing may take and when it will be held.<sup>82</sup>

A desirable approach to preparatory hearings is to have the parties and their lawyers agree, where possible, on the orders

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<sup>80</sup> For example, Section 625.1 of the Canadian Criminal Code provides that on application by the prosecutor or the accused or on its own motion, the court may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matter, and to make arrangement for decisions on those matters. There are also pre-trial reviews in English magistrates' courts; plea and directions hearings in English Crown Courts; intermediate diets in Scottish Sheriff Courts; pre-trial conferences in the Ontario Court of Justice; contest mention hearings in Victorian Magistrates' Courts; pre-trial hearings in the New South Wales Supreme Court; and status hearings (in summary cases) and callovers (in indictable proceedings) in New Zealand. See Trendle, "Judicial Case Management: Reallocating Responsibilities", Paper submitted at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, 8-12 August 2004.

<sup>81</sup> Hong Kong Practice Direction 9.4 (Criminal Proceedings in the District Court), 8 April 2008.

<sup>82</sup> "Delivering Justice For All: A Vision for New Zealand Courts and Tribunals", New Zealand Law Commission, Report No 85, March 2004, p 145.

that should be made that are then proffered to the judge for approval.<sup>83</sup> Communication between the parties is therefore vital.

It is important that judges attempt to balance the holding of preparatory hearings, with the objective of minimising the number of court appearances. Unfortunately counsel are sometimes unwilling to commit to theories or versions of the facts until the last possible moment. This practice clashes with the objective of a case managing judge who is intent on obtaining the earliest possible resolution of issues.<sup>84</sup>

#### *E. Case Conferences*

Case conferences can take a variety of forms: an early evaluation or screening exercise; an occasion to discuss the diversion of the dispute into mediation; a settlement conference; or, if the case cannot be settled and is bound for trial, a trial management conference.<sup>85</sup> Generally speaking, however, case conferences possess a less formal and less adversarial character than traditional pre-trial hearings. The case conference approach therefore normally represents a deliberate attempt to avoid the damage that flows from the “nasty affidavit war”<sup>86</sup> that so often accompanies the filing of motions. In a case conference environment, court intervention by way of motion should be viewed as a last resort, to be used only where there is a contentious issue that is significant to the litigation and that requires resolution. Bringing motions for the sake of bringing motions makes an already clogged court list even more difficult to access.<sup>87</sup>

#### *F. Telephone Hearings*

Case management powers in England and Wales include the power to receive applications by telephone, or by any other

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<sup>83</sup> “Case Management”, Address by Justice P. A. Bergin at the National Judicial Orientation Program, Queensland, 3-8 August 2008.

<sup>84</sup> Sherman, “Restructuring the Trial Process in the Age of Complex Litigation” (1984) 63 *Texas Law Review* 721.

<sup>85</sup> “Managing the Process”, in Walker (ed.), *The Civil Litigation Process: Cases and Materials* (6th ed., 2005), at pp. 525-613.

<sup>86</sup> *S.A.K. v. J.A.K. (J.A.N.)* [2007] ON.C.J. 514 (CanLII)

<sup>87</sup> *Donald Contracting Ltd. v. Carrera Homes et al.* [2004] CanLII 26322 (ON. S.C.).

means of electronic communication, and to conduct a hearing by these means.<sup>88</sup> Such use of technology enables cases to be managed without the costs of attendance at court. Research has shown there is a startlingly widespread take-up of hearings being conducted by telephone and this appears to be rapidly becoming the norm.<sup>89</sup> Telephone case conferences are also routine in many other jurisdictions.<sup>90</sup>

Telephone hearings offer a number of advantages. They were seen as beneficial to those involved in the civil litigation process by providing time and costs savings. Telephone hearings encouraged fee earners with conduct and full knowledge of the case to deal with the hearing themselves rather than sending someone unfamiliar with the issues to court. They encouraged advocates to make more focused and succinct submissions, ultimately reducing the time taken in comparison with oral hearings. It is important that the judge has case summaries, skeleton arguments and draft directions, as required, available in good time to ensure that the hearing can be carried out without delay. In a courtroom hearing a document that turns out to be vital, and is not included in a bundle, can be handed in to the judge. This is not possible in a telephone hearing. Some practitioners take the precaution of contacting the court before the hearing to ensure that any papers sent to the court have reached the judge's file.<sup>91</sup>

Telephone hearings also possess a number of disadvantages. Firstly, if there are a number of parties and several controversial issues to raise, then a telephone conference is not the best way of doing it. Research in England and Wales has shown that telephone hearings with time estimates over 30 minutes were invariably more complex, and therefore not

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<sup>88</sup> "Sharing UK experience on Enhancing Efficiency and Accountability of the Judiciary: With Particular Reference to Judicial Case Management", Speech by Sir Igor Judge, March 2006, India. See also Practice Direction 23 of the CPR.

<sup>89</sup> "The Management of Civil Cases: The Courts and Post-Woolf Landscape", Peysner and Seneviratne, Department of Constitutional Affairs Research Series 9/05, November 2005, p. 26.

<sup>90</sup> *Seitz v. Canada* [2002] F.C.T. 456.

<sup>91</sup> Peysner and Seneviratne, "The Management of Civil Cases: The Courts and Post-Woolf Landscape", Department of Constitutional Affairs Research Series 9/05, November 2005, p. 28.

suitable, for a telephone hearing. Secondly, many consider telephone hearings unsuitable for litigants in person, as some litigants in person may not be able to maintain the discipline of speaking in turn without interruption. Control of some litigants is a very difficult task when they are present at a hearing and this may be more difficult on the telephone. Another concern is the extent to which they may be prompted or assisted by others. Others view these concerns as unfounded. Findings from pilot courts have demonstrated that, in those instances where litigants in person have participated in a telephone hearing, such hearings were very successful with no disruption to the proceedings.<sup>92</sup> Finally, telephone hearings may lead to a greater sense of judicial isolation.

### *G. Judicial Continuity*

Judicial continuity has increasingly been recognised as important in ensuring effective and efficient case management. It allows a judge to deal with a case throughout its life so that he can gain proper familiarity with its issues and personalities, together with an understanding of how it has developed over time.<sup>93</sup> Continuity prevents the need for a new judge to have to get to grips with case detail afresh. In some cases judicial continuity may be “essential”<sup>94</sup> in others merely “an aspiration of case management”.<sup>95</sup> Judicial continuity is especially helpful for high conflict and child protection cases and in family law cases particularly it can be disconcerting for the parties when another (or yet another) judge becomes involved.<sup>96</sup> Where a judge

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<sup>92</sup> “Telephone Hearings in Civil Proceedings”, Department for Constitutional Affairs, Response to Consultation, CP 14/05, July 2005.

<sup>93</sup> “Family Justice: The Operation of the Family Courts”, Fourth Report of the House of Commons Constitutional Affairs Select Committee, HC 116, 23 February 2005, Written Evidence submitted by Judge Meston QC.

<sup>94</sup> *Re N (Sexual Abuse Allegations: Professionals not Abiding by Findings of Fact)* [2005] 2 F.L.R. 340.

<sup>95</sup> “The Technology and Construction Court Guide”, 2007 revised edition, paras 3.7.1. and 5.1.5.

<sup>96</sup> Submission to the Attorney General by the ADR Institute of Ontario in consultation with Family Lawyers, ADR Practitioners, and St Stephen’s Community Mediation Service, 20 March 2008.

recognises a need for judicial continuity he will reserve the case to himself.<sup>97</sup>

There may be a tension between judicial continuity and the avoidance of delay.<sup>98</sup> Does one select a judge who has some time available for the case in his list or wait until the judge who has previously dealt with it becomes available? A judge may decide, after weighing the balance of the desirability of judicial continuity and the avoidance of delay, that he should hear the case.<sup>99</sup>

In practical terms, judicial continuity may be difficult to achieve. For the High Court judge in England and Wales, whose life is divided between London and different circuit commitments, with periodic duties in the civil and criminal divisions of the Court of Appeal, it is virtually impossible to achieve any degree of continuity in any one case. For the circuit bench it is marginally easier, since circuit judges tend to remain largely in the same place or on the same circuit and are able to plan their lives a year ahead. Even so, the division of their time between family, crime and civil litigation also makes planning difficult.<sup>100</sup>

Judicial continuity is seen as particularly important in problem solving courts.<sup>101</sup> A key feature of the Integrated Domestic Violence Court is the concept of one family/one judge, which entails complete judicial continuity for every hearing of a case relating to the same family. In therapeutic jurisprudence, significant benefits are perceived to flow from the ongoing relationship between judge and defendant. The defendant becomes accustomed to an individual judge's expectations and then begins to meet these expectations. Continuity of judicial supervision is a key element and appears to contribute to successful outcomes. Defendants know they will be held

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<sup>97</sup> *Re W (Permission to Appeal)* [2007] E.W.C.A. Civ. 786.

<sup>98</sup> "Family Justice: The Operation of the Family Courts", Fourth Report of the House of Commons Constitutional Affairs Select Committee, HC 116, 23 February 2005, Written Evidence submitted by Judge Meston QC.

<sup>99</sup> *Re B (a child)* [2006] E.W.C.A. Civ. 1906.

<sup>100</sup> *Re CB and JB (Minors) (Care Proceedings: Case Conduct)* [1998] 2 F.L.R. 211.

<sup>101</sup> *Hansard*, House of Commons, 10 June 2008, column 222W.

accountable by “their judge”.<sup>102</sup> However the concept may be impracticable, as it may not be able to cope with allowing judges time to attend training events or with judicial illness. Concern has also been expressed that, where a party does not welcome a particular decision, there may be a lingering perception of bias for the remainder of the proceedings. However these concerns may be assuaged, yet the benefits of the one judge concept still achieved, through careful case management in the context of a small judicial team.<sup>103</sup>

#### *H. Timetables*

Lord Woolf noted that one of the essential elements of his proposals for case management included fixing and enforcing strict timetables for procedural steps leading to trial and for the trial itself.<sup>104</sup> The benefits of having a firm timetable are that it sets the pace at which the parties need to work and makes deliberate procrastination more difficult. Everyone is able to assess case progress and to plan for the next phase.<sup>105</sup> If these benefits are to be enjoyed, the court must be resolute in holding the parties to the essentials of the timetable, anchored by the trial date or trial period, which are not to be moved save in exceptional circumstances. While it is important to avoid an excessively rigid approach, the flexibility allowed must be such as to enable the essential discipline of the timetable to be retained.<sup>106</sup> Courts no longer automatically grant an adjournment of a case simply because both parties consent to that course. Nor are decisions to grant adjournments sought by one party made solely by reference

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<sup>102</sup> Plotnikoff and Woolfson, “Review of the Effectiveness of Specialist Courts in Other Jurisdictions”, Department of Constitutional Affairs Research Series 3/05, May 2005.

<sup>103</sup> Hester, Pearce and Westmarland, “Early Evaluation of the Integrated Domestic Violence Court, Croydon”, Ministry of Justice Research Series 18/08, November 2008.

<sup>104</sup> “Access to Justice: Final Report” Lord Woolf, July 1996, para 1.16.

<sup>105</sup> *Final Report of the Chief Justice’s Working Party on Civil Justice Reform*, Hong Kong, 3 March 2004, para 379.

<sup>106</sup> *Final Report of the Chief Justice’s Working Party on Civil Justice Reform*, Hong Kong, 3 March 2004, para 380.

to the question whether the other party can adequately be compensated in costs.<sup>107</sup>

An overall timetable must be set “at the earliest practicable stage”.<sup>108</sup> That should, so far as possible, be realistic and workable so that the parties can reasonably be held to it. In making timetabling proposals, the parties must make allowances for contingencies and aim to give themselves ample time to meet the time-limits. Nevertheless the court must retain a discretion to override manifestly unreasonable proposals.<sup>109</sup> It is not enough just to set dates, and leave the case to counsel. Cases need to be managed in a forward manner to ensure trial readiness. Judges need to remember that often one side to the dispute may not want to go to trial at all, and is advantaged by delay.<sup>110</sup> The objective is to set a timetable with the benefit of estimates from counsel for the various stages of the trial, apply that timetable with reasonable rigour, being imaginative and determined in seeking to ensure that the case is brought to trial with minimum delay, while ensuring fair treatment of all parties.<sup>111</sup> In *R. v. Chaaban*<sup>112</sup> Judge LJ said:

Nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time ... Every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to

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<sup>107</sup> *State Pollution Control Commission v. Australian Iron and Steel Pty Ltd* (1992) 29 N.S.W.L.R. 487.

<sup>108</sup> *Re D (Intractable Contact Dispute: Publicity)* [2004] E.W.H.C. 727 (Fam.).

<sup>109</sup> *Final Report of the Chief Justice's Working Party on Civil Justice Reform*, Hong Kong, 3 March 2004, para 382.

<sup>110</sup> *Shearer v. Hood* [2008] M.B.Q.B. 322.

<sup>111</sup> *Attorney General of Zambia (for and on behalf of the Republic of Zambia) v. Meer Care and Desai (a Firm) and Others* [2008] E.W.C.A. Civ 875. The Court of Appeal observed in that case that the trial judge's actions represented “a remarkable example of effective proactive judicial case management”.

<sup>112</sup> [2003] E.W.C.A. Crim. 1012.

justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses ... In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary even-handedness and flexibility as the interests of the justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does.

Counsel may make decisions that unduly lengthen a trial, and timetabling requires judges to probe counsel's decisions. Can counsel explain why he wants to follow a particular path? Does he know what it is he wants to achieve by doing so? Is what he wants to achieve reasonably attainable? What will it cost in time, and therefore money, to achieve it? Counsel must be able to justify the choices that they make. If counsel cannot answer such questions, they will not be able to persuade the judge that their proposed course should be permitted.<sup>113</sup>

In *R. v. L.*<sup>114</sup> the court indicated that timetables should not be rigid or immutable. Judges should recognise that during the trial the unexpected must be treated as normal, and make due allowance for it. Judges should canvass the potential problems as well as the possible areas for time saving. A sensible informed discussion about the future management of the case and the most convenient way to present the evidence, whether disputed or not, and where appropriate, with admissions by one or other or both sides, enables the judge to make a fully informed analysis of a future timetable. The objective is not haste and rush but greater efficiency and better use of limited resources by closer identification of, and focus on, critical rather than peripheral issues.

A court may have regard to the disruption to the timetable which granting an application might cause. In *Woori Bank and*

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<sup>113</sup> "Judicial Case Management and The Duties Of Counsel", Mr Justice Hayne, Speech To The Bar Practice Course, Brisbane, 24 February 1999.

<sup>114</sup> [2007] E.W.C.A. Crim. 764.

*Hanvit LSP Finance Limited v. KDB Ireland Ltd*<sup>115</sup>, where a defendant sought to amend its defence, the court observed that a party may be able to persuade a court that “logistical prejudice” would occur if an amendment was allowed. This would particularly be the case where an amendment was sought at a late stage and could have the effect of significantly disrupting an imminent trial to the prejudice of a party. The court noted that, in the context of modern case management, such logistical prejudice may loom larger in the considerations of the court. Nevertheless the issue of fairness must always be uppermost in the judge’s mind. A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or on litigants generally. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.<sup>116</sup>

One Australian approach to timetabling is the adoption of “Stopwatch Hearings”. This involves the identification, by agreement of the parties, of the total amount of time that will be allocated to a trial. Blocks of time are allocated to the respective parties for examination in chief, cross-examination, re-examination and submissions. The order will allocate blocks of time to aspects of the respective cases. If it is in the interests of justice, the allocation of time will be adjusted by the Court to accommodate developments in the trial. This approach requires more intensive planning by counsel.<sup>117</sup>

Timetabling will be affected by whether the judge has other responsibilities or can allocate a full judicial day to the case at hand. In one US case a judge pared down the trial from the prosecutor’s three-month estimate to three-and-a-half weeks by rigorously adhering to a full-day, five-day-a-week work

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<sup>115</sup> *Woori Bank and Another v. KDB Ireland Ltd and Another* [2006] I.E.H.C. 156.

<sup>116</sup> *Robert Hicks v. Bridgestone Australia Limited* [1997] N.T.S.C. 65.

<sup>117</sup> “Case Management in New South Wales”, Chief Justice Spigelman, Address to the Annual Judges’ Conference at Kuala Lumpur, Malaysia, 22 August 2006 and Practice Note SC Eq 3, Supreme Court of New South Wales, 30 July 2007.

schedule.<sup>118</sup> In *R. v. Jisl, Tekin, Konakli*<sup>119</sup> Judge LJ said that in longer cases in particular, the organisation of a judge's administrative and other judicial burdens should, so far as practical, be reduced or organised to start at times which enabled him to sit every day for full court days.

### *I. Judicial Feedback*

Judges cannot be expected to wait until the end of a hearing before they start thinking about the issues. On the contrary, they will often form tentative opinions on matters at issue. Counsel may often be assisted by hearing those opinions and being given an opportunity to deal with them.<sup>120</sup> The Head of Group Litigation at Royal Bank of Scotland has commented that judicial feedback early on in a case is welcome, because it allows his bank to take a decision whether to pursue a case. It enables lawyers and their clients to know early on if a case is going badly.<sup>121</sup> Historically, Commercial Court judges have been more prepared to give views on the merits of a case than other judges. This reflects the fact that the Court was set up to assist businessmen to resolve their disputes, and that a pragmatic and practical approach was required for this. But, in all cases, the view expressed will only be a provisional one and the judge will clearly say so. The judge must be trusted to change his view if further material or consideration warrants it. It is preferable for a judge openly to express a view, rather than utter a hint or a Delphic expression, leaving the parties uncertain what view the judge is trying to communicate. Judges in the Commercial Court are encouraged to give views on the merits of particular issues, if it seems appropriate, at Case Management Conferences. They should also do so at trials, with the express agreement of the

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<sup>118</sup> de Grazia, "Review of the Serious Fraud Office", June 2008, p 106.

<sup>119</sup> [2004] E.W.C.A. Crim. 696.

<sup>120</sup> *Vakauta v. Kelly* (1989) 87 ALR 633. The court commented that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in her or her judgment would not represent a model to be emulated.

<sup>121</sup> Ruckin, "Litigation in the Limelight", *Legal Week*, 9 October 2008.

parties.<sup>122</sup> When given, judicial feedback must be cautiously expressed so as to indicate to the parties that the judge remains open to persuasion in the light of further evidence or new submissions.<sup>123</sup>

Judicial feedback may be useful to the parties in focusing their efforts on appropriate issues and making the best use of court time. In England and Wales the protocol for management of serious fraud and other complex criminal cases provides that the judge may wish to consider issuing occasional “case management notes” to counsel, in order to set out the judge’s tentative views on where the trial may be going off track, which areas of future evidence are relevant, and which may have become irrelevant. Such notes from the judge plus written responses from counsel can, cautiously used, provide a valuable focus for debate during the periodic case management reviews held during the course of the trial.<sup>124</sup>

### *J. Narrowing the Issues*

Early judicial identification of the principal factual and legal issues in dispute between the parties is an important case management tool. Lord Woolf stated that an essential element of his case management proposals included the power to summarily dispose of hopeless issues.<sup>125</sup> The concept of active case

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<sup>122</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, paras 99 and 104.

<sup>123</sup> Where a judge is over-robust in a statement of tentative views, his ultimate overall handling of the case may become an issue on appeal. In *Antoun v. R* [2006] H.C.A. 2 the High Court of Australia granted an appeal on the ground that the trial judge had conducted himself in such a way that a fair-minded observer might reasonably apprehend that he might not have brought an impartial and unprejudiced mind to the resolution of the question whether the appellants ought to be convicted. The trial judge, on being told there would be a submission of no case to answer, had announced his decision before hearing any argument. He had then listened to argument on sufferance and had repeated his decision. The High Court recognised that his decision was correct in that the submission was without merit. That, however, did not remove the impression created by the judge’s response.

<sup>124</sup> “Control and Management of Heavy Fraud and Other Complex Criminal Cases: A Protocol Issued by The Lord Chief Justice of England and Wales”, 22 March 2005.

<sup>125</sup> “Access to Justice: Final Report” Lord Woolf, July 1996, para 1.16.

management as defined in the Criminal Procedure Rules includes identifying issues at an early stage, deciding promptly which issues need full investigation and trial, disposing summarily of the others, and deciding the order in which issues are to be resolved. Such actions discourage wasteful pre-trial activities. Once the real issues between the parties have been identified, discovery can be restricted to documents relevant to those issues, as may the factual evidence and the expert evidence to be called. Equally, it may often be possible for one or more key issues to be decided first, with a view to settlement, mediation or, if absolutely necessary, trial, of the remaining issues.<sup>126</sup>

Judges will often have significant discretion in deciding when, and to what degree, identification of issues should be demanded. Narrowing issues often involves discussion of the merits of the arguments. In *Vakauta v. Kelly*, the court spoke of “the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case”.<sup>127</sup> Judicial case management has, as a central goal, frank discussion of the respective cases put forward by the parties in the interest of narrowing the scope of the litigation. To that end, the likely merits of the claims are part and parcel of that discussion.<sup>128</sup>

The issues which are viewed as relevant in the case are not static. The Jackson Report has proposed, in respect of the Commercial Court, that a judicially settled List of Issues should be prepared at the first Case Management Conference and should thereafter be updated as necessary. The List of Issues should become the keystone for management of all Commercial Court cases, with the pleadings being relegated to secondary importance.<sup>129</sup> The goal is not simply narrowing of the issues but that “the issues in the case are identified *well before* a hearing”.<sup>130</sup>

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<sup>126</sup> Trendle, “Judicial Case Management: Reallocating Responsibilities”, Paper submitted at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, 8-12 August 2004.

<sup>127</sup> *Vakauta v. Kelly* (1989) 87 A.L.R. 633.

<sup>128</sup> *Z.(A.) v. W.(J.)* [2004] ON.C.J. 158.

<sup>129</sup> “Review of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, p 278.

<sup>130</sup> *Writtle v. Director of Public Prosecutions* [2009] E.W.H.C. 36 (Admin.).

There will of course be cases where something occurs in the course of a trial which may properly give rise to a new issue.

Some question whether a judge is the appropriate person to narrow the litigation issues. Does he have enough knowledge of the case to do so? It has been suggested that judicial case management which has the judge becoming an inquirer into the issues is more likely to produce a slower, less efficient and ultimately more costly process. Leaving to the parties the task of identifying issues has the desirable effect of leaving to those who know the dispute, and who have an interest in the outcome, with the control of what goes into the decision making.<sup>131</sup> Others however urge that “effective judicial management must be early, continuous, active and knowledgeable”, and that a judge should act as a facilitator, to strip the case to its essentials and focus the lawyers’ attention on the issues on which the decision should turn.<sup>132</sup>

#### *K. Interventions during Trial*

Judges may need to intervene at trial for case management purposes. In *Johnson v. Johnson*<sup>133</sup> the court said:

... modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.

At trial there is often extended and pointless cross-examination with spurious defences being run in order to “muddy the waters”.<sup>134</sup> It is sometimes suggested in criminal cases that many trial judges are not robust enough in controlling this behaviour. Furthermore, some judges do not comment when non-

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<sup>131</sup> “Litigation and ADR”, Judge Pagone, of the Supreme Court of Victoria, Construction Law Conference, Melbourne, 22 May 2008.

<sup>132</sup> Schwartzer, *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges*, pp 6 and 12.

<sup>133</sup> [2000] H.C.A. 48.

<sup>134</sup> “Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View”, Mr Justice John Hansen, The 2006 F.W. Guest Memorial Lecture, Otago University, 28<sup>th</sup> September 2006.

essential witnesses are called, but the defence, in addressing the jury, uses that by way of criticism of the prosecution case. The same is often the case when defence counsel in closing puts forward a theory or proposition for which there is simply no evidence. While it is necessary to be careful as to the extent of interventions during trial or during counsel's address, such comments should be made as long as they are fair and balanced.<sup>135</sup>

Judges may therefore intervene during cross-examination for the purpose of suggesting that counsel move on when a point has been gone over sufficiently, or to keep the trial focused on the issues, or to clarify questions. Such interventions are quite proper. Ensuring that the issues in the case are addressed, that cross-examination concentrates on the issues in the case and that it is not unduly repetitive are all good trial management.<sup>136</sup>

#### *L. Managing Expert Evidence*

It is now clearly recognised that "active case management" includes controlling the use and cost of experts.<sup>137</sup> There are a number of ways this can be achieved. It requires the identification of the issues upon which the trial judge needs assistance from an expert, so as to prevent wastage of costs in obtaining expert opinion on matters that are unnecessary. Judges will often need to make decisions in respect of how many experts there should be and what specialisms should be covered,<sup>138</sup> and regulate the extent of expert evidence so that it is proportionate to the issues in question.<sup>139</sup> The court may give directions limiting the length of experts' reports.<sup>140</sup> It has been

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<sup>135</sup> "Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View", Mr Justice John Hansen, The 2006 F.W. Guest Memorial Lecture, Otago University, 28<sup>th</sup> September 2006.

<sup>136</sup> *R v. L* [2007] E.W.C.A. Crim. 764.

<sup>137</sup> See, for example, "The Public Law Outline: Guide to Case Management in Public Law Proceedings", April 2008, p. 5.

<sup>138</sup> Peysner and Seneviratne, "The Management of Civil Cases: The Courts and Post-Woolf Landscape", Department of Constitutional Affairs Research Series 9/05, November 2005, p 32.

<sup>139</sup> *Crossley v. Crossley* [2007] E.W.C.A. Civ. 1491.

<sup>140</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, para 83.

recommended that the Commercial Court give permission for expert evidence only after a list of issues has been judicially settled.<sup>141</sup> The Commercial Court may order experts first to meet and discuss matters and only then, having narrowed the contentious issues, write their reports on the remaining matters at issue.<sup>142</sup>

A court's powers may include a power to direct the appointment of a single joint expert give evidence on a particular issue.<sup>143</sup> In Australia, increased use is being made of the technique of having experts on different sides give their evidence concurrently under the direction of the judge – sometimes called “hot-tubbing”. In effect, the evidence is given through *discussion* in which the experts, counsel and the judge participate.<sup>144</sup> In New South Wales the Court may direct, among other things, that expert evidence not be adduced on specific issues; and that the experts confer prior to giving evidence with a view to preparing a joint report.<sup>145</sup>

Managing expert evidence, particularly in large scale litigation where it may assume a disproportionate role, is not without difficulty. It may involve the judge expressing views about the apparent cogency of the evidence a party proposes to adduce, and a decision not to permit additional expert evidence may have important consequences for the presentation of that party's case.<sup>146</sup>

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<sup>141</sup> “Review of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, p 409-10.

<sup>142</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, para 82.

<sup>143</sup> “Review of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, pp. 409-10.

<sup>144</sup> “Case Management in New South Wales”, Address to the Annual Judges Conference at Kuala Lumpur, Malaysia by Chief Justice Spigelman of New South Wales, 22 August 2006. For an analysis of the practice of concurrent evidence which concludes that it represents a useful tool albeit with limited potential, see Edmond, “Merton And The Hot Tub: Scientific Conventions And Expert Evidence In Australian Civil Procedure” (2009) 72 *Law and Contemporary Problems* 159.

<sup>145</sup> “Expert Evidence in the Managerial Age” Speech by Justice Ronald Sackville to the Forensic Accounting Conference, Sydney, 14 March 2008.

<sup>146</sup> “Expert Evidence in the Managerial Age” Speech by Justice Ronald Sackville to the Forensic Accounting Conference, Sydney, 14 March 2008.

*M. Managing Discovery*

Disclosure is one of the most expensive and time consuming aspects of litigation, and the burden of disclosure has grown hugely now that e-mail and electronic storage of information are almost universally used in business and personal affairs.<sup>147</sup> Active case management includes controlling the nature and extent of the documents which are to be disclosed between the parties.<sup>148</sup> In his general duty of case management the judge is required to regulate the extent of disclosure so that it is proportionate to the issues in dispute.<sup>149</sup> Of course it is only when the issues in the case have been identified that the proper ambit of discovery can be assessed.

In *K. v. K.*<sup>150</sup> Baron J observed that obtaining disclosure is often pivotal in some matrimonial property cases. In the context of litigation with “all guns blazing”, she noted that continual orders for disclosure can be counterproductive and that it might be better to have an oral hearing at an early stage or deal with the case in some other imaginative way. If an oral hearing had been used in that case it might have foreshortened years of litigation, ill feeling and huge costs.

In criminal trials disclosure is an area where all the participants, including the judge, have responsibilities.<sup>151</sup> The statutory scheme makes it the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective.<sup>152</sup>

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<sup>147</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, para 58.

<sup>148</sup> See, for example, “The Public Law Outline : Guide to Case Management in Public Law Proceedings”, April 2008, p. 5.

<sup>149</sup> *Crossley v. Crossley* [2007] E.W.C.A. Civ. 1491.

<sup>150</sup> [2005] E.W.H.C. 1070 (Fam.).

<sup>151</sup> *R v. K and Others* [2006] E.W.C.A. Crim. 724.

<sup>152</sup> “Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court”, 20 February 2006.

*N. Managing Settlements*

A principal objective in case management is, where possible, to assist parties to resolve their disputes. The concept of case management may therefore be defined as including encouraging the parties to use an alternative dispute resolution procedure and facilitating the use of such procedures.<sup>153</sup> Some jurisdictions may go even further. In New South Wales a power is conferred on the court to compel parties to engage in mediation, even where they do not wish to do so.<sup>154</sup> Other jurisdictions have introduced Financial Dispute Resolution Hearings into their ancillary relief proceedings as a regular mechanism of court-guided mediation.<sup>155</sup> In New Zealand the Law Commission has recommended that there should be a presumption that cases filed on the standard case management track in the High Court should be required to attempt mediation. Parties who believe their case is not appropriate for mediation would be able to make submissions to the judge who would retain a discretion to excuse them from mediation.<sup>156</sup>

Since litigation is a high risk gamble, the law increasingly recognises the value and importance of mediation and it has been suggested that there has been “the emergence of a symbiotic relationship between case management and alternative dispute resolution”.<sup>157</sup> Good case management therefore often involves building a mediation “window” into the litigation timetable at an appropriate stage.<sup>158</sup> Courts will ordinarily therefore accede to a party’s request for an adjournment to permit the mediation

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<sup>153</sup> See, for example, “The Public Law Outline: Guide to Case Management in Public Law Proceedings”, April 2008, p. 5.

<sup>154</sup> “Case Management in New South Wales”, Address to the Annual Judges’ Conference at Kuala Lumpur, Malaysia by Chief Justice Spigelman of New South Wales, 22 August 2006.

<sup>155</sup> For example Rule 2.61E of the Family Proceedings Rules 1991 in England and Wales, and Hong Kong Practice Direction 15.11 of 29 December 2003.

<sup>156</sup> “Delivering Justice for All: A Vision for New Zealand Courts and Tribunals”, New Zealand Law Commission, Report No 85, March 2004, p. 96.

<sup>157</sup> “Mega-litigation: Towards a New Approach”, Speech by Justice Ronald Sackville, Supreme Court of New South Wales Annual Conference, 17-19 August 2007.

<sup>158</sup> “Review of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, p 42.

process to be brought into play. Courts may also penalise parties who fail or refuse to give mediation a chance.<sup>159</sup>

#### *O. Sanctions*

The effectiveness of case management may be significantly reduced if parties who do not comply with judicial directions can escape the consequences of failure without significant adverse results.<sup>160</sup> In the Irish High Court, Clarke J. was satisfied that it was appropriate to place at least some weight on the need to discourage significant non-compliance in the case management process. Otherwise there is no point in case management in the first place. Excessive indulgence of non-compliance can only create a climate where there will be a significant level of non-compliance.<sup>161</sup> The New Zealand Law Commission adopted a similar view, commenting that the aims of case management can be subverted by parties not keeping to timetables if not enough is done to enforce them. While it is important that judges set realistic timetables with the cooperation of the parties, they must also take a firm approach to enforcement, making costs awards in order to indicate the court's adherence to case management objectives where the opposing party is disadvantaged by non-compliance. Consequences must follow for non-consensual departures from case management timetables.<sup>162</sup>

In civil cases, costs are the obvious sanction. The parties usually have a common aim in keeping costs down and thus in efficient and timely preparation for trial. The costs sanction may be exercised against, not only the loser of an issue, but also against either party for procedurally culpable conduct causing unnecessary expense.<sup>163</sup> Many practitioners believe that the court

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<sup>159</sup> "Mediation the First and Litigation the Last Resort", Speech by Mr Justice Lightman to the Action for Victims of Medical Accidents conference, Brighton, 11 July 2003.

<sup>160</sup> *Woori Bank and Another v. KDB Ireland Ltd and Another* [2006] I.E.H.C. 156.

<sup>161</sup> *Moorview Developments and Others v. First Active PLC and Others* [2008] I.E.H.C. 274.

<sup>162</sup> "Delivering Justice For All: A Vision for New Zealand Courts and Tribunals", New Zealand Law Commission, Report No 85, March 2004, p 205.

<sup>163</sup> Review of the Criminal Courts of England and Wales", Lord Justice Auld, September 2001, para 229.

system is failing to impose strict enough sanctions upon offenders. The general perception appears to be that there is little risk of any adverse order as a consequence of a “minor” delay in filing a document. It has been suggested that greater weight needs to be given to the prejudice to the judicial system as a whole suffered as a consequence of widespread delays and disregard of procedural deadlines.<sup>164</sup>

There is, however, greater difficulty regarding sanctions in criminal proceedings. Orders awarding costs, drawing adverse inferences, or depriving one side of the opportunity of advancing all or part of its case at trial are less appropriate means of enforcing compliance with criminal pre-trial procedures. An order for costs against a defendant personally is rarely possible, because of lack of means, and because it may be difficult to apportion fault as between him and his legal representatives. Fairness issues may arise if a defendant is under threat of a sanction if he, or his representatives, fail to comply with case management directions. An order for costs against the prosecution for non-compliance accomplishes little, being simply a transfer of funds from one public body to another. The sanction of a wasted costs order against legal representatives on one side or another requires the court to identify exactly who is at fault, something which is not always possible.<sup>165</sup>

#### *P. Case Tracks and Specialist Court Lists*

The creation of “tracks” for cases, and of specialist court lists, has been a frequent feature of reform of the justice system and seeks to ensure that each type of case receives an appropriate allocation of resources and degree of attention from the court. For specialist lists, a high degree of procedural autonomy is conferred on the judges in charge<sup>166</sup> and those who deal with specialist judges note a marked difference in case management.<sup>167</sup>

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<sup>164</sup> “Review Of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, p. 431.

<sup>165</sup> “Review of the Criminal Courts of England and Wales”, Lord Justice Auld, September 2001, para 230.

<sup>166</sup> Swain, “Civil Justice Reform”, *Hong Kong Lawyer*, April 2004.

<sup>167</sup> “Review Of Civil Litigation Costs: Preliminary Report”, Lord Justice Jackson, May 2009, p 417.

In Ontario, cases are allocated to either “the Standard Track” or “the Fast Track”. The former is designed for cases that raise complex issues of fact or law while the latter is designed for cases that are less complex and involve a small number of parties. In England and Wales, case management in the Fast Track is largely “off-the-peg”, containing standard directions to which the parties have to conform. In the Multi-Track, case management is “made-to-measure”, with cases being managed by procedural judges. The case management powers wielded by these procedural judges are extensive.<sup>168</sup>

Specialised courts are commonplace in the Common Law world, with different jurisdictions possessing, for example, Commercial Courts, Patent Courts, Gun Courts<sup>169</sup>, Water Courts<sup>170</sup>, Domestic Violence Courts<sup>171</sup>, Drug Courts<sup>172</sup>, Environment Courts<sup>173</sup> and Traffic Courts. Specialisation is utilised in fields where law is complex, either substantively or procedurally. From a case management perspective, specialist courts or lists allow judges to develop expertise in a particular field of law and practice and enable them to process cases more quickly and efficiently, thereby reducing pending caseloads and relieving crowded lists. An alternative approach, which avoids the need for legislative or rule changes, is the nomination of specialist panels of judges for particular types of litigation.<sup>174</sup>

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<sup>168</sup> Peysner and Seneviratne, “The Management of Civil Cases: The Courts and Post-Woolf Landscape”, Department of Constitutional Affairs Research Series 9/05, November 2005, p 4.

<sup>169</sup> Established in Jamaica under the Gun Court Act, 1974.

<sup>170</sup> Established, for example, under Colorado’s Water Right Determination and Administration Act, 1969.

<sup>171</sup> See for example, “Justice With Safety: Specialist Domestic Violence Courts Review 2007-8” (Her Majesty’s Court Service, Home Office and Crown Prosecution Service, March 2008).

<sup>172</sup> Established, for example, under New South Wales’ Drug Court Act, 1998.

<sup>173</sup> Established, for example, in New Zealand under the Resource Management Amendment Act, 1996.

<sup>174</sup> “The Role of Specialist Courts – An Australian Perspective”, Speech by Justice Michael Moore, Federal Court of Australia, 1 December 2001.

*Q. Managing Mega-litigation*

Mega-litigation<sup>175</sup> is on the increase because of the increasing sophistication and complexity of commercial transactions. Judges do, of course, currently have powers that allow the exertion of considerable influence over the scope, duration and conduct of mega-litigation. However, as Lord Hope commented in *Three Rivers District Council v. Governor and Company of The Bank of England*, sometimes there is only so much that astute case management can do to reduce the burdens on the parties and on the court.<sup>176</sup> In *Seven Network Limited v. News Limited*<sup>177</sup> procedural directions and rulings in the course of the trial (including evidentiary rulings rejecting the tendering of certain expert reports) undoubtedly reduced the length of the trial, and so vigorous pre-trial judicial management of mega-litigation can be expected to have at least some moderating effect on any excesses by warring parties. Nevertheless the trial judge in *C7* commented that certain responses during the trial illustrated that parties to mega-litigation are often able effectively to ignore, albeit politely, directions made by the court, if they consider that their forensic interests will be advanced by doing so. He therefore suggested that, if the courts are to acquire and exercise the capacity to curtail the impact of mega-litigation on the judicial system, the role of the judiciary will need to evolve further. He observed:

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<sup>175</sup> The terms “supercase” and “mega-litigation” are used synonymously. Sir Anthony Clarke defined “supercase” as one which involved large amounts of money; gave rise to complex legal and/or factual issues; gave rise to a large amount of active judicial case management over a long period of time; and gave rise to a large amount of, generally contested, interim hearings. However he recognised that there were definitional difficulties: Sir Anthony Clarke, “The Supercase – Problems and Solutions: Reflections on *BCCI* and *Equitable Life*”, KPMG Forensic’s Annual Law Lecture 2007, London, 29 March 2007. The term should not, however, be restricted to commercial cases as large, complex terrorism cases have become a very important species of modern mega-litigation: Lesage and Code, “Report of the Review of Large and Complex Criminal Case Procedures”, November 2008, Ontario, chapter 2. However the term is defined, all major cases need to be subjected to early judicial management, so as to *prevent* them from becoming “mega-litigation”.

<sup>176</sup> [2001] U.K.H.L. 16 at 106.

<sup>177</sup> [2007] F.C.A. 1062 (often referred to as “the *C7* case”).

Specifically, the courts will have to adopt even more rigorous and interventionist pre-trial case management strategies. They will also have to demonstrate a greater willingness to exercise stringent control over the parties and their legal representatives in the conduct of the trial itself ... In addition, the courts will need to have available a greater panoply of case management tools and to demonstrate a greater willingness to use them ... Judges must be given explicit statutory powers to curtail the scope, duration and expense of mega-litigation exercisable *even over the express opposition of the parties*.<sup>178</sup>

However, this view does not find universal favour. Sir Anthony Clarke, reflecting on the UK experience of mega-litigation, did not consider that it was a wider category of case which required specific treatment in the sense of an individual tailored code of practice. It was merely a timely reminder that the CPR needed to be applied to each individual case appropriately, fairly and robustly.<sup>179</sup>

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<sup>178</sup> “Mega-litigation: Towards a New Approach”, Speech by Justice Ronald Sackville, Supreme Court of New South Wales Annual Conference, 17-19 August 2007. The powers suggested by Justice Sackville included firstly, refusing permission for potential witnesses to give evidence if, in the opinion of the judge, there are reasonable grounds to think that the probative value of the proffered evidence will be outweighed by the danger that the evidence might cause or result in an undue waste of time; secondly, making orders restricting the categories of discoverable documents and imposing limits on the total cost of discovery (to ensure that the costs are proportionate to what is at stake in the proceedings and that, in any event, the costs are not unreasonable); and, thirdly, giving directions as to the template which the parties must follow in making submissions and which is to constitute the framework for the judgment. Other innovative solutions to address the challenges of mega-litigation have also been suggested. For example, Western Australian judges have proposed that multiple trial judges preside over large cases at first instance. The intention is to split up witnesses between the judges and for them to hear concurrently: “A Legal Framework for a Modern Competitive Economy”, Speech by Robert McClelland, Attorney-General of Australia, Law Institute of Victoria, Melbourne, 3 October 2008.

<sup>179</sup> Sir Anthony Clarke, “The Supercase – Problems and Solutions: Reflections on *BCCI* and *Equitable Life*”, KPMG Forensic’s Annual Law Lecture 2007, London, 29 March 2007.

#### IV. APPEALING CASE MANAGEMENT DECISIONS

Case management decisions are case specific,<sup>180</sup> and a judge using case management powers will exercise a considerable measure of discretion. An appeal court will not interfere with a case management decision unless it involves an error of principle or law, or the judge misapprehended a material factual matter.<sup>181</sup>

In *Banque Financière de la Cité SA v. Westgate Insurance Co Ltd*<sup>182</sup>, Lord Templeman said that an appeal court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. In an appeal concerning case management decisions Wall J said :

The importance of effective judicial case management is, in my judgment, difficult to overstate ... Particularly where (as should be the case) case management is synonymous with judicial continuity, the specialist judge managing a case acquires a knowledge of it and a “feel” for it which is unique. It follows, that, appeals from case management decisions made by specialist judges will inevitably be difficult to sustain. Thus it is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.<sup>183</sup>

A similar approach is adopted in other jurisdictions. For example, in *Sawridge Band v. Canada*<sup>184</sup> the Federal Court of Appeal in Canada held that case management judges must be given some “elbow room” to resolve endless interlocutory matters and move cases on to trial. The court said that in some cases the

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<sup>180</sup> *R v. K* [2006] E.W.C.A. Crim. 724.

<sup>181</sup> *Wallbrook Trustee (Jersey) Ltd v. Fattal* [2008] E.W.C.A. Civ. 427 at [33].

<sup>182</sup> [1990] 2 All E.R. 947.

<sup>183</sup> *MacIntyre v. Chief Constable of Kent and Others* [2002] E.W.C.A. Civ. 1087.

<sup>184</sup> *Sawridge Band v. Canada* [2001] F.C.A. 338. On the facts the court held that the carefully crafted orders made by the case management judge displayed a sound knowledge of the rules and the related case law. In addition, the orders contained a provision that the parties were free to return to the case management judge for relief from the imposition of any intolerable burden imposed by the orders.

case management judge would have to be innovative to avoid having the case bog down in a morass of technical matters and that only in the clearest cases of misuse of judicial discretion would an appeal court interfere. The appeal court was not there “to fine tune orders made in interlocutory proceedings”.

Despite this general approach, however, there has been criticism that persistent misinterpretation of the overriding objective on appeal continues to emasculate the ability of trial judges to manage cases effectively. Such misinterpretation moves the litigation process back to a traditional case management model, where the management of court proceedings was at the whim of the parties and where the court could only hope that sooner or later the parties would allow it to proceed to an adjudication of the merits.<sup>185</sup> Sir Anthony Clarke has stated that it is important for appeal judges to take a robust view and, if at all possible, to support case management decisions taken by judges. He has observed that such decisions should generally be upheld, unless they are plainly wrong, and that appeal judges should hesitate, perhaps more than at present, before interfering with a case management decision.<sup>186</sup>

Litigants who have suffered injustice by reason of case management orders are not, however, without remedy. Ultimately the touchstone by which decisions will be tested is that of fairness. Although firm judicial case management is much to be encouraged, appeal courts may consider that judges manifestly went too far if there has been a denial of a party’s right to be heard.<sup>187</sup> If a litigant is led by judicial case management decisions to forgo rights or otherwise to change position upon an assurance that his position will not be prejudiced, and it is prejudiced, his option is to appeal for a new trial on the ground that he has been denied procedural fairness or natural justice.<sup>188</sup>

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<sup>185</sup> Zuckerman, “A Colossal Wreck: The *BCCI - Three Rivers* Litigation”, [2006] C.J.Q., 25 (Jul), 287.

<sup>186</sup> Sir Anthony Clarke, “The Supercase – Problems and Solutions: Reflections on *BCCI* and *Equitable Life*”, KPMG Forensic’s Annual Law Lecture 2007, London, 29 March 2007.

<sup>187</sup> *Re C (Children)* E.W.C.A. Civ., 2 July 1999.

<sup>188</sup> *Financial Wisdom Ltd v. Dale Newman* [2005] V.S.C.A. 110.

Appeal courts may also be critical where there has been a deficit of appropriate judicial case management. In *Re H (A Child) (Contact: Domestic Violence)*<sup>189</sup> the Court of Appeal described the case chronology as wholly unacceptable, noting that there had been “a complete lack of structured planning and judicial case management” and all the parties had been badly served thereby. In *Re D (Intractable Contact Dispute: Publicity)* Munby J was critical of “the astonishing number of different judges” who had been involved in the case. There had been 43 hearings conducted by 16 different judges. The case exhibited the appalling delays of the court system, exacerbated by the absence of any meaningful judicial continuity, seemingly endless directions hearings, the lack of any overall timetable, and the failure of the court to adhere to such timetable as had been set.<sup>190</sup>

### V. RISKS OF JUDICIAL CASE MANAGEMENT

If judges are to case manage effectively they must understand the risks associated with exercising such powers.

Firstly, judicial case management may give rise to risks regarding impartiality. If the judge conducting the case management hearings will also be the eventual trial judge, there may be attempts by counsel “to poison the well” of the judge’s mind at a time when what the judge hears is not filtered by rules of evidence. Counsel may seek to create impressions, which could not be supported by evidence, to assist in achieving a favourable final outcome. A judge managing a case must ensure that pre-trial management and final decision-making are separate activities.

Secondly, a judge must beware taking case management decisions based on an inadequate knowledge of the case. As previously indicated, some critics go so far as to question whether judges are capable of learning enough about cases to provide intelligent pre-trial management.<sup>191</sup> The thought that, after a brief read of the papers, a judge might be better able to

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<sup>189</sup> [2005] E.W.C.A. Civ. 1404.

<sup>190</sup> *Re D (Intractable Contact Dispute: Publicity)* [2004] E.W.H.C. 727 (Fam.).

<sup>191</sup> Sherman, “Restructuring the Trial Process in the Age of Complex Litigation” (1984) 63 *Texas Law Review* 721.

grasp the detail of the case and take sensible decisions on its preparation for trial than are the lawyers with a more intimate knowledge of the case and the issues has been described as “a little doubtful” and “an insult to the professionalism of the legal representatives”.<sup>192</sup>

Thirdly, case management can lack procedural safeguards. There is often no duty to give reasons and judges are not forced to submit their views to the discipline of a written justification. The absence of legal criteria to guide the process creates the possibility of inconsistency. An interventionist judge may have a significant influence on the course of the proceedings and their outcome.<sup>193</sup>

Fourthly, case management responsibilities may influence judges to value their statistics more than the quality of their decisions. Concern has been voiced that judges might become “... seduced by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age”.<sup>194</sup> Judges must always remember that they are there to serve the needs of the litigants, not the litigants to serve the needs of the courts.<sup>195</sup>

Fifthly, although there is in principle no inconsistency between an expanded judicial case management role and the essential requirements of an adversary system, and hence the criticism that case management functions are “subversive of the adversarial process” must be rejected,<sup>196</sup> there may be a risk that over-active judicial case management may undermine the adversarial system. In *Bidner v. State of Queensland*,<sup>197</sup> after a case management judge had advised a plaintiff how he should plead his case, the Queensland Court of Appeal said:

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<sup>192</sup> “Have the Woolf reforms Worked?”, *The Times*, 9 April 2009.

<sup>193</sup> Trendle, “Judicial Case Management: Reallocating Responsibilities”, paper submitted at the 18th International Conference of the International Society for the Reform of Criminal Law held at Montreal, 8-12 August 2004.

<sup>194</sup> Resnik, “Managerial Judges” (1982) 96 *Harvard Law Review* 374.

<sup>195</sup> “Judicial Case Management and the Duties of Counsel”, Speech To The Bar Practice Course, Mr Justice Hayne, Brisbane, 24 February 1999.

<sup>196</sup> “The Criminal Justice System in England and Wales : Time for Change?”, Lord Judge, Speech to the University of Hertfordshire, 4 November 2008.

<sup>197</sup> [2000] Q.C.A. 368.

There will on occasions be some difficulties in reconciling the functions of a judge acting in his or her traditional role in the adversarial system with the more recent evolution of a role as a judicial case manager. It is not possible, or perhaps appropriate, here to try to determine the proper limits of that function. Some matters, by reason of the very nature of the issues involved or the condition in which they are found to be, attract the use of strong measures and a firm hand; others do not. It is impracticable to attempt to define the proper limits of judicial activism in the abstract or to do so in advance in a way that might in the end prove to be either too stultifying or unduly liberating in the development of the case management function in the future.

Sixthly, the risk of outspokenness. Case management functions may well incline a judge towards a degree of outspokenness of a kind which he would not be inclined to adopt in a traditional role. This explains why a judge may find himself speaking more candidly and strongly than he might otherwise have been able to do in the past. Outspokenness by a case management judge, who is subsequently required to be a trial judge, may lead to an application for his recusal.<sup>198</sup>

### CONCLUSION

The judicial role has been steadily evolving in many jurisdictions to include a strong emphasis on case management. Now, as Hardiman J. has observed:

We live in an era of case management, when a serious attempt is being made to deal with all litigation, civil or criminal, in an efficient manner.<sup>199</sup>

As the court indicated in *State of Queensland v. J.L. Holdings Pty Ltd*<sup>200</sup> the objective of this is clear:

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<sup>198</sup> *Brown v. Brown (No. 2)* [2007] Fam.C.A. 493.

<sup>199</sup> *Cruise v. O'Donnell and Another* [2007] I.E.S.C. 67.

<sup>200</sup> [1997] H.C.A. 1.

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim ...

Case management is now recognised as a “sophisticated art”<sup>201</sup> which is “fundamental to the efficient administration of justice”.<sup>202</sup> It is “an essential skill for the modern judge to hone”.<sup>203</sup> The court no longer simply sits and waits passively for the parties to act but is “an active rather than a reactive creature”.<sup>204</sup> Case management requires different skills from those usually associated with the traditional form of adjudication, and some judges are more comfortable with the change in role than others.<sup>205</sup> This is a common experience across jurisdictions. In Australia, it has been suggested that not all judges are as willing to manage a court list as might be wished.<sup>206</sup> In Canada, it has been suggested that a few members of the judiciary still resist attempts to introduce any judicial case management role.<sup>207</sup>

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<sup>201</sup> *Sali v. SPC Ltd* (1993) 116 A.L.R. 625. Effective case management requires more, of course, than well-skilled judges. It requires properly trained and skilled court officials; innovative processes which may be invoked to assist the parties to speedily resolve their disputes; a sufficient complement of judges; and a culture of cooperation between the lawyers representing the parties.

<sup>202</sup> *Bevan-Smith v. Reed Publishing (NZ) Limited and Another* [2006] N.Z.C.A. 85.

<sup>203</sup> “Case Management”, Address By Justice P. A. Bergin at the National Judicial Orientation Program, Queensland, 3-8 August 2008.

<sup>204</sup> “The Supercase – Problems and Solutions: Reflections on *BCCI* and *Equitable Life*”, Sir Anthony Clarke, KPMG Forensic’s Annual Law Lecture, London, 29 March 2007.

<sup>205</sup> Trendle, “Judicial Case Management: Reallocating Responsibilities”, Paper submitted at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, 8-12 August 2004.

<sup>206</sup> “Case Management in New South Wales”, Address to the Annual Judges’ Conference at Kuala Lumpur, Malaysia by Chief Justice Spigelman of New South Wales, 22 August 2006.

<sup>207</sup> Lesage and Code, “Report of the Review of Large and Complex Criminal Case Procedures”, November 2008, Ontario, chapter 2.

The need for such skills to be developed should not be underestimated if case management is to be fairly carried out.<sup>208</sup>

Case management has now become “the prevailing theory with respect to the proper performance of the judicial function in modern society”.<sup>209</sup> However, as the High Court of Australia observed in *D’Orta-Ekenaike v. Victoria Legal Aid*,<sup>210</sup> the enthusiasm for case management is not universal, and it may be proper to regard it in its most radical or intrusive forms as still experimental. The evolution of the judicial role may not therefore have yet concluded.

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<sup>208</sup> “Managing Justice: A Review of the Federal Civil Justice System”, Australian Law Reform Commission, Report No 89, January 2000, para 6.4.

<sup>209</sup> *Cockerill v. Collins* [1999] 2 Qd. R. 26.

<sup>210</sup> [2005] H.C.A. 12.